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## The Constitutionality of Copyright Term Extension: How Long is Too Long

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# THE CONSTITUTIONALITY OF COPYRIGHT TERM EXTENSION: HOW LONG IS TOO LONG?\*

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## WILLIAM PATRY

I am Professor William Patry of the Benjamin N. Cardozo School of Law. I will be the moderator of this star-studded debate on the Sonny Bono Copyright Term Extension Act.<sup>1</sup>

To refresh your recollection, as the evidence professors say, the "I've Got You, Babe" composer and Congressman died in a skiing accident. Congress, which is a rather sentimental group, then proceeded to pass legislation increasing the term of copyright protection by twenty years, and honored Sonny by naming this legislation after him. Of course, they also rejected many of the amendments he had offered, establishing that there are limits on the type of sentimentality they are willing to engage in.

During the considerations of Sonny's bill on the floor of the House, Mary Bono, Sonny Bono's widow and successor—referring

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<sup>1</sup> Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303 and 304) [hereinafter the Sonny Bono Copyright Term Extension Act]. The Sonny Bono Copyright Term Extension Act increased the term of protection by twenty years for works created after January 1, 1978 to a term of protection which is now "life of the author plus seventy years thereafter." 17 U.S.C. § 302(a). For "works made for hire," "anonymous works," and "pseudonymous works," the term of protection is now either ninety-five years from publication or 120 years from creation, whichever comes first. *Id.* § 302(c). The term of extension was also extended for works created prior to the effective date of the 1976 Act. The renewal term for pre-1978 works was extended by twenty years to sixty-seven years, thereby giving total protection of ninety-five years to those works. *Id.* § 303(b).

both to his copyrights and his Congressional seat—observed that Sonny favored perpetual protection,<sup>2</sup> putting him in the Mark Twain category<sup>3</sup>—although, at least on that issue, not for literary merit. Mary Bono had been tipped off by her staff that there was some kind of funny issue of constitutionality about perpetual protection, so she spoke rather warmly about a trial balloon that had been floated by one of Washington's premier lobbyists, Jack Valenti of the Motion Picture Association of America.<sup>4</sup> Mr. Valenti had proposed that there be a term of perpetuity less one day; however, he never stated what fixed date that actually was.

This panel will try to determine, on the great continuum of limited times that the Constitution prescribes for copyright in Article I, Section 8, Clause 8,<sup>5</sup> the term of protection that Congress has actually fixed. In other words: How long is too long? Sonny's bill establishes a term of protection of life plus seventy years for individual authors for works created on or after January 1, 1978.<sup>6</sup> The bill retroactively provides ninety-five years of protection for 1909 Act works.<sup>7</sup> This legislation has been challenged in a complaint filed in the District of Columbia on January 11, 1999, in *Eldred v. Reno*.<sup>8</sup> One of our speakers is actually involved in this challenge. I

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<sup>2</sup> See 144 CONG. REC. H9946, 9952 (Wed., Oct. 7, 1998) (statement of Mary Bono) (noting that "Sonny Bono wanted the term of copyright protection to last forever.").

<sup>3</sup> Mark Twain once said:

I am aware that copyright must have a limit, because that is required by the Constitution of the United States . . .

. . . .  
When I appeared before [a] committee of the House of Lords the chairman asked me what limit I would propose. I said, "Perpetuity."

Samuel Clemens, *Copyright*, in MARK TWAIN'S SPEECHES (1910).

<sup>4</sup> See 144 CONG. REC. H9946, 9952.

<sup>5</sup> U.S. CONST. art. I, sec. 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

<sup>6</sup> See 17 U.S.C. § 302 (as amended by the Sonny Bono Copyright Term Extension Act.).

<sup>7</sup> See *id.*

<sup>8</sup> 74 F. Supp. 2d 1 (D.D.C. 1999). The lawsuit was joined by a number of other plaintiffs, including American Film Heritage Association, a non-profit film preservation group established to represent film preservationists; Dover Publications, Inc., a commercial book publisher; Moviestart, Inc., an incorporated commercial film archive, and Copyright's Commons, a non-profit organization operated out of Harvard University's Berkman Center for Internet and Society. See First Amended Complaint at 11, *Eldred*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-65). On October 28, 1999, District of Columbia District Court Judge Jane L. Green granted the governments' motion to dismiss on the pleadings. See *Eldred*, 74 F. Supp. 2d at 1 (holding that the Sonny Bono Copyright Term Extension Act does not violate the U.S. Constitution's requirement that authors receive exclusive rights to their creations for only a limited time). An appeal of that decision to the United States Court of Appeals for the District of Columbia Circuit was decided on February 16, 2001. See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001). A three-judge panel of the D.C. Circuit affirmed the district court in a 2-1 decision, holding that the twenty-year copyright term extension was contrary to neither the Copyright Clause nor the First Amendment. See *id.* at

will quickly introduce all of the speakers, and then set out the structure of the debate.

Our first speaker is Professor Wendy Gordon. She is the Paula J. Leakis Scholar in Law at Boston University. Next year, she will be a Visiting Research Fellow at St. John's College, Oxford University. Professor Gordon has won a sort of academic equivalent of the tennis grand slam, by a series of articles in top law journals that plumb the depths of incentive, restitution, and natural rights theory. So, fittingly, she will be our first speaker, and she will talk about how the term of protection fits or does not fit into incentive and natural rights theories.

Next will be the silver fox himself, Arthur Miller, who is in town to catch a performance of his perpetually successful play, "Death of a Salesman," and to put the finishing touches on the story of his torrid 1956 marriage to Marilyn Monroe. Some of you, though, may know him as the charismatic Bruce Bromley Professor of Law at Harvard Law School, co-author of a famous treatise on federal practice and procedure.<sup>9</sup> Additionally, he is the author of an apparently widely-pirated series of tapes on Civil Procedure,<sup>10</sup> and is known from his occasional television appearances as well. Copyright lawyers, however, know him from his work in the late 1970s on CONTU, the National Commission on New Technological Uses of Copyrighted Works<sup>11</sup>—one of the transformative experiences in his professional life, he has told us—when he was transformed, or some might say "transmogrified," depending upon your view tonight, from being a low protectionist, á la Professor Ben Kaplan, to a high protectionist, á la Cher's former husband. Professor Miller has submitted an amicus brief in the *Eldred v. Reno* case on behalf of a group of organizations and companies who support the legislation.<sup>12</sup> He will, therefore, speak in favor of the

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372. As of the date of this publication, an appeal of that decision is underway. See Copyright's Commons News (detailing the course of the *Eldred* case), available at <http://cyber.law.harvard.edu/cc/news20.html#dcaopinionsummary> (Feb. 19, 2001).

<sup>9</sup> CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE (various dates according to volume, supplemented annually).

<sup>10</sup> ARTHUR R. MILLER, AUDIO TAPES ON CIVIL PROCEDURE, (Sum & Substance 6th ed.).

<sup>11</sup> The National Commission on New Technological Uses of Copyright Works [hereinafter CONTU] was an organization created specifically by Congress in 1974 to recommend changes to the Copyright Act in light of advances in computer technology. Professor Miller has served as Commissioner of CONTU, and chaired the CONTU subcommittee that was responsible for studying the copyrightability of computer programs.

<sup>12</sup> See Amicus Brief in Support of Defendants' Motion for Judgment on the Pleadings, *Eldred*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-65). The brief was filed in behalf of The Sherwood Anderson Literary Estate Trust, The Sherwood Anderson Foundation, American Society of Composers, Authors and Publishers, Amsong, Inc., Association of American Publishers, Inc., Broadcast Music, Inc., Motion Picture Association of America, Inc., National

## Sonny Bono Copyright Term Extension Act.

In the critical clean-up position, we have five-time MVP—that's most vaunted professor—award-winning Professor Jane Ginsburg, the Morton L. Janklow Professor of Literary and Artistic Property Law of Columbia University. She comes from a family of notorious under-achievers. She has, however, through hard work and her native brilliance, risen above her upbringing to become a true scholar of copyright and trademark. I've known Professor Ginsburg for fifteen years, not nearly as long as Professor Miller has known her, but it has been a while. I met her when she was an Associate at the illustrious firm of Cowan, Leibowitz and Latman in New York, when she co-wrote a column for the *New York Law Journal* with Professor Alan Latman, one of the legendary figures in copyright.<sup>13</sup> Since then, of course, she has created an oeuvre second to none. In the field, she has written extensively on comparative law, conflicts of law, and, certainly, fact works.<sup>14</sup> One of the best articles ever written on fact works was her article on the *Hoehling* case,<sup>15</sup> written by the late Judge Kaufman here on the Second Circuit.<sup>16</sup> Professor Ginsburg, in addition to being not only a brilliant scholar, has the unique feature, I think, of being the voice of reason and moderation. She is a frequent witness before Congress, and, when I worked for the House Judiciary Committee, we enjoyed getting her advice whenever she was gracious enough to give it to us.

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Music Publishers' Association, Inc., Recording Industry Association of America, and the Songwriters Guild of America. *See id.*

<sup>13</sup> *See* Alan Latman & Jane C. Ginsburg, *Copyright Law: Facts, Phone Books*, 191 N.Y.L.J., at 1, col. 1 (May 18, 1984).

<sup>14</sup> *See, e.g.*, Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Jane C. Ginsburg, *Copyright Without Borders: Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153 (1997); Jane C. Ginsburg, *Conflicts of Copyright Ownership Between Authors and Owners of Original Artworks: An Essay in Comparative and International Private Law*, 17 COLUM.-VLA J.L. & ARTS 395 (1993); Jane C. Ginsburg, *Domestic and International Copyright Issues Implicated in the Completion of a Multimedia Project*, 25 SETON HALL L. REV. 1397 (1995); Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyrights in Cyberspace*, 95 COLUM. L. REV. 1466 (1995).

<sup>15</sup> *See* Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment of the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios*, 29 J. COPYRIGHT SOC'Y 647 (1982).

<sup>16</sup> *See* *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (Kaufman, C.J.).

*Eldred v. Reno*<sup>17</sup>

APPELLANTS' REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

CORRECTED BRIEF

THIS CASE IS SCHEDULED FOR ORAL ARGUMENT ON  
OCTOBER 5, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 99-5430

ERIC ELDRED, *et al.*,

*Plaintiffs-Appellants,*

v.

JANET RENO, In her official capacity as Attorney General,

*Defendant-Appellee.*

Appeal From The United States District Court

For The District Of Columbia (D.D.C. No. 99-0065 (JLG))

APPELLANTS' REPLY BRIEF

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<sup>17</sup> *Editor's Note:* The full text of the Appellants' Reply Brief in the *Eldred v. Reno* case has been inserted prior to the panel discussion as background for the ensuing debate. The Editorial Board of the *Cardozo Arts & Entertainment Law Journal* gratefully acknowledges the assistance of Copyright's Commons, Berkman Center for Internet & Society, Harvard School of Law, in obtaining the text of the Brief. The textual argument and the footnotes are substantially unedited except as indicated by brackets; however, internal page references, certificates and other pages that do not contain the substance of the brief have been omitted and minor typesetting and typographical adjustments have been made to comply with the format of this publication.

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## GLOSSARY

TERM	REFERENCE
<i>Amici</i> Br.	Brief of <i>Amici Curiae</i> , The Sherwood Anderson Literary Estate Trust, <i>et al.</i>
App. Br.	Appellants' Opening Brief
Appellants	Eric Eldred; Eldritch Press; Higginson Book Company; Jill A. Crandall; Tri-Horn International; Luck's Music Library, Inc.; Edwin F. Kalmus & Co., Inc.; American Film Heritage Association; Moviestart, Inc.; Dover Publications, Inc.; and Copyright's Commons
CTEA	The Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 304
Gov't Br.	Corrected Brief for Appellee



## APPELLANTS' REPLY BRIEF

In our main brief, Appellants argued that (1) the retrospective aspect of the CTEA violates both the "originality" requirement of the Copyright Clause and the "limited times" term of that clause and (2) the retrospective and prospective aspects of the CTEA cannot satisfy intermediate scrutiny under ordinary First Amendment analysis. The government tacitly concedes the central point of Appellants' first claim—that Congress may not extend copyright to works in the public domain. But if Congress cannot extend copyright to works in the public domain, then it cannot extend the term on subsisting copyrights. The government does not contest Appellants' second claim but argues only that this Court has held that ordinary First Amendment analysis does not apply to statutes passed pursuant to Congress's Copyright Clause power. For the reasons set forth below, this argument cannot salvage the CTEA.

## SUMMARY OF ARGUMENT

I. A. The government wrongly argues that the "originality" requirement applies only "to determine whether a work is eligible for copyright protection in the first place." The originality requirement arises from the Copyright and Patent Clause's stipulation that the author's monopoly must be conferred in exchange for "promot[ing] the progress of science." It is irrelevant for the purposes of the originality requirement whether the monopoly in question is a newly-conferred one or the extension of an existing one.

B. The government is wrong in urging that the constitutionality of the CTEA should be tested under a "rational basis" review. Appellants do not claim the CTEA was an enactment that was beyond Congress's power, but instead challenge the CTEA under *Feist's* requirement of "originality." Because originality is an independent constitutional standard, rational basis review is irrelevant.

C. The government's suggestions that increases in the "commercial life" of copyrighted works and increases in life expectancies justify the CTEA are groundless. The former argument leads to the absurd result that different works should have different copyright terms, and some works should have only fleeting copyright terms. The government's suggestion that increases in life expectancy justify the CTEA's increase in copyright term makes no sense because increases in adult life expectancy do not begin to match the extraordinary increases in copyright terms.

D. The government is wrong in arguing that the retrospective extension of copyright is justified because it creates incentives for companies to restore and preserve old films. If creating an incentive by establishing a government monopoly on speech truly were a sufficient justification for a copyright restriction, then it should extend to works in the public domain as much as to works whose copyright is still subsisting.

E. The government's argument that the history of past copyright term extensions justifies the CTEA is misplaced. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), stands only for the proposition that legislation enacted when the Constitution's framers sat in Congress is entitled to great weight. But the first copyright term extension occurred in 1831, when none of the framers still sat in Congress. And the government is incorrect in suggesting that the CTEA was the fulfillment of some earlier "promise" made by Congress because none of the pre-CTEA copyright laws contained any such promise.

II. A. The CTEA should be tested under the standard of First Amendment intermediate scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) and *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997). The Supreme Court clearly held in *Turner II* that restrictions on speech are always subject to heightened scrutiny.

B. There is no "copyright exception" to the First Amendment. Copyright statutes, like all others, are subject to First Amendment review. As a general matter, copyright statutes survive First Amendment review because of the "expression/idea" dichotomy: since copyrights restrict copying of expression only, but do not restrict dissemination of the underlying ideas in a work, they do not unduly restrict speech. However, this dichotomy is one that describes the First Amendment limitations upon a copyright's scope.

C. It is a different matter whether a copyright's duration impinges upon the First Amendment. *Turner II* requires the government to show that the CTEA's restrictions on speech serve an "important government interest"—which, in the case of copyright, can only be "the general benefits derived by the public from the labors of authors," *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)—without "unduly burdening" speech. The CTEA's extension of copyright terms does not increase the benefits to the public from the labors of authors because it gives no real present incentive to authors. By removing from the public domain for another

twenty years a massive body of works, the CTEA dramatically limits access to the public commons.

D. The government wrongly characterizes Appellants' position as one that is in effect a claim to a "First Amendment right to express themselves using the copyrighted materials of others." In fact, Appellants argue that the CTEA cannot constitutionally confer these copyrights in the first place. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989), and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) do not, as the government urges, stand for the sweeping proposition that copyright statutes cannot be challenged under the First Amendment. Instead, both stand for the unremarkable principle that a copyright infringer cannot claim that his infringement is privileged under the First Amendment.

E. Appellants have standing to challenge the prospective features of the CTEA under *United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152 (D.C. Cir. 1987), and other authorities.

## ARGUMENT

### I. THE RESTROSPECTIVE ASPECT OF THE CTEA VIOLATES THE "ORIGINALITY" REQUIREMENT AND "LIMITED TIMES" TERM OF THE COPYRIGHT CLAUSE.

Our opening brief demonstrated that the CTEA's retroactive extension of copyright terms violated both the "originality" requirement and the "limited times" term of the Copyright Clause. (App. Br. at 23-28.) In response, the government attempts to minimize the importance and scope of the originality requirement (Gov't Br. at 40-41), offers a wooden interpretation of the term "limited times" (*Id.* at 42-46), and advances baseless arguments about a "national tradition" of copyright extensions. (*Id.* at 46-51.)

#### A. *A Grant of a Copyright to a Subsisting Work Does Not Satisfy the "Originality" Requirement*

The Supreme Court has consistently limited copyright to those works that are "original." Most recently in *Feist*, but originally in *The Trade-Mark Cases*, the Court denied copyright protection for works that did not add to the sum of useful knowledge even though a grant of copyright protection to such works might be said rationally to advance a copyright-related interest. See *Feist Publica-*

*tions, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991). In *Feist*, the issue was not whether granting copyrights to unoriginal listings of telephone directories would satisfy a “rational basis” requirement (which it clearly would). Instead, the question was whether granting copyrights to ordinary telephone listings—i.e., facts—was consistent with the express limitation of the Copyright Act, namely, that the copyright “promote the progress.” *Feist*, 499 U.S. at 347. This requirement of “originality,” the Court held, “is a constitutional requirement.” *Id.* at 346.

The government argues that the “originality” requirement applies only “to determine whether a work is eligible for copyright protection in the first place.” (Gov’t Br. at 41.) But this is too narrow a reading of the rule. The originality requirement arises from the Copyright and Patent Clause’s stipulation that the author’s monopoly must be conferred in exchange for “promot[ing] the Progress of Science.” It is irrelevant for the purposes of the originality requirement whether the monopoly in question is a newly-conferred one or, instead, an extension of an existing one. Either way, the monopoly cannot be given without meeting this requirement.

The government concedes much of this point by acknowledging that the extension of a copyright to a work in the public domain would not satisfy the originality requirement. (Gov’t Br. at 35, 41.) See *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1996); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989). Even though the works at stake would initially have been “original” for purposes of the Copyright Clause, the government admits that the works’ passage into the public domain would render them no longer capable of being protected through copyright.

While the government does not explain the grounds for this concession, the explanation is not hard to find: the essence of Congress’s power under the Copyright and Patent Clause is to create a monopoly to “promote the Progress of Science and useful Arts.”<sup>18</sup>

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<sup>18</sup> No doubt, as the government and *amici* argue, there are other purposes to the Copyright Clause in addition to promoting progress. But the objective of the textual limitation on the clause is a necessary condition on Congress’ exercise of power. Although there are plenty of cases where the Supreme Court has acknowledged the legitimate end of providing benefits to authors and their families, there is no case where a copyright restriction that *only* benefited authors and families without also inducing progress has been upheld. Cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”). Likewise with the justification based upon “harmonization.” The government argues that the CTEA is justified by the need to harmonize copyright law but it has not demonstrated why harmonization must be retroactive, what

Where a work already has been produced, however, there is no justification for monopoly, especially a monopoly that affects speech. As the Supreme Court said, where the monopoly will not “add to the sum of useful knowledge,” *Graham*, 383 U.S. at 6, or where the monopoly is simply “the adoption of something already in existence,” *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1880), the justification for a copyright disappears. And there is no meaningful distinction, in logic or in the Copyright and Patent Clause, between extending a monopoly for a subsisting copyright or for a copyright of work in the public domain.<sup>19</sup>

*Amici* and the government respond that even though a copyright for a subsisting work would not induce the creation of anything new, it is still “progress” because it would create incentives to distribute or preserve existing works. (Gov’t Br. at 38-39.) Appellants agree that this is “progress” in some sense. But it is not the sort of “progress” that the Supreme Court has required in the context of the Copyright Clause. The government argues, for example (*Id.*), that the retrospective extension of copyright is justified because it creates incentives for companies to restore and preserve old films. But the same would be true whether those films enjoyed a subsisting copyright or were in the public domain already. If creating an incentive by establishing a government monopoly on speech were a sufficient justification for a copyright restriction, then it should extend to works in the public domain as much as to works whose copyright is still subsisting.

B. Feist’s Requirement of “Originality,” and Not “Rational Basis”  
Review, Is the Appropriate Constitutional Standard

The government and *amici* wrongly urge that the standard by which the CTEA should be tested is one of “rational basis” review.

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benefit harmonization would produce or how harmonization with some countries while increasing disharmony with others can be a rational way to pursue “harmonization.”

<sup>19</sup> The government argues that works in the public domain are different because their copyright has already lapsed, while works with a subsisting copyright have not fallen into the public domain. Every issuance of a copyright by definition gives rise to two distinct property interests: (1) it gives authors a present right to exclude others from using the copyrighted work during the duration of the copyright, U.S. CONST. art. I, § 8, cl. 8 (granting authors “the exclusive Right to their . . . Writings”); and (2) it vests in the public a future remainder interest in the right to use the copyrighted work once the copyright expires, *see id.* (copyrights may only be “secur[ed] for limited Times”); *see also Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; & Copyright Per Program Licenses: Hearings Before the Subcomm. On Courts & Intellectual Property of the House Comm. On the Judiciary*, 105th Cong. 90 (1997) (describing the “Constitutional requirement” that the public be made “the remainderman under all copyright laws”). Thus, regardless of whether the change to these entitlements occurs during the present exclusive right, or after it has passed, the change restricts the future remainder interest of the public, without any compensating promotion of “progress.”

(Gov't Br. at 21-22; Amici Br. at 10-11.) We pointed out in our main brief, of course, that the CTEA independently must be tested under the First Amendment standards of *United States v. O'Brien*, 391 U.S. 367 (1968), and *Turner Broadcasting System, Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997). See (App. Br. at 33). But even beyond this, the government's arguments are misplaced.

The government cites *Stewart v. Abend*, 495 U.S. 207, 230 (1990), and this Court's decision in *Schnapper Public Affairs Press v. Foley*, 667 F.2d 102, 111 (D.C. Cir. 1981), for the proposition that courts should defer to Congress's copyright enactments and, presumably, afford them deferential review. But *Stewart* contains no such holding: the language from *Stewart* the government quotes does not even rise to the level of dicta and, in all events, is quoted out of context. Similarly, *Schnapper* does not support the government's arguments. As we read *Schnapper*, it holds that the preamble to the Copyright and Patent Clause is not a substantive limitation upon the Clause's scope and that a court has only a limited role in reviewing general challenges to Congress's power under Article I. *Id.*

But the question here is different. The deficiency in the CTEA is that it fails the test of "originality" that the Supreme Court imposed in *Feist*, and this requirement of originality is an independent constitutional standard that the CTEA must satisfy. No amount of collateral review—"rational" or otherwise—can rescue the CTEA if it cannot pass *Feist*'s threshold requirement of originality. And, in view of *Feist*, *Schnapper* cannot have the broad reading the government now urges. At most, *Schnapper* stands for the proposition that the preamble to the Copyright and Patent Clause is not an independent limitation upon congressional power. *Id.* But in *Feist* the Supreme Court clearly found that the preamble informed the meaning of the balance of the Clause's language and that, as so read, the Clause contains a requirement of "originality." This requirement exists separate and apart from those questions of the scope and limits of congressional power that call for a "rational basis" review.

C. *The CTEA's Retrospective Extension of Subsisting Copyrights Is Not a "Limited Time" for Purposes of the Copyright and Patent Clause*

Our opening brief argued that the CTEA's extension of the life of subsisting copyrights also violated the "limited times" term of the Copyright and Patent Clause. Although no court before now

has had to interpret the words "limited times," the Supreme Court's method for interpreting the other terms within the Copyright Clause has been consistent. As with "Writings," (*Trade-Mark Cases*, 100 U.S. at 94) and "Authors" (*Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)), the question is not what the term "limited times" means in the abstract. Instead, it is what the term mean in light of the express purpose of the clause, namely "to promote Progress."

So understood, a copyright term should be considered "limited" only if it is a term that "promote[s] progress" as described in *Feist* and *The Trademark Cases*. For the same reason that copyrighting "facts" does not "promote progress," a copyright term that retrospectively extended a subsisting copyright would not be a "limited time[ ]." This is because that term would extend the life of an earlier copyright term in a way that would not promote progress, since there is no "promotion of progress" in giving a windfall to an author (or an author's grandchildren) for a work that already has been created. In the sense that "term limits" set "limited" terms, such a change would not be a limited term that promoted progress.

Although the government rejects this specific interpretation, it acknowledges the general point that there is some substantive limitation on the scope of the term "limited times." "It may well be that some [term] extensions are so long that a court could conclude that the Congress in effect created an unlimited term." (Gov't Br. at 42; *see also id.* at 17.) The problem with the government's limitation, however, is that there are no limits on the restrictions that the government imagines the clause imposes. The test the government adverts to is a boundless, unguided guess by federal courts about how long is too long. Nor is the government's position rescued by its suggestions of the proper measures of copyright terms. At various points in its brief, the government suggests that the appropriate length of copyright terms should be either the commercial life of a work (Gov't Br. at 28) or the life expectancy of the author. (*Id.* at 13, 23, 25, 50.)

Yet neither of these suggestions makes any sense. The "commercial life" notion, for example, fails because it ignores the constitutional requirement that the copyright term "promote progress." There is no evidence (in the government's brief or elsewhere) that authors generally know in advance what commercial success their work is likely to enjoy or over what period of time that success is likely to endure. Thus, adding a copyright term extension across the board to all works (including the vast majority of works that will

not enjoy commercial success) does not “promote progress.” Moreover, the government’s theory wholly ignores that class of works that are not created with commercial success in mind to begin with.

The government’s “commercial life” theory also leads to absurd results because it must necessarily mean that there cannot be any single copyright term, since different works enjoy different measures of success. Under the government’s theory, the notorious Hollywood dud *Ishtar* should have no copyright term at all, while the descendants of Homer should still be receiving royalties on the *Iliad*. And, since most determinations of commercial success can only be made with hindsight, the entire notion of inducing authors to create works with advance guarantees of a copyright monopoly of some length would become impossible.

Similarly, the government’s approach would mean that some categories of work, such as computer software, could not have a constitutional copyright term longer than a few years. For example, under current law, computer software produced as a work for hire receives a copyright that extends for ninety-five years. That means that the first version of Windows 95 will fall into the public domain in 2090. Unlike ordinary literary works, such as books, or plays, there can be no possible value to software code ninety-five years after it is released. Under the government’s test, it is open for the court to conclude (quite reasonably, in our view) that this “limited” term is “in effect” unlimited and therefore should be struck under the government’s substantive copyright term test.

The government fares no better with its theory that a proper measure of copyright term should be the life expectancy of the author. (Gov’t Br. at 23, 25, 31-33.) Despite the government’s reliance on the notion of greater life expectancies, the fact of the matter is there has been relatively little increase in the life expectancy in the past century. Between 1976 (when Congress determined that life expectancies justified an extension of subsisting copyright terms to seventy-five years) and today (when the CTEA has extended those terms to ninety-five years), the life expectancy for people at birth has increased by only three years. The life expectancy for people who have reached the age of twenty (and thus are those most likely to create copyrighted works) increased by just 2.3 years. Center for Disease Control & Prevention, Vital Statistics of the United States, 1995, Table 6-3 (1998); Center for Disease Control & Prevention, Vital Statistics of the United States, 1976, Table 5-3 (1978).



D. *The Special Case of Films Does Not Justify a General Retrospective Extension of All Copyright Terms*

The government and *amici* both argue that a core justification for the retrospective extension of the copyright term is the special characteristics of film. "Generally speaking," the government argues, "the principal class of works for hire that are likely to have significant economic value at the end of the former seventy-five year term of protection are motion pictures." (Gov't Br. at 31; see *Amici Br.* at 15.)

This argument founders upon the same requirement of "originality" as the rest of the government's claims. And, of equal weight, even if the technological change of digitization could justify a special grant of protection to "restore" works, that justification would not apply to the vast array of books, poetry, music, plays and images covered by the CTEA. Nor would it balance the extraordinary cost to the creative process that this general restriction imposes. Although the government never acknowledges these costs, it is evident that the real effect of the CTEA in this regard is to increase vastly the number of "orphan" works that are badly in need of restoration, yet cannot be restored because of the impossibility of locating the copyright holders. (Gov't Br. at 14, 46 n.20.) Indeed, two of the major restorers of older films (American Film Heritage Association and Moviecraft, Inc.) are plaintiffs in this action.

Finally, the government's arguments about the unique economic value of film demonstrate the unreasonable overbreadth of the CTEA. If, indeed, the economic value of films are a special case, then the appropriate solution would be a special copyright term for film, not the general deferral of the public domain for the millions of non-film works that the CTEA effects in the name of preserving film.

E. *There Is No "Tradition" that "Ratifies" Congress's Retrospective Extension of Copyright*

Both the government and the *amici* make the puzzling argument that Congress's extensions of the copyright term over the past two hundred years "ratifies" the CTEA or creates a "national tradition" that somehow justifies the statute. There are two fallacies in the argument.

First, both the government and the *amici* rely upon *Burrow-Giles Lithographic Co. v. Sarony* as authority for this claim that, since there have been several extensions of subsisting copyright terms,

the constitutionality of the practice is therefore “almost conclusive.” *Burrow-Giles*, 111 U.S. at 58. This is simply a misreading of authority. What the Supreme Court said in *Burrow-Giles* was that when there was an interpretation “by the men who were contemporary with its formation, many of whom were members of the convention which framed it” then that interpretation is “entitled to very great weight.” *Id.* (emphasis added).

*Burrow-Giles* was speaking of statutes passed in 1790 and 1802, when a significant portion of the Congress would have been framers. But in this case, we have no instance of an interpretation by the framers of the Constitution that would suffice to validate the CTEA. The First Congress’s ratification of existing copyrights in 1790 is fully understandable under a Supremacy Clause analysis: the objective was to unify copyright law nationally, and in the transition to a federal state, there was a need to clarify which law (state or federal) would govern these copyrights. After that initial case, the next arguable “authority” for Congress’s CTEA was 1831. But by 1831, only one of the framers—James Madison—was still alive and he had long since retired from Congress.<sup>20</sup> The view of the Congress in 1831 (much less the view of the Congress that passed the CTEA) cannot be said to be the view of the framers.

Second, it is absurd to argue (Gov’t Br. at 16-17), that there is a “national tradition” of extending copyright terms that somehow “promotes progress,” or that the CTEA represents Congress’s fulfillment of some earlier “promise.” (*Id.* at 25.) The government’s argument seems to be that, since subsisting copyrights have been given term extensions from time to time over the years, authors have been motivated all along not just by the present incentive of the copyright term given in the existing copyright statute, but also by the prospect of unspecified, yet-to-come retroactive copyright term extensions. As we pointed out in our opening brief, the present value of any such extensions is too negligible to be a meaningful incentive. (App. Br. at 39-40). Moreover, the sheer randomness of any congressional copyright term extension is such [that] it cannot constitute a meaningful present incentive.<sup>21</sup>

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<sup>20</sup> See *The U.S. Constitution OnLine* (last modified April 1, 2000) <<http://www.usconstitution.net/constframedata.html>>; National Archives and Records Administration, *The Founding Fathers* (last modified May 7, 1997) <<http://www.nara.gov/nara/exhall/charters/constitution/virginia.html>>.

<sup>21</sup> *Amici* point out the interesting example of an author who was motivated to create by a gross misunderstanding of his incentive in the first place. Their brief cites the congressional testimony of musician Bob Dylan to the effect that, when he began writing songs in 1961 (a time when the 1909 statute gave him a maximum copyright term of 56 years), he somehow was led to believe that his work would be copyrighted at least for the duration of

## II. THE PROSPECTIVE AND RETROSPECTIVE ASPECTS OF THE CTEA VIOLATE THE FREE SPEECH AND PRESS CLAUSE OF THE FIRST AMENDMENT

In our opening brief, Appellants demonstrated that the CTEA was a regulation of speech that was subject to heightened First Amendment scrutiny under the *O'Brien* test. (App. Br. at 17.) We showed as well that none of the claimed justifications for the CTEA could survive this heightened scrutiny, and that both the CTEA's retrospective aspects and the CTEA's prospective application therefore violated the First Amendment. (*Id.* at 11, 32-33.)

The government has made no attempt to show that the CTEA can survive heightened scrutiny. (App. Br. 37-40.) Instead, it contends that First Amendment analysis is irrelevant because, as the government puts it, "Plaintiffs have no First Amendment right to reproduce the copyrighted works of others." (Gov't Br. at 53-59.) In other words, so long as copyright protects expression rather than ideas, the government argues that no First Amendment challenge to a copyright statute can be allowed.<sup>22</sup>

### A. *The CTEA Is Subject to Heightened Review Under the O'Brien Test*

The Supreme Court has stated that "laws that single out the press, or certain elements thereof are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) (emphasis added). It is essentially undisputed that the CTEA is a regulation of speech: as a copyright statute, it regulates who can say what. By extending for twenty years the term of all subsisting and future copyrights, it increases the burdens the government imposes upon speech. As such, the CTEA must be tested under the ordinary analysis of the First Amendment. See, e.g., *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536 (1987) (intermediate scrutiny for assignment of term "Olympic"); *Regan v. Time, Inc.*, 468 U.S. 641, 655-56 (1984) (intermediate scrutiny for regulation about copying currency). A content-neutral regulation of speech such as the CTEA can survive a First Amendment challenge

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his grandchildren's lives. (*Amici* Br. at 17.) Dylan testified that Congress should enact the CTEA so that his misunderstanding could become the law.

<sup>22</sup> The government argues that *O'Brien* only applies when the government is restricting speech, not when there are simply competing speech interests. Its argument misses the mark; this case does not involve competing speech interests because the constitutional presumption is that works should be in the public domain. See *Bonito Boats*, 489 U.S. at 151 ("[I]mplicit in the Patent Clause itself is that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception.") The issue in this case is how far Congress can go in extending a monopoly at the expense of the public domain.

only “if it advances important governmental interests unrelated to the suppression of free speech” and “does not burden substantially more speech than necessary to further those interests.” *Turner II*, 520 U.S. at 189.

The government and amici cannot argue with this principle. Instead, both contend that there is, in effect, a general First Amendment exception for copyright legislation. To reach this conclusion, the government explodes a narrow line of authority into a new, putative First Amendment rule. This is plain misapplication of the authority from this Court and the Supreme Court, and it does not address the First Amendment claim that Appellants raise.

B. *There Is No Copyright Exception to the First Amendment*

The government maintains that, so long as copyright protects expression only, there can be no First Amendment challenge to any copyright legislation. (Gov’t Br. at 54-59.) Any such challenge, the government argues, is in effect a claim to a “First Amendment right to use material that is protected by copyright laws.” (*Id.* at 56.) Such claims, the government continues, have been rejected by this Court and the Supreme Court. (*Id.*) The amici similarly pronounce that “this Court has squarely rejected [the] argument that the copyright laws violate the First Amendment.” (Amici Br. at 26.)

At the outset, it is worth remembering that we have never contended that that “copyright laws violate the First Amendment.” Nor have Appellants questioned the principle that no one has “a First Amendment right to reproduce the copyrighted work of others.” The government’s and amici’s insistence upon saying otherwise suggests a studied misreading of our position and, evidently, the hope of obfuscating the issues before the Court.

Our argument is a simple one. It is that the authority the government relies upon does not stand for the sweeping proposition the government claims. Instead, these authorities are restricted solely to the narrow case where a litigant demands a right to use otherwise legitimately copyrighted material. In every case that the government relies upon, the question was whether there is a “[F]irst [A]mendment defense . . . to a copyright claim.” *United Video, Inc. v. FCC*, 890 F.2d 1173, 1190 (D.C. Cir. 1989) (Wald, C.J.).<sup>23</sup> The claim in these cases is not that a certain work cannot

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<sup>23</sup> In *United Video*, “the petitioners desire[d] to make commercial use of the copyrighted works of others.” 890 F.2d at 1191. They did not challenge the copyright gener-

be copyrighted, but instead that, although a work is properly copyrighted, these particular claimants have a First Amendment right to use that work. See *United Video*, 890 F.2d at 1191, and *Harper*, 471 U.S. at 567. Such claims are analogous to cases where a party raise a First Amendment defense to a trespass action. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976). In such cases, even though there is a legitimate property right at stake, the petitioner claimed that the First Amendment should give it the right to trespass.

Courts rightfully reject such claims of a First Amendment right to trespass, on either real or intellectual property. The system for granting the property rights at issue may be constrained to assure the rights are granted consistent with the First Amendment; but once granted consistent with the First Amendment, there is no subsequent First Amendment challenge to the use of that property.

But cases alleging First Amendment review of the use of a property interest are plainly distinct from First Amendment challenges to the constitutionality of the statute granting a property right in the first instance. Whether or not the use of a copyright is free of First Amendment review, the statute that grants the copyright obviously remains subject to ordinary First Amendment analysis. As we pointed out before, a statute that granted copyrights to “decent” works only, cf. *Reno v. ACLU*, 521 U.S. 844 (1997), or denied copyright to works by convicted felons, cf. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105 (1991), or that purported to copyright the American Flag would each raise a First Amendment issue that was not exhausted by the claim that the copyright protected expression only.

This is precisely the claim made here. Appellants do not argue that the First Amendment gives anyone the right to use otherwise legitimately copyrighted material from 1923. Appellants instead argue that material from 1923 cannot legitimately be given a further copyright term. No case relied upon by the government speaks beyond the narrow class of cases that we have identified. And both the government and the amici have completely ignored the Second Circuit’s decision in *Authors League of America v. Oman*,

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ally. In *Harper*, the *Nation* wanted a First Amendment right to use excerpts from President Ford’s biography, not a declaration that the biography could not be copyrighted. *Harper & Row Pubs., Inc. v. Nation Enter.*, 471 U.S. 539 (1985). *Schnapper*, 667 F.2d 102, could have been a claim of the form we raise, as the petition there did argue (mistakenly, in our view) that it violates the First Amendment for works by the government to be copyrighted. But as this Court made clear in that case, *id.* at 113, the claim it reviewed was petitioner’s demand “to reprint the screenplays for commercial gain”—in other words, to use otherwise permissibly copyrighted material. It is therefore not an exception to the rule that we describe.

790 F.2d 220 (2d Cir. 1986), which considered on the merits a First Amendment challenge to the Manufacturing Clause of the Copyright Act, despite the alleged copyright exception to the First Amendment that the government relies upon. (See App. Br. at 54.) The government has not, in short, given any reason why this Court should not apply ordinary First Amendment review to the CTEA.

C. *The First Amendment Interests Raised By Copyright's Duration Are Distinct From the Interests Raised By Its Scope*

The government disputes that a First Amendment challenge to a copyright's duration should be treated any differently from a First Amendment challenge to a copyright's scope. (Gov't Br. at 56-57.)<sup>24</sup> In fact, the Supreme Court has distinguished duration from scope (e.g., "[t]he limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution . . ." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)), but the question this Court must resolve is whether the duration of a copyright affects First Amendment interests in the same way that the scope of a copyright affects First Amendment interests.

They plainly do, and this is shown by the reasoning that the Supreme Court has used to explain why copyright law (a regulation of speech and the press by Congress) is compatible with the First Amendment (a right limiting the regulation of speech and the press by Congress). In *Harper*, 471 U.S. at 558, the Supreme Court explained this compatibility in direct terms: Copyright law is consistent with the First Amendment because ordinarily copyright law functions as "an engine of free expression." Without giving authors the limited monopoly of copyright, less "original" work would be produced than with the limited monopoly of copyright. Copyright therefore does not "abridge" speech; copyright instead enhances speech, by "promoting Progress of Science." See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, Boston College Law Review (forthcoming September, 2000).

But this First Amendment justification for copyright reaches

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<sup>24</sup> Appellants dispute the government's suggestion that we bear the burden of demonstrating why we are entitled to ordinary First Amendment review. If the government seeks to apply a lesser First Amendment standard to this regulation of speech, then it bears the burden of demonstrating why a challenge to a duration raises the same First Amendment interests as a challenge to a copyright's scope. The government has not tried to make such a showing.

only so far as this premise remains true—only so long, in other words, as copyright functions as an engine of free expression. Where there is a change in the Copyright Act that restricts speech without any plausible compensating speech incentives, then this First Amendment justification for copyright disappears. Excessive copyright protection, in other words, can restrict speech more than it arguably promotes speech and, in so doing, loses the justification of *Harper*.

This is the insight behind the Court's dicta (embraced by the government) (Gov't Br. at 18-19) suggesting that a copyright law that protected ideas as well as expression would be inconsistent with the First Amendment. *See, e.g., Lee v. Runge*, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting from denial of certiorari). *Cf. New York Times Co. v. United States*, 403 U.S. 713, 726, n.# [sic] (1971) (Brennan, J., concurring) (copyright laws are not restrictions on freedom of speech because copyright "protect[s] only form of expression and not the ideas expressed"). While protecting ideas may well create greater incentives to produce ideas, the constraint on free expression that such a regime would create would outweigh any increase in incentives. A regime where ideas could be copyrighted would function, in the language of *Harper*, not as an engine of free expression, but as a brake. Copyright therefore cannot, consistent with the First Amendment, protect ideas. *Harper*, 471 U.S. at 556.

But this is not the only way in which increasing protections might render copyright a restraint on free expression. Changes in the duration of copyright are, in fact, the clearest example. When Congress extends copyright retrospectively, it increases the constraints on speech (to the extent that more speech is within the control of the law), without producing any greater incentive to create.<sup>25</sup> Causation is prospective. Thus retrospective increases in duration increase restrictions on speech without any compensating speech productive benefit.

And this is true, moreover, whether or not Congress protects expression only. This is the critical point that distinguishes duration from scope. A retrospective extension of duration is a brake on free expression even if it satisfies the "idea/expression" analysis

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<sup>25</sup> The government for the first time argues that in fact a retrospective increase in copyright would increase present incentives, since "[p]eople have more incentive to create new works within a system in which the Government keeps its promises." (Gov't Br. at 28.) At the threshold, we question what "promises" the government has in mind, since there is no evidence that the Congress in the 1976 Copyright Act (or in any earlier copyright statute) made a "promise" that it would repeatedly extend terms of subsisting copyrights. [Internal citation omitted.]

by protecting expression only. Thus while the ultimate First Amendment inquiry for copyright duration and scope is the same—namely, whether the speech restrictions can arguably be said to induce more speech than they restrict—the analysis of whether duration restricts more speech than it produces is orthogonal to whether scope restricts more speech than it produces. The two inquiries are independent. The First Amendment test applicable to the one should not apply to the other.

D. *Appellants Have Standing to Challenge the Prospective Application of the CTEA*

Appellants have properly pleaded their standing to challenge the CTEA's prospective elements. [Internal citation omitted.] They are injured not only by the fact that works from 1923 which would have entered the public domain in 1999 were kept out but also by the fact that, for every subsequent year, works that would have entered the public domain will be kept out for an additional twenty years. Regardless of whether the works were copyrighted in 1997 (and thus fall under the CTEA's retrospective section) or were copyrighted in 1999 (and so are covered by the CTEA's prospective section), Appellants face the same injury: they are forced to wait an additional twenty years before they may legally copy, distribute or perform works that otherwise would have been in the public domain. *See United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1157 (D.C. Cir. 1987); *see also Redden v. Interstate Commerce Comm'n*, 956 F.2d 302, 306 (D.C. Cir. 1992). Nor is standing disturbed by the fact that copyrights on new works will outlive the individual Appellants, since most Appellants are business entities who intend to continue their businesses infinitely. [Internal citation omitted.] *See, e.g., Campbell v. Louisiana*, 523 U.S. 392, 397 (1998). Otherwise, Congress's extension of copyright terms beyond the human life span would take the statute outside the review of the courts. *See, e.g., Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C. Cir. 1975).

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed, the Copyright Term Extension Act declared unconstitutional, the enforcement of the No Electronic Theft Act against persons whose infringement of a copyright would not have happened but for the CTEA's amendment of 17 U.S.C. § 304(b) en-



joined, and the Appellants awarded costs of this action, including reasonable attorneys' fees.

#### PANEL DISCUSSION:

##### WENDY GORDON

Let me begin by making things more concrete. What does it mean to have a copyright duration of life plus seventy? It is hard for us to project into the future, since so many of its changes are unimaginable now. So instead, let us project into the past.

Imagine that the "life plus seventy" rule had been enacted at the turn of the *last* century, and turn your mind's eye to a talented, fictional somebody born in 1900. Imagine that this individual immigrates to the United States a child, learns an immense amount growing up in New York City, comes to maturity, and becomes a songwriter and lyricist. Her many brilliant songs during the Roaring Twenties are said to capture the spirit and age of the City. Let us now say that in 1931, at the age of thirty-one, she writes something that captures the transition between the period of prosperity she had long celebrated, and the economic anxiety that followed the 1929 Wall Street crash. The song is played everywhere, and every artist wants his or her voice to be heard singing this particular song. This vogue goes on for a few years, but, as with most popular music, after a while the song stops being so popular.

However, for the long copyright term to have any impact, the song would need to become the kind of classic whose market never dries up completely. So let us assume this is the case. The song has become a "standard." Recordings continue to sell, bands continue to "cover" the song, and the song continues to reside in the public imagination. Anyone hearing even a few bars of the tune will recognize it. And let us assume that the song has an influence in the music community. As with literature and the visual arts, individual pieces of music can significantly alter the course of the art form, and so it is with our musical work.

So, an individual who arrived in New York near the start of the last century, and lived the immigrant New York experience that so many of our families shared, forged a great piece of music, which was released in 1931 and remains of interest years later. Imagine, now, that this individual dies at the age of seventy in 1970. She leaves middle-aged sons and daughters, along with grandchildren in their twenties.

Under a life plus seventy rule, the copyright of that piece of

1931 music would not expire until the year 2040.<sup>26</sup> At that point, the composer's *grandchildren* would be in their nineties, if they were alive at all, and those grandchildren would have adult grandchildren and great-grandchildren of their own. Therefore, a cultural and musical fixture, which was created under a series of influences from the very early twentieth century, and which in turn influenced the growth and development of the twentieth century, will have copyright protection through a good part of the twenty-first.

During the last twenty years or so of that term—an amount equal to what is added by the Bono extension—it is likely that the composer will have personally known none of the surviving royalty recipients. Yet, should a new composer want to adapt the famous song to reflect on a twenty-first-century period of financial tumult and transition, the new composer could not do so without permission from at least one of those copyright owners. Similarly, someone who in 2031 wants to make a multi-media CD-ROM showing the history of mid-twentieth-century music could not include this and other music from the period without seeking permission from remote holders of copyrights all over the world. Some of the people who hold the copyrights in these century-old songs will no longer be identifiable through ordinary methods of search. The new law makes us face the question of whether all this is a good idea.

My role on this panel is not to talk about the constitutionality of the Sonny Bono Copyright Term Extension Act. Rather, I am going to look at the statute through the lens of two kinds of policies. One set of policies might be grouped under the title, “authors’ rights.” The other set might be called “instrumentalist.” They provide two quite different evaluative perspectives.

The authors’ rights advocate usually views copyright as resting on some characteristic *tie* between the author and her work, which justifies giving ownership to the author, regardless of its societal effects. Thus, authors’ rights approaches focus on the individual producer, and tend to look backwards: A work has been produced—now how should the law treat it? The answer of the au-

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<sup>26</sup> The example in the text simplifies by imagining that something *like* the Bono Act had been applicable at the time the 1931 song was created. Under the *actual* Sonny Bono Copyright Term Extension Act, “life plus seventy” only applies to works created on or after January 1, 1978. See 17 U.S.C. § 302(a). There are special rules for works for hire and some other works, see *id.* §§ 302(b)-(c), and the Act also gives special treatment to works that were created earlier than 1978. See *id.* § 303. Thus, for works already in their renewal terms when the Bono Act became effective, the copyright term is “95 years from the date copyright was originally secured.” *Id.* § 304(b).

thors' rights advocate typically is that the creator of the work deserves ownership in it.

By contrast, an instrumentalist policy focuses on economic incentives or other societal effects of granting copyright. Instrumentalism is concerned with the producer, too, but views her as one person among many who may be affected by a change in law. Instrumentalism looks forward, rather than back. Its proponents ask: How best can the law encourage authors to produce new work in the future, and do so in a such a way that the value of new works so induced exceeds the costs of the system?<sup>27</sup> The answer to that question is not always ownership.

Most of you know that our Constitution's Copyright and Patent Clause is instrumentalist in wording. Congress is given the power to grant exclusive rights to authors and inventors "to promote the Progress of Science and the useful Arts."<sup>28</sup> Yet, when James Madison defended the Clause in the *Federalist Papers*, he did so on the grounds that granting copyrights and patents was one of the few places where the public interest coincided with private claims of right.<sup>29</sup> This convergence of private and public perspectives—analogueous to authors' rights and instrumentalism—occurs often. Our law tends to be most stable and least contested when such convergence occurs.

One area where the two kinds of policies would likely converge is in the giving of copyright in the first instance.<sup>30</sup> To extend the term of copyright from zero years to ten years, for instance, would greatly increase the incentives of authors, and simultaneously honor their ties to their work. And the resulting incentives would outweigh the monopoly restraints on access that copyright also brings. Therefore, both perspectives would give a "thumbs up" if the question were increasing a copyright term from zero years to ten. Increasing the term of copyright from ten years to, let's say, thirty years or fifty years might also gain support from instrumentalists, as well as authors' rights advocates.

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<sup>27</sup> See S.J. Liebowitz, *Copyright Law, Photocopying and Price Discrimination*, 8 RESEARCH IN LAW AND ECONOMICS 181-200 (1986).

<sup>28</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>29</sup> "The public good," he wrote, "fully coincides . . . with the claims of individuals." THE FEDERALIST NO. 43, at 309 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter MADISON]. Let us leave outside our scope whether Madison was correct in thinking that the common law would have given authors valid claims to control the copying of their published work.

<sup>30</sup> See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1365-66 (1989) (noting that a copyright grant and private property ownership both include the right to exclude others).

But when the question instead is extending copyright from life-of-the-author-plus fifty to life-of-the-author plus seventy, one would think that the authors' rights and instrumentalist approaches might pull away from each other. A simple view of authors' rights seems to say: All Power to the Poet—increase her copyright term as much as you can. By contrast, an instrumentalist is likely to doubt that incentives will be significantly enhanced by the extra twenty years of copyright term.

Under life plus fifty, our imaginary New York composer would have had eighty-nine years of copyright in her 1931 composition. Under something like the Bono Act's life plus seventy, she would have 109 years of copyright in the composition. Perhaps a sleepy author could be dragged to an early worktable by the thought of making his grandchildren better off.<sup>31</sup> But under the law prior to the Bono Act, that generation was already protected. Is the slugged author likely to stir any earlier at the thought of increasing the wealth of his grandchildren's grandchildren—or the great-great-grandchildren of the publisher to whom the copyright is assigned?

If not, an instrumentalist would oppose the extension. It provides twenty more years of making works expensive and difficult to access, without giving a compensating gain in incentives.<sup>32</sup> As Lord Macaulay said of a piece of legislation that would have increased copyright term to a length less than that granted by the Bono Act, "it leaves the advantages nearly what they are at present, and increases the disadvantages at least four fold."<sup>33</sup> Someone who believes the goal of law is the instrumental one of being "beneficial for mankind"<sup>34</sup> is thus highly unlikely to favor the extension.

So one would hardly expect convergence here. One might assume that persons flying an authors' rights flag would favor the Bono extension of copyright term, while those wearing instrumentalist colors would oppose it.

The theory of the various instrumentalist positions—at least those classified as economic or utilitarian—are fairly well under-

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<sup>31</sup> This example is adapted from the work of Thomas Macaulay. See Speech by Thomas Macaulay before the House of Commons (Feb. 5, 1841), in MACAULAY: PROSE AND POETRY 736 (Harvard Univ. Press 1967) (opposing a bill that would have extended the duration of copyright protection to life plus sixty) [hereinafter MACAULAY].

<sup>32</sup> See Liebowitz, *supra* note 27.

<sup>33</sup> MACAULAY, *supra* note 31, at 733.

<sup>34</sup> *Id.* at 732. The law of England at the time of Macaulay's speech gave copyright for the duration of the author's life or twenty-eight years, whichever was longer. The bill he opposed would have extended copyright to life of the author and sixty years. See *id.* at 731. Macaulay himself apparently favored copyright for life, or forty-two years, whichever was longer. See *id.*

stood. Still needed, however, is a deeper understanding of the authors' rights claim. Too often, such claims are presented as a sort of unreasoned impulse that leaves the important questions unanswered.

For example, we might all agree it is laudable to "reward authors." But how much reward is appropriate? For another example, some authors' rights advocates speak of "giving every cow its calf." But unlike calves and kids, a new intangible can have many mothers and look like none of them. So how should the cow-calf relationship be defined? Or sometimes authors' rights advocates take refuge in the notion that "reaping without sowing" is an evil that should be prohibited.<sup>35</sup> But to oppose "reaping without sowing" is profoundly antisocial. From Ben Kaplan<sup>36</sup> and John Dawson<sup>37</sup> back through time, students of society have realized that we all obtain benefits that we did not earn, simply by being born into human society. To *learn* is to reap more than we sow.<sup>38</sup> If we could not use the tools that make up our culture without the permission of the descendants of whoever initially created that culture, many bad results would follow. One result, I think, is that we would end up with a feeling that we do not really belong to the same community, which could have some bad effects for legitimacy, willingness to obey the law, and general civility. Reaping without sowing is hardly something that deserves broad condemnation.

Therefore, I will illustrate what I think to be the best form that an author's claim of right can take. Oddly enough, in the end, I find that authors' rights advocates should *condemn* the new extension. They should join the instrumentalists in opposing it.

There are many views of authors' rights. The most popular links authors' rights to the natural rights of property, as explicated in John Locke's second treatise.<sup>39</sup> Current thinkers, including myself, are not the only ones who find Locke congenial—so did the

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<sup>35</sup> The most famous secular statement of reaping and sowing appears in *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918) (upholding a right to sue for misappropriation of news). For a fuller discussion, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 149-66, 178-80 (1992).

<sup>36</sup> See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967).

<sup>37</sup> See John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974).

<sup>38</sup> As Justice Benjamin Kaplan noted, "if man has any 'natural' rights, not the least must be a right to imitate his fellows . . . '[P]rogress' . . . depends on generous indulgence of copying." KAPLAN, *supra* note 36, at 2.

<sup>39</sup> For discussion of the John Locke's natural rights theories, and their application to copyright law, see Wendy J. Gordon, *Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993). Throughout the course of her discussion of Lockean theories, Professor Gordon relies on JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287-88 (Peter Lassiter ed., 2d ed. 1967) (3d ed. 1698, corrected by Locke) (bk II).

Framers. John Locke was one of the most influential of the philosophers read by the group who wrote our Constitution—including the Copyright and Patent Clause.<sup>40</sup>

Locke's second treatise says that originally we all owned the earth in common.<sup>41</sup> He explains this common ownership by reference to God's gift and God's intent. For secular readers of today, the explanation lies in a belief in equality that was still questioned in Locke's time. In fact, fostering an increase in equality was integral to Locke's main goal.<sup>42</sup> he wrote in opposition to the divine right of kings.<sup>43</sup> Locke sought to justify a right to government that serves the *people's* interest by reference to this original common ownership of the earth. Therefore he posited that in a state of nature we would all be equally entitled to the fruits of the earth, whether they be fish in the sea or nuts and apples in the forest.<sup>44</sup>

Now, to understand how Locke's property theory fits with his theory of government, we need to recall the arguments of Sir Robert Filmer, another philosopher of the period. Filmer supported the divine right of kings.<sup>45</sup>

Filmer belittled the notion of common ownership. He argued that if everybody owned the earth the common, then no one person could ever take even a walnut from a walnut tree, without getting the consent of everyone else.<sup>46</sup> That would be an insuperable barrier to ever creating private property. Therefore, Filmer concluded that the only way for private property to come into being—this institution that we see all around us and which is so beneficial—was to have a king. A king does not have to create a consensus of the whole every time somebody gets hungry and wants to eat a walnut.<sup>47</sup> A king can declare who owns what.

Locke's response was that common ownership of property does not necessarily give every co-owner a right to be *consulted* whenever it is used.<sup>48</sup> Rather, all the co-owners have a right not to be *harmed* by its use.<sup>49</sup> Locke believed that if someone's private use

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<sup>40</sup> See Gordon, *supra* note 39, at 1539.

<sup>41</sup> See *id.* at 1542.

<sup>42</sup> This is not to say that Locke would support the kind of full equality (as between the genders) that we seek today.

<sup>43</sup> See Gordon, *supra* note 39, at 1542.

<sup>44</sup> See *id.*

<sup>45</sup> See generally SIR ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS* (Peter Laslett ed., 1949).

<sup>46</sup> See Gordon, *supra* note 39, at 1542.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* Locke was discussing a moral and theological view of what equal and common ownership would mean, rather than presenting the English common law rules.

<sup>49</sup> See *id.*

or consumption has not harmed strangers, the strangers' only interest in challenging it would come from motives not worth respecting, such as covetousness, envy, and laziness.

But if, by contrast, strangers are *harmed* by someone's taking a bite out of the common property for private property, then they have a legitimate right to complain. From this comes a fairly famous axiom of Locke's: The laborer owns whatever from the common he has intermixed with his labor, so long as "enough, and as good," is left for everyone else. Locke reasoned that if enough and as good is left, then there is no ground for complaint.<sup>50</sup>

This seems reasonable. If many of us are on a desert trek and running out of water, and one happens upon a small pool of fresh water, we would think that person acts wrongfully if he tries to exclude all the rest of us, or if, after filling his own water bottle, he uses the pool as a latrine so it becomes unsuitable for drinking. But if all of us find springs or pools of fresh water sufficient for our needs, we would not think any of us wrongful if we kept our own spring to ourselves, and used it for any purpose we desired. That rightful exclusive use is the key to what we call "property."<sup>51</sup> Thus, the "enough and as good" condition is crucial to Locke's justification of a natural right of property.

Imagine another example: An individual spends the day climbing trees in the forest to gather apples. By the end of the day she has a small heap of apples. Imagine further that upon completing her work, there are just as many good apples left on the trees for someone else to pick. Anyone who invests the same kind of labor can obtain just as many apples of equivalent quality—there is "enough and as good" left. Then a stranger comes along and takes the heap of apples that the laborer has already picked.

Unless the stranger has some physical disability that prevents him from picking his own fruit, it is clear the stranger is acting that way solely to take advantage of the laborer's pains.<sup>52</sup> If using the other gatherer's labor did not motivate him, he would have picked his own apples, which would have been equally good.<sup>53</sup> The stran-

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<sup>50</sup> See *id.* at 1544-48 (discussing the laborer's claims).

<sup>51</sup> Property includes more than a right of use. Typically it also includes, *inter alia*, a right to alienate and to bequeath. See A.M. Honore, *Ownership*, in *PROPERTY: CASES, CONCEPTS, CRITIQUES* 78, 85 (L.C. Becker & K. Kipnis eds., 1984). For discussion of property entitlements in the copyright context, see Gordon, *supra* note 30, at 1343-1469. However, it is usually agreed that Locke's theory grounds a right of use and consumption much more securely than it does other property entitlements, such as a right to alienate. The entitlement probably most questionable in the Lockean scheme is the right to transmit by inheritance.

<sup>52</sup> See Gordon, *supra* note 39, at 1545-46.

<sup>53</sup> See *id.*

ger is acting wrongfully to so favor his own interest over another's. He is using the other's labor as a means toward his own ends, violating the very tenets of equality.<sup>54</sup> He is *harming* the laborer by taking her labor, which is now inextricably tied to the apples that she gathered. Because he is acting wrongfully to take the laborer's pile, she has a right to exclude him from using the apples. She has a form of property in the apples.

Locke says the earth was given to us for the benefit of the industrious and rational, not for the benefit of those who are covetous.<sup>55</sup> What does it mean to covet in Lockean terms? I think it is something that we, in secular terms, can understand. It means to want what someone else has created; to choose one's self over the other who has invested his effort in it; to disregard that person's efforts and take the thing to one's self. If you want to use deontological language, it is a primary violation of the right of equal treatment.

The application of this theory to intellectual property is obvious. So obvious, in fact, that Locke has sometimes been misdescribed as if he himself created an explicit defense of intellectual property.<sup>56</sup> But, though that was not part of his project, applying Locke's property theory to the labor of the mind is intuitive and appealing: A creator takes something out of the common heritage—language, myth, artistic forms, ideas. With this she mixes something of her own: intellectual labor, artistry, taste, and judgment. The result is an intangible—a song, a story, a computer program—in which both common and individual elements are mixed. If, in taking from the common heritage, she left “enough and as good” there for others to use, she would seem entitled to exclude strangers from what she has made. Similarly, she would seem entitled to demand compensation as a price for their using it. If so, she has a justifiable form of “property.”

Thus the theory suggests that, once the laborer has mixed her labor with the common, she has a right to call on either God, other people in the community, civil society, or the government to keep strangers from this new thing she has made. That is her right. But for every right that a property owner has, there is a corresponding duty on others. So what about the rest of us? Do we have nothing

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<sup>54</sup> For a discussion of the links between “prohibitions on harming” and “equality,” see Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1741-85 (1993).

<sup>55</sup> See Gordon, *supra* note 39, at 1554 n.123.

<sup>56</sup> See EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 13 (1980).



but duties once the laborer has acted? Let me just try to make clear what the rights and duties of the public are.

We have, under this view of Locke's, no right to another's pains, except if we are in great need. Aside from those extreme situations, strangers owe us no duties to improve our lot. This is a norm quite unlike that of the pure economic or utilitarian perspective, which seems to say that all persons should be enlisted in creating the greatest net social product. The Lockean approach says "no" to such instrumentalism. The consuming public does not have a right to the biggest and best. The public's right is preserved in its ability to make use of the common heritage.<sup>57</sup> That entitlement is enshrined in the "enough and as good" principle, which prevents new property from forming if the assertion of property rights would leave the public worse off in its use of that heritage. The public also has a right to act toward the created object in ways that do not take the creative person's labor.

I want to suggest that if you take the Lockean perspective seriously, you end up not with an unlimited right, but rather, with a very limited one. The example of Mark Twain will suggest that an unlimited right is an impossibility if we are going to have a culture at all. Twain is sometimes referred to as an advocate of extreme and perpetual copyright. But really, he could not have been. After all, in writing *A Connecticut Yankee in King Arthur's Court*,<sup>58</sup> he borrowed from the many bards who had told King Arthur's tales in prior years. If Twain was going to be able to use images and stories that he learned through somebody else's efforts, and if he felt rightful in doing so, he must have had a conception of boundaries on those prior writers' initial rights. There are many such possible boundaries—perhaps ownership could subsist in expression and not ideas, or perhaps there could be some type of time limit on the ownership of expressions. But if there is to be more than one generation of author, *some* limitations on the claims of the initial generation are mandatory.

At the end of this talk I am going to suggest a conclusion that I defend at more length elsewhere:<sup>59</sup> that our current copyright law gives authors *more* than they would get under Lockean natural rights. Sometimes the assertion of United States copyright law leaves the public worse off than it otherwise would have been in its ability to use the preexisting heritage, and the law sometimes gives

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<sup>57</sup> See Gordon, *supra* note 39, at 1542.

<sup>58</sup> MARK TWAIN, *A CONNECTICUT YANKEE IN KING ARTHUR'S COURT* (Bantam Classic ed. 1981).

<sup>59</sup> See Gordon, *supra* note 39.

property rights far broader than are justified by the laborer's initial investment. Current copyright law gives *more* than a thoughtful authors' rights framework would justify.

It seems to me that there are at least three ways of handling that conclusion. First, if, in fact, current copyright law gives authors more than they would justifiably receive under natural rights, one response might be to amend the natural rights framework, or to junk it. A second response might be to amend copyright law, or junk *that*. A third response might be to investigate whether current copyright law gives back to the public—either in kind or in different form—benefits to compensate it for the losses it inflicts.

The latter is my favored option. I argue that copyright law is justifiable under a natural rights framework if it takes from the public only fungible, commensurable losses for which the law fully compensates in other ways. And I think that U.S. copyright law—at least until recently—did a fairly good job of providing such compensation, and *should* do so. In short, the authors' rights perspective ends up saying that the copyright statute must, to some extent, serve the public interest, which includes the interest of future creators, as well as the public.

This does not collapse the authors' rights and instrumentalist views together. For example, an author may deserve property rights, even if those rights do not lead to maximizing the sum of value in the world. All that is necessary under the Lockean approach is for the creative laborer to satisfy the "enough and as good" proviso; if she does, then she has a legitimate property claim to exclude other people from taking the labor she has invested. Yet, the nature of the proviso and the limited nature of the claim do involve our law in some give-and-take. For purposes of practical administration and otherwise, we grant copyrights a scope far beyond these limits. Something must be paid for the erosion of the public's rights.

The easiest and least costly way to serve that goal—to leave the individual creator unharmed and give benefit to the public—is to cut off ownership at a limited term, particularly when the cut-off occurs after the author's death. Anything beyond the author's lifetime stretches the notion of protected the laboring author herself—and that protection is the Lockean focus. Although no particular specification is possible, I think this is a perspective that is more on the *Eldred* side in opposing the Bono extension than it is on Professor Miller's side in favoring it.

That, then, is the structure of my argument: Under an authors' rights view, the creative person's investment of labor should

be protected, so long as she leaves “enough and as good.” Our law gives creative persons—and their employers and assigns—much more than that. It protects more than the investment of labor, and gives rights even where “enough and as good” may not be left. The public’s rights are thus eroded. As a result, the law owes something to the public. One of the best ways to partly pay this debt is to limit the copyright term.

What remains to be specified are some of the ways in which our current law gives more scope to copyright than the Lockean view would justify. Let me then end by giving you three examples of things that we do protect by copyright, which I do not think a Lockean would protect.

The first such candidate is the extreme right over derivative works.<sup>60</sup> Right now, a copyright owner can control any substantial use of his or her authorship, even if the second person is a creative individual who is doing something with the work that the original author never in a million years could have done themselves.<sup>61</sup> In that case, a derivative work author causes the creator no harm at all, interferes in no way with the creator’s initial plans, and may even give the creator new publicity and, therefore, new funds. There is no taking of the initial investment or interference with the creative person’s foreseeable range of goals. Nevertheless, current copyright law imposes liability on this person who—unlike the stranger who stole the apples—is causing no harm. There may be practical reasons for such a choice, but it nevertheless goes much further than a Lockean analysis would justify.

Second, it is not clear that natural law would go any further than giving property during the life of the author itself. Even the right of transfer during life might be questioned.

For a third set of examples, I will refer back to my imagined piece of music that was created in 1931. Recall the new composer who wants to use it one hundred years later to comment on a pe-

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<sup>60</sup> See 17 U.S.C. § 101 (1999) (defining a “derivative work” as a work “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, consideration, or any other form in which a work may be recast, transformed or adopted”); see also Julia Reytblat, Note, *Is Originality in Copyright A ‘Question of Law’ or a ‘Question of Fact’? The Fact Solution*, 17 CARDOZO ARTS & ENT. L.J. 181, 189 (1999) (noting that a “derivative work” is anything that takes a preexisting copyrightable work, regardless of whether this work was in the public domain, and “recasts,” “transforms,” or “adopts” it in some way, and that the copyright in a derivative work extends only to the original author’s contributions and does not effect the copyright or the public domain status of the preexisting work).

<sup>61</sup> See 17 U.S.C. § 106 (providing that only a copyright owner can authorize a derivative work); *id.* §§ 501-506, 509 (listing remedies for copyright infringement); see also *id.* § 103(b) (providing that copyright in derivative works does not extend any copyright in the preexisting material).

riod of economic tumult in her own life. She really has no substitute for the associations the music brings. She is not like the covetous stranger who uses the fruit of another's labor simply to save himself effort. She has a goal that can be defined independently from the saving of effort. If so, this user of the 1931 song is outside the class of persons whom Locke wished to restrain. In addition, her derivative work may be outside of the class of activities that would constitute an erosion of the original composer's investment.

The same may be true of a person who wants to collect twentieth-century songs for a history volume. Furthermore, enforcing copyright against this music historian might violate the proviso of leaving "enough, and as good." A historian in the state of nature had a freedom that copyright law will not allow to today's historian.

Describing our surroundings through art is one of the ways we navigate that described world. In virtually any view of human nature, making our own art or having access to others' art is essential for emotional and cognitive flourishing. So, when a historian uses others' images or sounds not simply to save himself labor, but because he and his audience need to understand the past to better navigate the present, he is not violating the tenets of equality. He is not like Locke's covetous stranger. If we borrow another's image, not to use it for its original purpose, but rather, because we need to describe our world accurately, the Lockean approach would not forbid us. Yet copyright today does so forbid us.

Moreover, in the state of nature, we could create art that described our surroundings. But when we need to describe the world around us today, we cannot be accurate if all we describe is natural woods and water. Rather, most of us seeking to represent our environment would describe created architecture, manmade sounds, and cultural symbols. If we are to have "enough, and as good," we must continue to have the freedom to use our surroundings in our own art. Yet the copyright courts forbid such uses.

There are many plausible reasons why copyright law draws the lines here. Most notably, if the uses I describe were permitted, it could be administratively quite difficult to distinguish good-faith users from the commercially-motivated covetous strangers, who might disguise their pure parasitism under a cloak of independent artistic goals. Similarly, if unforeseen derivative uses were free of copyright restraint, determining foreseeability could embroil the courts in complex investigations into inherently uncertain counterfactuals. But though practical reasons may explain the grant of copyright in ways that erodes the public's entitlement, that erosion

still requires compensation. A reasonably short copyright term is one way to make such repayment.

### ARTHUR R. MILLER

I stand before you as the troglodyte on the panel and, in terms of those who oppose the term extension, I guess I stand before you as the unconstitutional lawyer. I'm reminded as I listen to the speakers today of the almost-Justice Robert Bork, and how he believed in following the original intent of the Framers.<sup>62</sup> Ultimately, Bork may have failed to gain a seat on the United States Supreme Court because he believed too fervently in original intent.<sup>63</sup> What I have heard here is that not only should we stick with original intent and find out what the Framers thought, but that we really should determine what the Framers' favorite philosopher thought because that is original intent.

Now, look at the Copyright Clause. To paraphrase, the Clause says that Congress shall have the power to promote the progress of science and the useful arts by granting to authors and inventors limited time monopolies.<sup>64</sup> Notice the words, "Congress shall have the power." *Congress* shall have the power. Not courts. Congress. The Congress is empowered to grant limited time monopolies.<sup>65</sup> Limited times. The Clause does not say limited fixed times; it does not say limited times coextensive with the life of a human being. It says limited times. Congress shall have the power to promote the progress of science and the useful arts by creating limited time monopolies.

When the founding fathers got together and wrote that in Philadelphia, it was against the background of common law copyright in the colonies. Common law copyright was perpetual.<sup>66</sup> So when the Framers wrote the words "for limited times," one might argue, to the undying hisses and boos of human kind—at least,

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<sup>62</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: POLITICAL SEDUCTION OF THE LAW* (1990); see also Robert H. Bork, *Technological Innovation & Legal Tradition: Enduring Principles for Changing Times* 4 TEX. REV. L. & POL'Y 1 (1999).

<sup>63</sup> See Linda Greenhouse, *Bork's Nomination is Rejected 58-42: Reagan 'Saddened,'* N.Y. TIMES, Oct. 24, 1987, at A1.

<sup>64</sup> See U.S. CONST. art. I, sec. 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

<sup>65</sup> See *id.*; see generally *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Bleistein v. Donaldson Lithographics Co.*, 188 U.S. 239 (1903); *Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>66</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834) (holding that the Copyright Act replaces perpetual common law copyright and that an author may not have a perpetual and exclusive property in the future publication of the work, once the author shall have published it to the world).

according to some—that “limited times” meant something short of perpetual because Congress was not empowered by the Copyright Clause to replicate the common law system of perpetual copyright. In point of fact, parts of American statutory copyright law remained perpetual until 1976/1978, when the base law that we currently function under was enacted.<sup>67</sup> Until then, if you wrote something and did not publish it, you maintained a common law perpetual copyright.<sup>68</sup>

Under doctrines we now giggle at, but which were dominant in the nineteenth century and through the first half of the twentieth century, this notion of unpublished perpetual copyright embraced such art forms as music, theater, speech, and perhaps phonograph records—because, under the doctrine, phonographic records did not produce copies.<sup>69</sup> Because they did not produce copies, they were not published.<sup>70</sup> And because they were not published, they enjoyed perpetual protection.<sup>71</sup> Now along came the 1976/1978 Copyright Act, which wiped that out, marked time from creation, and gave protection for life plus fifty years, which has now

<sup>67</sup> The 1976 Copyright Act provided:

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the terms provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

17 U.S.C. § 303(a) (1976) (before being amended by the Sonny Bono Copyright Term Extension Act).

<sup>68</sup> The 1909 Copyright Act provided: “[N]othing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.” Act of March 4, 1909, ch. 320, § 2, 35 Stat. 1075, 1090 (1909).

<sup>69</sup> The older statute provided that copyright could be claimed in the following classes of work:

- Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
- Periodicals, including newspapers.
- Lectures, sermons, addresses (prepared for oral delivery).
- Dramatic or dramatico-musical compositions.
- Musical compositions.
- Maps.
- Works of art; models, or designs for works of art.
- Reproductions of a work of art.
- Drawings or plastic works of a scientific or technical character.
- Photographs.
- Prints and pictorial illustrations including prints or labels used for articles of merchandise.

*Id.* § 5; *see also id.* § 1(e) (“The provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only composition published and copyrighted after this work goes into effect.”).

<sup>70</sup> *See id.*

<sup>71</sup> *See supra* note 68.

become life plus seventy.<sup>72</sup>

There has, indeed, been increasingly frenetic legislative activity in the copyright field. Copyright was not a major intellectual interest in this country among lawmakers until the modern communications and mass media and multimedia developments occurred. That is why Congress did not legislate much on copyright after 1790. Copyright hit the books again in 1831;<sup>73</sup> then Congress basically ignored it until in 1909.<sup>74</sup> Then it lay quiet until 1976. Now, it is the cat's meow, because so much of modern life turns on information, communication, and expression. Congress has gotten hyperactive about copyright, and has adjusted the term, in part, to take account of such things as the abolition of perpetual common law copyright, the increased longevity of people, and the fact that the United States has been a laggard in the world community in terms of duration.<sup>75</sup> Over the vast expanse of our history, we have—by and large, as judged by global standards—under-protected authors in terms of duration. We were catching up in 1909, catching up in 1976, and catching up in 1999 with the Sonny Bono Copyright Term Extension Act.<sup>76</sup> The notion that somehow we are a bunch of primitives running loose in the forest, granting incredibly long monopolies while the rest of the civilized world is awarding two-week monopolies, turns the world and history on its head.

The folks that brought the *Eldred* case view the constitutional Clause as having one function. The function of the Clause, according to the *Eldred* folk, is that it must create an incentive for an author to produce the next work. And we know Hawthorne is dead. And even Sonny Bono won't get much more out of him. And we know Locke is dead, so copyright protection won't incentivize him. But that is not what the Clause says. The Clause says, "to promote the progress of science and the useful arts." The Clause does not say, "to create an economic incentive to produce the next work." The Clause gives Congress the power, in its infinite wisdom, to de-

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<sup>72</sup> See 17 U.S.C. § 302 (1999) (as amended by the Sonny Bono Copyright Term Extension Act).

<sup>73</sup> See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831).

<sup>74</sup> See Act of March 4, 1909, ch. 320, § 23.

<sup>75</sup> A great number of European countries had in fact implemented a life plus fifty standard years before the United States. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), 828 U.N.T.S. 221 [hereinafter BERNE CONVENTION] (establishing a basic term of life of the author plus 50 years). The United States joined the Berne Convention in 1989. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter BERNE IMPLEMENTATION ACT] (establishing United States compliance with the Berne Convention, and thus, extending term of copyright to life plus 50).

<sup>76</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

cide how to promote the progress of science and the useful arts by giving creators limited time monopolies.<sup>77</sup> It has not been the history of American copyright law to accept the notion that copyright is unavailable unless one can demonstrate that the particular awarding of a particular copyright to a particular author promotes the progress of the sciences or the useful arts. Rather, American copyright law looks holistically at what Congress has done. In other words: Is there a legitimate legislative purpose for a Congressional determination as to duration that a court can say is rational? It is not for courts to substitute their judgment for Congress's judgment once Congress has passed that low threshold of rationality. It is not for courts to say, "Life plus seventy, no." A court cannot say, "I will buy life plus sixty-two and six months, but not life plus seventy." That is not what courts are in business to do. Courts are not super-legislatures.

Thus, the question is: Did the sadness over Sonny Bono's death so blind the Congress of the United States that they did a totally irrational and unjustifiable thing? That is, I submit, the question we should ask the judge who will hear the *Eldred* case.<sup>78</sup> What one should do is take a look at the legislative history of the Sonny Bono Copyright Term Extension Act and see what it was that Congress did.<sup>79</sup> Mr. Eldred, in an interview at the *Boston Globe*, said, in effect, that no one ever said anything and that there was no legislative history.<sup>80</sup> He created that false image. That is not true. There was legislative history.<sup>81</sup>

So, why did Congress add in the extra twenty years? It is very fashionable to say that the Robber Barons told them to do it. Now, even though most of this audience is in law school and we have a bunch of academics on this panel, none of us would want to know how laws are made—or, for that matter, how sausage is made. There is a reality there. Yes, there was lobbying and yes, certain people are going to get rich on this extension. But that is life. Some of the people who will get rich are authors—but they are also people. They are citizens, and they have the right to lobby for protection.

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<sup>77</sup> See U.S. CONST. art. I, sec. 8, cl. 8.

<sup>78</sup> See overview of the judicial actions in the *Eldred* case since the date of this symposium, *supra* note 8.

<sup>79</sup> See *infra* notes 82, 88, 92, 93 and accompanying text.

<sup>80</sup> See Daren Fonda, *Copyright Crusader; Eric Eldred Says the Latest Copyright Law Goes Too Far, Keeping Thousands of Creations Out of the Public Domain. Now, the New Hampshire Book Lover Has Some High-Powered Legal Allies*, BOSTON GLOBE, Aug. 29, 1999, Magazine, at 12.

<sup>81</sup> See, e.g., *The Copyright Term Extension Act of 1995: Hearing Before the Committee on the Judiciary of the United States Senate*, 104th Cong. 4 (1995) [hereinafter SENATE TERM EXTENSION HEARING].



Reason number one found in the legislative history is harmonization.<sup>82</sup> Harmonization can be explained as the movement towards a worldwide understanding about copyrights and their protection. The United States was an outlying country until 1989.<sup>83</sup> We were the only major country that, for a century, did not join the world community of copyright. We did join in 1989. Throughout most of our history, however, as I have said before, we lagged behind with regard to the length of the copyright term. Indeed, with regard to the 1909 Act, even though the Europeans had gone to life plus fifty, we only went to twenty-eight plus twenty-eight.<sup>84</sup> People in Congress worried that America, the great leader, was a laggard in terms of intellectual protection and that we were totally out of synch with the world community. We started to get into synch with the world community with the 1976 statute.<sup>85</sup> We continued that process when we joined Berne in 1989.<sup>86</sup>

During the legislative process, Congress found out that the world community was going to life plus seventy.<sup>87</sup> The Register of Copyrights testified that there is now a global market place for copyrighted works, and it would facilitate America's involvement in the global market place if we harmonized our law with that of other copyright-protecting nations.<sup>88</sup> It also is true that when Europe went to life plus seventy, they adopted what is called the "rule of the shorter term." This meant that, for example, if France gave its people life plus seventy, and an American copyright wandered into Paris—remember, intellectual property is our number one export, so you can not think about this without also thinking about

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<sup>82</sup> See, e.g., H.R. REP. NO. 105-452, at 4 (1998) (statement of the Committee of the Judiciary) (noting that, upon enactment of this extension, "U.S. works will generally be protected for the same amount of time as works created by the European Union Authors; therefore, the United States will ensure that profits generated from the sale of U.S. Intellectual Property abroad will come back to the United States"); see also SENATE TERM EXTENSION HEARING, *supra* note 81 (statement of Sen. Feinstein) (noting that "perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms"); Arthur R. Miller, *Copyright Term Extension: Boon for the American Creators and the American Economy*, 45 J. COPYRIGHT SOC'Y 319, 325-26 (1997).

<sup>83</sup> See BERNE CONVENTION IMPLEMENTATION ACT, *supra* note 75.

<sup>84</sup> See S. REP. NO. 59-6187, at 6-7 (1907) and H.R. REP. NO. 59-7083, at 13-14 (1907), reprinted in 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & Abe Goldman eds., 1976).

<sup>85</sup> See 17 U.S.C. § 302 (1976) (before being amended by the Sonny Bono Copyright Term Extension Act).

<sup>86</sup> See BERNE IMPLEMENTATION ACT, *supra* note 75.

<sup>87</sup> See Council Directive 93/98, 1993 O.J. (L. 290/0) (establishing a new copyright term of life of the author plus seventy years for members of the European Union).

<sup>88</sup> See SENATE TERM EXTENSION HEARING, *supra* note 81, at 7 (statement of Marybeth Peters) (noting that the importance of international harmonization of copyright laws is enhanced by the "expulsion of the global information infrastructure," which means that "[c]opyrighted works now may be transmitted, virtually instantly, almost anywhere in the world"); Miller, *supra* note 82, at 325-26.

trade policy—it would not get life plus seventy the way a French copyright would get life plus seventy.<sup>89</sup> It would only get life plus fifty, because that is all the protection that United States copyright law provided.<sup>90</sup> The law of the shorter term would, therefore, emasculate the American copyright twenty years before the French copyright, thus depriving the royalty flow not only into the author's pocket or the copyright exporter's pocket, but into the American economy's pocket. So, harmonization was a major motivating factor for Congress. I also submit to you that harmonization with the international copyright community in the Internet world—remember that those little messages you type on that machine can be picked up anywhere in the world—is equally imperative. We must simplify our ability to transact internationally, and harmonization promotes simplification of the purchasing and selling of copyrighted works. That is a legitimate Congressional policy that promotes the progress of science and the useful arts, because it promotes dissemination, it promotes economic reward, and it promotes the ability to transact on a global scale.

Second, look to the scope of copyrights in 1790—maps, books, and charts? Roll your minds back to 1790. Do you know how limited the universe of communication was in 1790? Or the universe of expressing yourself in 1790? Of course American copyright law has broadened substantially in the two centuries since 1790. I wish I were alive at Antietam during the Civil War to watch Matthew Brady take photographs and listen to the nineteenth-century Eldreds say, "My God, my God, the sky is falling. Copyright will never be the same. Now every human being with a Kodak Brownie can take a photograph and it will be copyrighted and subjected to governmental regulation, and it will eviscerate our freedom."<sup>91</sup> Now

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<sup>89</sup> The relevant directive provides:

Where the country of an origin or work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire at the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in this directive.

Council Directive 93/98, 1993 O.J. (L. 290/0), at art. 7, para. 1; *see also* Miller, *supra* note 82, at 325 (noting that United States copyright owners of works used in Europe could benefit from the European term extension only if the term of the United States copyrights were similarly adjusted; otherwise, under the so-called "rule of the shorter term," United States copyrights would not be protected in Europe past the expiration of the shorter United States term).

<sup>90</sup> *See* 17 U.S.C. § 302 (1976) (before being amended by the Sonny Bono Copyright Term Extension Act).

<sup>91</sup> *See id.* § 102(a)(5) (protecting "pictorial, graphic and sculptural works"); *see also id.* § 102(a) (noting that photographs are still subject to the originality requirement); *id.* § 102(b) (noting that photographs are still subject to the idea vs. expression requirement); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (holding that it was within

there was nobody at Antietam as smart as the people making the arguments in the *Eldred* case today. If there were, that argument would have been made about the photograph, it would have been made about radio, it would have been made about the motion picture. It would have been made about the phonograph record. It would have been made about television. It would have been made about the computer. And today, of course, it is made about the Internet.

In addition to the extraordinary growth in communicative media, modes of expression, and ways in which we exercise this free speech, has come the realization that we no longer stand on the corner and cry the news to passing folk as we did in 1790. And this is not the world of Thomas Payne when we handed out little leaflets. We have enormous industries that invest millions of dollars into works of expression—from books to phonograph records, television shows, motion pictures, and Internet systems. That is the way we disseminate copyrighted works, and thank goodness—because that enables us to disseminate not simply on Fifth Avenue and Forty-Second Street, but to the four corners of the globe through the Internet. That takes money. It takes capital.

You must attract capital into the copyright industries or you will not achieve the purposes of the Copyright Clause. You must attract capital by making sure that those industries can have a rate of return. It is not simply Hawthorne sitting at his desk with a quill. We have to provide incentives for a whole raft of people and industries to invest capital in order to promote the progress of science and the useful arts. That was the second reason Congress gave for moving American copyright law to what it believed would be the forefront of copyright policy making, and there is a legislative finding on this issue.<sup>92</sup> Congress believed the United States was going to become, and had already in part become, the global standard.<sup>93</sup>

You also have to provide incentives for people to preserve works that are at risk of destruction. You have to provide incentives for people to make those evil derivative works that Wendy Gordon spoke about. It is not evil that when Margaret Mitchell writes *Gone With the Wind*, she has a monopoly. How are you going to get MGM

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Congress' power under the Intellectual Property Clause to grant a copyright in a photograph . . .").

<sup>92</sup> "[T]he primary purpose of a proprietary interest in copyrighted works that is descendible . . . is to form a strong creative incentive for the advancement of knowledge and culture in the United States." S. REP. NO. 104-315, at 12 (1996) (statement of the Committee of the Judiciary).

<sup>93</sup> See discussion of world harmonization as one of Congress's rationales for the Sonny Bono Copyright Term Extension Act, *supra* note 82.

to make the movie without enabling Mitchell to transfer part of her copyright to MGM? You cannot expect MGM to invest ten million—or today one hundred million—dollars into translating a book into a motion picture without assuring MGM that it can get a rate of return on that investment. You have to provide incentives for a tremendous array of people. You have to provide incentives for them to make the original investment in the work—to publish the book. Then you have to provide incentives for them again to produce the derivatives, the motion picture, the TV series, the documentary, whatever it may be—perhaps even a musical! Do you think when they made *West Side Story*, that they did not want a copyright in it? I cannot believe anyone is that naïve. So, it is a very important policy. We must incentivize the dissemination industries, the preservation industries, and the derivative work industries. It is not just Hawthorne sitting at the desk with a quill. It is everybody who is going to take Hawthorne's work and magnify it and project it to the rest of the world in a multimedia environment so we can all enjoy it—whether we speak English or Swahili, whether we are visual people or oral people. That is the way copyright will promote the progress of science and the useful arts.

Third, Hawthorne is dead. I feel badly about it, very badly. However, the notion that there is something in the Clause that prevents Congress from developing a term that exceeds the life of the author is bizarre. From the 1790 Act to this day, the Congress of the United States, including those characters in the first Congress who were also the draftspeople of the Constitution—and who the United States Supreme Court says we should give great deference to in interpreting the Constitution (because they were the same cast, by and large)—has taken the position that it is good public policy to provide intergenerational incentives. I have children. I have grandchildren. It certainly is important to me that my productivity provides something for them. That has been United States policy from the first Copyright Act to the current Copyright Act. There was considerable testimony before Congress on the Sonny Bono Copyright Term Extension Act that the term extension was important to those who create.<sup>94</sup> Now, who knows—in the

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<sup>94</sup> One example of such testimony is the following:

Based on the numerous viewpoints presented to the Committee as it has considered these issues, the Committee concludes that the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation. The Committee believes that this general anticipation of familial benefit is consistent with both the role of copyrights in promoting creativity and the constitutionally-based constraint that such rights be considered for 'limited-times.'

Olympian or public policy sense, maybe I should be working at McDonald's. Maybe I would be more socially useful at McDonald's than writing the neuralgic and technical stuff that I write. But that is not a judgment a court makes. It is a judgment that Congress has made—by providing intergenerational incentives, you promote the progress of science and the useful arts.<sup>95</sup>

That leads to the fourth point. Obviously, what I wrote yesterday was not affected or promoted by a copyright extension enacted today or tomorrow. But two facts should be noted. First, creators of works of expression have longevity. If you provide the proper incentives today, it will not enhance my productivity in the past, but it may promote my productivity in the future. In other words, I may stay and continue to write or do my scholarly thing today because, yesterday, Congress enacted a statute that enhances my reward. Second, since 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today.<sup>96</sup> That has always been a rule of equity that Congress has followed since 1790.

Whether you look at the Act as purely prospective, or partially retrospective, because the twenty years of additional protection goes to existing works, there are good and valid Congressional judgments that have been made about these twenty years that have been tacked on to the copyright statute. As to the First Amendment argument, it is interesting. I will leave that by and large to Professor Ginsburg. The notion that copyright, *ipsi dixit, ipso facto*, suppresses speech, however, boggles my mind. Anyone can take my speech, take my ideas, and make fair use of it. Indeed, that is what the United States Supreme Court said in *Harper & Row v. Nation Enterprises*.<sup>97</sup> That is the critical balancing point. Anyone can do that—I just ask that they don't steal my expression. They

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S. REP. NO. 104-315, at 10 (1996) (statement of the Committee of the Judiciary); *see also* SENATE TERM EXTENSION HEARING, *supra* note 81, at 44 (statement of songwriter Alan Menken) (testifying that there comes a point in most people's lives when one must make a practical decision about the choice of a career, and that the continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor, and that if it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.").

<sup>95</sup> *See supra* note 92.

<sup>96</sup> *See* Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 (1831); Act of March 4, 1909, ch. 320, § 23, 24, 35 Stat. 1075, 1090 (1909); 17 U.S.C. §§ 302, 303, 304.

<sup>97</sup> 471 U.S. 539, 592 (1985) (noting that "the fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption").

can use my ideas; but if they take my expression, please just give me a kopek or two.

I had a wonderful experience earlier tonight walking through the building, when a couple of people recognized me from who knows where—some post office undoubtedly, or perhaps it was from television. They both said what has become almost humorous to me. Wherever I go people say, “Thanks for the audiotapes! They got me through Civil Procedure.” And so I asked these two people, “Scout’s honor, did you buy the tapes or did you illicitly duplicate the tapes?” I won one and I lost the other. Now, call me a meretricious, unconstitutional, speech-suppressing person, but I think it is people like me—those who produce works of expression—who have made American intellectual life worth living. Most assuredly, I am more likely to produce updated Civil Procedure tapes if the copyright on them continues and is honored.

### JANE GINSBURG

I feel I am here under false pretenses, because I do not know anything about constitutional law. I think I know something about copyright law, though. I would like first, since we are all acknowledging where we came from, to note that this is a kind of old-home evening for me, since I learned copyright law from Arthur Miller. As Professor Patry indicated, I was a young associate in a law firm when Bill came by because he had recently discovered copyright law through a correspondence with Alan Latman. Around the same time, Wendy Gordon came by, since she was taking a leave from academia to wallow in practice for a bit. So there we all were being junior people in copyright.

More importantly, I got my start teaching copyright law here at Cardozo Law School. When I was still in practice, I was an adjunct on this law faculty. As a result, I always have a soft spot for the school and for the wonderful experience I had to begin teaching copyright law here.

If, as Professor Patry has advertised, I am supposed to be the soul of reason here, I think I would like to break this up into three general propositions. First, I cannot resist giving my take on the history of copyright law. Second, I would like to explain why I think term extension was a bad idea, but, third, why it is nonetheless not unconstitutional.

The policies underlying U.S. copyright law, have vacillated between a natural rights view of copyright—although perhaps not quite the same view as Professor Gordon expressed, but a strong

property-urged view of copyright law nonetheless—and a more instrumentalist, incentive view. Both views are present in the constitutional Copyright Clause. “To promote the Progress of Science and useful Arts”<sup>98</sup> could be considered to be an instrumental objective. But Congress has also said “by securing for limited Times to Authors.”<sup>99</sup> I do not understand the term “by securing” to mean to grant something that wasn’t there before, but rather, to reinforce a pre-existing right. Indeed, that pre-existing right was acknowledged by Madison’s justification for the Copyright Clause in *Federalist* 43,<sup>100</sup> when—referring not to *Donaldson v. Beckett*<sup>101</sup> but to *Millar v. Taylor*<sup>102</sup>—Madison said that copyright had been adjudged in England as a right at common law.<sup>103</sup> It is true that *Donaldson v. Beckett* had, I think, already been decided when Madison made this declaration, but it seems that the news did not make it across the Atlantic by the time that Madison wrote his contribution to the *Federalist* papers. Thus, he was referring to the other traditional view of copyright law.

Nonetheless, I think it is also fair to say that the first copyright statute expresses an incentive rationale more than does the constitutional Copyright Clause. The statute identified three kinds of works to protect.<sup>104</sup> The works selected—maps, charts, and books—did not express the entire universe of creativity in the United States at the time. But they did express the kind of creativity for which the U.S. government sought to provide an incentive, particularly maps and marine charts for a largely unmapped new Republic. There was, I think, a definite cultural policy behind the 1790 Copyright Act.

There was a third strain of U.S. copyright law: for the first 100 years or so of our existence, we were a pirate nation. We lived happily by copying other nations’ literary works, particularly England’s. One reason that we did not have particularly strong copyright laws until relatively late in the game was that we thought the balance of economics favored piracy over protection. When the balance shifted, as Arthur Miller indicated, we changed from

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<sup>98</sup> U.S. CONST. art. 1, sec. 8, cl. 8.

<sup>99</sup> *Id.*

<sup>100</sup> See MADISON, *supra* note 29.

<sup>101</sup> 98 Eng. Rep. 257 (H.L. 1774) (holding that, regardless of common law, publication of work terminated any perpetual right an author may have, limiting the author to the protection to be granted by statutes).

<sup>102</sup> 98 Eng. Rep. 201 (K.B. 1769) (holding that authors held a perpetual common-law property right in their works, despite the existence of the Statute of Anne, which arguably codified any rights an author had in a work).

<sup>103</sup> See MADISON, *supra* note 29.

<sup>104</sup> See Act of May 31, 1790, § 1, 1 Stat. 124 (1790) (protecting maps, books, and charts).

being a pirate nation to a major copyright-producing nation. We then increased the scope of copyright protection, as well as its duration. The current frenzy in copyright legislation is surely related to the displacement by copyrighted works and other forms of intellectual property of a great deal of the other sorts of things we used to export.

Finally, in this overall picture, I think it is necessary to acknowledge that the international copyright system is based not only on Anglo-American ideas, but also on civilian ideas about copyright law, which are, perhaps, somewhat more property-oriented and humanistically-oriented. The incentive strain is somewhat muted on the other side of the Channel. Those tendencies in copyright law have shaped the major international convention, the Berne Convention, which enunciated the life plus fifty standard for duration.<sup>105</sup> Slowly, we found it in our best interest to join the community of copyright-protecting nations. The standards of the Berne Convention influenced the revision of the copyright law in 1976, so that, ultimately, we were able to join the Berne Convention belatedly in 1989.<sup>106</sup> (Belatedly, because the Berne Convention was first promulgated in 1886.) Those civilian ideas, perhaps alien to some of the Anglo-American tradition, have also permeated our copyright law as the years have gone by.

Arthur Miller helpfully reminded us that the federal copyright law did not, until 1978 (the effective date of the 1976 Act), define the entire landscape either of creativity or of economic value in the world of copyright, and that common law copyright, which covered unpublished works, in fact protected a very large zone of significant economic activity. The perpetual character of common law copyright certainly led to a lot of anomalies. One such anomaly was motion pictures, which, although viewed by millions of people, had not been distributed in copies and, thus, were technically unpublished. The 1976 Act therefore played a major role in harmonizing and, to some extent, curtailing the duration of copyright, at least with respect to that deceptively large class of unpublished works formerly protected by common law copyright.<sup>107</sup> Let us now turn to the matter at hand: The Sonny Bono Copyright Term Extension Act.<sup>108</sup>

The year of 1998 produced the pompously-named Digital Mil-

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<sup>105</sup> See THE BERNE CONVENTION, *supra* note 75, at art. 7(1).

<sup>106</sup> See THE BERNE IMPLEMENTATION ACT, *supra* note 75.

<sup>107</sup> See 17 U.S.C. §§ 104(a), 302 (regarding unpublished works).

<sup>108</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).



lennium Copyright Act,<sup>109</sup> and the absurdly-named Sonny Bono Copyright Term Extension Act. I think that term extension was not a good idea. One can justify, or can attempt to justify, term extension on two bases. One is a copyright rationale and the other is an international trade rationale. I think Arthur Miller has given the international trade rationale quite effectively, so I address that argument only briefly. Moreover, that argument is the more persuasive of the two.

I think that the copyright rationale is a little harder to sustain. On the incentive question, it is difficult to demonstrate that term extension could provide an incentive for works that have already been created. Moreover, the incentive to create present works or future works is probably too attenuated to make a big difference, at least from the point of view of the author. From the point of view of the investor, it can, indeed, make a difference. To the extent that the work-for-hire doctrine defines the landscape of American copyright, I think that there is something to say for the incentive argument.

Since, however, I am not a fan of the work-for-hire doctrine,<sup>110</sup> and I think that the Constitution does say "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times *to Authors*," not to assignees, the "exclusive Right to their respective Writings,"<sup>111</sup> I think that one should look at what term extension does for authors. In the previous term extension instituted by the 1976 Copyright Act, Congress provided that, for new works, the term would be the life of the author plus fifty years,<sup>112</sup> thus aligning us with the world's standard.<sup>113</sup> Congress then harmonized the copyright term of works that had first been published under the 1909 Act, which had been protected for a term of twenty-eight years, renewable for another twenty-eight,

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<sup>109</sup> The Digital Millennium Copyright Act, Pub. L. No. 101-305, 112 Stat. 2860 (1998) (adding provisions concerning circumvention of technological measures, protection of access to copyrighted works and rights of copyright owners, and limitation of liability of on-line service providers).

<sup>110</sup> A work made for hire is:

a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work should not be considered a work made for hire.

17 U.S.C. § 101 (1999 & 2000 Supp.)

<sup>111</sup> U.S. CONST. art. 1, sec. 8, cl. 8 (emphasis added).

<sup>112</sup> See 17 U.S.C. § 302 (1976) (before being amended by the Sonny Bono Copyright Term Extension Act).

<sup>113</sup> See THE BERNE CONVENTION, *supra* note 75, at art. 7(1).

for a total of fifty-six.<sup>114</sup> Calculating that life plus fifty usually averages out to seventy-five years of protection, Congress added nineteen years to 1909 Act works so that they would be more or less coterminous with new Act works.

This concept of bringing old acts along was not unique to the 1976 Act. But the question then arose: Who gets the benefit of the extra nineteen years? Is it the author, the publisher-grantee? Congress split the difference by giving the authors, or their heirs, a termination right—the right to get their rights back from the transferees, despite their grant during the previous term of copyright.<sup>115</sup> One might therefore contend that the 1976 term extension went to authors in that, at least, it gave authors the chance to retrieve those rights.

The current term extension, however, does not contain a feature at least as author-friendly as the previous term extension. This term extension provides that the benefit of the extra twenty years goes to the assignee, unless the author failed to effect the 1976 Act extended renewal termination within the time allotted by the Copyright Act.<sup>116</sup> The nineteen-year extended renewal termination was a “use it or lose it” proposition. If the author did not use it, or did not use it properly, then her assignee kept the extra nineteen years. So if the author (or her heirs) failed at that bite of the apple, she got another chance with the Sonny Bono Act’s new twenty-year provision.

If, however, the author did properly effectuate the 1976 Act termination to retrieve the nineteen-year extension, then she did not get the next extension’s twenty years.<sup>117</sup> I think that this is inconsistent with the constitutional directive that the exclusive right go “to authors,” because it means that if the author properly terminated at the end of the fifty-six years and renegotiated a new nineteen-year contract with the grantee, the grantee now finds him or herself with thirty-nine years of exclusive rights for the price of nineteen. This, to me, does not seem consistent with the idea that the benefits of the term extension or the benefits of copyright in general should go to authors. So, I do not think that there was a strong justification for the term extension as a matter of copyright

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<sup>114</sup> See Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1090 (1909) (granting an initial copyright period of twenty-eight years and extending the renewal term to twenty-eight years).

<sup>115</sup> See *id.*

<sup>116</sup> See 17 U.S.C. § 304(c) (1999) (as amended by the Sonny Bono Copyright Term Extension Act).

<sup>117</sup> See *id.*

logic. However, I do think that as a matter of international trade logic, there was a pretty strong justification.

Europe imports a lot of our works. That is a significant balance of trade advantage for us. But without a U.S. term extension, we would not get the full benefit of the European Union's term extension, because the European Union added a reciprocity clause to its directive on duration.<sup>118</sup> I realize the whole world is not Europe. Japan and many other economically significant nations have not gone to life plus seventy,<sup>119</sup> but the European market, I think, is very significant and is the only potentially persuasive justification for term extension. Term extension was nonetheless a bad idea, even if justified on international trade grounds. What concerns me is that there is a lot of grumbling about copyright in general today: many complain that copyright is an unpleasant form of regulation of speech. It sometimes seems as if everybody today is in the business of recirculating other people's speech. As a result, an argument can be made that copyright is interfering with our democratic way of life—therefore, we should re-think everything about the copyright system.

I think the pressures to re-think everything are certainly strong. In fact, I think that one can, in U.S. copyright's relatively recent history, find that a similar argument prevailed. The example is the Sony Betamax case.<sup>120</sup> The video tape recorder was alleged to be a copyright infringement machine, and a lawsuit was brought against the manufacturers and distributors of what was then the Betamax.<sup>121</sup> The Supreme Court took an unusually long time to decide the case.<sup>122</sup> By the time the decision issued, what had initially been about 20,000 video tape recorders distributed in the United States at the time of initiation of the case, had turned into millions of tape recorders distributed in the United States.<sup>123</sup> This meant that if the Supreme Court held that the Sony Betamax was, in fact, a copyright infringement machine, then, as Alan

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<sup>118</sup> See discussion of the rule of the shorter term, *supra* note 89.

<sup>119</sup> See *Copyright Term Extension Act: Hearings on H.R. 989 Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 34 (1995) (statement of William Patry) (noting that the term of copyright duration in Japan is the life of the author plus fifty years).

<sup>120</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that time shifting of free broadcast television programs is fair use, and therefore distributing devices that enable home users to time shift [as well as retain copies] is not contributory infringement because the devices are widely used for legitimate, unobjectionable purposes).

<sup>121</sup> See *id.*

<sup>122</sup> The first argument was heard in this case on January 18, 1983. The Supreme Court ultimately decided the case on January 17, 1984. See *id.*

<sup>123</sup> See *id.* at 422.

Latman explained, every American (perhaps including the members of the Supreme Court as well) would have been committing copyright infringement in the privacy of his or her own home. It would have been counterintuitive to conclude that everyone was a copyright infringer.<sup>124</sup> Alan's observation accounts for a result and an analysis in the Sony Betamax case that I think are otherwise totally unpersuasive, not to say spurious. But the Betamax case illustrates what can happen when the gulf between legal doctrine and everyday practice becomes too wide: when everybody is doing it, it must be fair use. In the Internet environment, the *Eldred* argument may be right: we may be heading towards the generalization of the Betamax decision's cavalier treatment of the copyright law.

Even if we are not going that far, I think that there are more grumblings about the legitimacy of copyright than there used to be, perhaps because more people come into contact with copyright. One unintended consequence of term extension, I fear, is to promote contentions that the only way to offset the excessive term of copyright is to cut back on the scope of copyright—to establish weaker derivative works protection<sup>125</sup> or weaker protection across the board. This offset would come by way of judicial interpretation, not (at least not yet) by statute. The overall compromising of copyright is a danger that term extension poses; hence, my belief that term extension was a bad idea.

Finally, is the term extension therefore unconstitutional? Not every bad idea is unconstitutional. I think that there was certainly a rational basis for the term extension, which Arthur Miller has expressed very well. The *Eldred* plaintiffs would like to avoid the rational basis test, to put the extension to a higher standard. I am not a constitutional lawyer, but I think the argument goes this way: The term extension has a deleterious impact on speech; and once one pronounces the word "speech," a higher level of scrutiny attaches. But where is the "speech" at issue here? What Eric Eldred proposes to do is recirculate *other people's* speech. The First Amendment is certainly about the freedom to make your *own* speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt.

Nevertheless, once that speech is in the public domain, it is an element of information, and the concept of free speech would include reiterating unprotected information. I agree with that. I

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<sup>124</sup> See Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y 1, 18 (1997) (paraphrasing Alan Latman).

<sup>125</sup> See discussion of derivative works, *supra* notes 60, 61 and accompanying text.

think there is a First Amendment right to publish freely works that are in the public domain. The problem here is that the effect of the Sonny Bono Copyright Term Extension Act is to delay works from falling into the public domain. It is not retroactive in the sense of taking a work that was in the public domain and re-bestowing a copyright on it. Congress has done that before. It did so in 1994 as part of our implementation of our obligations under the Trade-Related Aspects of Intellectual Property Rights ("TRIPs") annex to the World Trade Organization accord.<sup>126</sup> The TRIPs agreement obliged us to implement a provision of the Berne Convention that we had declined to adopt when we ratified that Convention in 1989. Under Berne Convention article 18, we should have restored the copyrights in foreign works that had lost their U.S. copyrights because of our abnormally short term, or because of our copyright formalities.<sup>127</sup> By contrast, the Sonny Bono Copyright Term Extension Act does not take something out of the public domain. It just disappoints the expectation that the work was going to go into the public domain at the end of 1998, as opposed to twenty years thereafter.<sup>128</sup>

Do those disappointed expectations amount to an issue of constitutional dimension? Does the public have a vested interest in a work going into the public domain at the date on which it would have gone into the public domain when the work was originally created? The argument runs as follows: When this work was created, the term of copyright was X; the public therefore has a vested interest in that work going into the public domain on date X. If Congress, at a later date, adds twenty years to date X, that addition is suspect or illegitimate, because it certainly did not provide an incentive for the creation of that work. Moreover, that addition disappoints the public's vested interest.

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<sup>126</sup> See BERNE CONVENTION, *supra* note 75 at art. 18(1) (requiring new members to restore the copyright to a foreign work that has not fallen into the public domain in its country of origin, if the work to be restored would have fallen into the public domain in the new country because of failure to comply with formalities that the new country had previously required); see also Thomas Jordan Kennedy, Note, *GATT-out of The Public Domain: Constitutional Dimensions of Foreign Copyright Restoration*, 11 ST. JOHN'S J.L. COMM. 545, 554 (1996) (explaining that old members are required to give reciprocal rights to new members, and, accordingly, the retroactive restoration of copyrights in certain foreign works in the U.S., as well as the restoration of American works in some foreign countries, should have occurred when the U.S. joined the Berne Convention).

<sup>127</sup> See Katherine S. Deters, *Retroactivity and Reliance Rights Under Article 18 of the Berne Copyright Convention*, 24 VAND. J. TRANSNAT'L L. 971, 994 (1991) (discussing retroactively effective provisions of Article 18 of the Berne Convention and concluding that the United States was substantially in violation of those provisions).

<sup>128</sup> See 17 U.S.C. § 301 (1999) (as amended by the Sonny Bono Copyright Term Extension Act).

But is there such a vested interest? The brief in the *Eldred* case includes an interesting discussion of the “public trust doctrine” championed by Professor Richard Epstein, among others.<sup>129</sup> Richard Epstein advanced the public trust doctrine most entertainingly in the *Wall Street Journal*,<sup>130</sup> and in more academic venues as well.<sup>131</sup> Nonetheless, I doubt the existence of the public’s vested interest in the work going into the public domain on the date it would have gone into the public domain, given the date on which it was created. The argument proves too much. Congress has extended the terms of copyright frequently, more frequently lately than in our first one hundred years of copyright.<sup>132</sup> For the first one hundred years, however, copyright was a sleepy backwater about which nobody cared. Now that people care, Congress has reinforced copyright for a number of the reasons that Arthur Miller has suggested.

Congress extended the term of copyright in 1831 and in 1909. Throughout the 1960s, Congress extended the term every year, all during the many years that Congress worked on revising the 1909 Act. Everybody knew that when the 1976 Act was enacted, the worldwide life plus fifty standard was going to be adopted. Congress determined that works whose copyrights would expire during the time the Act was being revised should not be left behind simply because Congress took fifteen years to enact what became the 1976 Copyright Act. Another term extension took place in 1994, with the Uruguay Round Implementation Act, where as I mentioned earlier, we actually fished some works out of the public domain in order to comply with our treaty obligations.<sup>133</sup>

If the public has a vested interest in a work falling into the public domain on the date expected at the time of the work’s creation, then it follows that every term extension after 1790 is constitutionally infirm. The *Eldred* papers do not offer a limiting principle

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<sup>129</sup> See Memorandum in Support of Plaintiffs’ Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment on the Pleadings, at 47, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-65).

<sup>130</sup> See Richard A. Epstein, *Congress’s Copyright Gateway*, WALL ST. J., Dec. 21, 1998, at A19.

<sup>131</sup> See Richard Epstein, *The Public Trust Doctrine*, 7 CATO. J. 411 (1987) (arguing that the public trust doctrine should regulate the transfer of public property to private parties generally and prohibit such a transfer where there is no “reason to believe that the private owner of the asset can make better use of it than the public owner”).

<sup>132</sup> The Appellants in *Eldred* noted that the Sonny Bono Copyright Term Extension Act was “the eleventh time in thirty-seven years that Congress . . . extended the term for subsisting copyrights, and the second time it . . . extended the term prospectively in the same period.” Appellants’ Opening Brief at 1, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

<sup>133</sup> See Uruguay Round Implementation Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994) (amending section 104A of the U.S. Copyright Act in its entirety and restoring certain works to copyright protection that had previously been in the public domain); 17 U.S.C. § 104A (1997 & 2000 Supp.).

to help us understand how the public's interest could have been any less "vested" in 1831, 1909, every year in the 1960s, and 1994 than it is today. Why is the Sonny Bono term extension more noxious than every other term extension?

By the same token, one could say that the scope of the public domain was actually defined in 1790, when Congress protected maps, charts, and books against reproduction.<sup>134</sup> Congress did not include pictures, music, a derivative works right, or a public performing right. Sound recordings were brought within the scope of the Copyright Act only in 1972, and a digital performance right in sound recordings was enacted only a couple of years ago.<sup>135</sup> Under the theory that the scope of the public domain was defined in 1790, every one of those congressional acts constituted an incursion into the public domain. Perhaps the public had a vested interest in the public domain being whatever the subject matter and scope of copyright was at the time that each of those works was created. That would mean, for example, that any sound recording created before enactment of the Digital Performance Right in Sound Recordings Act of 1995 should not enjoy such a performance right today.

Thus, there is a serious problem that the *Eldred* argument proves too much. I will conclude by asking the *Eldred* proponents either to explain why this term extension is any more unconstitutional than the others, or to concede that all term extensions (and subject matter and scope enlargements) since 1790 have been unconstitutional. In that case, however, it may be difficult to get a court to agree that every step along the way, Congress has been acting *ultra vires*.

#### WILLIAM PATRY

A few quick historical points: The category of books was very broad in the 1790 Act.<sup>136</sup> Musical works were actually registered as

<sup>134</sup> See Act of May 31, 1790, § 1, 1 Stat. 124 (1790) (providing that, in furtherance of the encouragement of learning, the author of a map, chart or book or his assignee would have a copyright for a term of fourteen years, and, if the author survived the initial term, that he or his executors, administrators or assigns could renew the copyright for a renewal term of fourteen years).

<sup>135</sup> See The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-139, 109 Stat. 336 (codified as amended at 17 U.S.C. 101, 106, 111, 114, 115, 119, 801-803 (Supp. I. 1995)). The Digital Performance Right in Sound Recording Act gives the owner of the sound recording copyright a limited right of public performance "by means of a digital audio transmission." 17 U.S.C. § 106(6). Owners of sound recording copyrights still have no general right of public performance, however. See *id.* § 114(A).

<sup>136</sup> See William F. Patry, *Copyright and Computer Programs: It's All in the Definition*, 14 CARDOZO ARTS & ENT. L.J. 1, 24 (1996) (observing that "[t]he term 'book' . . . was construed quite broadly").

books.<sup>137</sup> They did not have a performance right, but they were nevertheless protected as books. The colonial laws that were enacted before the 1790 Act actually had limited terms as well.<sup>138</sup> It was only after the 1790 Act that they became perpetual.<sup>139</sup> On the intergenerational issues, with respect to the first Copyright Act, if the author was unfortunate enough to die in the first term, that was too bad. The successors did not get the copyright.<sup>140</sup> It was only, I think, in the 1831 Act that they did.<sup>141</sup>

I have a question for the *Eldred* plaintiffs, in addition to Professor Ginsburg's question. Maybe this is building on her comment that no one has a right to take other people's speech. In *Harper & Row*,<sup>142</sup> the question was posed whether, if the First Amendment is in play, and it is argued that the public has a First Amendment right to this material, is it only a one-way street?<sup>143</sup> In other words, do not authors have, under the old *Wooley v. Maynard* case,<sup>144</sup> a

<sup>137</sup> See *id.* at 24 (noting that "although musical compilations did not receive express statutory protection until 1831, they too were registered under the 1790 Copyright Act as books").

<sup>138</sup> One author summarizes the term limits in the following manner:

By 1786, all the original states except Delaware had passed copyright statutes of some kind. All contained express term limits: North Carolina had a fourteen year term, New Hampshire had 20 year term, three states had a 21 year term (Massachusetts, Rhode Island, and Virginia), and seven states had a fourteen year term followed by a renewal term of an additional fourteen years (Connecticut, Maryland, New Jersey, Pennsylvania, South Carolina, Georgia, and New York).

Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 SEATTLE U. L. REV. 259, 277 n.101 (1995) (citing Copyright Office, Library of Congress, Copyright Office Bulletin No. 3, Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright 1-21 (1973)).

<sup>139</sup> See, e.g., H.R. REP. NO. 94-1476 (1976) (noting that, prior to the enactment of section 301 of the 1976 Copyright Act, the common law protection of unpublished works was "perpetual").

<sup>140</sup> See Act of May 31, 1790, § 1, 1 Stat. 124 (1790) (providing a second copyright term to authors "still living" who properly republish and re-record).

<sup>141</sup> See Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 (1831) (granting a second copyright term to an author's "widow and child or children," provided the work is properly re-recorded and other formalities observed).

<sup>142</sup> *Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>143</sup> The Supreme Court stated:

The fact that the words the author has chosen to clothe his narrative may of themselves be "newsworthy" is not an independent justification for unauthorized copying of the author's expression prior to publication. . . .

"The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same end as ultimate end as freedom of speech in its affirmative aspect."

*Id.* at 557-59 (citation omitted) (emphasis in original).

<sup>144</sup> 430 U.S. 705 (1977). In *Wooley*, the Supreme Court held that New Hampshire's ef-



right to remain silent? And if so, how does that factor into your argument?

### ARTHUR R. MILLER

First, let us get rid of the sophistry. Congress did not give a fig about Europe, in terms of worrying about Europe. Congress was trying to create a regime that would make it easier for Americans to market in Europe, to disseminate in Europe, and to make sure that American authors received as much protection in Europe as European authors would receive in Europe. To me, that is providing incentives for American authors. To me, that is part of the promotion of the progress of science and the useful arts. That brings it perfectly within the power of Congress under the Constitution.

Second—and it hurts me to say this because I have a lovely little grandson—Congress was not trying to provide incentives for the grandson. That is sophistry. It is true that a grandson may take Granddaddy's royalty stream and go fritter it away in Monte Carlo. But that has nothing to do with the point that Congress was trying to provide incentives for the grandfather or grandmother to be more productive by saying, "If you care about your grandchildren, we will give you a sufficiently powerful copyright so that you can provide for them"—as I believe I am trying to provide for my grandchild. Congress can make the determination that creating that type of intergenerational reward will provide incentives for contemporary authors and promotes the progress of science and the useful arts.

Much of the *Eldred* position is simply a disagreement with Congress's judgments. And of course, because the proponents of this position are so fervent about protecting our free speech rights, we are all free to disagree with Congress's legislative findings. Professor Ginsburg did, and I respect her enormously. She thinks the Act was bad; I think it was good. It is what makes horse races, and why we cherish free speech. But Congress did hold hearings, and every single argument that you have heard here this evening was presented to Congress. And Congress made its choices. I think it is bad governmental structure to say to a federal court sitting in Washington, "Hey, I engaged in new factfinding and have a better handle on the facts than the other people that Congress listened to." That is not what courts do. Courts are supposed to give defer-

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forts to compel its residents to display the state motto, "Live Free or Die," on their license plates, was an unconstitutional form of forced speech. *Id.* at 714.

ence to the judgments made by Congress. That is what separation of powers is all about. So whatever you may think—and remember, I am an advocate in the context of this particular piece of litigation—about harmonization or incentivizing or rebalancing the monopoly versus the promotion of the public domain, Congress chose to make its judgments.

Now, I could sit here and spellbind you—more likely, anesthetize you—until daylight on why it may be empirically true that term extension promotes the public domain over the long haul because extended protection incentivizes people to create—to create derivative works, to disseminate works, to preserve works—that, over the long haul, more works may have been created because of the higher front-end copyright incentives. I do not know whether that is right. But one thing I do know—the *Eldred* folks do not know whether it is wrong. And there is not one bit of evidence to suggest that they are right and I am wrong. I do not believe the United States District Court in Washington is in business to make that kind of an empiric judgment.

#### WENDY GORDON

Very quickly, let me make a couple of points centered on the question of whether copyright law restrains speech. When I spoke about John Locke, I was not making a legal pronouncement. I was speaking philosophically. But now let me turn briefly to matters of case law and doctrine. Like Professor Ginsburg, I am primarily a copyright lawyer but, like her, I do constitutional law when it intersects with areas of my interest, and the First Amendment intersects with copyright daily.

Recall the famous novel and movie, *Gone With The Wind*. The novel contains a host of material on racial and sexual relations. Imagine someone who wants to do a show on Broadway showing how the women's movement could have helped Scarlett reclaim her sexuality as well as her strength. The way current law operates, the right-holders could probably keep that show from appearing. That is a serious matter of restricting speech.

Incidentally, let me clarify that the derivative work right is what gives Margaret Mitchell's heirs and assigns the right to say "no" to everybody who wants to do a version of her work.<sup>145</sup> It has nothing to do with later creators' ability to get a copyright in their variation. Variations, if lawfully and creatively done, can always

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<sup>145</sup> See 17 U.S.C. § 106 (listing the exclusive rights of the copyright owner).

have copyright.<sup>146</sup> The derivative work right is what prevents a variation from being lawful unless it has the permission of the copyright owner.

Let me return to the issue of speech. The assertion that copyright does not regulate speech rests on several assumptions, as I understand Arthur Miller's point. One is that the First Amendment is concerned only with expressing outward, and not with what the public can hear.

Yet, a number of cases state that listeners have rights also. If a law suppresses the circulation or reprinting of a message, it seems to me that suppression can have First Amendment implications. It should also be recalled that people who are speakers—who have something original to say—might have as part of their message a recapitulation of others' utterances. An art historian who wants to discuss the evolving style of a particular painter may, in order to make his point, need to reprint substantial portions of that painter's work. Copyright may restrain the historian from doing so. There may or may not be sufficient reasons for the First Amendment to allow copyright to do this, but it is absurd to deny that speech is affected.

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<sup>146</sup> See 17 U.S.C. § 103(a) ("The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

ORAL ARGUMENT OF MR. LAWRENCE LESSIG<sup>147</sup>  
ON BEHALF OF ERIC ELDRED, APPELLANT

IN THE UNITED STATES COURT OF APPEAL  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERIC ELDRED, *et al.*,

*Appellants,*

v.

JANET RENO,

*Appellee.*

No. 99-5430

Thursday  
October 5, 2000  
Washington, D.C.

The above-entitled matter came on for  
oral argument, pursuant to notice before:

THE HONORABLE DOUGLAS H. GINSBURG, Judge

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE KAREN LeCRAFT HENDERSON, Judge

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<sup>147</sup> Editor's Note: Lawrence Lessig, Professor of Law, Stanford Law School, participated in the panel discussion at the August 1999 Symposium at the Benjamin N. Cardozo School of Law. His remarks were withheld from the foregoing transcript of the discussion at his request. The Editorial Board of the *Cardozo Arts & Entertainment Law Journal* gratefully acknowledges the assistance of Copyright's Commons, Berkman Center for Internet & Society, Harvard School of Law, in obtaining the text of Professor Lessig's argument before the Court of Appeals for the District of Columbia Circuit. The text of Professor Lessig's argument and the Court's responses are substantially unedited except as indicated by brackets. The argument of Alfred Mollin, Esq., who appeared on behalf of the Appellee, has been omitted. Minor typesetting and typographical adjustments have been made to comply with the format of this publication. All footnotes were added to the text by the Editors of the *Cardozo Arts & Entertainment Law Journal*.

APPEARANCE:

On Behalf of Appellants:

LAWRENCE LESSIG, ESQ.

of: STANFORD LAW SCHOOL

MR. LESSIG:

May it please the Court, the question in this case is whether the Framers' vision of a limited power to issue copyrights tied to a constitutional guarantee of a vibrant public domain continues to bind Congress.

Appellants in this case are individuals and organizations that depend upon the public domain for their livelihood, like the Disney Corporation with "Cinderella" or "Sleeping Beauty" or the "Hunchback of Notre Dame." Some of these plaintiffs draw upon the public domain to create new and derivative works. Others recover out of print works and make them available to the public generally. Finally, others restore old and decaying films and make them more widely available.

In 1998, Congress passed the Copyright Term Extension Act ["CTEA"],<sup>148</sup> extending the term of subsisting copyrights by twenty years and prospectively extending the term of future copyrights by twenty years. This statute has harmed the Appellants. In an age when the Internet has multiplied the opportunities that are available to produce new and derivative work, it has extended the term under which an author's estate or its assigned can control the access to copyrighted works. By extending the term of copyright for many works whose current copyright holder cannot be found, it has created essentially a publisher's black hole, where the cost of identifying current copyright holders is simply too great.

THE COURT:

How is that handled today?

MR. LESSIG:

That's the same problem that exists today, Your Honor, but it is extended by virtue of the fact that the ordinary—

THE COURT:

You have a long footnote detailing all of the steps one would have to take to trace the copyright. Find the heirs and so on, which

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<sup>148</sup> 17 U.S.C. § 304.

would seem to be, as you say, almost to the same degree, at least a somewhat lesser degree of [the] problem today. Surely there are services that do that.

MR. LESSIG:

There are services. That's right, Your Honor, but the fact is if the service is unable to find this copyright holder, given the effect of the [NET] Act,<sup>149</sup> which was passed also in 1998, this becomes a criminal offense if this is not identified to publish this material. And so the Appellants in this case, including Higginson Book [Company], for example, face the threat of criminal prosecution if they continue to publish works whose copyright holder cannot be discovered.

THE COURT:

When did it become a criminal offense?

MR. LESSIG:

The [NET] Act passed in 1998. It makes it a criminal offense to publish, either electronically or not, works whose value is greater than a thousand dollars within a period of 180 days. Plaintiffs challenged this act when it first came into effect in January 1999. The government moved on the Pleadings. We cross-moved for Summary and the District Court, without a hearing or without oral argument, granted the government's motions on the Pleadings.

Now the essence of the government's claim is that the challenge to the duration of a copyright act must be tested under rational basis review. If this is the standard, then we lose. But we do not believe that the authority of this Court or the Supreme Court supports this as the standard for reviewing a change in the Copyright Act. Whether under the Copyright Clause or the First Amendment, Congress's extension of this monopoly on speech rights merits heightened review.

We'll argue first that under ordinary First Amendment review both the prospective and retrospective aspects of the Copyright Term Extension Act are unconstitutional and second that the limited times and originality requirements of the Copyright Clause invalidate the retrospective aspect of the Copyright Term Extension Act. Let me address the First Amendment first.

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<sup>149</sup> No Electronic Theft Act, P.L. 105-147, 111 Stat. 2678 (1997) ("NET Act").

## THE COURT:

Could you just state the standard of review then?

## MR. LESSIG:

Well, we believe under the First Amendment the standard of review would be ordinary First Amendment review for a content neutral regulation. It should be intermediate scrutiny as specified in *O'Brien*.<sup>150</sup> And under the Copyright Clause, the question is whether this change comports with the requirements of originality and limited times.

The Court has not interpreted the meaning of limited times, and we suggest the method that has been adopted when interpreting authors and writings should guide you in interpreting the meaning of limited times. But it has clearly held that the originality requirement is a constitutional requirement.

First, in the trademark cases and most recently adverted to in *Feist*,<sup>151</sup> and under the holding of the originality requirement as a constitutional requirement and the definition of originality to not include works in the public domain. We think it follows from that, that so too works that are simply having their copyright term extended cannot qualify as original for purposes of the Copyright Clause.

The government argues, however, under the First Amendment that there's a special First Amendment exception under the Copyright Act that so long as copyright protects only expression, there is no First Amendment issue to be raised. Now we submit there is no authority for this extraordinary claim of a copyright exception and the authority the government relies upon stands for a very different and wholly pedestrian point. Every case the government cites is a case where the claimant demands a First Amendment right to use an otherwise legitimately copyrighted work.

In essence, the First Amendment right to trespass, courts have rightly rejected. But Appellants here are claiming something fundamentally different, we are not arguing we have the right to use an otherwise legitimately copyrighted work. We are arguing that this work is not legitimately copyrighted. That the copyright power, given the restraints of the First Amendment cannot extend to this kind of work. Our claim is not that we have a special right to trespass; it's that this property cannot, under the First Amend-

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<sup>150</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>151</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

ment and the Copyright Clause, legitimately be considered property.

THE COURT:

If you don't have a cognizable First Amendment right in using the work, then why would you have any greater right in challenging the eligibility of the copyright?

MR. LESSIG:

Your Honor, if we were challenging the right to use a work we would have no greater right to the general copyright. But, as the posture of this case now stands we're making a facial challenge to a statute that's affecting the terms of copyrights generally.

THE COURT:

But your interest in doing so is your First Amendment interest, correct?

MR. LESSIG:

It's a First Amendment interest to get access to—

THE COURT:

And we've been told you don't have a First Amendment interest in access to the works.

MR. LESSIG:

Into a particular work, that's right. That's the meaning of this line of cases that says you don't have a First Amendment right to trespass. But it can't be that that holding converts to no ability to challenge for any First Amendment reasons the extensions of the Copyright Act.

THE COURT:

Let's just revert to real property for a moment since it's less challenging to the judicial mind. If you don't have the right to trespass on my land, and you don't, you're saying you might nonetheless have a right to object to my putting up a fence. Now I suppose if the fence obscures your ancient rights, you do, but if that's not your objection, but rather it's the fence that keeps you out. Then you don't, because you don't have a right to come in.



MR. LESSIG:

That's right.

THE COURT:

What's the difference there?

MR. LESSIG:

There's no difference in the way you framed the question. But I believe a slightly different hypothetical would make the point. I don't have a right to enter your land because I don't have the right to trespass on your land. But if the power under which Congress grants you the land is expressly limited by the Constitution in some other way, then the challenge that I'm making is to the violation of this limitation as it applies to the grant of land in the first place.

So it's not about my particular right to enter the land. Although, the fact that I'm harmed by the fact that I can't use these works that otherwise should have fallen into the public domain is a sufficient nexus required to give us standing to raise this.

THE COURT:

I don't see how that different hypothetical illuminates the situation. If the land grant is from the government for the purpose of operating a public university, and you're excluded from that university, do you have a basis for objecting to the land grant?

MR. LESSIG:

Well, if the land grants were, for example, given on the basis of racial discrimination and I'm challenging the racial discrimination in granting that land, then I might not have the right to enter the university, but I certainly should have the right to challenge the racial discrimination that was made in making that land grant in the first place. They're conceptually different and yet, because of the nexus that's required to demonstrate the standing we can raise that harm and ask for—

THE COURT:

You've gotten to the problem—the standing problem. If you don't have a right to enter the university how do you have a right to challenge the land grant that underlies the university? What's the right of yours that's being violated to give you standing?

## THE COURT:

I frankly didn't understand why Mr. Mollin<sup>152</sup> challenged your standing until now.

(Laughter)

## THE COURT:

You've done a good job of making his case. Well, it is clarifying. It does help, but go ahead.

## MR. LESSIG:

Well, Your Honor, the harm that we suffer here is that we don't have access to the public domain works. The authority that the government relies upon to show why we can't raise a claim about access to works is raised in a narrow context. We have no authority for saying this is the only First Amendment interest that one has in any context. Right. So here's a separate way to think about it.

## THE COURT:

What's the source of your right to access? You may have harm—excuse me. You don't have judicially cognizable harm when your access is defeated unless you have a right to that access. Now is the First Amendment your right to that access or is something else your right to that access?

## MR. LESSIG:

Your Honor, this is an answer to the question, I assure you. We understand this limitation on the ability to raise this right to trespass as a compromise expressing the limited scope of the copyright term of a copyright. Copyright has a limited scope and that protects the rights for people to get access around the edges of a legitimate copyright.

And that feeds the ultimate justification that the Court has given for copyright, which is that it serves an engine of free expression. Now we're—

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<sup>152</sup> Alfred Mollin, Esq., of the Department of Justice, Civil Division, appeared and argued on behalf of the government—the Appellee.

THE COURT:

Yes, but if your only harm is the same harm that is to the public generally, then you don't have a standing.

MR. LESSIG:

No, that's right and in that—

THE COURT:

And what we're trying to find, exploring here, is where your right comes from that is violated by the allegedly overreaching act of Congress that gives you justiciable harm for purposes of standing.

MR. LESSIG:

That's right. But the second dimension that we assert that exists for a First Amendment right is when Congress's action cannot reasonably be said to be creating an incentive to produce speech by extending duration, that's a separate kind of harm. Now there is no holding or statement of any court that says that when the harm is about producing or restricting access on the dimension of duration, that we don't have success to this—

THE COURT:

Now try this for me. Just try giving me a yes or a no to this: Is the source of the right that you say gives you a justiciable interest, which has been harmed, the First Amendment?

MR. LESSIG:

In this part of the argument it is, Your Honor.

THE COURT:

Is there some other source of right that you say gives you standing?

MR. LESSIG:

There isn't, but we are saying that there are two dimensions to this First Amendment—

THE COURT:

There is or there isn't?

MR. LESSIG:

With respect to the First Amendment there are two dimensions of that harm.

THE COURT:

With respect to your standing is there some other source of right than the First Amendment which gives you—

MR. LESSIG:

Well, we have standing—

THE COURT:

A justiciable protectable interest?

MR. LESSIG:

Under the Copyright Clause, Your Honor.

THE COURT:

Under the copyright laws?

MR. LESSIG:

Under the Copyright Clause. Our claim is that the extension retrospectively of the copyright term, here, harms our ability to get access in violation of the limited times provision and originality provision. And that was—

THE COURT:

That would seem to me to be the source of your *Lopez*<sup>153</sup> argument as to the invalidity of the act. But see what I'm still trying to explore is why you have standing to justiciably attack that *Lopez* argument.

MR. LESSIG:

We have standing in just the same way that in *United Christian Scientists*<sup>154</sup> [there was] standing to challenge an act, which was restricting the ability for people to get access to works of the Christian Science Church. In that case, too, there's a First Amendment

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<sup>153</sup> General Motors Corp. & Adam Opel AG v. Jose Ignacio López de Arriortua, 948 F. Supp. 684 (E.D. Mich. 1996).

<sup>154</sup> *United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152 (D.C. Cir. 1987).

argument about the Establishment Clause and there's also a Copyright Clause argument about the ability for them to get access to this work taken from them in violation of the Copyright Clause. The standing there, too, was in both dimensions grounded upon the harm caused by the act of Congress.

THE COURT:

Well, I have another question I wanted to ask you. Have you adopted any arguments that appear in any of these amicus briefs? Or maybe—I don't remember, there is more than one, but in any brief other than your own?

MR. LESSIG:

Well, in particular, Mr. Jaffe's brief is a brief that makes textualist arguments that we believe are quite strong in this way.

THE COURT:

Is there any place in which you have adopted them, in your briefs?

MR. LESSIG:

We formally acknowledged them in our briefs. I don't believe we have, Your Honor, no.

THE COURT:

Okay. So because it seems to me, I don't know whether there's really any difference, but the verbal formulation that he advances under the Necessary and Proper Clause derived from the case is at least different in terms than the intermediate scrutiny or rational review.

MR. LESSIG:

That he advances for challenging the act?

THE COURT:

Yes.

MR. LESSIG:

Yes. Well, it is different in the sense that it's emphasizing the propriety of the particular act and I believe we, too, are arguing about the propriety, but we wanted to focus on the very different

types of inquiries that would exist under both questions we've raised.

One, the inquiry under the First Amendment, we think is governed by standard review. Two, as the Court has done in the copyright context inquiry about the specific meanings of this implied term "original" and also the expressed term "limited times." These two terms, we believe, have been interpreted in light of the purpose of the Copyright Clause and that's the source—

THE COURT:

Well, there's some tangency—yes, some tangency there because of his reliance on the *John Deere*<sup>155</sup> case.

MR. LESSIG:

That's right, and the *Graham* case.

THE COURT:

Is that cited in your brief? I don't remember. *Graham*?

MR. LESSIG:

The *Graham* case, yes it is, Your Honor.

THE COURT:

Yes, of course. It's a principal case. What did you want us to do with *Schnapper*?<sup>156</sup>

MR. LESSIG:

Well, there are two dimensions Your Honor. The *Schnapper* dimension with respect to what the government claims—the ability to rely upon the Purpose Clause, we think is just in this reading of *Schnapper*.

In *Schnapper*, what the Court said was that you didn't have the requirement to show that each particular work satisfied the purpose requirement. It relies directly on *Mitchell Brothers*<sup>157</sup> in the Fifth Circuit. *Mitchell Brothers* in the Fifth Circuit expressly says, and [Mr.] Jaffe argues this as well, that the purpose requirement restrains Congress, not particular requirements. Now we believe

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<sup>155</sup> *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1996).

<sup>156</sup> *Schnapper Public Affairs Press v. Foley*, 667 F.2d 102, 111 (D.C. Cir. 1981).

<sup>157</sup> *Mitchell Brothers Film Group and Jartech, Inc. v. Cinema Adult Theater, a/k/a Cinema 69*, 604 F.2d 852 (5th Cir. 1979).

that's clearly distinguishable from the kind of argument we're making here. But if it's not distinguishable, then we believe that the *Feist* case has clearly drawn *Schnapper* into doubt, because *Feist* clearly is relying upon the narrowing purpose of the Copyright Act.

In both *Graham* and *Bonito Boats*,<sup>158</sup> the Court quite expressly states that the purpose is a limitation on the scope of the power in the Copyright Clause. This is the only clause in the Constitution that grants power to Congress and simultaneously says what the purpose of that power must be.

#### THE COURT:

Well, I guess there is still an undistributed middle here. In the sense that if the introductory phrase in the clause serves as a limitation and *Schnapper* tells us it's not to be, *Mitchell*, actually as opposed to *Schnapper*, tells us it's not to be applied to each work.

It leaves open the possibility that it is to be applied categorically. And then what are the categories? One division of the categories is between prospective and retroactive application. Another would be by media when subjected [sic] that there's no incentive effect with respect to extension of copyright for works created long ago. The government comes back and says film restoration. And I think they might have added, from my limited personal knowledge, the problem of acidic paper. Books written on acidic paper and phonographic masters. All of which are going to disappear if there is no economic incentive to rehabilitate them. But that still leaves open the question: Is that a separate category or does it carry over to all works described in the extension?

How do we cut into this, is there a middle ground? Or is it going have to be either *Schnapper* as the government reads it or *John Deere* (*Graham*) as you read it?

#### MR. LESSIG:

First of all, Your Honor I would suggest that you distinguish between incentives for creativity and incentives that subsidize production. My reading of the authority and the framing intent of the Copyright Clause, is to clearly subsidize creativity and make an express decision by granting to authors, rather than publishers, the decision to subsidize production. And in particular, in the *Graham* case, the Supreme Court explains that the background of the monopoly power that was granted in England, often granted monopo-

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<sup>158</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

lies to companies that have already produced something for the purpose of subsidizing it in the future. That's the production subsidy. And the Court distinguished our Copyright and Patent Clause from that tradition. So, I don't believe there is authority for the notion that Congress can exercise this monopoly power to subsidize production rather than creativity.

Now, the middle ground in *Schnapper*, it seems to me, is not to see *Schnapper* standing out there as a restriction independent of any of the terms. It is a way of understanding the meaning of the terms. That was the way it was used to bring out the implied term "originality." There are, you know, obviously authors and writings that don't say "original." Yet, by looking at the purpose to promote creativity the Court has seen originality as the essential expression of that, and I think the only way to understand that creative, active interpretation is to see it against the Purpose Clause; and so too in the Limited Times Clause.

Now, you know, in a law review article we might speculate about a number of different dimensions we would like to cut this and this media dimension might be one, but again, only if you believe the justification is a subsidy for production. And I don't think, given the extraordinary anxiety the Framers had about monopoly rights, generally, and their belief that they were narrowly carving an exception for the creative activity, that you can view this grant of copyright authority to be a grant to subsidize film producers who want production—

THE COURT:

[D]istinguishing production from what?

MR. LESSIG:

From the creative acts.

THE COURT:

So are you saying creation and production are two different things?

MR. LESSIG:

Yes.



## THE COURT:

So meaning production here is not the original creation, but some subsequent replication.

## MR. LESSIG:

A subsequent copy. That's right, copying of it.

## THE COURT:

Even though the act of what you're now calling production would be the only thing to preserve the work for anybody's use. It will not be available in the public domain, either, if the paper disintegrates or the original master is allowed to disintegrate.

## MR. LESSIG:

Well, that's their claim, Your Honor, it's a factual claim. We deny it in particular because we have Appellants who do precisely this. We have Appellants who take work from the public domain that would be destroyed in the sense that you say, and turn it into work on the Internet, for example, or republish it as Dover Books does. We also have film libraries, Movie Craft for example, that take silent films and other films in the public domain—

## THE COURT:

Well, no, I think you're missing the point, because your answer begs the question in this sense. If the—what we're hypothesizing or the government is, and maybe I'm embellishing it—is that there is an item, let's say a film master, which before the copyright has expired will become unusable if they don't have any incentive, to let's say digitize it before it's too late. The one who would like to republish it after it enters the public domain, won't have that opportunity, as you were suggesting, you know, putting the books on the Internet or something like that, because the work will be gone during its protected period.

## MR. LESSIG:

Right.

## THE COURT:

It used to be said, maybe it should still be, that many [twentieth century] authors will outlive their works because of the acidic paper.

THE COURT:

And so there just isn't going to be anything there posthumously for a publisher to reintroduce.

THE COURT:

Which may be a blessing to later generations.  
(Laughter.)

MR. LESSIG:

I don't know what they are published on, Your Honor. But, Your Honor, the reason this is hard to make clear is that we have to be clear in which context you are asking the question. If you are asking the question in the First Amendment context, then I think we have to really evaluate [whether] the incentives, as they allege, are as the world would make them. We've had no opportunity to investigate and challenge to see whether there is substantial evidence there. If it's in the context of the Copyright Clause, then it seems to me it's not a fact-based inquiry, it's an inquiry into whether we believe that this kind of production, just subsidizing somebody—

THE COURT:

And I was thinking at that point about the Copyright Clause.

MR. LESSIG:

If that is considered original under *Feist*, then they get a copyright for the production of that. If it's not considered original under *Feist*, then I think the meaning of *Feist* is that that's not what the Copyright Clause extends to and Congress cannot simply expand the powers of the Copyright Clause merely because—[There are] lots of ways Congress can help restore films, they can subsidize restoring of films, they can create tax incentives for restoring films, they can pay the—

THE COURT:

So you're not denying the incentive effect and that it is more or less aligned with the incentives built into the Copyright Clause, you're simply saying it is not at the threshold—it doesn't surmount the threshold to get into the Copyright Clause.

MR. LESSIG:

Right. In the Copyright Clause you must show it's original and I think that's an important limitation on the scope of Congress's power, which the Court has embraced.

THE COURT:

Take it back to *Schnapper* just a moment. If I recall, it literally says that the Purpose Clause does not place a limit on Congressional power—am I misremembering? I can't give you the exact quotation.

MR. LESSIG:

You know, you're right about its literal interpretation.

THE COURT:

If we are writing an opinion and we are bound by *Schnapper* as precedent, which we are, I'm not sure that I understood you in your answer to Judge Ginsburg to say how we would write an opinion that gets out from under the apparent precedent of that language?

MR. LESSIG:

Your Honor, the meaning of the opinion is not taking this literal sentence out of context. I genuinely believe that this opinion does not say that the Copyright Clause, the Purpose Clause and the Copyright Clause have no effect on limiting Congress's power. I believe that—

THE COURT:

And aside from writing that Mr. Lessig doesn't believe that.

MR. LESSIG:

Well, you can say that—

THE COURT:

How would I write the sentence in the opinion or how would one of my colleagues write the sentence?

MR. LESSIG:

But Your Honor that's right.

THE COURT:

That says we're not bound by the sentence and the precedential sense.

MR. LESSIG:

That's right.

THE COURT:

What's right? That's a question, it's not a statement. My questions keep being right this morning.

MR. LESSIG:

Well, no. The thrust of your question I think is, how are we going to write an opinion.

THE COURT:

Yes.

MR. LESSIG:

That properly deals with this opinion. And I think the way to properly deal with this opinion is to interpret it correctly. Now, look at *Schnapper*, decided after *Graham*, which clearly states that the Purpose Clause is a limitation on the power that Congress has in the Copyright Clause. To interpret this Court as ignoring that clear authority from the Supreme Court, is to read into your behavior something less than good work. I don't read that into your behavior. It seems to me—

THE COURT:

That's a good point. The Court, of course, was relying heavily on the Fifth Circuit's opinion on *Mitchell Brothers*.

MR. LESSIG:

And the Fifth Circuit—

THE COURT:

Now the Court nowhere cites *Graham*, does *Mitchell*?

MR. LESSIG:

That's right. No, *Mitchell* does cite *Graham*. I believe, Your

Honor, I need to check that, but *Mitchell* is precise about that fact that the Purpose Clause does constrain Congress. *Mitchell* expressly states that the words of the Copyright Clause of the Constitution do not require that writings shall promote Science and useful Arts, they require that Congress shall promote those ends. So *Mitchell* doesn't stand for the proposition that there is no constraint from this clause, and it's [a] completely sensible opinion in *Mitchell*. The case in *Mitchell* is whether an obscenity exception should exist for the copyright power, so that a judge should decide that this is obscene, and therefore it doesn't have the copyright power. The court quite reasonably says this would be a mess if courts had to decide. And it would be a mess, as *Mitchell* says for very valid First Amendment reasons, because the court would be in the position of trying to decide whether to grant copyright or not based on its judgment in the abstract of whether something is obscene.

So to avoid that mess, the court in *Mitchell* said it was completely reasonable for Congress to decide, it would just say everything is copyrightable and therefore not bog the process down—

#### THE COURT:

Why doesn't that carry over to the decision in the Congress to not distinguish between extant and inchoate works or future works?

#### MR. LESSIG:

Well, this line is not a hard one to draw. [There is an] existing copyright whose term is being extended. That's an expressed section of the statute, which is quite simple to distinguish from works that have not yet been copyrighted or reduced to a tangible form, which is also being extended. What Congress can do, within some limits is prospectively extend the term. We argue about how far, but they can certainly do that. But the meaning of limited times, if it must be limited times to promote progress, cannot be to create an incentive in dead people. The one thing we know about incentives is that you can't provide incentive to dead people and the retrospective extension here is now so great that the vast majority of those who get any benefit from this extension is clearly not original authors.

#### THE COURT:

Thank you very much, Mr. Lessig. We'll give you five minutes for rebuttal.

MR. LESSIG:

Thank you.

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REBUTTAL OF MR. LAWRENCE LESSIG ON BEHALF OF  
ERIC ELDRED, APPELLANT

Your Honors, my colleagues beat up on me and told me not to raise this argument, that it was a professor's argument and no one gets it, but I have to focus on originality once again. On page 57 of the government's brief, the government says the United States flag is in the public domain. It is not subject to copyright because it is not original. They said that because the Supreme Court in *Feist*, quoting *Harper*, says copyright does not prevent subsequent users from copying a prior author's work and those constituent elements that are not original—for example, facts. He mentions some other things, or materials in the public domain.

Now it is the case that the government, I believe, in their brief had asserted that material in the public domain could not be removed. The Uruguay Agreement<sup>159</sup> did remove material from the public domain. That has not been challenged yet.

THE COURT:

Has it been ratified?

MR. LESSIG:

It was ratified, Your Honor. So there's a question about whether Congress has this power.

THE COURT:

And at this point it has not been challenged?

MR. LESSIG:

It has not been issued a caveat, that's right.

THE COURT:

And the federal government's power, under that one, is that expected to invoke the treaty power or some other power?

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<sup>159</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (amending section 104A of the U.S. Copyright Act in its entirety and restoring certain works to copyright protection that had previously been in the public domain).

## THE COURT:

The issues are going to be quite different, if and when that's challenged, than the issues here.

## MR. LESSIG:

That's right. If this is only under the domestic powers, the Court said in *Graham*, Congress cannot, with respect to the patent power, remove objects from the public domain. And we submit for exactly the reasons the question suggested, although it was a question, Your Honor. There's no difference between the limitation with respect to the public domain and limitation with respect to existing works.

## THE COURT:

Aren't we told, with regard to the Uruguay Round, though, that the protection afforded under U.S. law was dependent on continuous preservation of the copyright abroad?

## MR. LESSIG:

That's my understanding as well.

## THE COURT:

So it's not a wholesale confrontation with requirement of no importation?

## MR. LESSIG:

That's right. As to the sufficient incentive, this argument that somehow if the government is a promise keeper, people will have sufficient incentives to continue to write. First, what's striking about this argument is the other half of this equation is completely invisible because the Constitution expressly envisions the construction of public domain. And where's the promise with respect to the public domain?

There, too, my clients have depended upon the promise of the government to allow material to fall into the public domain and that promise has not been kept. But secondly, if we can just hand wave [sic] this substantial incentive, it depends once again in what context we are trying to raise this question. If it's in the First Amendment context, then they can make their assertions about incentives, then we should have an opportunity to show that that's not based on substantial evidence according to intermediate re-

view. If it's in the Copyright Clause context, then the fact that they point to some incentives is not sufficient to get around the limitations—

THE COURT:

Your reference now, and earlier, to sufficient opportunity to show. Is that a procedural argument that this shouldn't have been decided by Summary at all?

MR. LESSIG:

It was decided, Your Honor, on a motion—[on] the Pleadings.

THE COURT:

Yes.

MR. LESSIG:

It should not have been decided on that basis, given that we had made assertions about the plausible grounds that Congress could have been relying upon in granting its extension. We don't believe it's plausible—

THE COURT:

So you're not asking us [to hold] that this is invalid, you are just asking us to return it for further proceedings in the district court to determine if it's invalid?

MR. LESSIG:

At a minimum, under the First Amendment Clause, we are asking for that.

THE COURT:

Never mind, which one are you asking for?

MR. LESSIG:

Well, Your Honor, when I read it, it's hard for me to see how any district court could conclude that this passed the intermediate scrutiny test. I'm willing to be proven wrong, but I believe I should have that right to have that argument in District Court. We've asked precisely in the briefs for this Court either to hold this under the intermediate scrutiny as insufficient—



## THE COURT:

In your conclusion you ask for the foregoing reasons, that the district court's decision should be reversed, the Copyright Term Extension Act<sup>160</sup> declared unconstitutional, and the enforcement of the No Electronic Theft Act<sup>161</sup> against persons whose infringement of a copyright would not have happened but for the CTEA's injunction, and that [the Appellants] be awarded costs. I don't find anything in there about us sending it back for further proceedings. Is that—

## MR. LESSIG:

Your Honor—

## THE COURT:

I'm rather taken by surprise at this line of argument. That's twice you've alluded to it and it's not what you say here.

## MR. LESSIG:

I believe, Your Honor, in fact we do say in the brief that at a minimum we should have an opportunity to make this showing. In the reply brief I didn't really express this—

## THE COURT:

Your conclusion requests nothing about this:

## MR. LESSIG:

Right. That might be the case, Your Honor.

## THE COURT:

It is the case, I just read it to you.

## MR. LESSIG:

The conclusion is the case, Your Honor.

## THE COURT:

All right.

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<sup>160</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>161</sup> No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

MR. LESSIG:

All right. Let me just mention two other points. As to the error issue, Your Honor, there is no plausible basis—

THE COURT:

I want to go back to that for just a moment. If your argument is that the District Court erred as a matter of law on a question of law and if the only evidence you talk about is not the kind of evidence we use in adjudication, but what you say is the evidence before Congress of its decision, I don't see what we could possibly be sending it back for. Our review is that same as the district court's. What could come before the district judge that couldn't come before us?

MR. LESSIG:

Well, Your Honor, the government in their briefs to this Court did not assert that this passed intermediate scrutiny. They did not make that argument and because they didn't make that argument in reply, we didn't believe we were in a position to be making the argument for them when arguing against them about that. So, we didn't frame it in that structure in the reply brief. [C]ertainly we believe that the same evidence could be reviewed by this Court, but we would like an opportunity to argue about that evidence instead of arguing about what standard should be governing this. Whether it's the intermediate standard or some special rule. And so that's why we believe we should be in a position if that's—

THE COURT:

What argument could you make on remand that you can't to us?

MR. LESSIG:

Well, the issue that's got to be resolved by the court below is whether Congress could have reasonably relied upon substantial evidence. That's the standard that comes out of—

THE COURT:

That's not a fact question.

MR. LESSIG:

That's right. It's—

## THE COURT:

That's not a finding. That's a question of law and I'm at a loss and I'm really as you say, taken by surprise. I looked just now at the conclusion of your reply brief and it has the same paragraph as your blue brief. It says nothing about remand for further proceedings.

## MR. LESSIG:

Right. The remand is not because the [district] court is more appropriate to do it, this Court could just as well make those [determinations] on the basis of what has been presented in the record.

## THE COURT:

I'm not sure why we're not obligated to, if you're correct, as to opposed to simply able. I'm not sure why we're not obligated to.

## MR. LESSIG:

It just seems like a much tougher job, Your Honor, and I wanted to—

## THE COURT:

We're up to tough jobs, counselor.  
(Laughter.)

## THE COURT:

There has been at least one case I'm familiar with [in] which we've passed for [the] district court's view in the first instance on a matter of law, because of the complexity.

## MR. LESSIG:

It seemed to me the same procedure the Supreme Court adopted in *Turner*. *Turner I*<sup>62</sup> set the standard and then said the district court must consider the facts, which were exactly the same type of facts. [The district court determined what] Congress could have reasonably believed and then [the case] had to go back up to *Turner II*<sup>63</sup> before the court could affirm that particular finding.

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<sup>162</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

<sup>163</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

## THE COURT:

It's sufficiently unusual that we know the few instances it exists.

## THE COURT:

And we've carved out an exception for you, but we said that we were carving out the exception and we further admitted that it was because we didn't want to have to do that.

## MR. LESSIG:

And finally, Your Honor, on the question of error and incentives. It is not plausible to believe that the things that have been pointed to are sufficient to explain the extension that has been granted for works that were being copyrighted in 1923. If it is a matter of incentive then, again, we don't think this is proper under the Copyright Clause analysis. It's been thirty years, Your Honors, since Melville Nimmer outlined the retrospective extension violating the First Amendment values implicit to the Copyright Clause.<sup>164</sup> And [its been] thirty years since Justice Breyer in his fallible state as a law professor outlined the very clear incentive reasons why there's no plausible incentive by retrospective incentives.<sup>165</sup> This is not about creating incentives. It's about an opportunity to use the copyright power for something it was not designed to do, which is to reward and protect monopolies. That was precisely what this clause was written against.

We believe the practice of the Court in interpreting "authors" and "writings," strictly according to the purpose of the clause should be followed with respect to "limited times".

If you follow that practice, and you accept the responsibility of creating a justiciable and manageable standard—the simplest way being to say no to retrospective extensions—then that forces no hard judgments in the future. It's a prophylactic, simple way of understanding plain language as in limited terms and limited times. In one shot they create the incentives and if they need to create other incentives later, there are plenty of other ways other than the monopoly power granted to them in an extraordinary limited way and that's—

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<sup>164</sup> See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

<sup>165</sup> See Stephen J. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photographs, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

THE COURT:

Well, what [should we] do with the Act of 1790?<sup>166</sup>

MR. LESSIG:

[The 1790 Act] is accomplishing two things at once. The 1790 Act did ratify existing copyrights as present copyright[s], but the purpose—

THE COURT:

And extended them in case of those states that had lesser limits.

MR. LESSIG:

That's right. But the purpose of that extension at that time was both to create incentives and also nationalize the copyright practice.

THE COURT:

Uniformity?

MR. LESSIG:

Within the United States.

THE COURT:

Because there was value in uniformity within a single market and that single market has now become broader than our national borders.

MR. LESSIG:

That's right, Your Honor, and the question of the transitional nature of the 1790 Act is, I think, a difficult one.

THE COURT:

You would admit of an exception for new constitutions?

MR. LESSIG:

Every new constitution gets this transition. That's right, Your Honor. That's a well-known rule.

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<sup>166</sup> Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (1790).

(Laughter.)

THE COURT:

You know we take with special deference, the implicit interpretations of the First Congress?

MR. LESSIG:

Yes, we do. Although, I don't think this is a clear interpretation of the power of the Court under the Act. Again, this is a term which [was] expressly set at fourteen years. We now have a term in the case of *Irving Berlin*<sup>167</sup> that is 140 years. This is a Congress that [was] clearly concerned about limiting the scope of copyright. It covered the printing of maps, charts, and books. Copyright now includes not just the printing of all of these objects, but also control over derivative works. The scope of this protection has increased significantly. Now under the reasoning—

THE COURT:

As of the production of such works—

MR. LESSIG:

That's right. Because of the prospective incentive, we're not questioning that this has had an effect, but we are questioning whether this is crowding out the second side of the Copyright Clause balance, which is the protection of the public domain. That's the only thing that's constitutionally required.

Congress has no obligation to pass a Copyright Act. They do have an obligation if they pass the Copyright Act to protect the public domain. That's the meaning of the Limited Times Clause here. Now if there were a repeated set of interpretations—actions by Congress, around this time, with the Framers, then under the authority of the Supreme Court this would require some special attention. We have one change by Congress in the first 100 years of the copyright term and one change again in the next fifty years of the copyright term. And since I was born we've had eleven changes retrospectively of the copyright term and two prospective changes.

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<sup>167</sup> *Irving Berlin v. Commissioner of Internal Revenue*, 420 B.T.A. 668 (1940).

THE COURT:

You wouldn't contend there's a causal affect there between your birth—

(Laughter.)

MR. LESSIG:

Well, Your Honor, I'm beginning to feel guilty and this explains my work on this case.

THE COURT:

I think that period coincides with a great increase in longevity and much more—a greater increase in the technological extensions of intellectual property.

MR. LESSIG:

Well, as to—

THE COURT:

You didn't cause that either.

MR. LESSIG:

I'm working on the second one, Your Honor.

THE COURT:

[N]ow you'd think he was the Vice-President.

(Laughter.)

MR. LESSIG:

As to longevity, as we argued in our brief, [ ] the longevity of people over the age of five is not changing substantially. We have specific numbers and the recent period is 2.3 years.

THE COURT:

Let's just go back to one last thing and then we'll give you a final opportunity. On the 1790 Act you were saying uniformity—or a need for uniformity—played a role there. The Framers apparently—or those in the First Congress—apparently did consider retrospectivity within their power. What do we say to get rid of it?

MR. LESSIG:

Well, it's uniformity under a conception, not necessarily improper, I believe about a transitional Constitution. No, I don't think it makes sense to read that as stating some constitutional rule. As to the extent that there were constitutional rules stated by our Framers in the 1790 to 1800 period, many of them have been questioned by subsequent courts. But I don't think we have to be that direct about questioning the acts of this Congress.

THE COURT:

Thank you very much Professor Lessig . . . The case is submitted.<sup>168</sup>

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<sup>168</sup> Editor's Note: The United States Court of Appeals for the District of Columbia Circuit decided in favor of the government in *Eldred v. Reno*, 239 F.3d. 372 (D.C. Cir. 2001). As of the date of this publication, an appeal is under way.



