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### ©ancelling Dr. Seuss

Cathay Y. N. Smith

*University of Montana School of Law, cathay.smith@umontana.edu*

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# ©ancelling Dr. Seuss

Cathay Y. N. Smith\*

## ABSTRACT

*Dr. Seuss Enterprises announced in March 2021 that it would no longer license or publish six of its children’s books because those books portrayed people in racist or culturally stereotypical ways. Since then, the public has learned through news reports and social media that other publishers have similarly reviewed and altered their catalogues of classic children’s works, including withdrawing them from the public, editing them to remove problematic content, or adding disclaimers to warn the public about racially insensitive or outdated content. The public reaction to Dr. Seuss’s decision and these other actions has been largely divided. Some criticized these decisions as censorship or a product of “cancel culture.” Others applauded the decisions as a long-overdue reckoning with problematic portrayals in children’s works. While recent decisions to alter or withdraw classic works have generated significant attention and controversy, it is in fact not uncommon for authors, copyright owners, and publishers to remedy racist or sexist content in their expressive works, especially in works intended for children.*

*This Article examines one approach that copyright owners have taken to deal with racist, sexist, or otherwise problematic classic children’s works—ceasing to make those works available to the public. Specifically, copyright owners have attempted to withdraw certain problematic children’s works by ceasing to publish, license, perform, or*

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\* Professor of Law, University of Montana Blewett School of Law; 2022–23 Visiting Research Fellow, Oxford Intellectual Property Research Centre, University of Oxford. Many thanks to Bitu Amani, Victoria Barnes, Sarah Burstein, Felicia Caponigri, Lauren Crais, Brian Frye, Dev Gangee, Cathy Gellis, Andrew Gilden, Laura Heymann, Amy Landers, Van Anh Le, Glynn Lunney, Lisa Macklem, Marcus De Matos, Luke McDonough, Jacob Noti-Victor, Jan Osei-Tutu, Alex Roberts, Betsy Rosenblatt, Zahr Said, and Paula Westenberger. Thanks also to organizers and participants at the Oxford IP Discussion Group, the MOSAIC IP Conference on “Access for All? The Role of IP in Equity, Power, and Democracy in Challenging Times,” the Brunel (London) Law School Research Seminar Series, the University of Glasgow CREATE Public Lecture Series, and the Oxford Intellectual Property Research Centre Invited Speaker Series. The author would also like to thank the diligent student editors at Vanderbilt JETLaw, including Angela Karas and Charlotte Yates.

*broadcast those works, and otherwise making those works unavailable to the public. This Article reviews well-known examples of copyright owners ceasing to make their popular children’s works available to the public, including Dr. Seuss’s refusal to publish or license six of its books, United Artists’ failure to broadcast cartoons known as the “Censored Eleven,” and Disney’s rejection of its controversial film Song of the South. It examines the copyright law and policy implications of those actions, and explores the balance and conflicts between copyright policy, free speech, and social policy.*

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### I. INTRODUCTION

On March 2, 2021, Dr. Seuss Enterprises [“Dr. Seuss”] publicly announced that it would no longer publish or license six of its children’s books.<sup>1</sup> According to its announcement, Dr. Seuss’s mission is to “support[] all children and families with messages of hope, inspiration, inclusion, and friendship.”<sup>2</sup> Consequently, it worked with a group of experts to review its catalogue of children’s books to identify racially

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1. *Statement from Dr. Seuss Enterprises*, SEUSSVILLE (Mar. 2, 2021), <https://www.seussville.com/statement-from-dr-seuss-enterprises/> [<https://perma.cc/5M5G-PA85>].

2. *Id.*

insensitive and other problematic content.<sup>3</sup> Dr. Seuss selected six books from its collection that “portray[ed] people in ways that are hurtful and wrong.”<sup>4</sup> These books were *And to Think That I Saw It on Mulberry Street*, *If I Ran the Zoo*, *McElligot’s Pool*, *On Beyond Zebra!*, *Scrambled Eggs Super!*, and *The Cat’s Quizzer*.<sup>5</sup>

The public reaction to Dr. Seuss’s decision to cease publishing those six classic children’s books was largely divided. Some criticized the decision as censorship or the product of “cancel culture.”<sup>6</sup> Others applauded the decision as a long-overdue reckoning with the problematic portrayals in the books.<sup>7</sup> While Dr. Seuss’s decision elicited attention and backlash from the media, the public, and even political figures, it was not the first time that a publisher decided to take actions to withdraw its works from the public.<sup>8</sup> In fact, since Dr. Seuss’s March 2021 announcement, news reports and social media posts have drawn attention to other publishers’ decisions to make changes to popular classic children’s works, including editing works to remove offensive content<sup>9</sup> or attaching content warning labels to the start of problematic materials.<sup>10</sup> This Article examines the copyright law and policy implications when copyright owners cease publishing, licensing, or otherwise making their copyrighted classic works available to the public.

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3. *Id.*

4. *Id.*

5. *Id.*

6. *See, e.g.*, Aaron Rugar, *Why Fox News Is Having a Day-Long Meltdown over Dr. Seuss*, VOX (Mar. 2, 2021, 7:50 PM), <https://www.vox.com/2021/3/2/22309176/fox-news-dr-seuss-cancel-culture-fox-news-biden> [<https://perma.cc/R6TB-VAYS>].

7. *See* Char Adams, *The Reckoning with Dr. Seuss’ Racist Imagery Has Been Years in the Making*, NBC NEWS (Mar. 3, 2021, 5:02 AM), <https://www.nbcnews.com/news/nbcblk/reckoning-dr-seuss-racist-imagery-has-been-years-making-n1259330> [<https://perma.cc/J5MR-9EJJ>].

8. *See* Kelly Robinson, *Dr Seuss ‘Cancelled’? There’s Nothing New About Cutting Racism from Children’s Books*, GUARDIAN (Mar. 9, 2021, 12:15), <https://www.theguardian.com/books/2021/mar/09/dr-seuss-cancelled-theres-nothing-new-about-cutting-racism-from-childrens-books> [<https://perma.cc/KPE2-EBYN>].

9. *See, e.g., id.*; Derrick Bryson Taylor, *Roald Dahl’s Books Are Rewritten to Cut Potentially Offensive Language*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/books/roald-dahl-books-changes.html> [<https://perma.cc/KN5M-Q4ZC>]; Laura Willard, *8 Changes That Were Made to a Classic Richard Scarry Book to Keep up with the Times. Progress!*, UPWORTHY (Feb. 17, 2023), <https://www.upworthy.com/8-changes-that-were-made-to-a-classic-richard-scarry-book-to-keep-up-with-the-times-progress> [<https://perma.cc/27PT-3EMS>].

10. *See, e.g.*, Reese Oxner, *Disney Warns Viewers of Racism in Some Classic Movies with Strengthened Label*, NPR (Oct. 16, 2020, 2:52 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/16/924540535/disney-warns-viewers-of-racism-in-some-classic-movies-with-strengthened-label> [<https://perma.cc/V283-H5A8>].

As society becomes increasingly aware of institutional biases and the harmful effects of racial, gender, and other hurtful stereotypes in popular children's books and films, copyright owners and publishers are contending with problematic content in their catalogues of classic works.<sup>11</sup> Over the years, authors, copyright owners, and publishers have taken different approaches to dealing with these works.<sup>12</sup> Some choose to update or edit works to replace stereotypical language, images, or references, or rewrite entire plots to remove offensive tropes.<sup>13</sup> The publisher of the popular *Nancy Drew Mystery Series*, for instance, reissued edited versions of some of its early books to erase overtly racist and cartoonish caricatures of villains.<sup>14</sup> Other publishers have attached labels or content warnings to works.<sup>15</sup> For instance, the beginning of some Disney classic animation films, such as *Dumbo*, *Peter Pan*, and *The Aristocats*, include the warning that “[t]his program includes negative depictions and/or mistreatment of people or cultures. These stereotypes were wrong then and are wrong now.”<sup>16</sup>

This Article focuses on a third approach that copyright owners and publishers have taken to deal with problematic children's works: ceasing to make new copies available to the public. Specifically, copyright owners and publishers have withdrawn problematic children's works by halting publishing, licensing, or otherwise making new copies of those copyrighted works available to the public.<sup>17</sup> The most well-known examples, discussed more fully below, are Disney's refusal to make available its infamous film *Song of the South*,<sup>18</sup> United Artists' ban on broadcasting a group of *Looney Tunes* cartoons dubbed

11. See Mark Pratt, *6 Dr. Seuss Books Won't Be Published for Racist Images*, AP (Mar. 2, 2021, 2:13 PM), <https://apnews.com/article/dr-seuss-books-racist-images-d8ed18335c03319d72f443594c174513> [<https://perma.cc/72BE-BXX5>].

12. While problematic content is more likely to appear in *classic* children's works, recent works are not immune to criticism. See, e.g., Liam Stack, *Scholastic Halts Distribution of 'A Birthday Cake for George Washington'*, N.Y. TIMES (Jan. 17, 2016), <https://www.nytimes.com/2016/01/18/business/media/scholastic-halts-distribution-of-a-birthday-cake-for-george-washington.html> [<https://perma.cc/3EG5-327L>].

13. Robinson, *supra* note 8.

14. *Id.*

15. See Oxner, *supra* note 10.

16. *Id.*

17. Robinson, *supra* note 8.

18. *Disney Updates Content Warning for Racism in Classic Films*, BBC (Oct. 16, 2020), <https://www.bbc.co.uk/news/world-us-canada-54566087> [<https://perma.cc/95VN-XPP8>]; Scott Tobias, *Song of the South: The Difficult Legacy of Disney's Most Shocking Movie*, GUARDIAN (Nov. 19, 2019, 1:20), <https://www.theguardian.com/film/2019/nov/19/song-of-the-south-the-difficult-legacy-of-disneys-most-shocking-movie> [<https://perma.cc/B8Y7-H9NR>]; Ben F. Silverio, *The Song of the South Controversies Explained*, SLASH FILM (Aug. 10, 2022, 8:56 PM), <https://www.slash-film.com/960577/the-song-of-the-south-controversies-explained/> [<https://perma.cc/RP9F-CMBT>].

the “Censored Eleven,”<sup>19</sup> and Dr. Seuss’s decision to cease publishing and licensing six of its children’s books.<sup>20</sup> This Article appraises the potential consequences when copyright owners withdraw their works and considers how this approach affects the balance between free speech, copyright law, and the public interest. It critically examines three copyright doctrines that scholars and litigants have argued could allow for the reproduction of withdrawn or out-of-print copyrighted works.

The right of a copyright owner or publisher to cease publishing expressive works may seem irrefutable, especially in the case of children’s books that contain outdated racial and gender stereotypes. Authors, copyright owners, and publishers generally have the right to refrain from publishing certain works and the discretion to cease licensing copyrighted works for publication.<sup>21</sup> This right is complicated here, however, because the works at issue are classic children’s works, are often still protected by copyright, and are being withdrawn because they are offensive.<sup>22</sup> Classic works occupy a special societal status, frequently embodying sentiments of tradition, heritage, and nostalgia, which makes their preservation seem important to society. At the same time, however, children’s literature requires a higher standard of sensitivity. Children may not be able to contextualize racial and gender stereotypes they encounter in expressive works, making it difficult for them to recognize and reject problematic content.

Furthermore, if a copyright owner retires a work still protected by copyright, that owner’s decision to cease publication and licensing of the work would significantly decrease the public’s access to copies of that work during the copyright term.<sup>23</sup> Specifically, once a copyright owner decides to no longer publish or license their work, no new copies

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19. See Katy Gillett, *What is the Censored Eleven? The Racist Looney Tunes and Merrie Melodies Cartoons Banned Since 1968*, NAT’L (Apr. 11, 2021), <https://www.thenational-news.com/arts-culture/film-tv/2021/04/10/what-is-the-censored-eleven-the-racist-looney-tunes-and-merrie-melodies-cartoons-banned-since-1968/> [<https://perma.cc/4AM9-DWXJ>].

20. *Statement from Dr. Seuss Enterprises*, *supra* note 1.

21. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

22. Frederic Haber, *Copyright and Literary Estate Implications of Dr. Seuss Enterprises Withdrawing Six Books*, COPYRIGHT CLEARANCE CTR. (Mar. 18, 2021), <https://www.copyright.com/blog/copyright-and-literary-estate-implications-of-dr-seuss-enterprises-withdrawing-six-books/> [<https://perma.cc/AY4X-CFB3>]; see *Copyright Services: Copyright Term and the Public Domain*, CORNELL U. LIBR., [hereinafter *Copyright Services*] <https://guides.library.cornell.edu/copyright/publicdomain> [<https://perma.cc/7QSV-TRA7>] (last visited Sept. 3, 2023).

23. See Shane D. Valenzi, *Rereading a Canonical Copyright Case: The Nonexistent Right to Hoard in Fox Film Corp. v. Doyal*, 36 HASTINGS COMM. & ENT. L.J. 89, 91 (2014) (“Disney’s 1946 live action-animated mash-up *Song of the South* has not been available to the public in any form since 1986 . . . most born after 1980 or so have likely never seen the film, and those who have seen it likely did so via unlicensed and technically infringing means.”).

of that work can be made available until the end of its copyright term.<sup>24</sup> While copyright exhaustion rules will prevent a copyright owner from “recalling” tangible works already available to the public, as discussed more fully below, withdrawing works that were primarily published digitally, streamed, or performed in theaters, or that will remain protected by copyright for a long term, could effectively decrease and potentially suppress access to those works in the future.<sup>25</sup>

Finally, the reasons prompting a copyright owner to withdraw a classic work can also complicate the “right” to withdraw. If copyright owners are motivated by “corporate safetyism,”<sup>26</sup> they could be accused of destroying literary heritage for greed. If they want to retire a work because it threatens the political, social, or moral order, or because it harms or offends readers, they could be accused of censorship. But at the same time, demanding that copyright owners or publishers continue to publish, or distribute, or license content could inappropriately compel them to publish speech that they find offensive or morally repugnant.

These competing interests introduce challenging moral questions about protecting children, whitewashing history, and advancing social justice. They raise legal issues under copyright abandonment, fair use, and remedy analyses. They also prompt policy implications concerning copyright’s purpose, free speech, and the public interest. Ultimately, by exploring high-profile examples of copyright owners withdrawing their works, this Article begins to untangle copyright’s role in both supporting and hindering change and examine how copyright can serve the varying and diverse interests of society.

It is important to clarify that this Article does not criticize the authors or creators of any of the children’s works described below. This Article also neither normatively asserts that authors, copyright owners, and publishers should remedy offensive children’s works, nor attempts to dictate the form of such remedies. While this Article raises moral considerations and policy implications both for and against retiring problematic children’s works, this Article focuses on the complicated legal and policy implications *if* copyright owners choose to withdraw those works. Finally, this Article focuses on *children’s* works. Children are impressionable and often form their understandings of race, culture, society, and self-image through interacting with expressive works. They are also less likely to understand and contextualize the

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24. *Id.*

25. See discussion *infra* Part III; Valenzi, *supra* note 23.

26. Helen Lewis, *Roald Dahl Can Never Be Made Nice*, ATL. (Feb. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/without-nastiness-roald-dahl-isnt-roald-dahl/673141/> [https://perma.cc/PCB3-X6A7].

problematic portrayals of people and content within such works' historical backdrops. These considerations make the moral and policy debates in this Article, including how copyright should advance the "public interest," particularly challenging.

This Article proceeds as follows: Part II reviews high-profile instances of copyright owners ceasing to publish, license, or otherwise make their works available to the public. It further explains arguments about how withdrawing outdated classic children's works can serve or harm the public interest. Part III explores the balance of free speech, copyright, and the public interest when copyright owners cease publishing, licensing, or making their works available to the public. When copyright owners cease publishing or licensing a copyrighted work, it could result in decreased access to or, in the most extreme circumstances, the total suppression of that work, frustrating copyright's purpose. Part IV critically examines three copyright doctrines that scholars and litigants argue could have the potential to allow unauthorized reproductions of withdrawn works: copyright abandonment, fair use, and the public interest. It assesses the viability of those arguments and their considerations under copyright policy. Ultimately, the analysis in this Article concludes that copyright owners have the right to cease commercial publication and licensing of problematic children's works and the right to prevent others from reproducing copyrighted works. However, they cannot prevent the limited reproduction of those works for archival and educational purposes, commentary and criticism, and other fair uses. While this approach could in due course decrease the public's access to certain classic children's works, it strikes an appropriate balance between supporting free speech, recognizing copyright owners' right to control their works, and considering the public interest.

## II. OH, THE CONTENT YOU'LL CANCEL: WITHDRAWING PROBLEMATIC CLASSIC WORKS

Today, most people are aware that racial, gender, and other problematic stereotypes can appear in popular and beloved works of literature, films, and other expressive works.<sup>27</sup> In an opinion for the US Court of Appeals for the Ninth Circuit, Judge Reinhardt acknowledged that, "[i]t is now uncontroversial to observe that some of the most lauded works of literature convey, explicitly or in a more subtle manner, messages of racism and sexism, or other ideas that if accepted blindly would serve to maintain or promote the invidious inequalities that exist

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27. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998).



in our world today.”<sup>28</sup> However, adults can have trouble recognizing racism in classic children’s works or acknowledging their potential impact on children.<sup>29</sup> Professor of English and renowned children’s literature scholar Philip Nel breaks down this phenomenon as follows:

Adults often fail to acknowledge the racism in beloved books, toys, films or games from their childhoods because doing so would complicate their affective relationship with their memories. Racial stereotypes safely hide in children’s literature and culture because nostalgia can mystify ideology. To admit racist content in cherished memories unsettles not only adults’ nostalgia, but their sense of themselves. The logic goes like this: (1) Good people do not like racist things. (2) I like this book (or film, or game). (3) Therefore, this book (or film, or game) is not racist.<sup>30</sup>

It is because of this cognitive dissonance that many people find it difficult to understand why copyright owners and publishers of popular classic children’s works would choose to withdraw or cease publishing, licensing, or otherwise making those works available to the public.<sup>31</sup> This confusion likely explains some of the backlash and accusations of cancel culture and censorship after Dr. Seuss’s March 2021 announcement.<sup>32</sup> Therefore, to put these works into perspective and to provide context for the copyright owners’ decisions, the following sections review some of the well-known books and films that copyright owners have ceased making available to the public and the considerations that copyright owners and publishers face when making those decisions to withdraw classic works from the public.

### *A. Classic Children’s Literature*

Books play a crucial role in shaping children’s understanding about important topics, such as race, gender, and class.<sup>33</sup> “[C]hildren’s books offer a window into society and are encoded with racialized, gendered, and classed meanings, shaped by larger sociopolitical structures that exist within our world.”<sup>34</sup> Yet, scholars have noted the “almost complete omission” of people of color from historical children’s

28. *Id.*

29. See PHILIP NEL, WAS THE CAT IN THE HAT BLACK?: THE HIDDEN RACISM OF CHILDREN’S LITERATURE, AND THE NEED FOR DIVERSE BOOKS 22 (2017).

30. *Id.*

31. *See id.*

32. *See id.*

33. Lindsay Pérez Huber, Lorena Camargo Gonzalez & Daniel G. Solórzano, *Theorizing a Critical Race Content Analysis for Children’s Literature About People of Color*, URBAN EDUC. 1, 3 (2020).

34. *Id.*

books published in the United States.<sup>35</sup> While recent years have seen a general increase in books published about or by people of color,<sup>36</sup> most of those books have not yet stood the test of time to achieve societal designation as “classics.”<sup>37</sup> Books that are often considered “classics” tend to be the original versions of older books that do not feature characters of color or, if they do, are more likely to rely on troubling stereotypes to portray those characters.<sup>38</sup>

Dr. Seuss’s catalogue of children’s books serves as an example of this problem. Theodor “Seuss” Geisel is often referred to as “the most popular children’s author in America.”<sup>39</sup> It is estimated that “one out of every four children born in the United States receives as its first book a Dr. Seuss Book.”<sup>40</sup> Two researchers, Katie Ishizuka and Ramon Stephens, examined all fifty of Dr. Seuss’s children’s books and found that, of the 2,240 human characters that appeared in those books, only forty-five—or just 2 percent—were characters of color.<sup>41</sup> All forty-five of those characters of color were male, none of them had speaking roles, and all were “presented in subservient, exotified, or dehumanized roles,” such as “hunting down or carrying exotic animals for a White male.”<sup>42</sup>

For instance, Dr. Seuss’s first children’s book, *And to Think That I Saw It on Mulberry Street*, was about a boy named Marco imagining what he saw walking home from school on Mulberry Street.<sup>43</sup> One thing Marco sees is an East Asian man.<sup>44</sup> In the book, the man was portrayed holding chopsticks and a bowl of rice, and wearing a triangular hat and sandals with elevated wood-base (resembling traditional Japanese “geta” footwear).<sup>45</sup> He was featured in the original version of the book with bright yellow skin, slanted eyes, and a long black braid—known

35. *Id.* (quoting Nancy Larrick, *The All-White World of Children’s Books*, SATURDAY REV. 63 (Sept. 11, 1965)).

36. Huber et al., *supra* note 33.

37. See Rose Clark, *What Makes a Book a Classic?*, GUARDIAN (Apr. 17, 2012, 10:04), <https://www.theguardian.com/childrens-books-site/2012/apr/17/what-makes-a-classic> [<https://perma.cc/T6AN-3QAM>].

38. See Huber et al., *supra* note 33, at 2.

39. PHILIP NEL, DR. SEUSS: AMERICAN ICON 6 (2004).

40. *Id.* at 3.

41. Katie Ishizuka & Ramón Stephens, *The Cat is Out of the Bag: Orientalism, Anti-Blackness, and White Supremacy in Dr. Seuss’s Children’s Books*, 1 RSCH. ON DIVERSITY IN YOUTH LITERATURE 1, 13 (2019).

42. *Id.* at 14–15.

43. *How Dr. Seuss Got His Start ‘On Mulberry Street’*, NPR (Jan. 24, 2012, 3:52 AM), <https://www.npr.org/2012/01/24/145471724/how-dr-seuss-got-his-start-on-mulberry-street> [<https://perma.cc/L3PH-YTMU>].

44. See Ishizuka & Stephens, *supra* note 41, at 15.

45. *Id.*

colloquially as a “cue” braid.<sup>46</sup> The text under the image of this man originally read, “[a] Chinaman who eats with sticks.”<sup>47</sup> In 1978, Geisel revised his portrayal of this character, removing the character’s bright yellow skin color and braid. He also edited the text to read “[a] Chinese man who eats with sticks.”<sup>48</sup>

In another Dr. Seuss’s children’s book, *If I Ran the Zoo*, a young white boy named Gerald McGrew, dissatisfied with his visit to the zoo, described the bizarre and exotic creatures that he would put in his zoo.<sup>49</sup> In that book, most Asian characters were portrayed in a one-dimensional way, wearing conical hats and working for McGrew.<sup>50</sup> The only three Asian characters in the book not wearing hats were portrayed identically with slanted eyes and “Fu Manchu” mustaches.<sup>51</sup> The text accompanying the image explained that the main character will “hunt in the mountains of Zamba-ma-Tant / With helpers who all wear their eyes at a slant.”<sup>52</sup> That same book included Middle Eastern characters in turbans that the main character talks about putting in his zoo: “[a] Mulligatawny is fine for my zoo / And So is a chieftain. I’ll bring one back too.”<sup>53</sup> Finally, in all fifty children’s books, of the 2,240 human characters, only two were Black.<sup>54</sup> Those two characters appeared in *If I Ran The Zoo* where they are identified as African and portrayed shirtless, shoeless, with large hoop nose-rings and grass skirts, and hair styles that matched the exotic animal they were carrying.<sup>55</sup>

In March 2021, thirty years after Geisel’s death, Dr. Seuss announced that it would no longer publish or license *And To Think That I Saw It On Mulberry Street* or *If I Ran The Zoo*, along with four additional children’s titles that featured racial stereotypes and

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46. *Id.*; see also DR. SEUSS, AND TO THINK THAT I SAW IT ON MULBERRY STREET (1st ed. 1937) [hereinafter DR. SEUSS, MULBERRY STREET].

47. Ishizuka & Stephens, *supra* note 41, at 15.

48. *Id.*

49. See DR. SEUSS, IF I RAN THE ZOO (1st ed. 1950) [hereinafter DR. SEUSS, IF I RAN THE ZOO].

50. Ishizuka & Stephens, *supra* note 41, at 15.

51. See DR. SEUSS, IF I RAN THE ZOO, *supra* note 49.

52. *Id.*

53. *Id.*

54. See Ishizuka & Stephens, *supra* note 41, at 21.

55. See *id.*

caricatures.<sup>56</sup> Swift backlash ensued.<sup>57</sup> Some commenters called Dr. Seuss’s decision “censorship” and accused it of caving to the “woke mob.”<sup>58</sup> Other critiques of the decision seemed to unintentionally justify the need for change.<sup>59</sup> For instance, some online comments did not understand why some of the character portrayals in Dr. Seuss’s books were problematic, displaying a lack of cultural understanding—a common result when individuals grow up reading books with only one-dimensional characters of color portrayed through inaccurate racial stereotypes: “[t]o me this depiction was not racist or derogatory, but simply a physical characteristic (which every race has- even us Caucasian’s [sic.]) that lends to the diversity of that culture!,” and “[a]re we pretending that Chinese men don’t use chopsticks to eat and didn’t wear those kinds of hats at that time?”<sup>60</sup>

Putting aside these common critiques, little public attention has been paid to any potential legal consequences of Dr. Seuss’s decision.<sup>61</sup> Because all six of those Dr. Seuss books are still protected by copyright, Dr. Seuss’s decision to cease publishing and licensing them means that no new copies of those books can be published or produced until their copyright terms expire and they enter the public domain.<sup>62</sup> Under current US copyright law, the copyright term for expressive works created after January 1, 1978 lasts for seventy years after an author’s death.<sup>63</sup> Copyright terms for works created before 1978 can vary based upon when the work was published and whether copyright formalities were necessary and observed at the time of publication.<sup>64</sup> Dr. Seuss published *Mulberry Street* in 1937 and, therefore, the copyright to that

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56. Ron Charles, *The Time is Right to Cancel Dr. Seuss’s Racist Books*, WASH. POST (Mar. 2, 2021, 1:26 PM), [https://www.washingtonpost.com/entertainment/books/dr-seuss-books-canceled-notebook/2021/03/02/b3496b98-7b55-11eb-a976-c028a4215c78\\_story.html](https://www.washingtonpost.com/entertainment/books/dr-seuss-books-canceled-notebook/2021/03/02/b3496b98-7b55-11eb-a976-c028a4215c78_story.html) [<https://perma.cc/2N5B-L5BS>].

57. *See id.*

58. *Id.*

59. *See* Comment to Greg Evans, *Dr. Seuss Controversy: White House Weighs in, Sales Spike & Fox News Grouses as Six Titles Discontinued for Racist Imagery - Update*, DEADLINE (Mar. 2, 2021, 2:05 PM), <https://deadline.com/2021/03/dr-seuss-books-canceled-no-longer-published-hurtful-wrong-imagery-1234704658/comment-page-2/#comments> [<https://perma.cc/E3K2-TQJU>].

60. 60’S Kid, Comment to *id.* (Mar. 29, 2021, 12:09 PM).

61. *See* Bethany Mandel, *Dr. Seuss Censorship Didn’t Begin and Won’t End with This*, GAZETTE (Apr. 8, 2022), [https://gazette.com/opinion/dr-seuss-censorship-didn-t-begin-and-won-t-end-with-this-opinion/article\\_0f853390-7c48-11eb-9069-0f2e2d4440a7.html](https://gazette.com/opinion/dr-seuss-censorship-didn-t-begin-and-won-t-end-with-this-opinion/article_0f853390-7c48-11eb-9069-0f2e2d4440a7.html) [<https://perma.cc/2KYQ-78FW>].

62. *See* Valenzi, *supra* note 23; 17 U.S.C. § 302.

63. *See* § 302.

64. *See* *Copyright Services*, *supra* note 22.

book expires ninety-five years from publication on January 1, 2033.<sup>65</sup> Similarly, the copyright to *If I Ran the Zoo*, published in 1950, will not expire until January 1, 2046.<sup>66</sup> Of the six books that Dr. Seuss has withdrawn, *The Cat's Quizzer* has the longest copyright term remaining and will not enter the public domain until January 1, 2072.<sup>67</sup> This means that between March 2021 and each book's copyright expiration date, the only copies of those books available to the public will be limited to already-published copies found at libraries, held in personal homes, or listed for sale by second-hand retailers.<sup>68</sup>

Of course, Dr. Seuss's books are not the only children's works that have been accused of perpetuating harmful stereotypes, nor are they the only works that a copyright owner has withdrawn from the public.<sup>69</sup> The next Section examines some of the more controversial children's films that copyright owners and film distributors have withdrawn due to the problematic content in those films.

### B. Classic Children's Films

Similar to children's literature, children's films and cartoons have not escaped legacies of racism, sexism, and other harmful social and cultural stereotypes.<sup>70</sup> Cartoons can play to society's "most unfiltered, primal selves"; comic artist Art Spiegelman explains that, "[w]e're prone to cartoon stereotyping because that's how we think, how we hold images in our heads . . . it's preliterate thinking."<sup>71</sup> Researchers understand that children form their self-image and gather cultural

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65. DR. SEUSS, MULBERRY STREET, *supra* note 46 was first published by Vanguard in 1937 and, according to the copyright notice, copyright to the work was renewed in 1967. The copyright will expire ninety-five years from first publication, on January 1, 2033. See *Copyright Services*, *supra* note 22.

66. DR. SEUSS, IF I RAN THE ZOO, *supra* note 49 was first published in 1950 and copyright to the work was renewed in 1977. The copyright will expire ninety-five years from publication, on January 1, 2046. See *Copyright Services*, *supra* note 22.

67. DR. SEUSS, THE CAT'S QUIZZER (1st ed. 1976) was first published in 1976, and copyright to the work will expire ninety-five years from publication, on January 1, 2072. See *Copyright Services*, *supra* note 22.

68. See *Copyright Services*, *supra* note 22.

69. See Theara Coleman, *22 of America's Most Unexpectedly Banned Books*, WEEK (Aug. 31, 2023), <https://theweek.com/articles/459795/america-surprising-banned-books> [<https://perma.cc/52JN-UCD7>].

70. See John Leland, *Ideas & Trends; Rascal or Racist? Censoring a Rabbit*, N.Y. TIMES (June 3, 2001), <https://www.nytimes.com/2001/06/03/weekinreview/ideas-trends-rascal-or-racist-censoring-a-rabbit.html> [<https://perma.cc/LRK3-B39E>].

71. *Id.*

information about others and group membership through visual images in picture books, magazines, television, and in films.<sup>72</sup>

Disney Enterprises has been one of the most influential creators of visual imagery for children, frequently taking classic fairy tales from the public domain and reproducing long-lasting visual representations of their characters.<sup>73</sup> Disney, as such, dominates the children's media industry.<sup>74</sup> Unfortunately, as several critical film scholars have noted, Disney has a history of producing films that rely on racial and gender stereotypes.<sup>75</sup> As Neal Lester notes, “[Disney is] a globally dominant producer of cultural constructs related to gender, race, ethnicity, class and sexuality.”<sup>76</sup>

One of the most notorious Disney productions was its 1946 film *Song of the South*.<sup>77</sup> *Song of the South* is a film about a young white child, Johnny, who moved to his mother's family plantation in Georgia, where he befriended Uncle Remus, a formerly enslaved person living on the property.<sup>78</sup> Through the Br'er Rabbit stories Uncle Remus told Johnny, Uncle Remus shared lessons about life that helped Johnny cope with struggles with life on the post-Civil War plantation.<sup>79</sup> The film's famous and catchy song, Zip-a-Dee-Doo-Dah, won an Oscar for Best Original Song.<sup>80</sup> It was the only Disney film to feature a Black main character until Disney's release of the animated film *Princess and the Frog* in 2009.<sup>81</sup> Nevertheless, the film has been described as “one of Hollywood's most resiliently offensive racist texts.”<sup>82</sup> Since its production, scholars and activists have criticized the film for promoting

72. See Dorothy L. Hurley, *Seeing White: Children of Color and the Disney Fairy Tale Princess*, 74 J. NEGRO EDUC. 221, 221–22 (2005).

73. See *id.*

74. See Katherine van Wormer & Cindy Juby, *Cultural Representations in Walt Disney Films: Implications for Social Work Education*, 16 J. SOC. WORK 578, 583 (2016).

75. See Neal A. Lester, *Disney's the Princess and the Frog: The Pride, the Pressure, and the Politics of Being a First*, 33 J. AM. CULTURE 294, 295 (2010).

76. *Id.* at 294.

77. See John Ligan, *Bristling Dixie: Uncle Walt Thought Song of the South Would Be His Masterpiece. Now It's Invisible*, SLATE (Jan. 4, 2013, 11:36 PM), <https://slate.com/culture/2013/01/song-of-the-south-disneys-most-notorious-film-by-jason-sperb-reviewed.html> [<https://perma.cc/XZM3-EYLL>].

78. See *id.*

79. See *Song of the South*, INTERNET ARCHIVE, [https://archive.org/details/SongOfThe-South\\_Disney](https://archive.org/details/SongOfThe-South_Disney) [<https://perma.cc/MVV4-TEK9>] (last visited Sept. 11, 2023).

80. See Silverio, *supra* note 18.

81. See Karina Longworth, *Disney's Most Controversial Film (Six Degrees of Song of the South, Episode 1)*, YOU MUST REMEMBER THIS, at 8:31–8:43 (Oct. 22, 2019), <http://www.youmustrememberthispodcast.com/episodes/2019/10/21/six-degrees-of-song-of-the-south-episode-1-disneys-most-controversial-film> [<https://perma.cc/98P5-7JCY>].

82. Ligan, *supra* note 77.

racial stereotypes and romanticizing slavery and the post–Civil War South.<sup>83</sup> Some described the film as “at best, an anachronistic pastiche depiction of an Old South fantasy that depended on ugly racial stereotypes and subtle but unmistakable undertones of institutional racism.”<sup>84</sup> The National Association for the Advancement of Colored People (NAACP) picketed the movie for “perpetuat[ing] a dangerously glorified picture of slavery . . . giv[ing] the impression of an idyllic master-slave relationship which is a distortion of the facts.”<sup>85</sup> Even though the film was released and rereleased in theaters at various times between 1946 and 1986, due to the film’s disrepute, Disney has never released the film on any home video format in the United States.<sup>86</sup> In 2010, Disney CEO Bob Iger confirmed that, for the foreseeable future, Disney would not make available the “antiquated” and “offensive” *Song of the South* in the United States.<sup>87</sup> Because the film was primarily broadcast in theaters and never made available in the United States on VHS or DVD, there are few to zero outlets in the United States to legally obtain a copy of *Song of the South*.<sup>88</sup> The film’s copyright will not expire until January 1, 2041.<sup>89</sup>

Disney, of course, is not the only film producer who has faced backlash from problematic content in its children’s films.<sup>90</sup> Other film rights holders and networks have similarly withdrawn films from broadcast.<sup>91</sup> After announcing a Bugs Bunny Festival marathon, Cartoon Network pulled twelve cartoons—originally created between 1941 and 1960—from airing on the network because of racially offensive content.<sup>92</sup> Other rights holders have similarly withdrawn classic

83. See Tobias, *supra* note 18.

84. Jason Sperb, *How (Not) to Teach Disney*, 70 J. FILM & VIDEO 47, 57 (2018).

85. Matthew Bernstein, *Nostalgia, Ambivalence, Irony: Song of the South and Race Relations in 1946 Atlanta*, 8 FILM HIST. 219, 221 (1996).

86. See Longworth, *supra* note 81, at 9:02–22.

87. Matt Singer, *Just How Racist is ‘Song of the South,’ Disney’s Most Notorious Movie?*, SCREEN CRUSH (Mar. 4, 2016), <https://screencrush.com/song-of-the-south-racism/> [<https://perma.cc/H7P3-QK7J>]; see also Tom Grater, *Bob Iger Confirms ‘Song Of The South’ Won’t Be Added to Disney+, Even with a Disclaimer*, DEADLINE (Mar. 11, 2020, 8:29 AM), <https://deadline.com/2020/03/bob-iger-song-of-the-south-disney-disclaimer-1202879464/> [<https://perma.cc/29FM-5QSH>] (Bob Iger again confirming in 2020 that the movie would never appear on Disney+, calling it “not appropriate in today’s world.”).

88. See Singer, *supra* note 87.

89. See *Copyright Services*, *supra* note 22.

90. See Leland, *supra* note 70.

91. See *id.*

92. See *id.* (explaining the twelve films included *All This and Rabbit Stew*, produced in 1941, which featured a Black hunter stalking Bugs Bunny, and the other films included similar problematic content, such as “bloodthirsty Native Americans, bumbling Japanese soldiers, savage Eskimos”).

children’s animation from public distribution and broadcast, most notably United Artists’ withdrawal of a group of *Looney Tunes* and *Merrie Melodies* films frequently referred to as the “Censored Eleven.”<sup>93</sup> The Censored Eleven are a group of cartoons produced and originally released by Warner Bros. that have not been legally broadcast in the United States since 1968 because of their racial stereotypes and offensive content.<sup>94</sup> Those films frequently included offensive caricatures of African Americans or cartoon characters appearing in blackface.<sup>95</sup> Because these films have not been publicly available for the past fifty-five years, and only three of the eleven films are currently in the public domain (the rest remain protected by copyright), most people under the age of fifty are not likely to have seen or even be aware of these films.<sup>96</sup>

### C. *Withdrawing Classic Children’s Works & Considering the Public Interest*

There are likely several reasons why cultural stereotypes, offensive words, and racist tropes appeared in expressive works, and not all were precipitated by racial animus. In some instances, an author or creator may include offensive materials in their works to support a narrative or reflect historical accuracies.<sup>97</sup> These works may accurately reflect and memorialize a racially charged historic legacy, including dialogue between characters in a book that use racist slurs common in their vernacular speech of the time.<sup>98</sup> In other instances, an author may purposefully include offensive materials to provoke controversy.<sup>99</sup> In many of the scenarios discussed above, however, creators may have simply lacked the racial and cultural awareness to understand the negative impacts that racial and gender stereotypes and tropes could have on children. These creators grew up and lived in a time when

93. See Gillett, *supra* note 19.

94. See *id.*; see also *Bugs Bunny Nips the Nips*, WARNER BROS. ENT. WIKI, [https://warner-bros.fandom.com/wiki/Bugs\\_Bunny\\_Nips\\_the\\_Nips](https://warner-bros.fandom.com/wiki/Bugs_Bunny_Nips_the_Nips) [<https://perma.cc/A7WP-FY7J>] (last visited July 31, 2023) (other children’s cartoons, including offensive World War II era cartoons, have similarly been withdrawn from publication, licensing, and performance).

95. See Gillett, *supra* note 19.

96. See *Censored Eleven*, LOONEY TUNES WIKI, [https://looneytunes.fandom.com/wiki/Censored\\_Eleven](https://looneytunes.fandom.com/wiki/Censored_Eleven) [<https://perma.cc/3M6X-5Y4A>] (last visited Sept. 15, 2023).

97. See Michiko Kakutani, *Light Out, Huck, They Still Want to Sivilize You*, N.Y. TIMES (Jan. 6, 2011), <https://www.nytimes.com/2011/01/07/books/07huck.html> [<https://perma.cc/GK87-FMV3>].

98. See *id.*

99. See Kunle Olulode, *Airbrushing Racism: Why Racist Words Shouldn’t Be Edited from History*, 44 INDEX ON CENSORSHIP 34, 34 (2015).



stereotypes were so normalized that creators may not have contemplated the full extent to which “[their] visual imaginations were so steeped in the cultures of American racism.”<sup>100</sup>

Given our increasing understanding of institutional racism and impressionability of children, there has been a growing trend of addressing problematic content in children’s works.<sup>101</sup> Nevertheless, not everyone agrees with the normative desirability of these changes or what might best serve the public interest.<sup>102</sup> Those who laud the withdrawal of problematic children’s works assert that these changes are necessary to build a more just and inclusive society. In *Monteiro v. Tempe Union High School District*, the Ninth Circuit recognized “that the younger a person is, the more likely it is that those messages will help form that person’s thinking, and that the feelings of minority students, especially younger ones, are extremely vulnerable when it comes to books that are racist or have racist overtones.”<sup>103</sup> But when children are exposed to positive images of people of color, they are less likely to maintain negative attitudes on the basis of race.<sup>104</sup> These arguments support withdrawing expressive children’s works that contain offensive stereotypes.

Others believe that such actions may in fact counterintuitively prove more culturally troubling.<sup>105</sup> Kunle Olulode, director of Voice for Change England and a film exhibitor, argues that by “airbrushing out racist monikers of the past,” we could “lose [a] contextual understanding of the work and an understanding of the period.”<sup>106</sup> US writer and literary critic Michiko Kakutani construes that suppressing or redacting children’s works as “a form of denial: shutting the door on harsh historical realities—whitewashing them or pretending they do not exist.”<sup>107</sup> Still others argue that retiring problematic works is a form

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100. Rebecca Onion, *How Dr. Seuss Responded to Critics Who Called Out His Racism*, SLATE (Mar. 3, 2021, 6:06 PM) (quoting Philip Nel), <https://slate.com/culture/2021/03/dr-seuss-racist-books-mulberry-street-interview.html> [<https://perma.cc/7ZG5-BQH7>].

101. See, e.g., Taylor, *supra* note 9.

102. See *id.*

103. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998).

104. See, e.g., Arianna Braga, *The Importance of Children’s Representation in Literature and Media*, HUMANIUM (Mar. 22, 2022), <https://www.humanium.org/en/the-importance-of-childrens-representation-in-literature-and-media/> [<https://perma.cc/XZL8-HEJM>]; Huber et al., *supra* note 33, at 3; Nancy Larrick, *The All-White World of Children’s Books*, SATURDAY REV. 63, 63, 84 (Sept. 11, 1965).

105. See, e.g., Olulode, *supra* note 99, at 34; Kakutani, *supra* note 97.

106. Olulode, *supra* note 99, at 36.

107. Kakutani, *supra* note 97.

of the aforementioned “corporate safetyism.”<sup>108</sup> Critics also worry that using ever-changing social attitudes to judge classic works could result in the withdraw of many significant and historic works of art and literature because they may offend current-day sensibilities.<sup>109</sup> These arguments support allowing market forces to dictate the popularity and longevity of such works that become the subject of controversy instead of retiring classic works that are still popular with readers today.<sup>110</sup>

These varying arguments for and against the withdrawal of problematic children’s works can, in turn, influence legal and policy considerations about copyright law and copyright owners’ right to exclude the public from their classic works. For instance, copyright owners’ free speech right to cease publishing problematic works, combined with their right to exclude others from reproducing copyrighted works, could frustrate copyright’s very purpose to encourage dissemination and public access. Similarly, the legal doctrines discussed below, including abandonment, fair use, and injunctive relief, can require a court to consider the public interest when it may conflict with a copyright owner’s exclusive rights. As discussed above, however, considerable debate exists concerning what best serves the public interest.<sup>111</sup> Given copyright owners’ increased efforts to withdraw or otherwise remedy problematic children’s works, it is important to consider the potential consequences and legal implications of these actions.

### III. BALANCING FREE SPEECH, COPYRIGHT, & THE RIGHT TO WITHDRAW

The US Supreme Court is clear that “freedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all.’”<sup>112</sup> Private copyright owners such as

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108. Lewis, *supra* note 26. See also Leland, *supra* note 70 (citations omitted) (“Disney erases memory by making their older cartoons unavailable to newer audiences . . . [t]hey’re able to maintain the globalized image of Disney as patriotic, diverse, all-inclusive and respectful of others’ identity.”).

109. See Cathy Young, *Why the Dr. Seuss ‘Cancellation’ is Chilling*, WEEK (Mar. 5, 2021), <https://theweek.com/articles/969971/why-dr-seuss-cancellation-chilling> [https://perma.cc/PGK7-TMY5].

110. See Annabel Nugent, *Philip Pullman Suggests Roald Dahl Books Should Go ‘Out of Print’ Amid Edits Controversy*, INDEP. (Feb. 20, 2023, 10:22) (citations omitted), <https://www.independent.co.uk/arts-entertainment/books/news/roald-dahl-philip-pullman-edits-b2285643.html> [https://perma.cc/7DLA-849T].

111. See, e.g., Braga, *supra* note 104; Olulode, *supra* note 99, at 36; Young, *supra* note 109.

112. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); see also *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (holding copyright owner has the right to protect “the expressive content of

Disney and Dr. Seuss certainly have the right *not* to publish or produce certain works,<sup>113</sup> and “[t]he First Amendment strongly embodies the principle of editorial discretion and the right to decide what to publish or not publish.”<sup>114</sup> Filmmakers, publishers, and other creative entities regularly decide to retire works from dissemination or to not publish works.<sup>115</sup> A lack of interest, bandwidth, or financial resources can oftentimes prompt these decisions.<sup>116</sup> At the same time, when copyright owners like Disney and Dr. Seuss refuse to publish and license works that are still protected by copyright, that decision could significantly decrease and potentially eliminate future access to those works.<sup>117</sup> This appears incongruent with the purpose of copyright.

The Copyright Clause of the US Constitution encourages the creation and dissemination of socially valuable works to “promote the Progress of Science and useful Arts.”<sup>118</sup> The clause aims to encourage artistic and scientific innovation to enrich society by granting creators the exclusive right to reproduce, create derivatives, perform, display, and distribute their copyrighted works to the public during the term of their copyright.<sup>119</sup> This exclusivity, in turn, serves to “promote the creation and publication of free expression” and “disseminate ideas.”<sup>120</sup> Nevertheless, copyright owners can also use copyright to suppress access to their works.<sup>121</sup>

For example, some copyright owners have asserted copyright to hide embarrassing facts or past assertions which may no longer be acceptable by contemporary standards.<sup>122</sup> In *Worldwide Church of God (Worldwide Church) v. Philadelphia Church of God, Inc.*, Worldwide stopped publishing and distributing its founder’s copyrighted religious text because the text contained “historical, doctrinal[,] and social

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his unpublished writings for the term of his copyright”); Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L., ETHICS & PUB. POL’Y 13, 24 (2012).

113. See Sedler, *supra* note 112.

114. *Id.* at 33.

115. See, e.g., Mark A. Lemley, *Disappearing Content*, 101 B.U. L. REV. 1255, 1263–64 (2021).

116. See, e.g., *id.* at 1263; *Why do TV Shows and Movies Leave Netflix?*, NETFLIX, <https://help.netflix.com/en/node/60541> [<https://perma.cc/DV7E-ZZJ4>] (last visited Sept. 11, 2023).

117. See Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 10 (2021); Lemley, *supra* note 115, at 1265.

118. U.S. CONST. art. I, § 8, cl. 8.

119. *Id.*; see Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

120. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

121. See, e.g., Cathay Y. N. Smith, *Copyright Silencing*, 106 CORNELL L. REV. 71, 77–78 (2021).

122. See, e.g., *id.*

errors” that were “racist” and “not in conformity with biblical teachings.”<sup>123</sup> In other cases, copyright owners may want to bury uncomfortable facts or family histories, such as the estate of James Joyce leveraging its copyright to hide stories about the Joyce family, especially journal entries written by Joyce’s “troubled” daughter, Lucia.<sup>124</sup> As such, copyright owners can paradoxically utilize copyright protections to suppress rather than promote their work.

Copyright owners who withdraw copyrighted classic books and films can also effectively suppress those works. Copyright’s exhaustion doctrine, or the “first sale doctrine,” protects against a copyright holder recalling existing physical copies of a work.<sup>125</sup> In other words, legal owners of a copyrighted work can sell, display, or otherwise dispose of their physical copy of the work notwithstanding the interests of the copyright owner.<sup>126</sup> However, once copyright owners decide to no longer publish or license a copyrighted work, no further legal publication, distribution, or public performance of the work can occur during the copyright term.<sup>127</sup> Copyright owners can also prevent the creation of derivative works, such as new editions, films, or other adaptations from their copyrighted works.<sup>128</sup> Practically, this means that at least until their copyright terms expire, the original versions of since withdrawn works may only be available on the resale market, in homes, or in libraries.

This could particularly impact books and films that publishers primarily or exclusively released in theaters, through streaming services, or via digital downloads. For instance, because works released digitally can be easily withdrawn from streaming services and e-readers, and because customers do not own the works they “purchase” on digital platforms, publishers have the ability to withdraw content at the push of a button.<sup>129</sup> Similarly, works such as *Song of the South* or

123. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1113, 1122 (9th Cir. 2000) (Brunetti, J., dissenting).

124. David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 550–53 (2010); Cathay Y. N. Smith, *Weaponizing Copyright*, 35 HARV. J.L. & TECH. 193, 211–12 (2021).

125. 17 U.S.C. § 109(a) (sometimes referred to as copyright’s “First Sale Doctrine”); see *Copyright Infringement—First Sale Doctrine*, U.S. DEPT. JUST. ARCHIVES [hereinafter *Copyright Infringement*], <https://www.justice.gov/archives/jm/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine> [<https://perma.cc/GEU4-968M>] (Jan. 17, 2020).

126. § 109(a); see *Copyright Infringement*, *supra* note 125.

127. See *Copyright Infringement*, *supra* note 125.

128. See *id.*

129. See Reggie Ugwu, *It’s Their Content, You’re Just Licensing It*, N.Y. TIMES (Apr. 4, 2023), <https://www.nytimes.com/2023/04/04/arts/dahl-christie-stine-kindle-edited.html> [<https://perma.cc/6WFG-N6EV>].

the Censored Eleven were primarily broadcast in theaters and not released physically on VHS, DVD, or in other tangible formats, which means that few to no legal copies of those films are available in the public.<sup>130</sup> These circumstances, together with the long copyright terms remaining before the works enter the public domain, could effectively suppress the public's access to works.<sup>131</sup> This potential outcome appears to be inapposite with the purpose of copyright to promote the dissemination of and access to ideas.<sup>132</sup>

However, given the problematic nature of the children's works described in Part II, some may celebrate this result regardless of the means by which it was achieved.<sup>133</sup> While US copyright law is largely bereft of noneconomic justifications for copyright jurisprudence, certain European civil law nations, including France, Spain, Greece, Italy, Germany, and Portugal, explicitly recognize a moral right to withdraw expressive works from the public: *Le droit de repentir*.<sup>134</sup> This moral right of withdrawal permits authors to withdraw their works from public dissemination when they "can no longer reconcile the contents of their works with their personal convictions," or when authors otherwise wish to distance themselves from their creations.<sup>135</sup> It extends to copyright contracts with licensees or assignees, even after the creator has published the work, as long as the author indemnifies the other parties to the contract.<sup>136</sup> Creators can only exercise the right for moral reasons; specifically, changes to an author's convictions for political, religious, scientific, or ideological reasons.<sup>137</sup>

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130. See Gillett, *supra* note 19; Valenzi, *supra* note 23, at 91–92.

131. See Valenzi, *supra* note 23, at 90–91 (“Disney’s 1946 live action-animated mash-up Song of the South has not been available to the public in any form since 1986 . . . most born after 1980 or so have likely never seen the film, and those who have seen it likely did so via unlicensed and technically infringing means.”); Grater, *supra* note 87; Sean Malin, *What Actually Happens When a TV Episode Gets Pulled?*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/arts/television/pulled-episodes-blackface.html> [https://perma.cc/T9RT-RP26].

132. See *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); see also Smith, *supra* note 124, at 195.

133. See Olulode, *supra* note 99, at 34.

134. Basak Bak, *Reviving a European Idea: Author’s Right of Withdrawal and the Right to Be Forgotten Under the EU’s General Data Protection Regulation (GDPR)*, 19 SCRIPTED 122, 123, 125–26 (2022) (France, Spain, Greece, and Italy apply the right of withdrawal as “an independent moral right belonging to authors.” Germany and Portugal apply the right of withdrawal as a “legal remedy granted to authors that serves the same purpose.”); see Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 362–63 (2006).

135. Rigamonti, *supra* note 134, at 363; see Bak, *supra* note 134, at 131.

136. Bak, *supra* note 134, at 126.

137. *Id.* at 130–31.

Even though the United States does not recognize a moral right to withdraw,<sup>138</sup> its underlying purpose is to allow authors to publicly change their minds, and its practical effect is similar to Dr. Seuss’s and Disney’s approach of no longer publishing, producing, or licensing works during their copyright terms.<sup>139</sup> While US copyright law heavily emphasizes economic over moral rights, some commentators have inferred that “courts should—and likely would—defer to a copyright owner’s decision to protect an author’s legacy by keeping racially insensitive works off the market.”<sup>140</sup>

In fact, the US Supreme Court has acknowledged the right of creators to refuse to continue publishing or licensing their copyrighted works. Specifically, the Court stated:

[A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors . . . But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.<sup>141</sup>

The Court thus recognizes copyright holders’ prerogative to refuse to license their creations.<sup>142</sup> As such, owners of the applicable copyright right can prevent the publication, license, performance of their works, in addition to the creation of derivative works.<sup>143</sup>

But *should* copyright policy support a copyright owner’s choice to withdraw an expressive work if that choice could lead to the permanent disappearance of the work?<sup>144</sup> Scholars argue that a copyright owner removing a title from the marketplace ultimately harms the public, excepting “some compelling justification,” such as cybersecurity concerns or legal restrictions.<sup>145</sup> When a copyrighted work

138. See Rigamonti, *supra* note 134, at 363; Bak, *supra* note 134, at 122 (“[A]n author’s withdrawal right, based on moral reasons, has been until now mostly theoretical due to the scarcity of case law and has thus been perceived as a concept with no practical use.”); WILLIAM CORNISH & DAVID LLEWELLYN, *INTELLECTUAL PROPERTY* 461 (5th ed. 2003) (the right of withdrawal “appears to be exercised rarely”).

139. See Bak, *supra* note 134, at 122.

140. Aaron Moss, *Is It Fair Use to Reproduce Out-of-Print Seuss?*, COPYRIGHT LATELY (Mar. 5, 2021), <https://copyrightlately.com/fair-use-to-reproduce-out-of-print-seuss/> [https://perma.cc/Z62M-A6XU].

141. *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990) (internal citations removed).

142. *Id.*

143. See *id.*

144. For a creative legislative solution to this question, see generally Brian L. Frye, *The Right of Reattribution*, 5 BUS. ENTREPRENEURSHIP & TAX L. REV. 22 (2021).

145. Lemley, *supra* note 115, at 1269, 1278–82.

is suppressed, it can remove ideas and cause them to “fade out of circulation—and eventually fade away altogether . . . it can [also] remove the most credible evidence to validate or contest those . . . ideas, creating opportunities to undermine the search for truth in the first place.”<sup>146</sup>

Suppressing copyrighted works also disrupts copyright law’s exchange and balance between granting a limited monopoly to encourage the production of creative works and the public’s interest in accessing and building upon such expression. Copyright grants a limited monopoly to creators in order to incentivize them to create works and disseminate knowledge; in other words, it vests “with the expectation that the expression protected will contribute to the common weal.”<sup>147</sup> But when copyrighted works become inaccessible to the public, society is harmed without gaining its bargained-for benefit of access to creative expression or the knowledge within those copyrighted works.<sup>148</sup> When a copyright owner decides to prevent any new dissemination of a work, regardless of the merits of such a decision, the loss of potential social commentary can harm the public interest.<sup>149</sup>

Because of these potential concerns, scholars and litigants have argued that certain copyright doctrines and considerations, including abandonment, fair use, and the public interest, should be interpreted to allow others to reproduce withdrawn copyrighted works to ensure that those works are not lost to society forever. Part IV below examines those arguments and their associated implications for copyright policy.

#### IV. COPYRIGHT LAW & POLICY IMPLICATIONS OF WITHDRAWING CLASSIC CHILDREN’S WORKS

As discussed above, while authors in the United States do not have an official moral right to withdraw their copyrighted works,

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146. Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. 929, 935 (2020).

147. *Id.* at 939; *see also* Leval, *supra* note 119, at 1109 (“[Copyright] is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.”).

148. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 587 (2015); Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2487 (2016); Valenzi, *supra* note 23, at 125 (“[A]n author who hoards a word and refuses to release it to the public takes away more ‘good’ from society that it provides: the public loses access to the work (bad), a monopoly exists (bad), and the author earns no economic benefit, and thereby has no incentive to further create (neutral).”).

149. Smith, *supra* note 124, 206–07.

copyright owners do have the right to cease publishing, licensing, and otherwise making their copyrighted works available to the public. They also have the right to prevent others from publishing or publicly performing those works.<sup>150</sup> This, in turn, could lead to certain works sliding into obscurity or otherwise becoming less accessible to the public.<sup>151</sup> This Part explores arguments asserting that, for works to remain accessible to the public, the copyright doctrines of abandonment, fair use, and the public interest should be interpreted to permit others to reproduce withdrawn works. It further explores the copyright policy considerations of applying these doctrines to reproduce problematic classic children’s works that copyright owners have withdrawn.

### A. Abandonment

After Dr. Seuss’s March 2021 announcement, some online commentators argued that Dr. Seuss’s decision to no longer publish or license its six books meant that those works were in the public domain.<sup>152</sup> At first glance, this argument appeared to misunderstand copyright law. Copyright is not a “use-it-or-lose-it” framework.<sup>153</sup> Copyright law grants *rights*, not *obligations*. Most courts and scholars agree that—unlike trademarks,<sup>154</sup> or even trade secrets<sup>155</sup>—a copyright holder cannot abandon a copyright by mere nonuse.<sup>156</sup> The US Supreme Court, for instance, recognized that “[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.”<sup>157</sup>

However, copyright owners can abandon their copyright under *certain* circumstances. Copyright abandonment can occur when there is: “(1) an intent by the copyright owner to surrender the rights, and (2)

150. *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

151. *Id.*

152. *See, e.g.*, GeezerBob, Comment to *The Real Solution for Those Dr. Seuss Books: Shorten the Copyright Term*, RICOCHET (Mar. 11, 2021, 10:59 AM), <https://ricochet.com/910796/the-real-solution-for-those-dr-seuss-books-shorten-the-copyright-term/> [https://perma.cc/GH5T-BTBY].

153. *See, e.g.*, *Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736, 753 (S.D.N.Y. 2017) (“Congress did not provide a use-it-or-lose-it mechanism for copyright protection. Instead, Congress granted a package of rights to copyright holders . . . regardless of whether copyright holders ever intend to exploit those rights. Indeed, the fact that any given author has decided not to exploit certain rights does not mean that others gain the right to exploit them.”).

154. *See id.* at 439 n.19.

155. *See* Hrды & Lemley, *supra* note 117, at 2.

156. Smith, *supra* note 124, at 150–51.

157. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).



an overt act showing that intent.”<sup>158</sup> In the past, courts have considered certain public statements by copyright owners “overt acts” supporting their intent to abandon their copyright.<sup>159</sup> Courts have found the following copyright owner actions to constitute abandonment: signing an “abandonment of copyright” form that explicitly states the owner “hereby abandon[s] . . . copyright”;<sup>160</sup> gifting a copyrighted work to the Library of Congress where the former owner “dedicates to the public all rights, including copyrights”;<sup>161</sup> and including a date and time in the copyrighted work when the copyright will expire.<sup>162</sup>

Some courts also appeared willing to consider less explicit statements as potential “overt acts” signifying an intent to abandon.<sup>163</sup> In *Furie v. InfoWars*, a court had to consider whether a creator who publicly “killed off” his copyrighted character had abandoned his copyright.<sup>164</sup> Author Matt Furie had become so discouraged by white supremacists co-opting his creation, Pepe the Frog, to promote their Neo-Nazi and Alt Right agenda that he publicly “killed” his creation.<sup>165</sup> Afterward, Furie sued InfoWars for copyright infringement over InfoWars’s unauthorized use and commercial sale of Pepe the Frog in a “Make America Great Again” poster.<sup>166</sup> InfoWars defended itself by arguing, among other things, that Furie had abandoned his copyright in Pepe the Frog.<sup>167</sup> While the court in that case found triable issues of fact precluding summary judgment, it left open whether Furie’s public statements could support an intent to abandon copyright.<sup>168</sup> This case ultimately settled without the court deciding whether Furie’s statements were sufficiently explicit to support an intent to abandon copyright.<sup>169</sup>

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158. Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 493 (2020); Smith, *supra* note 124, at 150–51.

159. See *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 967 (C.D. Cal. 2019).

160. See *Bates v. Keirse*, No. D041368, 2004 WL 2850153, at \*8 (Cal. Ct. App. Dec. 13, 2004); Smith, *supra* note 125, at 150–51.

161. Smith, *supra* note 124, at 150–51.

162. *Id.*

163. See *Furie*, 401 F. Supp. 3d at 967.

164. *Id.* at 966.

165. James Vincent, *Pepe the Frog Is Officially Dead*, VERGE (May 8, 2017, 6:43 AM), <https://www.theverge.com/2017/5/8/15577340/pepe-the-frog-is-dead-matt-furie> [<https://perma.cc/Z6MS-B9N8>] (“Pepe the Frog’s battles are finally over. Cartoonist Matt Furie has officially killed off his most famous creation.”).

166. *Furie*, 401 F. Supp. 3d at 959.

167. *Id.* at 964–65.

168. See *id.* at 966 (finding genuine dispute of material fact as to whether public statements demonstrate abandonment); Cathay Y. N. Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 GEO. L.J. ONLINE 142, 152 (2021).

169. See *Furie*, 401 F. Supp. 3d at 956.

A copyright owner stating an intent to “cease publication and licensing” a copyrighted work is not enough to qualify as an overt act supporting an intent to abandon.<sup>170</sup> Since copyright abandonment results in the complete extinguishment of control over an author’s creation, the legal standard to find abandonment is exacting and necessarily high.<sup>171</sup> Furthermore, as discussed above, the Supreme Court has explicitly acknowledged copyright owners’ right to refuse to use or license their works during the copyright term.<sup>172</sup> Court should not find that copyright owners have abandoned their copyright when they exercise their right not to use or license their copyrighted works. Dr. Seuss, Disney, and United Artists’ public statements that certain copyrighted works would never be published or broadcast in the United States are not likely to have met the standard of abandonment for those works.

Some scholars may criticize this approach as promoting the waste of valuable intellectual resources when copyright owners withdraw their works.<sup>173</sup> If copyright owners no longer find value in their original or pre-edited copyrighted works, perhaps another party should be allowed to “pick up” the property and put it to good use. Many rules of US property law appear to find justification by encouraging the productive use of property, including the property law doctrine of abandonment of real personal property.<sup>174</sup> Ceasing to publish, license, or use a work certainly does not resemble a “productive” use of property. If copyright owners wish to withdraw their work or are no longer interested in disseminating or profiting from a work, and others are willing to take on the expense of using and publishing that work, perhaps copyright policy should incentivize this productivity.<sup>175</sup> At the same time, however, waste is not always negative. For instance, authors’ knowledge of their ability and right to withdraw their own works could motivate the creation of original works in the first place, spurring more initial original works than would otherwise reach the marketplace. Protecting authors’ right to withdraw could also promote

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170. See Smith & Lantagne, *supra* note 168, at 153.

171. See *id.*

172. Stewart v. Abend, 495 U.S. 207, 228–29 (1990) (citations omitted).

173. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 784 (2005).

174. Jason Gordon, *Property and Economic Prosperity*, BUS. PROFESSOR (Apr. 3, 2023), [https://thebusinessprofessor.com/en\\_US/property-law/property-and-economic-prosperity](https://thebusinessprofessor.com/en_US/property-law/property-and-economic-prosperity) [<https://perma.cc/LE8L-W6TV>].

175. See Lemley, *supra* note 115, 1273–74 (“[T]here is little reason to deny the public access to a work the copyright owner is no longer interested in exploiting. If a copyright owner has let a work go out of print . . . others should be legally entitled to copy that work to make it available to others. Once content is public and the copyright owner has relinquished any interest in profiting from it, there is a public interest in keeping that work available to the world.”).

risk-taking practices, encouraging authors to explore controversial ideas and topics with the understanding that they could cease further dissemination of those works if they were to later disagree or change their mind.<sup>176</sup>

Regardless, under current copyright jurisprudence, copyright owners are allowed to cease publishing, licensing, or otherwise making their copyrighted works available to the public. Their actions and statements pursuant to that right do not result in the abandonment of copyright.<sup>177</sup>

### B. Fair Use

In a recent article, Professor Mark Lemley argues that third parties should be able to legally reproduce withdrawn copyrighted works under the doctrine of fair use.<sup>178</sup> Fair use is one of the First Amendment safeguards in copyright law.<sup>179</sup> It functions as the “breathing space within the confines of copyright,” which excuses otherwise infringing uses for the purpose of criticism, commentary, news reporting, teaching, scholarship, research, and other socially valuable or transformative uses.<sup>180</sup>

In a case where a defendant used a copyrighted work without the copyright holder’s authorization but claimed fair use, courts would consider four factors to determine whether the use was fair. These factors are: the purpose and character of the infringing use; the nature of the copyrighted work; the amount and substantiality of the portion used by the defendant in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.<sup>181</sup> Under factor one, the purpose and character of the unauthorized use, courts have often focused their analysis on whether the unauthorized use transformed the original copyrighted work by adding a new meaning, message, or purpose.<sup>182</sup> The recent US Supreme Court decision in *Warhol v. Goldsmith* has shifted this focus under fair use factor one to examine whether the unauthorized use “share[s] the

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176. See Strahilevitz, *supra* note 173, at 832; see also Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2070 (2014) (arguing that the ability to protect certain copyrighted images from dissemination could incentivize the creation of those images because creators would be able to rely on copyright to *control* how images are used and shared).

177. See Strahilevitz, *supra* note 173, at 830.

178. Lemley, *supra* note 115, at 1270–74.

179. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 190–91 (2003).

180. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); Smith, *supra* note 124, at 234.

181. 17 U.S.C. § 107.

182. *Campbell*, 510 U.S. at 579.

same or highly similar purpose[]” as the original copyrighted work and whether the unauthorized use is a transformative parody, commentary, or criticism.<sup>183</sup>

Without “compelling public reasons to deny access,” Lemley argues that third parties should be permitted to reproduce out-of-print works to support the public’s interest in retaining access to published content.<sup>184</sup> His analysis relies most heavily on the fourth fair use factor—effect on the market for the copyrighted work.<sup>185</sup> Specifically, he states that “[b]y abandoning any effort to sell or license the work, the copyright owner should be understood to have relinquished any claim to market harm or effect under the fourth factor.”<sup>186</sup> He justifies fair use in these cases as serving the public interest because

[i]f a copyright owner has let a work go out of print . . . others should be legally entitled to copy that work to make it available to others. Once content is public and the copyright owner has relinquished any interest in profiting from it, there is a public interest in keeping that work available to the world.<sup>187</sup>

Lemley argues that fair use should apply even in cases where the copyright owner withdrew the works because of their offensive content,<sup>188</sup> such as Dr. Seuss’s decision to cease publishing its books or Disney’s efforts to suppress its film *Song of the South*.

There is case law that supports this argument.<sup>189</sup> In *Maxtone-Graham v. Burtchaell*, the court held that the unauthorized reproduction of portions from a copyrighted abortion and adoption book constituted fair use.<sup>190</sup> In reaching its decision, the court noted that an “out of print” work that consumers cannot obtain through standard marketplaces may grant third parties more license to reproduce it themselves.<sup>191</sup>

The dissenting opinion in *Worldwide Church* echoed this sentiment.<sup>192</sup> In *Worldwide Church*, Worldwide ceased publishing and distributing a text written by its founder that “conveyed outdated views

183. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1274 (2023).

184. Lemley, *supra* note 115, at 1270.

185. *See id.* at 1273.

186. *Id.*

187. *Id.* at 1274.

188. *Id.* at 1277 (“[A] substantive desire to withdraw published content from the world actually offers a good reason why a third part making that work available is in the public interest.”).

189. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986).

190. *Id.* at 1265.

191. *Id.* at 1264 n.8.

192. *Worldwide Church of God v. Philadelphia Church of God, Inc.* 227 F.3d 1110, 1123 (9th Cir. 2000) (Brunetti, J., dissenting).

that were racist in nature.”<sup>193</sup> The church destroyed all inventory copies of the text with the exception of copies for archival and research purposes.<sup>194</sup> When defendant Philadelphia Church of God began copying the text to distribute to its own church members, Worldwide sued the defendant-church for copyright infringement.<sup>195</sup>

The US District Court for the Central District of California found the defendant’s unauthorized use to be copyright fair use because “copying a complete religious text is reasonable in relation to that use,” and the text was no longer in print.<sup>196</sup> On appeal, the dissenting opinion agreed that because the religious text could “only be obtained through some libraries and used bookstores” and had been out of print for nine years, factor one of the fair use analysis, which examines the purpose and character of the defendant’s unauthorized use, favored the defendant.<sup>197</sup> In addition to the first factor of fair use, the dissenting opinion explained that the out-of-print status of the original copyrighted work should also tip the fourth factor of fair use in the defendant’s favor in that Philadelphia Church of God’s redistribution did not result in “market interference.”

Worldwide’s decision to cease publication of [the text], destroy inventory copies, and disavow [the text]’s religious message in the context of its doctrinal shift as a church demonstrates that [the text] is no longer of value to Worldwide for such purposes, regardless of [the defendant’s] actions. Because Worldwide has admitted that it has no plans to publish or distribute [the text] as originally written, there can be no market interference.<sup>198</sup>

Nevertheless, the majority opinion in *Worldwide Church* rejected the defendant’s fair use defense, even though Worldwide had not published the copyrighted text for nine years and had no obvious intentions of reproducing it again.<sup>199</sup> The majority reversed the district court’s opinion based on an analysis of the four factors of fair use, focusing on the first and fourth factors.<sup>200</sup> Under the first fair use factor, the purpose and character of the use, the majority found that the defendant’s copying of Worldwide’s copyrighted text in its entirety to distribute to its members “merely supersede[d] the object of the original [text],” added no independent “intellectual labor and judgment,” and was used “for the same intrinsic purpose as the copyright holder’s,”

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193. *Id.* at 1113 (majority opinion).

194. *Id.*

195. *Id.*

196. *Id.* at 1115.

197. *Id.* at 1123 (Brunetti, J., dissenting).

198. *Id.* at 1124.

199. *Id.* at 1123.

200. *Id.* at 1120–21 (majority opinion).

which “seriously weaken[ed] a claimed fair use.”<sup>201</sup> This last point in the court’s analysis appears consistent with the recent Supreme Court decision in *Warhol*, which found factor one of the fair use analysis to weigh against fair use if the defendant’s unauthorized use of the copyrighted work shared substantially the same purpose as the copyright owner’s use.<sup>202</sup>

Similarly, under the fourth copyright fair use factor, which examines the effect of the use upon the potential market for the copyrighted work, the majority in *Worldwide Church* rejected the defendant’s argument that Worldwide’s failure to publish its copyrighted text for nine years, and its lack of intent to publish it in the future, demonstrated that the defendant’s unauthorized reproduction would not adversely affect Worldwide’s market in the work.<sup>203</sup> According to the majority, “[e]ven an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the ‘potential market’ and, second, because he has the right to change his mind.”<sup>204</sup> In sum, the court found that the wholesale copying and distribution of Worldwide’s copyrighted book was not fair use.<sup>205</sup>

Applying the majority opinion in *Worldwide Church* to the commercial reproduction of offensive children’s works would mean that courts are unlikely to excuse wholesale copying and commercial exploitation of problematic children’s works under fair use, even when the copyright owner has ceased publishing or licensing the work.<sup>206</sup> This is likely the correct result. Indeed, it is one thing to want to document history, hold people accountable for their past behaviors, and “allow[] the world to see what the copyright owner once believed,”<sup>207</sup> but it seems another to justify the wholesale copying, reproduction, and commercial exploitation of works that copyright owners have themselves cancelled in order to stop disseminating racial and gender stereotypes and hurtful speech.

At the same time, the public should be able to access what authors or copyright owners once created, even if they have since

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201. *Id.* at 1117.

202. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1277 (2023).

203. *Worldwide*, 227 F.3d at 1119.

204. *Id.*

205. *Id.* at 1120.

206. *Id.* at 1119.

207. Lemley, *supra* note 115, at 1278.

changed their mind.<sup>208</sup> Furthermore, the fact that problematic content like those described in Part II were once normalized to the point of being in children's works is, itself, an important historical reality that should not become hidden or buried by copyright.

Copyright fair use can assuage these concerns. While fair use might not allow others to commercially reproduce withdrawn works, it would allow for certain uses of the works for commentary, criticism, archival, educational and other purposes, which would enable the public to benefit from an unfiltered historical record.<sup>209</sup> It can, for instance, permit the reproduction of works or portions of withdrawn works for commentary or criticism, the archiving of entire works to maintain the historic record, or the creation of a parody of the original classic children's work.<sup>210</sup> These fair uses strike a balance between the public's interest in preserving historical and cultural records with the right of authors and copyright owners to exert authorial control over their catalogue.

### *C. Injunctive Relief & the Public Interest*

Some scholars and litigants contend that the public's interest in maintaining access to expressive works should influence the remedy for copyright infringement, advocating for the allowance of third parties to continue reproducing withdrawn works.<sup>211</sup> In 2006, the Supreme Court issued its opinion in *eBay Inc. v. MercExchange*<sup>212</sup> curtailing injunctive relief in intellectual property disputes, including copyright infringement.<sup>213</sup> Prior to *eBay*, courts frequently presumed irreparable harm when an infringer violated a copyright owner's exclusive rights and routinely granted injunctions in copyright infringement cases as an exclusionary remedy.<sup>214</sup> *eBay* restated and reemphasized the four-factor test plaintiffs must satisfy to obtain preliminary injunctive relief.<sup>215</sup> In order to succeed, a plaintiff must show the following four factors: (1)

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208. See Lemley, *supra* note 115, at 1278; Leland, *supra* note 70 (describing Disney's efforts to "erase memory").

209. See Lemley, *supra* note 115, at 1277–78 n.109. See, e.g., Sista ToFunky, *The Censored Eleven - Banned Cartoons*, MUSEUM OF UNCUT FUNK, <https://museumofuncutfunk.com/2011/10/05/the-censored-eleven/> [<https://perma.cc/U8X3-HJXX>] (last visited Sept. 11, 2023); *Song of the South*, *supra* note 79 (preserving Disney's *Song of the South*).

210. Lemley, *supra* note 115, at 1285.

211. Lemley, *supra* note 115, at 1270.

212. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

213. See Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of Ebay*, 63 WM. & MARY L. REV. 773, 779–80 (2022).

214. *Id.* at 780–81.

215. *Id.* at 816.

that they are likely to succeed on the merits; (2) that legal remedies such as monetary damages are inadequate; (3) that the balance of hardships is in the plaintiff's favor; and (4) "that the public interest would not be disserved by a permanent injunction."<sup>216</sup>

Some argue that when copyright owners cease to disseminate or make their copyrighted works available, the public interest in maintaining access to copyrighted works should tip the *eBay* factors to deny injunctive relief.<sup>217</sup> Thus, if a defendant were to reproduce a controversial work the copyright holder had ceased publishing but did not abandon, a court would award reasonable royalties to the copyright owner instead of enjoining the unauthorized reproductions.<sup>218</sup> In this way, similar to a compulsory license, copyright owners would effectively lose the right to exclude, but they would receive compensation from the otherwise infringer at the rate the court deems appropriate.<sup>219</sup>

This would, however, require a court to find not only that the copyright owner's refusal to use or license a work injures the public interest, but also that this single *eBay* factor should weigh against issuing an injunction.<sup>220</sup> A court allowing a defendant to continue reproducing copyrighted works without authorization seems antithetical to the goals of copyright jurisprudence and would strip the copyright owner of control over their works. A compulsory license in these cases would also be antithetical to the copyright owner's motivation for withdrawing a work, which is to forgo profit from these works and withdraw them from the public. Nevertheless, there is case law that lends support to this argument.<sup>221</sup>

In *TD Bank N.A. v. Hill*, the Third Circuit relied on *eBay* to vacate the district court's permanent injunction on distributing an infringing book.<sup>222</sup> In 2006, preeminent banker Vernon Hill decided to write a book about his business philosophy and his thirty-year experience in the banking industry.<sup>223</sup> Hill finished writing his book in 2007 and assigned his copyright to the Bank,<sup>224</sup> which then entered into an agreement with a publisher to publish the book.<sup>225</sup> The relationship

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216. *eBay*, 547 U.S. at 391.

217. Valenzi, *supra* note 23, at 130–32.

218. *Id.* at 133–34.

219. *Id.* at 131.

220. *Id.*

221. *Id.* at 132.

222. *TD Bank N.A. v. Hill*, 928 F.3d 259, 265 (3d Cir. 2019).

223. *Id.* at 265–66.

224. *Id.* at 266–67. The court raised but did not resolve the possibility that the work could be considered a work-for-hire if it was created in the scope of Hill's employment. *Id.* at 277.

225. *Id.* at 266.



between Hill and the Bank soured, however, and the Bank terminated Hill and its agreement to publish Hill's book.<sup>226</sup>

In 2012, Hill decided to publish and market another book called *FANS! Not Customers: How to Create Growth Companies in a No-Growth World*, which reused approximately 16 percent of his original unpublished manuscript.<sup>227</sup> The Bank filed a copyright infringement claim against Hill, and the lower court enjoined Hill from "publishing, marketing, distributing or selling" his book on the theory such actions would interfere with the Bank's "right to not use the copyright."<sup>228</sup>

The Third Circuit reversed and vacated the injunction. In its opinion, the court emphasized the public's interest in accessing works.<sup>229</sup> First, under the analysis of *eBay's* second factor, that legal remedies are inadequate, the court clarified that no presumptive irreparable harm exists when a third party deprives the copyright owner of its "right to not use the copyright," and the court dismissed the Bank's argument that copyright infringement is equivalent to compelled speech.<sup>230</sup>

Under *eBay's* fourth factor, that the public interest would not be disserved, the court explained that enjoining Hill's book would prevent the public from legally obtaining a copy of the manuscript.<sup>231</sup> Specifically, the court acknowledged a distinction between issuing an injunction to preserve commercial marketability versus to merely stifle certain forms of speech.<sup>232</sup> In this case, because the Bank did not intend to publish or otherwise license the manuscript, the court held that the public interest counseled against issuing injunctive relief.<sup>233</sup>

*TD Bank*, of course, is distinguishable from Dr. Seuss's or Disney's decisions to cease publication, performance, or licensing of their works. First, unlike Dr. Seuss and Disney, the Bank was not in the business of creating or publishing expressive works.<sup>234</sup> The book at issue in *TD Bank* was "peripheral to the copyright holder's business,"<sup>235</sup> while Dr. Seuss and Disney's enterprise directly encompasses

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226. *Id.* at 267.

227. *Id.*

228. *Id.* at 267–68.

229. *Id.* at 286.

230. *Id.* at 281–82.

231. *Id.* at 284.

232. *Id.*

233. *Id.* at 285–86.

234. *Id.* at 266.

235. *Id.* at 280–81.

publishing children's media.<sup>236</sup> Second, the Bank's motivation to prevent Hill from further publishing or distributing his book was vindictive.<sup>237</sup> No moral or even economic reasons prompted the Bank to enjoin Hill from publishing his book.<sup>238</sup> Dr. Seuss and Disney both articulated changing societal attitudes motivating their decision.<sup>239</sup>

These factors raise interesting considerations in determining what action best serves the public interest under *eBay's* fourth factor. For instance, copyright benefits the public interest by incentivizing the creation of socially valuable and creative works as well as encouraging the dissemination and increased access of those works. Consequently, using copyright policy's interpretation of the public interest, the public interest is harmed when copyright owners restrict access to copyrighted works through withdrawing of those works. At the same time, as discussed in Section II.C above, the public interest may be served by removing outdated children's works from the market, but courts are not necessarily in the best position to determine the social value of expressive works. This dichotomy and the differing interests of society complicate the analysis in these cases.

Finally, the Bank was attempting to prevent the initial publication of Hill's manuscript.<sup>240</sup> Enjoining Hill's book would deprive the public from ever having access to the book's content. On the other hand, Disney and Dr. Seuss had previously disseminated their works.<sup>241</sup> In the case of Dr. Seuss's six books, copies continue to be available in households, libraries, schools, and through resellers.<sup>242</sup> Additionally, third parties appear to have uploaded versions of Disney's *Song of the South* and the Censored Eleven films on Internet Archive (although the legality of these uploads may be in dispute).<sup>243</sup> Considering the legal

236. See Robinson, *supra* note 8 (“But over the decades, many beloved children’s books have been quietly updated to remove racist content: some people will have never read their childhood favourites in their original form, because they were updated long before modern audiences saw them.”).

237. See Samuelson, *supra* note 213, at 827.

238. Samuelson, *supra* note 213, at 828.

239. Charles, *supra* note 56; Grater, *supra* note 87.

240. *TD Bank*, 928 F.3d at 280.

241. See, e.g., Timothy Beck Werth, *Yes, You Can Still Buy the Banned Dr. Seuss Books Online*, SPY (Mar. 5, 2021), <https://spy.com/articles/lifestyle/entertainment/buy-banned-dr-seuss-books-1202742405/> [<https://perma.cc/SE4M-JBTP>]; *Song of the South*, *supra* note 79.

242. See, e.g., Beck Werth, *supra* note 241.

243. *Song of the South*, *supra* note 79; Leon Schlesinger & Warner Bros. Cartoons, *Censored 11 - A Collection of BANNED Cartoons by Warner Bros.*, INTERNET ARCHIVE, <https://archive.org/details/censored-11-a-collection-of-banned-cartoons-by-warner-bros.> [<https://perma.cc/36W9-3WDT>] (last visited Sept. 11, 2023). It appears that the films were uploaded by members of the public to Internet Archive's data cluster. The legality of Internet Archive's digital reproduction of copyrighted works for archival purposes is currently the subject

system's deference to property rights and authorial control, a court is unlikely to allow an unauthorized third party to commercially exploit the Disney and Dr. Seuss catalogues, even if the decision may deprive the public of the ability to purchase those works from lawful sources.

In light of the foregoing, the copyright policy that best addresses the competing concerns of serving the public interest, and allowing for public access and the right to withdraw, is one that would allow copyright owners to cease publication of insensitive children's works while still permitting fair use avenues for the public to access those works in their original form.

## V. CONCLUSION

Given the clear language from the US Supreme Court on copyright owners' right to "hoard" their works, copyright owners have the right to cease publishing and licensing their work, including excluding others from commercially exploiting their works. This right persists even if withdrawing those works results in near-total loss of the public's access to them, particularly given the sensitive nature of children's media. Scholars, litigants, and case law have addressed arguments that abandonment, fair use, and the public interest could allow others to reproduce withdrawn copyrighted works but, as discussed above, none of those doctrines are likely to allow for the wholesale and unfettered commercial reproduction of withdrawn works. The public's interest in preserving these works, however, could be achieved through limited fair uses of withdrawn works for educational, news reporting, commentary, criticism, archival, transformative, parodic, and other purposes analyzed under copyright's fair use factors. The law, under this approach, attempts to strike a balance between recognizing the exclusionary rights of copyright owners and the public's interest in accessing knowledge and preserving history.

Despite legitimate concerns that certain withdrawn works could become less accessible, in the Internet epoch, it is unlikely that a classic work could truly disappear forever.<sup>244</sup> Statutory exceptions like the first

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matter of a federal dispute. *See, e.g.,* Susan D'Agostino, *Legal Blow to Internet Archive, Controlled Digital Lending*, INSIDE HIGHER ED (Mar. 26, 2023), <https://www.insidehighered.com/news/2023/03/27/legal-blow-internet-archive-controlled-digital-lending> [<https://perma.cc/D5G7-VFSE>].

244. *See* Leland, *supra* note 70 (describing how banned cartoons can be found on the Internet, frustrating the efforts of rightsholders and studios to withdraw them: "The Internet is a sprawling, unbridled, inchoate world — a global id. Bugs, Daffy, Tom and Jerry and the rest should feel right at home.").

sale doctrine and fair use further ensure a work remains available to the interested public.<sup>245</sup> Once the copyright term for a work expires, the work enters the public domain, where it can be freely copied, reproduced, distributed, and sold in any format. For instance, as of January 2023, Dr. Seuss's *Mulberry Street* is still available to purchase from numerous resellers and to borrow from libraries. In less than ten years, on January 1, 2033, the copyright to *Mulberry Street* will expire in the United States, allowing anyone to freely copy, reproduce, and publicly distribute in any medium and format.<sup>246</sup> Even works that were primarily released in theaters, such as Disney's *Song of the South* and the "Censored Eleven," have found ways to continue existing online.<sup>247</sup> Classic works that remain valuable to society will not necessarily become lost and may, in time, be reproduced and again become freely available and accessible to the public. Whether the public will find those problematic children's works worth saving, however, remains to be seen.

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245. 17 U.S.C. § 109(a).

246. DR. SEUSS, *MULBERRY STREET*, *supra* note 46 was first published by Vanguard in 1937 and, according to the copyright notice, copyright to the work was renewed in 1967. The copyright will expire ninety-five years from first publication, on January 1, 2033. *See Copyright Services*, *supra* note 22.

247. *Song of the South*, *supra* note 79; Leon Schlesinger & Warner Bros. Cartoons, *supra* note 243.