ESSAYS

Congestion Externalities and Extended Copyright Protection

DENNIS S. KARJALA*

ABSTRACT

Intellectual property is not vulnerable to the tragedy of the commons and, because the marginal cost of reproducing works of intellectual property already created is usually low, giving no protection at all would maximize economic utility. Traditional microeconomics analysis based on the public goods nature of intellectual property, especially nonrivalrous consumption, thus leads to the conclusion that it is economically inefficient to protect works beyond what is required as an incentive for their creation.

Professor William Landes and Judge Richard Posner have recently challenged this analysis as part of a more general argument for an indefinitely renewable copyright. These authors posit “congestion externalities” as a potential cause for diminution in value of a popular work that is no longer protected under copyright. The idea is that, after too much unrestrained use, the demand curve for use of the work may shift downward, reducing much of the consumer surplus that would otherwise result from entrance of the work into the public domain. In some cases, they argue, society will incur a net loss from allowing the work to reach public domain status. Other authors have echoed this concern.

While conceding the virtues of a copyright system requiring formal copyright renewal from time to time, this Essay argues that the Landes and Posner analysis on congestion externalities is incorrect. It is particularly inapt for copyright rights relating to digital technologies. The functionality of computer software may be superseded by technological advances but not by “overexposure.” Other works, such as digital databases, maps, and factual compilations, also seem invulnerable to congestion externalities from unrestrained use.

The Landes and Posner congestion-externalities analysis, however, is flawed in more fundamental ways. The analysis treats demand curves representing current social preferences as indicators of a sort of “inherent value.” In fact, a downward shift in the demand curve for a product does not necessarily, or even often, represent a loss in “value” to society as opposed to a change in overall social preferences. Moreover, even if their value analysis were correct, Landes and Posner present no empirical evidence that demand curves for works of authorship will shift sufficiently after entering the public domain to create a net social loss in value. This Essay argues, by reference to existing public domain and copyright-protected works, that dramatic, long-term downward shifts in the demand curves due to entrance into the public domain are implausible. It argues further that even if such shifts do occur, meaning that few would be willing to pay for use of the work after its overexposure (were payment somehow to be required), public domain works remain of fundamental value to society as a whole as cultural and intellectual symbolic references. This value is not fully, if at all, captured in the economic analysis.

* Jack E. Brown Professor of Law, Arizona State University. © 2006, Dennis S. Karjala. The author is indebted to Professors Aaron Fellmeth and David McGowan for many helpful comments on earlier drafts of this Essay.
TABLE OF CONTENTS

INTRODUCTION .......................................................... 1066

I. HOW CAN CONGESTION EXTERNALITIES AFFECT ECONOMIC
EFFICIENCY? ............................................................ 1068

II. EVALUATION OF THE "CONGESTION EXTERNALITIES" THEORY .... 1071
   A. THE BASIC FLAW IN THE ECONOMICS ...................... 1071
   B. SHIFTING DEMAND CURVES? ................................. 1074
      1. Trademarks .................................................. 1074
      2. Rights of Publicity ....................................... 1075
      3. Copyright ................................................... 1076
         a. Is There a Downward Shift in the Demand Curves? . 1076
         b. Most Works Are Largely or Wholly Invulnerable to
            Congestion Externalities ............................. 1080
         c. Literary and Film Characters .......................... 1084

CONCLUSION .......................................................... 1086

INTRODUCTION

Can the entrance of copyright-protected works into the public domain have
the effect of reducing their value to society? At first glance, the very question
seems strange. Traditional microeconomic analysis based on the public-goods
nature of intellectual property, especially nonrivalrous consumption, leads to the
conclusion that it is economically inefficient to protect works beyond what is
required as an incentive for their creation. Because intellectual property is not
vulnerable to the tragedy of the commons, and because the marginal cost of
reproducing works of intellectual property already created is usually low, giving
no protection at all should maximize economic utility (once a work is created).
Removal of protection through a work's entrance into the public domain,
therefore, should eliminate the artificial scarcity created by the intellectual
property right and restore economic efficiency by allowing the work to be sold
for the marginal cost of the production of copies.

This relatively straightforward story is now subject to challenge. As part of a
more general argument for an indefinitely renewable copyright, Professor Wil-
liam Landes and Judge Richard Posner posit "congestion externalities" as a
potential cause for diminution in value of a popular work that is no longer
protected by copyright.\(^1\) The idea is that, after too much unrestrained use, the demand curve for use of the work may shift downward, reducing much of the consumer surplus that would otherwise result from entrance of the work into the public domain. In some cases, they argue, society will incur a net loss from allowing the work to reach public domain status. Copyright owners will manage their intellectual property in a way that maximizes value over time.\(^2\) Once they are free for the taking, however, fictional characters that the public has come to know and love likely will change, subtly or otherwise, so that the original is at best a cherished memory.\(^3\)

While conceding the virtues of a copyright system requiring formal copyright renewal from time to time,\(^4\) this Essay argues that the Landes and Posner analysis on congestion externalities is seriously flawed. It is overbroad in that it is particularly inapt for copyright rights relating to digital technologies. The value of computer software, for example, derives from its functionality, which may be superseded by technological advances but not by "overexposure." Other works, such as digital databases, maps, and factual compilations, also seem invulnerable to congestion externalities from unrestrained use.\(^5\)

---

1. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CIN. L. REV. 471, 484–88 (2003). In addition to congestion externalities, Professor Landes and Judge Posner offer a series of additional arguments in support of their proposal for indefinitely renewable copyrights. They suggest, for example, that it would mitigate the theoretical market failure facing the publisher of a long-forgotten public-domain book: Taking a chance on republication might renew interest in the work, but others could then free ride on that new interest and undercut the first republisher's profit. See id. at 488–89. It would also reduce the incentive to make socially undesirable changes in the work just to get a new copyright as a derivative work. See id. at 489–90. Nearly all of their examples fall into the category of "ex post" justifications of copyright protection; that is, justifications for protection that look to management of the work after creation rather than incentives to create the work in the first place. Professor Mark Lemley has criticized the Landes and Posner approach, and others, as an unwarranted deviation from the basic justification of copyright law as an incentive for the production of socially desirable works. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 141–48 (2004). This Essay restricts its analysis to the Landes and Posner argument concerning congestion externalities.

2. See Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919, 925–26 (2003) (asserting that, without a copyright in the character Superman, new authors would create pornographic and similar works that tarnish Superman's image and exhaust consumers' appreciation of the character, thereby reducing the value of works involving Superman that can be produced in the future).


4. A bill that would place copyright-protected works in the public domain fifty years after their publication unless their copyrights are renewed at a nominal cost of one dollar fifty years after publication and every ten years thereafter has been introduced in Congress. See H.R. 2408, 109th Cong. (1st Sess. 2005).

5. Professor Lemley points out that the Landes and Posner analysis applies, at best, to the derivative-work right and cannot serve as a justification for disallowing competition in the market for copies of the original. See Lemley, supra note 1, at 146.

A perhaps related argument for lengthening the exclusive right to prepare derivative works, as opposed to the reproduction right, has recently been advanced by Professor Michael Abramowicz. Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 366–72 (2005). Professor Abramowicz applies rent-dissipation theory to show the possibility of economic inefficiency if too many people rush to create unauthorized derivative works based on a
The Landes and Posner congestion-externalities analysis, however, is also flawed in more fundamental ways. The analysis treats demand curves representing current social preferences as indicators of a sort of “inherent value.” In fact, a downward shift in the demand curve for a product does not necessarily, or even often, represent a loss in “value” to society as opposed to a change in overall social preferences. Moreover, Professor Landes and Judge Posner present no empirical evidence that demand curves for works of authorship will shift sufficiently after entering the public domain to create a net social loss in value. This Essay argues, by reference to existing public-domain and copyright-protected works, that dramatic, long-term downward shifts in the demand curves, caused by entrance of works into the public domain, are implausible. It goes on to argue that, even if such shifts do occur, meaning that few would be willing to pay for use of the work after its overexposure (were a right to payment somehow made available), public-domain works remain of fundamental value to society as a whole as cultural and intellectual symbolic references. This value is not fully, if at all, captured in the economic analysis.

I. HOW CAN CONGESTION EXTERNALITIES AFFECT ECONOMIC EFFICIENCY?

In opposing the Sonny Bono Copyright Term Extension Act of 1998 (CTEA),6 I wrote the following brief summary of copyright economics on behalf of some fifty copyright and intellectual property law professors:

The fundamental difference between tangible and intellectual property is that intellectual property is a nondepletable commons, while tangible property necessarily depletes with use. “The tragedy of the commons” is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to “overgrazing,” as soon as the item of property enters the public domain from which everyone may draw freely. Recognition of perpetual

---

property rights leads to economic efficiency, because a rational owner will optimize the balance between present and future consumption.

There can be no overgrazing of intellectual property, however, because intellectual property is not destroyed or even diminished by consumption. Once a work is created, its intellectual content is infinitely multiplicable. No matter how many people copy or use someone else’s idea or even “expression,” the author still has it and, absent legal intervention recognizing exclusive rights of some kind, can still make full use of it. If works would be created in optimal numbers without the incentive of copyright, economic theory tells us that the period of protection should be zero. We believe, however, that many authors depend on the expectancy of being paid something for their works in order to earn a living, so without any protection we are unlikely to have available as many works as the natural talents of our authors would permit. Therefore, we follow an incentive-based system of intellectual property rights.7

Professor Landes and Judge Posner cite this passage as an example of the lagging recognition of an “overgrazing” problem in copyright subject matter.8 They note that copyright owners such as Disney take great care not to overexpose their characters to avoid “debasing the currency.”9

That Disney and other copyright owners maintain artificial scarcities of their protected characters to extend the lives of their brands shows their belief that, in the long run, income to such copyright owners will be higher than in the absence of such management. For our purposes, we may assume that some copyright-protected works, such as fictional or cartoon characters, need husbandry of this type to maximize income to the copyright owner. Landes and Posner, however, make a much stronger claim—namely, that overall value to society can decrease if copyright-protected works enter the public domain and thereby become at risk to overexposure.

The logic of the claim is based on a hypothetical shift in demand curves for works that enter the public domain and thereby suffer from overexposure. The

---


8. See Landes & Posner, supra note 1, at 485. They also say the passage overstates the problem, in that it ignores the trademark and right-of-publicity cases, which are both regimes supplying rights that they treat as “intellectual property.” See id. at 486. I concede that the passage does not fully apply to trademark and publicity rights, and I will put aside for the present discussion the somewhat metaphysical issue of whether such rights are properly deemed “intellectual property.” Cf. United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) (“There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.”). I was really talking about copyright (the Statement was written in opposition to the Sonny Bono Act). Landes and Posner are talking about copyright, and this Essay too is talking about copyright. I stand by the passage in that context.

demand curve $D_0$ in Figure 1 shows the original situation, with a work still under copyright. It slopes downward from price $P_0$ (the highest price anyone would pay to use the work) to $Q_0$ (the quantity that would be used if the price were zero). The equilibrium point $E_0 = (Q_0, P_0)$ shows the price charged, $P_0$, and quantity actually used, $Q_0$, when the work is under copyright and the copyright owner charges a specific price. The total value of the work to society is the area under the $D_0$ demand curve, which is the area of the triangle $OQ_0P_0$; however, the smaller triangle $Q_0E_0Q_0$ is deadweight loss, representing the unused value to people who would pay something to use the work but not the price $P_0$ demanded by the copyright owner.10

If the copyright were to expire, so that the supply curve is flat at zero price, and if there is no shift in the demand curve, society would incur a net economic gain—triangle $Q_0E_0Q_0$, which was a deadweight loss while the work was protected, now represents valued uses that would actually be employed.11 However, Professor Landes and Judge Posner consider the case in which termination of the copyright leads to such overexposure of the work that people no longer value use of the work as they did before. The demand curve shifts to

10. In the figure, I have deviated slightly from that presented by Landes and Posner in the interest of what I think is greater clarity.
reflect this reduced demand, as shown in Figure 1 by D1, sloping downward from P1 to Q1. The total value to society of the work, the argument goes, is now the area of the triangle OP1Q1. If this area is less than the trapezoid OP0E0Q0 (the prior total value to society less the deadweight loss that was not being enjoyed anyway), there has been a net loss in value to society. In the extreme, the demand curve would become a mere point at the origin O of the graph, in which case all of the economic value in the work would be lost. On the other hand, if the demand curve moves only slightly, so that it hits the quantity axis at a point past Q0 (which is the case for the demand curve D1 shown in the Figure), some or all of the value lost from the trapezoid OP0E0Q0 (that is, the area P1P0E0X in the Figure) will be offset by gains from the triangle Q0XQ1, all of which was previously deadweight loss.12 Therefore, the demand curve must move down sufficiently in the high-valuing-user end to offset the gains remaining from the deadweight loss triangle before congestion externalities can be said, under the Landes and Posner analysis, to have reduced overall economic value.

II. EVALUATION OF THE “CONGESTION EXTERNALITIES” THEORY

The theory of Professor Landes and Judge Posner that “congestion externalities” causing shifts in the demand curves for works can lead to a loss of “value” to society implicitly equates the original demand curve D0 as representing some inherent value in the work. In that case, when society’s preferences change—as shown by the downward-shifted demand curve D1—some of the inherent value represented by D0 can indeed be lost. However, as discussed below, a demand curve like D0 does not, and cannot in general, represent inherent value. Moreover, even if the underlying economic theory were correct, shifts sufficient to cause an actual loss of value are implausible on their face for the vast bulk of copyright-protected works and not much more plausible for the one type of work with which they seem most concerned, namely, fictional characters. Finally, even if their theory were right and the hypothesized shifts in the demand curves at times take place, the analysis fails to consider other elements of social value that might more than compensate for the supposed reduction in economic value due to congestion externalities.

A. THE BASIC FLAW IN THE ECONOMICS13

Professor Landes and Judge Posner work solely with the demand curve for a

12. See id.
13. I am indebted to my colleague Aaron Fellmeth for having articulated and clarified for me this difficulty with the Landes and Posner theory. Professor Fellmeth has coined the term “preference paternalism” for their approach: Because no inherent value can be found in a demand curve, the claim that a work is “debased” from overexposure simply indicates a preference for the old version as opposed to whatever the public is now valuing more highly. To force the old version on society (which, of course, is not guaranteed in any event even with an extended copyright because copyright owners may permit “debasement” if it increases their financial return) is thus preference paternalism.
given work, and when they see a downward shift in that curve they equate the shift to a reduction in overall social value. A change in the demand curve for a work, however, while showing a change in how much society values that particular work relative to whatever else is available, says nothing about the total value to society of all the goods and services available. When the demand for horse-drawn buggies goes down as a result of competition from gasoline-powered vehicles, we do not say that society has lost anything valuable. The public’s tastes have simply changed and the value that the public previously attached to buggies has now shifted to cars. Buggies are indeed less valuable, but society has incurred no economic loss.14

The buggy example involves technological innovation desired by the vast majority of consumers, so it is easy to see the substitution effect and deny any net loss to society as a whole. But what basis can there be for saying that reduced demand for Mickey Mouse would not be compensated by gains elsewhere, through a similar substitution effect? While this character is under copyright, uses are controlled by the copyright owner to maximize the character’s return through pricing and other methods rendered possible by copyright’s exclusive rights. If the public decides that it is no longer willing to pay for the right to use Mickey, regardless of the cause, Disney may incur a loss, but that is no basis for saying that society incurs a net loss. It is most plausible that society has shifted the focus of its entertainment dollars in other directions, to the dismay of Disney but to the delight of the producers of products that are now substituting for Mickey. Many once popular characters, such as the Teenage Mutant Ninja Turtles, drop out of public view long before their copyrights expire—that is, the demand curves for use of such characters shift downward—but this most likely shows only that society now prefers something else. As far as value to society as a whole is concerned, it’s a complete wash. To say otherwise is either to postulate an independent measure of “value” or to assert that the entertainment dollars previously spent on the now-unpopular iconic character will simply disappear from the economy. The Landes and Posner analysis does not argue the latter and therefore implicitly takes the original demand curve $D_0$ as a measure of inherent value—they like the traditional versions of Mickey and Bogie, so any change represents a loss in value. The traditional versions may indeed be Landes and Posner’s preference, but if the demand curve has shifted downward it says no more than that they value Mickey and Bogie more highly than society as a whole does.

These considerations again highlight the fundamental differences between tangible and intangible property with respect to the “tragedy of the commons.” A field of grass useful for grazing animals, absent property rights, can lose value due to overgrazing in two ways: First, some of the present users might value the opportunity to graze there less than others. If the number of eligible users is

---

14. To say that society has suffered a loss when demand curves shift downward requires an independent measure of “value.” See infra note 15 and accompanying text.
large, this can represent a loss of present value where higher-valuing users, who would have been willing to pay the lower-valuing users not to graze and all would have been better off, are unable to make such deals due to high transaction costs, such as holdouts and the costs of contracting. This is a loss of value because physical grass can be eaten only once. Second, overgrazing can prevent the field from renewing itself, thereby potentially sacrificing a larger future value. This is a loss of value measured by the present value of the amounts users would have been willing to pay in the future for the grass that is not renewed due to the overgrazing. Both of these problems—present even where the demand curve for grass remains absolutely steady—are appropriately addressed through property rights. However, copyright-protected works can be reproduced without in any way inhibiting their further reproduction in the future, so this potential conflict between present and future values does not arise. Nor is there any conflict between current high- and low-valuing users, because both can use the work freely (absent property rights).

Neither in the case of grazing fields nor in the case of copyright-protected works do property rights insure “value” against a change in consumer preferences. The privately owned field of grass may lose its value as a source of animal feed due to advances in animal husbandry, a decline in meat consumption, or any number of other factors. The copyright-protected work may lose value because, as is the case with most works, it lacks the staying power of the tiny percentage of works that become classics. These losses in value are real to the owners of the property, but neither represents a net loss to society. Nearly every product has a downward-drifting demand curve over its useful life, as it is replaced by products more closely aligned with current preferences. In no such case do we say that society has lost “value” when consumer preferences shift demand curves in this way.

One can imagine situations in which a change in consumer preferences does result in a real loss to society, but all require an independent measure of value. For example, we might say that higher-gas-mileage motor vehicles are socially desirable in reducing air pollution and dependence on oil generally. In that case, if consumer tastes shift to a design that guzzles more gas, such as any given SUV, we can say that society suffers a net loss. We may be particularly prone to saying that if we feel the shift in consumer tastes was the result of heavy advertising that we believe has polluted the choices of the consuming public. I see nothing inherently wrong with this kind of value judgment. The perceived loss, however, does not flow from the mere downward shift in the demand curve for fuel-efficient cars. It is possible that, if all the data could be gathered and all the complex calculations done, the new demand for SUVs and the reduced demand for fuel-efficient vehicles results in a net economic gain for society—in employment in the SUV manufacturers (outweighing the employment losses in the fuel-efficient car and bicycle industries), in gasoline sales, in auto repairs (especially from accidents that cause more damage due to the larger cars in use), in more driving generally (because people like their SUVs so much) to
engage in other economic transactions where people used to walk in the park, and so forth. The shift in the demand curve itself tells us nothing about how much value has been lost or gained, absent such an independent measure of value.\textsuperscript{15}

B. SHIFTING DEMAND CURVES?

Even assuming their underlying theory were valid, Professor Landes and Judge Posner do not attempt to prove that demand curves for copyright subject matter will shift sufficiently to create a net social loss in value upon the work’s entrance into the public domain. They concede, in fact, that if the shift is not too large there will be a net gain.\textsuperscript{16} They base their hypothesis on trademarks and rights-of-publicity, as examples of intellectual property whose value can be diminished by consumption.\textsuperscript{17} They also offer a few examples from the copyright area that suggest a threat of loss of overall economic value from entrance of the works into the public domain. While my focus here is on copyright, I briefly consider the application of their theory to trademarks and rights of publicity, which they use as their analytical starting point.

1. Trademarks

Any loss due to the overconsumption of traditional trademarks would seem to be directly related to their signaling function of distinguishing the goods of the mark owner from similar goods offered by others. Free use by others, especially competitors, would render the mark incapable of effecting this basic signaling

\textsuperscript{15} Thus the phrase “preference paternalism” is used to label the claim that debasing a work due to overexposure constitutes a loss in overall social value. Unless the person making the claim has specified an independent measure of value, he or she is relying on personal preferences.

In a private communication, Professor David McGowan has posed the example of a Disney that would make another movie involving the character Tigger but only if Disney can control Tigger’s exposure prior to release, to help ensure higher revenue at the box office, or only if Disney can reap the benefit of spinoff revenues that the new movie would likely generate in the character. I do not see how these possibilities change any of the analysis. If the hypothetical new Tigger movie does not get made, that will be a loss (of some sort) to society, but if Disney has the ongoing right to control Tigger to ensure the success of its movie, society loses all the other uses to which Tigger would have been put by others. Moreover, if Disney does not make a new Tigger movie, what will the company do with the money it would otherwise have invested in the movie? Most likely Disney will make a different movie, which for all we know will be an even bigger economic hit than the Tigger movie would have been. Will it pay a dividend to shareholders? If so, that money may be used for other consumption or investment projects that again will offset to some extent any “losses” from the absence of the Tigger movie. Given all these substitution possibilities, it is impossible to say whether ongoing control by Disney would leave society as a whole better or worse off. It is certainly the case that films are made all the time involving public domain characters. The makers of \textit{Troy} do not get all marketing rights in Achilles (except maybe to the extent the spinoff products look like Brad Pitt), for example, yet we still got the movie (for what it was worth). Basic economic theory says that we do better when we allow competition to bring prices down to marginal cost, which in the case of existing copyright subject matter is zero. Why does this apply to the hula hoop but not to Tigger?

\textsuperscript{16} See \textit{Landes & Posner}, supra note 1, at 487.

\textsuperscript{17} See id. at 486.
function.\textsuperscript{18} Indeed, that is the whole point of trademark law. The trademark owner is not worried about overexposure: Microsoft, for example, would likely be quite happy to see its mark legitimately on every piece of computer software in existence. Even antidilution protection for famous marks looks to commercial uses and requires dilution of the distinctive quality of the mark as an element of the cause of action.\textsuperscript{19} Consequently, perpetual protection of trademarks does not supply a rationale for shielding well-known copyright-protected works from “overexposure.”

2. Rights of Publicity

Rights of publicity come closer to copyrights for the purposes under consideration here, although they too were traditionally limited to use of a celebrity’s name or image to sell goods and did not interfere with other uses, such as unauthorized biographies or pictures.\textsuperscript{20} However, Landes and Posner do not present or cite to any evidence of loss of overall social value when a celebrity’s image becomes free. They hypothesize that, if anyone were allowed to use Humphrey Bogart’s name or likeness in advertising, a proliferation of such uses might lead to confusion, tarnishing of the image, or outright boredom with it, to the point that Bogart’s image would become economically worthless.\textsuperscript{21} Whether this justifies rights of publicity is not entirely clear.\textsuperscript{22} Julius Caesar, Napoleonic Bonaparte, and Abraham Lincoln have all been long free for the taking, but it is hard to see evidence that any of their images have been so tarnished or overused.

\textsuperscript{18} See Richard A. Epstein, \textit{Liberty Versus Property? Cracks in the Foundations of Copyright Law}, 42 San Diego L. Rev. 1, 26 (2005) (conceding a strong case for protection of unlimited duration when the right is used for identification or branding).

\textsuperscript{19} See 15 U.S.C. §1125(c)(1) (2000); see also Mark A. Lemley, \textit{The Modern Lanham Act and the Death of Common Sense}, 108 Yale L.J. 1687, 1704 (1999) (arguing that antidilution protection can, at least in appropriate cases, reduce consumer confusion and thereby encourage investment in product quality). Professor McGowan has pointed out to me that the “tarnishment” aspect of antidilution protection has some analogies to Professor Green’s fear of harm to Superman by use of the character in pornographic films and like. See supra note 2. This, however, is not really a “congestion” externality, because even a legal parody in an otherwise wholly controlled market could have the same effect. See infra note 32. Moreover, any actionable tarnishment would still have to “dilute[e] . . . the distinctive quality of the mark.” 15 U.S.C. § 1125(c)(1) (2000). Finally, that Congress has recognized a cause of action for dilution by tarnishment does not necessarily mean that it is economically efficient to do so.

\textsuperscript{20} Even commercial sales of images of personalities may be protected by the First Amendment. See, e.g., ETW Corp. v. Jireh Publ’g, Inc., 99 F. Supp. 2d 829 (N.D. Ohio 2000), aff’d 332 F.3d 915 (6th Cir. 2003) (ruling that a sale of limited edition posters showing an original and expressive image of golfer Tiger Woods winning the Masters golf tournament is protected by the First Amendment from an attack based on state right of publicity). But see Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 n.11 (Cal. 2001) (looking to the degree a work is “transformative” in determining whether the First Amendment trumps a state right of publicity where pictures of well-known personalities—The Three Stooges—are sold commercially on T-shirts and disagreeing with ETW to the extent it finds a First Amendment override regardless of whether the accused work is transformative).

\textsuperscript{21} See Landes & Posner, supra note 1, at 486.

\textsuperscript{22} Professor Lemley argues that downward shifts in the demand curves are likely to occur only for works that are so well-known that they have become cultural icons, making the theory more applicable to rights of publicity than to copyright. See Lemley, supra note 1, at 145.
that their social value has been reduced relative to whatever it would have been had proprietary rights in their images been maintained by someone. Moreover, rights of publicity are subject to the same analysis applied below to copyright-protected works that fall into the public domain. That is, even if there is a downward shift in the demand curve sufficient to offset the economic gains that would otherwise occur when a work (or personality) becomes freely available, their value as cultural icons and elements of the language by which our culture expands must be taken into account.

3. Copyright

As mentioned above, Professor Landes and Judge Posner present no evidence that demand curves for copyright-protected works will shift upon a work’s entry into the public domain sufficiently to create a net loss in value (even assuming that the demand curve could serve as an indicator of “value”); indeed, they concede that if the shift is not too large there will be a net gain. In the absence of convincing data (notoriously absent no matter who is discussing these issues), we might at least insist on examples suggesting that congestion externalities of the type feared by Landes and Posner really do seem to exist. But the examples they give of works that have been debased by unlimited reproduction are the Mona Lisa, the opening of Beethoven’s Fifth Symphony, and several of Van Gogh’s most popular paintings (as opposed to the works of Shakespeare, whose value seems to them undiminished notwithstanding the large number of high- and low-quality derivative works based on them). Two questions arise from these examples: Is it true that no one would pay anything (or very much) to use the Mona Lisa, Beethoven’s Fifth Symphony, or Van Gogh’s paintings if they were still under copyright? Second, even if no one (or few) would pay anything (or very much) to use these works, are they without value to society?

a. Is There a Downward Shift in the Demand Curves? Starting from Landes and Posner’s examples of the Mona Lisa, the opening of Beethoven’s Fifth Symphony, and some of Van Gogh’s most popular paintings, it is difficult to see much of a basis for thinking that the demand curves for other popular works would shift significantly. Beethoven’s works are still widely played by symphony orchestras who also pay royalties to play more modern works. They play Beethoven not only because his music is free but also because it remains great music, notwithstanding all the “debasing” uses to which it has been put. If

23. Trademark law serves as a natural limit on “overuse” in this context. A new casino in Las Vegas named Caesar’s Village would likely infringe the Caesar’s Palace trademark, as an insurance company using Abraham Lincoln’s image would infringe that of the Lincoln National Life Insurance Company.
24. For example, it seems that The Audubon Society never had anything to do with John James Audubon other than to adopt his name. The values of the Society today may well be different from those of Audubon, who was often an indiscriminate hunter of birds in addition to his being a preserver of their images. Talk of the Nation: Profile: Life and Legacy of John James Audubon (National Public Radio broadcast Jul. 5, 2004) (interview with William Souder).
25. See Landes & Posner, supra note 1, at 488.
copyright were suddenly placed on Beethoven’s Fifth Symphony, we must assume that many orchestras would be willing to pay for the right to play it.26 (And if not now, we can wait a generation and it would be sure to make a comeback.) Copies of Van Gogh’s paintings still sell in large numbers, indeed for tens of thousands of dollars for high quality, nearly exact copies. It seems possible that it is the public-domain status of Van Gogh’s works that has allowed such widespread dissemination of copies and actually resulted in his current popularity.27

Probably no work has suffered more “debasing” uses than images of the Mona Lisa,28 and people still seem willing to buy products displaying very poor or even parodic copies of that famous image. It seems unlikely that the value of an assumed copyright in the Mona Lisa today would be zero if the work were placed under copyright. True, the hypothetical copyright owner might deny the right to “debase” the image in the crass commercial ways that have occurred. Those who love the original work might be pleased with a legal regime that allows that kind of control over our cultural icons. But Landes and Posner are engaged in an economic analysis, and they make no showing that the value to the copyright owner (together with the public surplus resulting from a downward-sloping demand curve) is greater than the area under the total but by-hypothesis-downwardly-shifted demand curve that they postulate for the Mona Lisa.

Professor Michael Green has suggested that Superman is a character who might suffer from overexposure and tarnishment (such as pornography) if allowed to enter the public domain.29 Superman has already been parodied, one example leading to famous litigation,30 and in any event parody represents the most likely application of the fair-use doctrine31 even where the character

26. The Phoenix Symphony chose Beethoven’s Fifth as part of its opening concert for the 2004–2005 season. See Kenneth LeFave, Symphony Breaks Out Beethoven’s Fifth, Ariz. Republic, September 16, 2004, at The Rep 30. Mr. LeFave admits having observed a critic once running from the auditorium after hearing the opening bars of Beethoven’s Fifth—a critic who later explained that he just couldn’t take another exposure to it. However, Mr. LeFave still argues that overperformance of this piece is a “myth” and that it is well worth listening to in any event.

27. I am indebted to my colleague Douglas Sylvester for this observation. It calls to mind the film It’s a Wonderful Life, which gathered dust in the copyright owner’s studio until it went into the public domain and became a classic based on the widespread distribution that public domain status permitted.


29. See supra note 2.

30. See Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231 (2d Cir. 1983) (holding no infringement of the Superman character by Ralph Hinkley in the television show “The Greatest American Hero” because of different attributes and character traits, although a number of visual effects and lines would call Superman to mind).

31. See 17 U.S.C. §107 (2000) (providing that the “fair use” of a copyright-protected work is not an infringement and setting up four nonexclusive factors as part of the analysis of whether a particular use is fair: (1) the purpose and character of the use; (2) the nature of the copyright-protected work; (3) the amount used in relation to the protected work as a whole; and (4) the effect of the use on the potential market for or value of the protected work).
remains under copyright.32 Certainly Santa Claus, probably an even greater cultural icon than Superman, has been placed in every conceivable situation in which such figures can be “overexposed,” including a critically acclaimed film about a department store Santa who didn’t really care if kids were naughty or nice.33 It is implausible that more economic value would be created for society were Santa to be placed back under copyright and this “overexposure” ended.

With lesser known characters, downward shifts in the demand curves seem even less likely. Because they are not so well-known, fewer derivative work authors would be interested in using them just to exploit the public expectations that have become associated with them.34 That is, there are no significant public expectations associated with relatively unknown works. There is thus a natural limit to “overexposure” even with respect to works that are freely available. New authors often use public-domain materials in derivative works to make a new works. If they cannot exploit an underlying work’s wide acceptance with the general public, because there is no such wide acceptance, they will choose works from the public domain that are relevant to their new artistic point. Keeping all works under copyright just to avoid debasement of a relatively small number of cultural icons that have emerged from the pack is almost surely too high a price to pay, even in purely economic terms.35

Judge Kozinski has expressed a related fear of what may happen when fictional characters become free for anyone to use in new works. He is not worried so much about tarnishment through intentionally debasing or pornographic uses, but rather through the personality changes that the character will undergo as more and more people use the character in new works. Taking the

32. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (holding that whether an allegedly infringing work is “transformative” is a key part of the analysis under fair-use factor (1) and asserting that “parody has an obvious claim to transformative value”); see also Mattel, Inc. v. Walking Mountain Prods., 335 F.3d 792 (9th Cir. 2003) (holding that a series of photographs of the famous Barbie Doll, placed nude and in various body positions alongside kitchen appliances, called “Food Chain Barbie” is a noninfringing fair use). Thus, even copyright-protected materials are not impervious to legal uses not desired by the copyright owner, not to mention widely available and likely illegal versions, such as pornographic films, based on the characters and available on the internet. It is worth asking whether those who favor greater copyright owner control in the service of protecting the moral health of popular characters would also favor a narrowing of fair use in this context and, if so, what their standard would be. Judge Posner, not surprisingly, seems consistent. In an article written prior to Campbell, he stated that the fair-use exemption for parodies should be extremely narrow: it should be limited to works that target the original (rather than use the original as a takeoff for targeting something else); it should allow taking only the minimum necessary; and the relative or absolute “minuteness” of the taking should not be a factor in the analysis. Richard A. Posner, When Is Parody Fair Use?, 21 J. LEGAL STUD. 67, 72 (1992).

33. BAD SANTA (Dimension Films 2003) (starring Billy Bob Thornton); see also Internet Movie Database, Bad Santa (2003), http://www.imdb.com/title/tt0307987 (last visited Sep. 29, 2005) (presenting the tagline, “He doesn’t care if you’re naughty or nice”).

34. See Lemley, supra note 1, at 145.

35. Professor Landes and Judge Posner do advocate a system of required renewals to maintain a copyright in force. This would alleviate some of the problem but would hardly eliminate it. We may assume, with them, that copyrights on works with continuing economic value to their copyright owners would be renewed. Only a few of these will involve true cultural icons.
example of Mickey Mouse, Judge Kozinski asserts that Disney has “truly done a marvelous job of taking care of their character, promoting him, and keeping him fresh in the public mind.” This protection and promotion, he argues, enhances the value of the character not only to Disney but to the general public as well: Removing intellectual property protection and allowing many people to create their own versions of Mickey could change Mickey’s fundamental personality, diminishing his value both to Disney and to the public.

As Professor Lemley has pointed out in a general critical analysis of ex post justifications for intellectual property, a belief that the original creator (or his transferee) can best manage the work in the public interest runs strongly contrary to our long-standing and fundamental reliance on free markets to allocate resources to the production and distribution of goods. If the public loves Mickey just the way he is, and if only Disney is capable of supplying that version of Mickey, Disney’s monopoly in Mickey will continue even after copyright in the character expires. In other words, if the public does not want a change in Mickey’s character, no one will buy the new Mickey that Disney’s competitors are selling. On the other hand, we may find the public actually likes at least some of the new flavors of Mickey. In that case, we run a serious risk of loss, both in the number of works available for the public to choose from and in

37. See id. at 469. Judge Kozinski’s approach overtly seems to be one of “preference paternalism.” See supra note 13. The problem is that these personality changes can occur even while the character remains copyright protected. Landes and Posner, for example, note that Mickey Mouse himself has changed over time—first towards a more youthful, cute image and ultimately, in the edgier 1990s, toward a more harried rodent. Landes & Posner, supra note 1, at 491 n.37. Professor Fellmeth has opined to me in a private communication that the original 1940’s Batman was a rather one-dimensional do-gooder. He became a wise-cracking “cool” chaser of evil in the sixties and seventies, often joking with Robin in the midst of battle. Now Batman is a much darker figure who engages in violence and revenge—even occasionally killing the bad guys, which is something he never did before. Robin has largely disappeared from the scene and Batman never jokes. All these changes in Batman’s character took place, presumably, because the copyright owner thought the public would be more willing to pay their money for the newer versions. Whether the original creator of Batman, Bob Kane, or indeed anyone else, finds these changes “debasing” is irrelevant. On the other hand, if Batman were outside of copyright protection, and if a significant segment of the public still wanted the “original,” someone would almost surely supply it. Even DC Comics, the copyright owner, will supply it if that seems the majority preference. Consequently, to insist on preserving the personalities of fictional characters against “debasement” from public domain uses is to impose one’s preferences on the majority. If the claim is that society suffers a net loss in utility when character personalities change, or multiple versions coexist, that claim needs an independent measure of value beyond simply “I don’t like the new version.” See supra note 15 and accompanying text.
38. Lemley, supra note 1. By “ex post justifications” he means theories that look to management of the work after creation, in contrast to incentive theories that focus on the motivation for creation in the first place. See id. at 130 n.4.
39. See id. at 144. Professor Lemley criticizes both the ex post justification for the CTEA as an incentive for restoring and distributing old films and the claim that control over the distribution of information would be beneficial to the public. See id. at 137–38. The former is flawed because it assumes a distributional market failure where none has been shown to exist. The latter is flawed because it rejects the notion that a free market will generally optimize social value, even where the individual actors have less than perfect knowledge, are not fully rational, and attempt to act solely in their own interests. See id. at 148–49.
overall cultural growth, when we leave Disney in perpetual control. Professor Lawrence Lessig has pointed out that Disney itself has taken dark, sometimes bloody aspects of fairy tales from the Brothers Grimm and converted them into happier stories that we now feel are more appropriate for young children.⁴⁰ It is implausible that our cultural lives would be richer had Disney been forced to negotiate with whoever would have had an ongoing right to control the Grimm stories and characters under a perpetual copyright system. Those stories, in the public domain, are readily available to anyone who wants them. When and if we ever tire of the Disney versions, we can always return to the originals.

We should therefore be skeptical about the threat of significant downward shifts in the demand curves for copyright subject matter upon the expiration of the copyrights, as hypothesized by Professor Landes and Judge Posner. There is no evidence that such shifts have occurred even with respect to works they cite (the *Mona Lisa*, the opening of Beethoven’s Fifth Symphony, and some Van Gogh paintings), and, in any event, cultural icons at that level comprise only a tiny percentage of the total supply of copyright subject matter. Works that are not so well-known are even less likely to suffer demand curve shifts that have the effect of wiping out some of the works’ economic value. Perhaps even more important, however, is that there are good reasons for allowing works to enter the public domain even if a resultant downward-shifted demand curve wipes out some or all of the works’ economic value. First, however, we must take a more systematic look at the types of works that are potentially vulnerable to loss of value due to overexposure in the public domain.

**b. Most Works Are Largely or Wholly Invulnerable to Congestion Externalities.**

The vast bulk of once-copyright-protected works are born, live out their copyrights, and die essentially unnoticed. Such works are without economic value, but that absence of value is society’s evaluation, with or without copyright. They do not lose their value as a result of overexposure or “congestion externalities.” If there are some undiscovered gems among this group of works, entrance into the public domain may be their only hope of redemption.⁴¹

Nor are we here concerned with works that achieve enormous initial popularity upon their release into the market but burn out while they are still under copyright protection. The Teenage Mutant Ninja Turtles and various Pokémon figures may well have suffered from overexposure (certainly many of the rest of

---

⁴¹ See Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, in 6 Joyce Studies 2004 (Luca Crispi & Catherine Fahy eds., 2004) (comparing the vast preponderance of copyright-protected works to Tithonus, the character of Greek legend who was given immortality but not freedom from aging, and arguing that, if the copyright could talk, it would echo Tennyson’s version of the myth and seek “the power to die,” that is, go into the public domain). Recall, too, that entrance into the public domain is what revived the now classic Christmas film *It’s a Wonderful Life*. Landes and Posner do not disagree that the preponderance of works would not benefit from extended protection. That is why they would make the copyright renewable, assuring that only those copyrights still making money for their owners would be extended.
us have suffered from their overexposure), but that overexposure is not the result of their entering the public domain. Rather, the copyright owners in these cases seem to have made a business decision to maximize early returns, on the theory that they are more like the hula hoop or the pet rock than the \textit{Iliad} or even \textit{Gone with the Wind}.\footnote{When Scott Adams, the creator of the Dilbert cartoon, was asked whether he feared the work might be overexposed by a spate of Dilbert paraphernalia, he is said to have replied, \textquotedblleft You can't get to overexposure without getting to filthy rich first.\textquotedblright \emph{David Futrelle, Sparky vs. Dogbert, SALON, Dec. 2, 1996, http://www.salon.com/dec96/tomorrow961202.html} (interview of Scott Adams). I am indebted to Aaron Fellmeth for making me aware of this anecdote.} It is conceivable that we will see a revival of the Ninja Turtles in that distant year when their copyright finally expires, but it would be speculative in the extreme to postulate not only a revival but also a public reception of such strength that overexposure again leads to their demise.

Moreover, it also nearly goes without saying that neither functional copyright subject matter like computer programs nor factual works like dictionaries, directories, and maps are susceptible to loss of economic value due to congestion externalities arising from their overexposure.\footnote{Patent subject matter is always functional; indeed, functionality (properly defined) is the traditional distinction between patent and copyright subject matter. \emph{See, e.g., Dennis S. Karjala, Distinguishing Patent and Copyright Subject Matter, 35 CONN. L. REV. 439, 448–68 (2003). As a result, public-domain overexposure is never a threat to patent subject matter. We may abandon a given technology, such as vacuum tubes, when a better one, such as semiconductors, comes along; but as long as a given technology works best within the financial, safety, and other constraints placed upon objects that are put to human service as tools, we do not switch to something else just to be different, no matter how prevalent a given structure or design is in society. The notion of using four wheels on automobiles has been in the public domain for a long time, and yet manufacturers still make cars that way and consumers still buy them.} In the case of many of these works, network externalities actually \textit{increase} a work's value in proportion to its "exposure," as has been the case, for example, with Microsoft's operating software.\footnote{\emph{See, e.g., Dennis S. Karjala, Copyright Protection of Operating Software, Copyright Misuse, and Antitrust, 9 CORNELL J.L. \\ & PUB. POL'y 161 (1999). On network effects generally, see Mark A. Lemley \\ & David McGowan, Legal Implications of Network Economic Effects, 86 CAL. L. REV. 479 (1998).} In many other cases the work simply becomes out-of-date or is superseded by an improved version.\footnote{That these works may be superseded by an improved version does not make irrelevant their status as protected or unprotected works. While most such prior products are indeed relegated to the dustbin of history, every once in a while a new and valuable use is discovered for older works, and transaction costs might eliminate some of these new uses if protection is maintained. That, indeed, is one of the effects of the recent copyright term extension, which increased the term of all works still under copyright, not just those still valued by their owners.} None, however, fall out of use simply due to overexposure, whether or not they have entered the copyright public domain.

It therefore seems the only works that are even potential candidates for death by congestion externalities are those very few that endure with substantial public awareness and affection throughout the life of the copyright. And even among works in this class we must make some important distinctions. If the copyright in a novel expires, for example, it is difficult to imagine how overexposure could affect the demand curve for verbatim reprintings of the work. People are not "exposed" to a book simply through the availability or
even acquisition of copies of it. Rather, they actually have to read the work, and, given the competition for readers' eyeballs, that is a severe natural limitation on the degree of overexposure the work will suffer. A similar analysis applies to plays—before a play can suffer from overexposure that reduces or eliminates demand it must actually be produced and people must pay their money and their time to go see it. Overexposure is simply implausible.46

Music, too, seems an unlikely candidate for the overexposure hypothesized by Landes and Posner. Music consumers either make their own choices about what to listen to on their playback machines or they hear what arrives by electronic transmission from others, such as radio and television. When consumers are making their own choices, overexposure is equally likely whether or not the work is under copyright because private playback is not subject to the copyright owner’s control. Broadcasters, too, have blanket licenses to broadcast most copyright-protected music, which would seem to render even protected music vulnerable if overexposure would increase the broadcaster’s audience. Yet, there is little evidence that owners of music copyrights are doing much to reduce this supposed risk. If overexposure of a given recent entry into the public domain would increase broadcasters’ audiences (even short term, after which they could switch to something else), we would likely have seen many examples already.47

The market for photographic copies or similar verbatim reproductions of famous paintings or sculpture also seems an unlikely candidate to show losses of value due to congestion externalities after entrance of the underlying works into the public domain.48 There was a time when copies of Pablo Picasso’s famous work Guernica were nearly ubiquitous in the dormitories of American universities. Such exposure


47. We must bear in mind that we are not talking about recent and still protected works that are “overexposed” and thereby run out of economic steam in the early years of their copyright term. Such works belong with the Ninja Turtles and the hula hoop.

48. There is a potential problem of market failure with respect to public-domain paintings and sculpture, which is that a painstakingly exact replica of the public domain work may not be protected against photographic or “plug-mold” copying by a competitor. In Hearn v. Meyer, 664 F. Supp. 832, 840 (S.D.N.Y. 1987), for example, the plaintiff sought out rare first printings of The Wizard of Oz and at some point (using filters, etc.) managed to make nearly exact reproductions of the original illustrations. The court found no infringement by defendant’s photographic reproduction. In L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976) (en banc), the court held that a near verbatim copy of a newly created reproduction of a public domain “Uncle Sam Bank” did not infringe, while the dissent would have found liability for slavish copying by using the plaintiff’s recent creation as a template for a mold. The Feist case may now have cast these decisions into stone. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362–63 (1991) (holding that the exercise of mere skill or effort, without intellectual creativity, does not serve as a basis for copyright protection); see generally Dennis S. Karjala, Copyright and Misappropriation, 17 U. DAYTON L. REV. 885 (1992) (discussing the limits of copyright, especially after Feist, to protect against these and other market failures).
may have taken some of the luster from what would otherwise be a more fulfilling visual experience with the original, but the work is still under copyright, so the public domain cannot be blamed for any such loss. It seems possible, even likely, that maintenance of the copyright has prevented the development of a "Guerniciana" market of T-shirts, socks, and coffee mugs similar to that which has developed with respect to the public domain Mona Lisa, but it would be interesting to compare the total market for Guernica licenses with that for works based on the Mona Lisa. Many of the latter may be cheap and tawdry, but here we are talking about economic value, not artistic merit, so if enough of them are sold, it adds up. Whether quality maintenance—by means of a longer or perpetual copyright—would maximize overall economic value is an empirical question. But, absent evidence to the contrary, there is little reason to assume that a market that pushes all prices for goods making use of famous images to marginal cost will not do better than a regulated market. We rely on markets, both in theory and in practice, to maximize economic utility for clothing, automobiles, and most objects of industrial design. Justification should be necessary if we are to do something else with the Mona Lisa and Guernica.

Even the general market for derivative works, such as films or plays based on novels, hardly seems to be vulnerable to congestion externalities, largely for the same reason that the market for verbatim printings of novels or new stage productions of plays cannot suffer from overexposure. Producing a film, or writing and staging a play, requires a significant investment of both money and time, even with the advantage of knowing that the underlying novel has shown itself to be popular. It is plausible that, without some lead time advantage, few would be willing to invest in the production efforts knowing that many other versions of the same story were coming out at the same time. But there are not many works whose entrance into the public domain inspire an immediate rush of expensive-to-create derivative works, like movies. Moreover, most works of enduring popularity will already have served as the basis for a variety of derivative works—especially movies based on books—so there is significant risk whether a new investment will pay off, even without competition. Overexposure to the point of public boredom and significant loss of economic value again seem highly unlikely. And against this must be balanced the number of works that seem to flower, or flower anew, when they enter the public domain. The film It's a Wonderful Life is the best known example, but Frances Hodgson Burnett's The Secret Garden also spawned a huge outpouring of new and creative derivative works upon entering the public domain in 1987.

49. See supra note 28 and accompanying text.
50. See Epstein, supra note 18, at 26 (noting that a hypothetical Shakespeare trust would likely not allow many "perverse" productions of the plays and arguing both that Shakespeare's reputation has not been injured by such productions and that society would be no better off if his works remained under copyright).
c. Literary and Film Characters. We are left, then, mainly with the market for derivative works based on popular literary or film characters as the main source of "overexposure" that might cause a drop in overall economic value of the character after copyright protection ceases. Let us now assume (implausibly) that the total economic value of Mickey Mouse, Superman, and similar cultural icons would indeed decrease if copyright in such characters were to expire. That is, we assume that the total dollars society would be willing to pay for use of these characters after "overexposure" is less than the total dollars that society was willing to pay when they were protected (and uses were limited to maximize the copyright owner's profits). Would such an assumed loss of value justify maintaining the copyrights beyond their normal expiration date?

Professor Rochelle Cooper Dreyfuss has considered a related question in connection with recent expansions in judicial notions of trademark protection.\footnote{See Rochelle Cooper Dreyfuss, Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 Notre Dame L. Rev. 397 (1990).} She points to numerous ways in which well-known marks have passed into the popular culture and attained expressive value in their own right, well beyond their original function of denoting the source of goods or services. Her goal is to ensure, as a matter of trademark policy, that such expressive uses of marks remain free to the public while the marks retain their signaling significance in the commercial markets of their owners, but much of her analysis of the expressive value of well-known marks applies equally to well-known copyright-protected fictional characters.\footnote{Of course, copyright differs from trademark in that, almost by definition, it is designed to give the economic benefit of expressive value to the author of the work. We are concerned, however, not with the copyright owner's rights while a work is protected but, rather, with whether the copyright term should be extended in time in order to ensure that overall economic value is not lost due to overexposure.} Characters like Indiana Jones, Barbie Doll, and of course Mickey Mouse can serve as metaphors or even words with a whole range of social meanings.\footnote{Among a number of introductory examples, Professor Dreyfuss quotes Joan Kennedy to the effect that she was treated as herself when she was alone but "when I'm with Ted I'm a Barbie Doll." See Dreyfuss, supra note 52, at 397. "Mickey Mouse" has long served as a term meaning "petty" or of small importance. Santa Claus is another example of a fictional character who serves a wide variety of metaphorical purposes. The Bible, of course, is full of characters (like Job) who are a constant source of expressive value.} There is no reason to think characters would lose their metaphorical value as communications tools just because they have no economic value in the sense that someone would be willing to pay for their use were they still protected. Indeed, the more "overexposed" they become, the more their metaphorical uses become ingrained in the vernacular.\footnote{This is not to say that extended use of a well-known symbol cannot change its meaning or its power as an evocative metaphor. The right to use the name "Hitler" is not something many organizations would be willing to pay for (although a few extremist groups might be). The word has become synonymous with almost unimaginable evil. If the goal is to say that someone else is evil, comparing him with Hitler does the trick quite well. The problem is that essentially nothing in our domestic lives is}
It is true that many expressive uses of popular characters would be noninfringing under the fair-use doctrine of copyright, but fair use, important as it is, cannot be relied upon as the sole protection for the public interest in expressive uses of characters. The mere threat of a copyright lawsuit is enough to chill the speech of many, even those who are quite certain they would eventually prevail on the fair-use issue. Moreover, as with the development of derivative works in general, no one can predict just how the expressive uses of a character will develop. One person’s use of a public-domain character in a derivative work can lead to a second person’s creative use of the character in a new metaphor, which can lead to yet more derivative works and more metaphorical expression based on the same character. The copyright term is limited precisely because of the importance of leaving to the market how such characters will develop.

Take Santa Claus as an example. While it is hard to think of any character who has been more “debased” at one time or another, it seems likely that many would still be willing to pay to use the image of Santa Claus at Christmas time, were Santa suddenly to come under copyright. Yet, if we assume that Santa has low economic value in the Landes and Posner sense, it means that most images of Santa would simply disappear were he to become protected (that is, few would be willing to incur the extra cost of the copyright royalty in addition to the marginal production cost of whatever version of Santa they are buying). Like all the common elements of our culture, Santa nevertheless has real value to at least some, as entertainment for their children and as a familiar communicative symbol. The value of these symbols as pieces of our cultural and intellectual heritage is not fully captured in the economic analysis, even in the unlikely event that a sufficient downward shift in the demand curve could be demonstrated to result from the absence of copyright protection.  

---

56. This argument may be a specific example of a more general infrastructure theory developed by Professor Brett Frischmann. See Brett M. Frischmann, An Economic Theory of Infrastructure and Commons Management, 89 Minn. L. Rev. 917 (2005). At the risk of oversimplification, he argues that where the outputs from infrastructure involve positive public and social externalities that cannot be appropriated by the user of the infrastructure, the case for management of the infrastructure as a commons rather than private property is often much stronger. He argues that at least some intellectual resources constitute infrastructure. See id. at 990–1003. For present purposes, popular fictional characters (1) may be consumed nonrivalously, (2) are used as inputs for downstream productive activity (such as a new book or movie), and (3) may be used as an input into a wide range of goods and services (advertising, entertainment, criticism, etc.). They therefore appear to meet Professor Frischmann’s definition of infrastructure. See id. at 956. Their use as cultural symbols and icons, moreover, is not easily appropriable, because of high transaction costs if nothing else.
CONCLUSION

Professor Landes and Judge Posner posit “congestion externalities” (overexposure) as posing a threat to the overall economic value of works that enter the public domain. They propose that copyright be indefinitely renewable so that works valued both by their copyright owners and the public can be nurtured and maintained by their owners to support a high overall economic value to society. This Essay demonstrates that their argument is wrong on the underlying economics, in that it treats a work as having an inherent value as represented by its current demand curve. In fact, the demand curve reflects society’s current preference with respect to other products. If demand for a given product decreases (whether due to overexposure, technological change, or plain fickleness), society incurs no net loss. Rather society has simply directed its tastes toward other products. Furthermore, even if the underlying economics analysis were sound, the Landes and Posner argument is implausible for all works; that is, the downward shifts in the demand curves necessary to make their argument valid are unlikely to occur for any work, whether popular or relatively unknown. The strongest case for the necessary downward shift in the demand curve, while still weak, is that for literary or movie characters. Even in this case, however, there is little reason to believe that overexposure from public domain status will cause a downward shift in the demand curve for use of the character representing a net loss of economic value. Achilles, Job, Shylock, Little Red Riding Hood, Sherlock Holmes, and Santa Claus all seem to be alive and well in the popular culture, notwithstanding years of potential overexposure from their public domain status. Finally, even if there are occasional downward shifts in the demand curves to lower economic value, characters in the public domain have social value as elements of our language and culture that is not captured in the economic analysis. In short, “congestion externalities” do not form a viable social policy basis for extending copyright rights or, for that matter, trademark rights (beyond their signaling function) or rights of publicity.