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# Unwise or Unconstitutional?: The Copyright Term Extension Act, the *Eldred* Decision, and the Freezing of the Public Domain for Private Benefit\*

Arlen W. Langvardt\*\* and Kyle T. Langvardt\*\*\*

## I. INTRODUCTION

Assume that in 2004, a person wishes to borrow and make use of the expression contained in a work that was created and published in 1922. Copyright protection on the work took effect in 1922, in accordance with the Copyright Act of 1909.<sup>1</sup> Now consider these questions:

1. Must the prospective user obtain a license—i.e., a grant of permission—from the copyright owner in order to avoid being liable for infringement when the use occurs?

2. What if the facts are the same, except that 1923 was the year of creation, publication, and copyright commencement?

The answers to the above questions relate directly to the public policy and constitutional issues on which this article will focus. We begin the identification of those issues by offering the following answers to the article's opening quiz:

1. *No, a license is not necessary.* Some law students would be quick to argue that this is a trick question because there is no copyright owner. This is because there is no longer a valid copyright on the 1922 work. Even assuming that the copyright owner properly renewed the copyright in 1950, the copyright expired at the end of 1997.<sup>2</sup> The 1922 work is therefore in the

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1. Copyright Act of 1909, ch. 320, §§ 9-10, 35 Stat. 1075, 1077-78 (1909) (amended by the Copyright Act of 1976 and currently codified at 17 U.S.C. §§ 101-1101 (2000)) [hereinafter Copyright Act of 1909].

2. The 1909 Act called for a basic copyright duration of 28 years from publication of the work, with a 28-year renewal term available if the renewal procedure was properly completed. Copyright Act of 1909, *supra* note 1, §§ 23-24. The 1909 Act was extensively overhauled by the Copyright Act of 1976. Copyright Act of 1976, 17 U.S.C. §§ 101-1101 (amended in various respects

public domain and any person may freely use it regardless of the use's nature or purpose.<sup>3</sup>

2. *Yes, a license is necessary* (assuming that the copyright owner renewed the copyright in 1951 and that copyright law's *fair use* doctrine<sup>4</sup> would not protect the use at issue). The copyright on the 1923 work continues to exist and will run through 2018. Copyright protection of the 1922 work and the 1923 work both arose pursuant to the Copyright Act of 1909, but the 1922 copyright has expired and the 1923 is still in force.<sup>5</sup>

What accounts for the drastically different durations of the copyrights on the works described in the above hypotheticals?

The Copyright Act of 1909 established a maximum copyright term of 56 years from the time of publication of the copyrighted work.<sup>6</sup> Therefore, when copyright protection was secured on the 1922 and 1923 works, the copyright owners would have expected that their copyrights would run until 1978 and 1979, respectively. The duration rules changed, however, more than five decades after the two works acquired copyright protection. The 1922 work received only the benefit of the 1976

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since enactment; current version codified as 17 U.S.C. §§ 101-1101 (2000) [hereinafter Copyright Act of 1976]. The Copyright Act of 1976 provided that if a work remained under copyright as of January 1, 1978, the 28-year renewal term called for by the 1909 Act would instead be a 47-year renewal term—meaning that the total copyright duration would be 75 years rather than 56 years. 17 U.S.C. § 304 (1976) (amended 1998). For further explanation of why the copyright on the hypothetical 1922 work ran through the end of 1997, see *infra* note 7 and *infra* text accompanying note 58.

3. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29-30 (2003) (noting that once a copyright expires and the work enters the public domain, any party may make unrestricted use of the work).

4. Under the *fair use* doctrine, use of a copyrighted work for such purposes as criticism, commentary, news reporting, teaching, scholarship, or research may not amount to copyright infringement, even though the user did not obtain permission from the copyright owner. *See* 17 U.S.C. § 107 (2000).

5. The explanation of why the copyright on the 1923 work continues to exist begins with the statutes cited *supra* note 2. Unlike the 1922 work, the 1923 work received the benefit of the 20-year duration extension provided by the Copyright Term Extension Act. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-28 (codified as amended at 17 U.S.C. §§ 302, 304 (2000) (amending 17 U.S.C. §§ 302, 304 (1976)) [hereinafter CTEA]. For further explanation of why the copyright on the hypothetical 1923 work has not expired, see *infra* note 9 and *infra* text accompanying notes 8-9, 59.

6. The 1909 Act established a basic copyright duration of 28 years from publication of the work, and allowed the option of a 28-year renewal term. Copyright Act of 1909, *supra* note 1, § 24.

enactment that extended the maximum copyright duration for pre-1978 works to 75 years.<sup>7</sup> Twice blessed, the 1923 work qualified not only for the 1976 statute's 19-year term extension but also for the 20-year bonus tacked on by the Copyright Term Extension Act of 1998 (CTEA).<sup>8</sup> The 1923 work came within the CTEA's coverage by still being under copyright when the CTEA took effect in 1998. The 1997 expiration of the copyright on the 1922 work caused that work to miss qualifying for the CTEA jackpot by one year.<sup>9</sup> Thanks to the CTEA, the 1923 work carries a 95-year copyright duration. This is 39 years more than the term contemplated by the law in effect at the time copyright protection on the work was secured.

A blunt two-part answer may be offered in response to the "What accounts for the drastically different durations?" question posed earlier. First, an accommodating Congress was too inclined to please institutional copyright owners and their lobbyists, so it granted a huge extension in copyright duration in 1998 without paying adequate attention to the public policy and constitutional implications of doing so.<sup>10</sup> Second, the Supreme Court was overly concerned about the practical effects of holding the CTEA unconstitutional, so it opted in its *Eldred v. Ashcroft*<sup>11</sup> decision for an exceedingly deferential posture toward Congress' enactments pursuant to the Copyright Clause.<sup>12</sup> In case the reader has not already guessed, the

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7. See *supra* note 2. As of January 1, 1978, the 1922 work was still under copyright, in what would have been the last year of its renewal term. By still being "alive," in a copyright law sense, as of January 1, 1978, the 1922 work obtained the benefit of the 1976 Act's 19-year duration extension. Copyright Act of 1976, *supra* note 2. The renewal term that would have been 28 years therefore became a 47-year renewal term. As a result, the copyright on the 1922 work ran through the end of 1997. See *id.* § 305 (copyrights run through end of calendar year in which they otherwise would expire).

8. CTEA, *supra* note 5, §§ 102, 112 (codified as 17 U.S.C. §§ 302, 304).

9. CTEA, *supra* note 5, § 102(d). By still being under copyright as of January 1, 1978, the 1923 work qualified for the 1976 Act's 19-year duration extension. See *supra* note 7. What would have been a renewal term of 28 years from 1951 thus became a renewal term of 47 years from 1951. Copyright Act of 1976, *supra* note 2, § 302. The 47-year renewal term meant that the 1923 work was under copyright as of October 1998. The CTEA took effect in October 1998, granting a 20-year duration extension to all existing copyrights that remained valid as of the statute's effective date. CTEA, *supra* note 5, § 102(d), at 112 Stat. 2827-28. The 1923 work therefore met the necessary condition for obtaining the CTEA bonus.

10. See *infra* text accompanying notes 47-53, 60-62, 277-295.

11. 537 U.S. 186 (2003).

12. See *infra* text accompanying notes 97-111, 131-135, 162-163, 340-411.

authors sympathize with the blunt objections raised in this paragraph.

This article offers critical analysis of the CTEA, a law that increased copyright duration by 20 years for works created after the CTEA's 1998 effective date and for preexisting works still under copyright as of 1998.<sup>13</sup> The CTEA amounts to a massive giveaway to corporate copyright owners and heirs of creators of copyrighted works at a steep cost to society. Among the CTEA's undesirable effects is the freezing of the public domain. We are in the initial stages of a two-decade period in which no copyrights will expire and no works will enter the public domain. This throws off the balance contemplated by the framers in the Constitution's Copyright Clause and serves as one of the reasons why the CTEA should have been regarded by courts as not merely unwise but unconstitutional.<sup>14</sup>

In addition, this article examines the *Eldred* decision in which the Supreme Court held that the CTEA passed constitutional muster despite its questionable public policy.<sup>15</sup> The *Eldred* assessment set forth here reveals serious deficiencies in the Court's analysis and demonstrates why Justice Breyer had the better of the argument. In his dissent, Justice Breyer asserted that the CTEA reflected "failings of constitutional kind."<sup>16</sup> Recognizing that *Eldred*, even if wrongly decided, has resolved nearly all questions concerning the CTEA's constitutionality, this article will explore that decision's implications for the future of copyright law and policy. In doing so, we offer recommendations for future copyright-related courses of action on the part of Congress, courts, copyright owners, and users of copyrighted works.<sup>17</sup>

## II. COPYRIGHT DURATION: THE HISTORICAL RECORD

### A. THE COPYRIGHT CLAUSE AND THE 1790, 1831, AND 1909 ACTS

Placing the CTEA in proper perspective requires consideration of the history of congressional enactments

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13. CTEA, *supra* note 5, §§ 302, 304(b).

14. *See infra* text accompanying notes 166-173, 210-222, 246-252, 266-267, 274-276, 290-295, 395-399.

15. *Eldred*, 537 U.S. at 222. For extensive examination of *Eldred*, see Part III of this article.

16. *Id.* at 243 (Breyer, J., dissenting). We explore Justice Breyer's dissent in a later subsection. *See infra* Part III.C.

17. *See infra* Part V.

dealing with copyright duration. The U.S. Constitution grants Congress the power to legislate with regard to copyrights and patents in Article I, § 8: “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>18</sup> The “promot[ing] the Progress of Science and useful Arts” portion of the clause has been characterized as a limitation on the grant of power to Congress because it states the objective that congressional exercises of the power must fulfill.<sup>19</sup> This portion of the clause and its proper role will receive further attention later in the article.<sup>20</sup> Congress is also cabined by the Copyright Clause’s “limited Times” language: Congress cannot constitutionally make copyright protection perpetual.<sup>21</sup> Thus, the matter of copyright duration has a constitutional dimension.

Congress enacted the first federal copyright law in 1790. It granted rights to creators of new works as well as creators of preexisting works.<sup>22</sup> The 1790 Act established a copyright duration of 14 years from the date of the work’s publication, with a 14-year renewal term being available if the creator survived the basic term.<sup>23</sup> In 1831, Congress amended the copyright duration rule to provide for a basic term of 28 years but made no change in the length of the possible renewal term.<sup>24</sup> The duration rule established by the 1831 Act applied to works created after the statute’s effective date and to preexisting works that were still in their initial copyright term at the time the statute took effect.<sup>25</sup>

After the 1831 Act, 78 years elapsed before Congress again lengthened copyright duration. In the Copyright Act of 1909,

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18. U.S. CONST. art. I, § 8, cl. 8.

19. See e.g., *Eldred*, 537 U.S. 212; *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

20. See *infra* Part IV.B.

21. See e.g., *Eldred*, 537 U.S. at 199-209 (suggesting that when the Court affirmed past copyright term extensions as being constitutionally valid in accordance with “limited Times,” it did not imply that the Constitution authorized perpetually unlimited times).

22. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed by Act of Apr. 29, 1802, ch. 36, Act of Feb. 15, 1819, ch. 19, Act of Feb. 3, 1831, ch. 16, and by Act of June 30, 1834, ch. 157).

23. *Id.*

24. Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436, 436-37.

25. *Id.* §§ 1, 16.

Congress added 14 years to the previous maximum duration of 42 years.<sup>26</sup> The 1909 Act established a maximum copyright duration of 56 years from publication—28 years for the basic term plus another 28 for the renewal term provided that the renewal right was properly exercised.<sup>27</sup>

## B. THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 took effect January 1, 1978. With it, Congress effected a major overhaul of copyright law.<sup>28</sup> Congress concluded that for future works, copyright duration should be determined on some basis other than the basic-term-plus-renewal approach of previous copyright law.<sup>29</sup> Two key factors led to this conclusion. First, the potentially harsh nature of the renewal requirement meant that a copyright owner's slip-up in filing renewal paperwork could result in the receipt of only 28 years of copyright protection. Second, the basic-term-plus-renewal approach was incompatible with the duration provision called for by the Berne Convention, an important international agreement that the United States seemed likely to join in the near future.<sup>30</sup> Congress therefore

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26. Copyright Act of 1909, *supra* note 1.

27. *See id.* Failure to take appropriate steps to renew the copyright during the final year of the basic term meant that the work passed into the public domain at the end of the basic term. *See id.*

28. Copyright Act of 1976, *supra* note 2. *See Eldred v. Ashcroft*, 537 U.S. 186, 264 (2003) (Breyer, J., dissenting) (referring to 1976 Act as having “thoroughly revised copyright law”). Details concerning the many changes made by the 1976 Act, other than those dealing with copyright duration, are largely beyond the scope of this article. However, we occasionally address a rules-change made by the 1976 Act if it bears at least a general relationship to the matter of duration. *See, e.g., infra* note 31 and accompanying text.

29. *See e.g.*, H.R. REP. No. 94-1476, at 134-35 (1976) (listing rationales for changing to duration based on the life of the author).

30. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02 (1995) (noting the “clumsy renewal structure” of the 1909 Act); Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 658 (2002) (the 1909 renewal system resulted in a “substantial burden and expense to the author;” further, the United States needed to join the Berne Convention); *Eldred*, 537 U.S. at 194-95 (the 1976 Act aligned the United States with the Berne Convention) (Breyer, J., dissenting); *id.* at 259, 264-65 (Breyer, J., dissenting) (the 1976 Act allowed the United States to conform to “an important international treaty”); H.R. REP. No. 94-1476, at 135-36 (the extended copyright term was required by the Berne Convention); S. REP. No. 94-473, at 118 (1975) (without the proposed “life-plus 50” term, the United States would not be able to adhere to the Berne Convention). The Berne Convention required subscribing nations to provide, in their respective copyright laws, that copyright protection would

established a different set of duration rules for works created in 1978 or thereafter.<sup>31</sup> The basic rule for the duration of works created on or after January 1, 1978 became the life of the creator plus 50 years.<sup>32</sup> Joint-creator works produced in 1978 or later were to receive copyright protection for the life of the last surviving creator plus 50 years.<sup>33</sup> In choosing a “life plus 50” framework for the basic rule and the joint-creator rule, Congress borrowed from the Berne Convention’s duration provision.<sup>34</sup>

The 1976 Act’s revised duration rules included a separate provision dealing with works-for-hire.<sup>35</sup> Works-for-hire created on or after January 1, 1978 would be protected for 75 years from first publication of the work or 100 years from the work’s creation, whichever came first.<sup>36</sup> Anonymous or pseudonymous works created on or after January 1, 1978 have the same duration.<sup>37</sup>

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last for a minimum of 50 years beyond the creator’s life. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, art. 7, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The United States did not formally join the Berne Convention until 1989, after Congress made other necessary changes in U.S. copyright law. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.). Nevertheless, the duration changes made in the 1976 Act proved critical to that effort. *Eldred*, 537 U.S. at 195; *id.* at 259, 264-65 (Breyer, J., dissenting); H.R. Rep. No. 94-1476, at 135-36; S. Rep. No. 94-473, at 118.

31. See *infra* text accompanying notes 32-37. The 1976 Act also departed from prior law by making creation of the work, rather than the publication thereof, the key event triggering the commencement of copyright protection. Compare Copyright Act of 1976, *supra* note 2, § 102 with Copyright Act of 1909, *supra* note 1, §§ 9-10. As will be seen, the longstanding duration rule that called for a basic term of 28 years from publication plus a possible renewal term continues to govern copyrighted pre-1978 works, though the 1976 Act lengthened the renewal term for qualifying pre-1978 works. Copyright Act of 1976, *supra* note 2, § 304; see also *infra* text accompanying notes 38-41. Works created prior to 1978 but not published until 1978 or later were made subject to the newly developed rules for works created on or after January 1, 1978. Copyright Act of 1976, *supra* note 2, § 303.

32. Copyright Act of 1976, *supra* note 2, § 302(a).

33. *Id.* § 302(b).

34. Berne Convention, *supra* note 30, art. 7.

35. The requirements for a work to constitute a work-for-hire to exist are currently set forth in 17 U.S.C. § 101 (2000). When a work-for-hire, exists, the copyright owner is the employer or the party for whom (or for which) the employee or the independent contractor prepared the work 17 U.S.C. § 201(b) (2000).

36. Copyright Act of 1976, *supra* note 2, § 302(c).

37. *Id.*

Congress also revisited the duration rule for pre-1978 works (the 28-plus-28 rule set forth in the 1909 Act).<sup>38</sup> The maximum 56-year duration established in the 1909 Act seemed likely to be a shorter period of copyright protection than the average term of protection under the life-plus-50 rule for works created in 1978 or thereafter.<sup>39</sup> Therefore, as part of the Copyright Act of 1976, Congress modified the 1909 Act's duration rule by providing that if a pre-1978 work was under either its basic term or renewal term as of January 1, 1978, the renewal term would be 47 years rather than 28.<sup>40</sup> The maximum duration for qualifying pre-1978 works thus became 75 years from publication.<sup>41</sup>

The duration change just described accounts for the 75-year duration of the copyright on the work referred to in the first of the two hypotheticals with which this article opened. Let us return briefly to that first hypothetical. In view of the 28-plus-28 rule of the 1909 Act, the work created and published in 1922 would have received 56 years of copyright protection and would then have passed into the public domain if not for the extension provided for by the 1976 Act. Because the 1922 work's copyright remained valid as of January 1, 1978, the renewal term that *would* have been 28 years under the 1909 Act *became* 47 years under the 1976 Act. This meant that the copyright on the 1922 work ran for 75 years, through the end of 1997.<sup>42</sup>

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38. Copyright Act of 1909, *supra* note 1, § 23.

39. Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 698-99 (2000) (comments of Jane C. Ginsburg).

40. Copyright Act of 1976, *supra* note 2, § 304.

41. Copyright Act of 1976, *supra* note 2, § 304. The foregoing explanation simplifies a somewhat more complex historical reality. The major copyright overhaul that finally took place in the 1976 Act required more than a decade of legislative preparation to accomplish. Confident that the overhaul almost certainly would include duration modifications but not knowing exactly when the full statute would be ready for enactment, Congress, beginning in 1962, passed a series of annual extensions of durations on copyrights that were in their renewal terms. RALPH S. BROWN & ROBERT DENICOLA, *CASES ON COPYRIGHT* 481 (7th ed. 1998). These annual extensions kept the copyrights on many works alive long enough to enable them to receive the 75-year duration established in the 1976 Act for qualifying pre-1978 works. *Id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 196 n.2 (2003).

42. See citations and explanation in *supra* note 7.

## C. THE COPYRIGHT TERM EXTENSION ACT OF 1998

The 1976 Act granted an additional 19 years of copyright protection to qualifying pre-1978 works and substituted new rules that lengthened the average copyright term for works created in 1978 or thereafter. In doing so, the 1976 Act increased copyright duration to a greater degree than had the earlier extensions enacted by Congress.<sup>43</sup> The jump in copyright term from 56 years to 75 or more years was not enough, however, as far as some copyright owners were concerned. The 1990s witnessed a significant behind-the-scenes lobbying effort, mounted largely by corporate copyright owners, for another statutory extension of copyright duration.<sup>44</sup> Among the leading proponents of a term extension was The Walt Disney Company.<sup>45</sup> Its copyright on the “Steamboat Willie” cartoon, which featured the first depiction of the Mickey Mouse character, was set to expire in the very early years of the 21st Century unless a term extension became law.<sup>46</sup> In addition, other Disney copyrights were destined for the same fate in steady succession if the duration rule remained as it was.<sup>47</sup>

The lobbyists and the sponsors of the relevant legislation stressed the supposed benefits that both corporate and individual copyright owners would receive from a duration extension.<sup>48</sup> They relied on the support of organizations such

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43. The extensions established in the 1909 and 1831 statutes had each been 14 years in length. Copyright Act of 1909, *supra* note 1, § 24; Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

44. For accounts of the lobbying effort, see Dennis S. Karjala, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 203-04, 229, 232-33, 235 (2002); Daren Fonda, *Copyright Crusader*, BOSTON GLOBE MAGAZINE, Aug. 29, 1999; Bill McAllister, *A Capital Way to Stop a Headache*, WASH. POST, Oct. 15, 1998, at A21; Brigid McMenamin, *Mickey's Mine!*, FORBES MAGAZINE, Aug. 23, 1999, at 43; Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, March 28, 1998, at B7, B9; John Solomon, *Rhapsody in Green*, BOSTON GLOBE, Jan. 3, 1999, at E2.

45. See generally, *supra* note 44.

46. See generally, *supra* note 44.

47. See generally, *supra* note 44.

48. See 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch, co-sponsor of the CTEA); 141 CONG. REC. S3390-92 (daily ed. Feb. 22, 1995) (statement of Sen. Hatch when extension bill was first considered in 1995); 141 CONG. REC. S3393 (statement of Sen. Feinstein, co-sponsor of CTEA, when extension bill was first considered in 1995); Fonda, *supra* note 44; McAllister, *supra* note 44, at A21; Smith, *supra* note 44, at A1.

as the Motion Picture Association of America, the estates of well-known composers such as George and Ira Gershwin, and the estates of less famous creators.<sup>49</sup> The CTEA's proponents also paraded before congressional committees an assortment of musical artists who urged enactment of the duration extension.<sup>50</sup> The well-financed backers of the legislation had little difficulty drowning out the objections of those who questioned the wisdom and constitutionality of extending copyright duration yet again.<sup>51</sup> As a result, the CTEA became

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49. See *supra* note 48.

50. Quincy Jones provided testimony to a House subcommittee. *Hearing on H.R. 989 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 104th Cong. 233-39 (1995) [hereinafter *Hearing on H.R. 989*] (statement of Quincy Jones in regard to CTEA forerunner when bill was under consideration in 1995). Bob Dylan, Don Henley, and Carlos Santana expressed their views to a Senate committee. *Hearing on S. 483 Before the Senate Committee on the Judiciary*, 104th Cong. 55-56 (1995) [hereinafter *1995 Senate Hearings*] (statement of Bob Dylan in regard to CTEA forerunner when bill was under consideration in 1995); *id.* at 56-57 (statement of Don Henley regarding same bill); *id.* at 57 (statement of Carlos Santana regarding same bill). The hearings dealing with what later became the CTEA occurred in 1995, when congressional committees first considered extending existing and future copyrights by 20 years. See S. 483, 104th Cong. (1995); H.R. 989, 104th Cong. (1995). The extension bill became stalled over another copyright issue, namely, whether restaurants, bars, and other small businesses should have to pay performance fees to song copyright owners when they played the radio or television at their establishments. Karjala, *supra* note 44, at 204 n.21; Fonda, *supra* note 44. That issue was not resolved until 1998, when Congress settled on the terms of the Fairness in Music Licensing Act (FMLA). Congress then revived the CTEA proposal and, in short order, enacted it along with the FMLA. CTEA, *supra* note 5, §§ 102(b) & 102(d), 112 Stat. 2827-28; Fairness in Music Licensing Act, Pub. L. No. 105-298, §§ 201-07, 112 Stat. 2830 (amending 17 U.S.C. § 110). In doing so, Congress did not conduct further hearings of an extensive nature on the duration-extension issues. Fonda, *supra* note 44. See McMenamin, *supra* note 44, at 43; Solomon, *supra* note 44, at E2.

51. See Fonda, *supra* note 44, at 25-27; McAllister, *supra* note 44, at A21; Smith, *supra* note 44, at B7; Solomon, *supra* note 44, at E2. When it enacted the CTEA, Congress "acceded to the demands of noncreative heirs and assignees." Karjala, *supra* note 44, at 199. Professor Dennis Karjala worked tirelessly in seeking to inform Congress of the problems with the CTEA when it was first proposed in 1995 and when it resurfaced in 1998. See, e.g., *Statement of Copyright and Intellectual Property Law Professors In Opposition to H.R. 604, H.R. 2589, and S. 505, The Copyright Term Extension Act, Submitted to the Committees on the Judiciary, Senate and House of Representatives*, 105th Cong. (Jan. 28, 1998) [hereinafter *Statement of Copyright Law Professors*] (statement of Dennis S. Karjala, representing group of approximately 60 copyright and intellectual property law professors); *Written Testimony Before the House of Representatives Committee on the Judiciary Subcommittee on Courts and Intellectual Property, on H.R. 989, A Bill to Amend Title 17, United States Code, With Respect to the Duration of*

law with almost no opposition in Congress and with minimal public fanfare.<sup>52</sup> One assumes, however, that there was plenty of fanfare in certain corporate boardrooms and offices.<sup>53</sup>

Congress officially named the CTEA the “Sonny Bono Copyright Term Extension Act,” in memory of the late entertainer-turned-Congressman, who had favored the legislation.<sup>54</sup> Bettering the previous length-of-extension record by one year, the CTEA tacked on 20 years to the copyright terms of both pre-1978 works and works created in 1978 or thereafter.<sup>55</sup> The CTEA thus applied both retrospectively (to certain works that existed prior to its enactment) and prospectively (to works created after it took effect in 1998).

For a pre-1978 work to qualify for the 20-year extension established in the CTEA, the work’s copyright must still have been valid in either the basic term or the renewal term as of

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*Copyright*, 104th Cong. (July 13, 1995) (written testimony of Dennis S. Karjala, representing group of approximately 45 copyright and intellectual property law professors); see link to Opposing Copyright Extension, at <http://www.law.asu.edu/HomePages/Karjala> (site maintained by Dennis S. Karjala, Professor of Law, Arizona State University) (last visited Apr. 9, 2004). In the constitutional challenge that made its way to the Supreme Court, Professor Lawrence Lessig took the lead. See *infra* notes 398, 415; *infra* text accompanying notes 416-417, 422.

52. See Fonda, *supra* note 44, at 25-26; Solomon, *supra* note 44, at E2. For discussion of the circumstances surrounding the CTEA’s 1998 enactment after bills proposing the same duration extension had been put on legislative hold in 1995, see *supra* notes 44-45 and accompanying text.

53. See Fonda, *supra* note 44, at 25-28; McMenamain, *supra* note 44, at 43; Solomon, *supra* note 44, at E2.

54. CETA, *supra* note 5. Originally, Bono had favored making copyright protection perpetual, though one assumes he must have backed off from that position upon being informed that the Constitution prohibited Congress from taking such action. See *Copyright Term, Film Labeling, and Film Preservation: Hearing on H.R. 989 et al. Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee*, 104th Cong. 94 (1995) (statement of Rep. Sonny Bono, raising question about whether copyrights should ever expire). See also 144 CONG REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono, who succeeded her late husband in the House, noting that Sonny Bono had favored perpetual copyright protection but that she had been “informed by staff” of the unconstitutionality of such a move by Congress).

55. 17 U.S.C. §§ 302, 304 (2000). Professor Karjala has observed that no pro-CTEA speakers—whether witnesses at hearings or members of Congress—attempted to make a special case for the statute’s prospective application. Instead, witnesses and members of Congress focused in their statements on the supposed need to extend the duration of existing copyrights. See Karjala, *supra* note 44, at 204, 216. This fact seems to demonstrate the real object of congressional attention on the question of duration extension. See *id.*

October 1998.<sup>56</sup> Many of the pre-1978 works that had received the 1976 Act's 19-year term extension also qualified for the CTEA's 20-year extension. Under the CTEA, the renewal term for qualifying pre-1978 works has become 67 years, with the total copyright duration for such works now being 95 years.<sup>57</sup>

We return, for illustrative purposes, to the hypotheticals with which this article began. As explained in the earlier discussion of the first hypothetical, the 1922 work qualified for the lengthened renewal term of 47 years established by the 1976 Act's extension of the 28-year renewal term called for by the statute under which the work's copyright arose. The 47-year renewal term ran through the end of 1997. Accordingly, the copyright on the 1922 work expired just prior to the CTEA's 1998 enactment, meaning that the work did not qualify for the 20 additional years of protection contemplated by the CTEA.<sup>58</sup>

The story is significantly different, however, for the work described in the second hypothetical. That work's year of creation, publication, and copyright acquisition was 1923. The 1951 renewal of the copyright on the work meant that the work clearly remained under copyright as of January 1, 1978. The renewal term therefore would have lasted for 47 years from 1951, if not for the CTEA's further sweetening of the pot. Measuring 47 years from the time of copyright renewal in 1951 would yield a date in 1998. Because copyrights run until the end of the relevant year, the copyright on the 1923 work would have expired at the end of 1998 if the CTEA had not been enacted. But because the 1923 work was still under copyright as of the October 1998 effective date of the CTEA, the 1923 work qualified for the CTEA's 20-year bonus. The copyright on that work therefore will not expire until the end of 2018.<sup>59</sup>

Consider, too, the similar good fortune of The Walt Disney Company, whose copyright on the "Steamboat Willie" cartoon would have entered the public domain on January 1, 2004 if the CTEA had not been enacted.<sup>60</sup> Instead, that copyright will remain valid through 2023. Also put off for 20 years each are the other copyright expirations that, if not for the CTEA, Disney would regularly have experienced after the expiration of

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56. 17 U.S.C. § 304(a), (b).

57. *Id.*

58. *See supra* note 7.

59. *See supra* note 9.

60. Fonda, *supra* note 44, at 25; McAllister, *supra* note 44, at A21; Solomon, *supra* note 44, at E2.

the Steamboat Willie copyright. The same is true of many other owners—whether corporate persons or natural persons—of pre-1978 work copyrights that would have expired beginning January 1, 1999 had the CTEA not come to the rescue.

The CTEA's application to qualifying pre-1978 works, as detailed in the preceding paragraphs, has produced a noteworthy effect: a frozen public domain. Since the CTEA's enactment, no works have entered the public domain. None will do so until the thaw begins on January 1, 2019.<sup>61</sup> This CTEA effect will receive further attention later in the article.<sup>62</sup>

We now turn to the CTEA's application to works created on or after January 1, 1978. Here, the CTEA did not cause the immediately visible and dramatic effect it produced regarding certain pre-1978 works: significantly delaying the entry into the public domain of works that were on the verge of entering it.<sup>63</sup> In view of the life-plus-50 rule established in the Copyright Act of 1976 for most works created in 1978 or thereafter, January 1, 2029 was the earliest time any work in that category could have entered the public domain.<sup>64</sup> For the vast majority of works in that category, the time of copyright expiration would have been much later. The CTEA's addition of 20 years to the duration of copyrights on works created on or after January 1, 1978<sup>65</sup> thus put off an inevitability that

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61. Copyrights run until the end of the relevant calendar year. 17 U.S.C. § 305 (2000). Therefore, any work whose copyright survived into 1998 qualified for the CTEA's 20-year bonus, which applied not only to future copyrights but also to existing copyrights that were still in effect as of the statute's 1998 effective date. *Id.* §§ 302 & 304. Any copyright that would have expired at the end of 1998 will, thanks to the CTEA, run through 2018. *Id.* § 304(b). Hence, no works have entered the public domain since January 1, 1998 (the date of entry of works whose copyrights expired at the end of 1997). The public domain will receive no additions until January 1, 2019. *See id.*

62. *See infra* text accompanying notes 173, 210-222, 274-276, 290-295, 395-396, 411-415.

63. *See supra* notes 59-60 and accompanying text.

64. *See* 17 U.S.C. § 302 (2000). For illustrative purposes, consider the case of a person who created a copyrighted work in 1978 and then died that same year. The life-plus-50 rule, operating in conjunction with the rule that copyrights exist until the end of the relevant year, would have dictated a copyright duration running through 2028. *Id.* § 305. Hence, January 1, 2029 would have been the underlying work's date of entry into the public domain—the earliest possible public domain entry date under the pre-CTEA rule governing the duration of works created in 1978 or thereafter. Post-CTEA, such works cannot enter the public domain until January 1, 2049 at the earliest. 17 U.S.C. § 302.

65. In regard to works created in 1978 or thereafter, the CTEA's application was both retrospective (to works created between January 1, 1978

already seemed rather distant. Even so, the long-term significance of this aspect of the CTEA will be considerable, as will be discussed extensively in this article.

With the enactment of the CTEA, the duration rule for most copyrighted works created on or after January 1, 1978 has become life of the creator plus 70 years.<sup>66</sup> The CTEA similarly adjusted the rule for joint-creator works.<sup>67</sup> That duration rule now speaks in terms of the life of the last surviving creator plus 70 years (increased from 50).<sup>68</sup> Finally, the CTEA added 20 to the relevant numbers of years set forth in the rules governing the duration of copyrights on works-for-hire and anonymous and pseudonymous works.<sup>69</sup> Those rules now call for a duration of 95 years from first publication (increased from 75) or 120 years from creation (increased from 100), whichever comes first.<sup>70</sup>

Congress may have acted unwisely when it enacted the CTEA, but did it act *unconstitutionally*? *Eldred v. Ashcroft*<sup>71</sup> presented that fundamental question. In the following section, we offer an in-depth examination of *Eldred*.

### III. THE *ELDRED V. ASHCROFT* DECISION

The plaintiffs in *Eldred* were providers of products or services that involved the use of public domain works.<sup>72</sup> They filed suit against the United States Attorney General in an effort to have the CTEA declared unconstitutional.<sup>73</sup> The

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and the CTEA's 1998 enactment) and prospective (to works created after the CTEA's enactment). 17 U.S.C. § 302. Pre-CTEA works created from 1978 on were made subject to the same qualifying condition applied to pre-1978 works: that they still were under copyright at the time the CTEA came on the scene. *Id.* See *id.* § 304(a), (b). Unlike the pre-1978 works, some of which qualified for the CTEA jackpot and some of which did not, all pre-CTEA works created on or after January 1, 1978 would have satisfied the qualifying condition. Under the life-plus-50 rule that existed prior to the CTEA, no copyright on a work created in 1978 or thereafter could have expired any earlier than the end of 2028. See *supra* note 64.

66. 17 U.S.C. § 302(a).

67. *Id.* § 302(b).

68. *Id.*

69. *Id.* § 302(c).

70. *Id.*

71. 537 U.S. 186 (2003).

72. *Id.* at 193.

73. *Id.* The lead plaintiff, Eric Eldred, operates a website on which he provided free access to copies of a wide range of public domain works. See <http://www.eldritchpress.org> (last visited Apr. 9, 2004). For a profile of

above-described 20-year freeze on the public domain caused the plaintiffs immediate concern because they very soon would have had unrestricted ability to use many works that were on the verge of entering the public domain at the time the CTEA was enacted. As previously explained, however, the CTEA delayed those works' entry date into the public domain by two decades. In addition, the CTEA's long-term consequences for the public domain troubled the plaintiffs.<sup>74</sup>

Recognizing that merely demonstrating why the CTEA was bad policy would not enable them to win the case, the plaintiffs stressed, as grounds for judicial intervention, what they regarded as constitutional infirmities in the CTEA. The U.S. District Court rejected the plaintiffs' arguments that the CTEA violated the Constitution's Copyright Clause and First Amendment, and granted the Attorney General judgment on the pleadings.<sup>75</sup> The U.S. Court of Appeals for the District of Columbia Circuit affirmed and later denied both rehearing and rehearing en banc.<sup>76</sup>

The Supreme Court granted certiorari to decide two questions: "whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights violates the First Amendment."<sup>77</sup> With Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas joining an opinion authored by Justice Ginsburg, the Court affirmed the decision of the Court of Appeals and held that the CTEA violated neither the Copyright Clause nor the First Amendment.<sup>78</sup> The following subsections summarize Justice Ginsburg's majority opinion and the separate dissents of Justices Stevens and Breyer. After those subsections, we subject the decision to careful analysis.

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Eldred, see Fonda, *supra* note 44.

74. See *Eldred*, 537 U.S. at 266 (Breyer, J., dissenting); *Eldred v. Reno*, 239 F.3d 372, 373-74 (D.C. Cir. 2001), *rehearing and rehearing en banc denied*, 255 F.3d 849 (2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003). See also Fonda, *supra* note 44 (discussing Eldred's concerns about CTEA).

75. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3-4 (D.D.C. 1999).

76. *Eldred*, 239 F.3d at 375-76, 377-78 (D.C. Cir. 2001), *rehearing and rehearing en banc denied*, 255 F.3d 847 (2001).

77. *Eldred*, 537 U.S. at 198. The first of these questions reflected Eldred's decision to focus (in the Supreme Court proceedings) on the CTEA's retrospective application. *Id.* at 193.

78. *Id.* at 187-91 (syllabus); see also *id.* at 194, 198, 204-05, 208-09, 221-22. Justices Stevens and Breyer dissented. *Id.* at 222 (Stevens, J., dissenting); *id.* at 242 (Breyer, J., dissenting).

## A. THE GINSBURG MAJORITY OPINION

Early in her opinion, Justice Ginsburg emphasized that the petitioners (referred to here collectively as “Eldred”) did not contest the validity of the CTEA insofar as it applied to copyrights arising after the statute’s effective date.<sup>79</sup> Eldred’s position was that the CTEA’s unconstitutionality resided in its application to existing copyrights.<sup>80</sup> The court was unsympathetic to Eldred’s primary contention: that the Copyright Clause bars Congress from extending the terms of existing copyrights.<sup>81</sup>

With the Court not previously having had occasion to decide whether Congress could constitutionally lengthen the duration of existing copyrights,<sup>82</sup> Justice Ginsburg began by observing that the CTEA was merely the latest in a long series, stretching back nearly as far as the Constitution itself, of retroactive extensions of term length.<sup>83</sup> The first in the series, she asserted, was the Copyright Act of 1790. The 1790 Act, which set a basic copyright term and provided for the possibility of a renewal term, applied not only to new works but also to already existing works that had been subject to state copyright.<sup>84</sup> Similarly, Justice Ginsburg noted, the duration extensions of the 1831 Act, the 1909 Act, and the 1976 Act applied to existing as well as future works.<sup>85</sup>

Justice Ginsburg characterized Eldred’s argument as one that “essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever ‘fixed’ or ‘inalterable.’”<sup>86</sup> Rejecting such a view, the Court reasoned that a congressional decision to extend the term of existing copyrights did not in and of itself create tension with

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79. *Id.* at 193.

80. *Id.* at 193, 198. *See id.* at 221-22. In the lower courts, Eldred had made a broader challenge, arguing that the CTEA was unconstitutional in its retrospective and prospective applications. *See Eldred* 239 F.3d at 373-74.

81. *Eldred*, 537 U.S. at 204; *see also id.* at 208, 219.

82. *Id.* at 202.

83. *Id.* at 194-96.

84. *Id.* at 194, 200. Justice Stevens disputed Justice Ginsburg’s characterization of the 1790 Act as the first in a series of duration extensions for existing copyrights. Instead of being a duration extension, he said, the 1790 Act *created* the federal copyright regime. *Id.* at 230-32 (Stevens, J., dissenting). *See infra* text accompanying notes 181-182.

85. *Eldred*, 537 U.S. at 194, 200-01, 204.

86. *Id.* at 199-200.

the Copyright Clause's "limited Times" provision.<sup>87</sup> Justice Ginsburg then added an observation to which she would return later: "there [was] no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA."<sup>88</sup>

As a possible further indication that Congress may constitutionally apply a term extension to existing copyrights, the Court noted that during the first part of the 19th Century, Congress had extended the duration of individual patents on various occasions.<sup>89</sup> Congress, moreover, had done so with judicial approval in cases in which Chief Justice Marshall and Justice Story sat as circuit justices.<sup>90</sup> Because the patent authority of Congress stems from the same constitutional source as its copyright authority, the Court concluded that the early judicial decisions on patent term extensions were relevant to the proper resolution of the current CTEA-related issues.<sup>91</sup> Justice Ginsburg also pointed out that in an 1843 decision, the Supreme Court had approved the retrospective application of a change in requirements for patentability.<sup>92</sup> If changes in patent law could be applied in that fashion, Justice Ginsburg reasoned, the same should be true of a new provision on copyright duration.<sup>93</sup>

According to the *Eldred* majority, the congressional rationale for applying copyright duration adjustments to existing works has traditionally been founded in a principle of equity: that it would be unfair to grant more favorable terms of

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87. *Id.* The Court stated that if a time period would be considered limited as applied to future copyrights, it still would be limited as to existing copyrights even though it extended the expiration point established in prior law. *Id.* This assumes, of course, that the extension did not go so far as to eliminate any expiration point and thereby make copyrights perpetual in duration. *See id.*

88. *Id.* at 199-200; *see id.* 209-10 & n.16. For consideration of the meaning and potential implications of the Court's statements in this regard, *see infra* text accompanying notes 340-349, 459-464; *see also infra* note 411.

89. *Eldred*, 537 U.S. at 201-202.

90. *Id.* at 202. The well-aged cases cited by the Court were *Evans v. Jordan*, 8 F. Cas. 872, 874 (C.C. Va. 1813) (No. 4,564) (Marshall, Circuit Justice), *aff'd*, 13 U.S. (9 Cranch) 199 (1815); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C. Mass. 1839) (No. 1,518) (Story, Circuit Justice); and *Evan v. Robinson*, 8 F. Cas. 886, 888 (C.C. Md. 1813) (No. 4,571). *Eldred*, 537 U.S. at 202.

91. *Eldred*, 537 U.S. at 201.

92. *Id.* at 202-03. *McClurg v. Kingsland*, 1 How. 202 (1843), was the 160-year-old decision cited by the Court. *Eldred*, 537 U.S. at 202-03.

93. *Eldred*, 537 U.S. at 203-04.

protection to authors whose works acquired copyright protection the day those terms took effect than to authors whose works came under copyright a short time earlier.<sup>94</sup> Since the 19th Century, Congress had frequently acted on this principle.<sup>95</sup> The Court regarded the CTEA's retroactive application as being in line with the "consistent historical practice" of Congress.<sup>96</sup> Taking into account "text, history, and precedent," Justice Ginsburg stated, "we cannot agree with [Eldred's] submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause."<sup>97</sup>

Having satisfied itself that the CTEA complied with the "limited Times" provision of the Copyright Clause, the Court turned its attention to whether the CTEA's retroactive component was a rational exercise of Copyright Clause authority.<sup>98</sup> As Justice Ginsburg recounted, Congress had concerns regarding U.S. copyright law's duration provisions in relation to the copyright term provided for in the European Union.<sup>99</sup> A 1993 EU directive had instructed all member states to adopt a term of life of the creator plus 70 years.<sup>100</sup> The EU operates under the rule of the shorter term, which means that if a work is under copyright outside the EU, the EU regards the copyright as expired once either the EU term or the foreign term has passed.<sup>101</sup> In other words, even though an EU-copyrighted work would pass into the EU's public domain only after the work's author had been dead 70 years, a U.S.-copyrighted work would pass into the EU's public domain a mere 50 years after the author's death—so long as life-plus-50

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94. *Id.* at 204.

95. *Id.* The Court stressed that the copyright duration extensions set forth in the 1831, 1909, and 1976 Acts had involved attempts on the part of the Congress to "place[] existing and future copyrights in parity." *Id.* at 194, 208.

96. *See id.* at 204.

97. *Id.*

98. *Id.* Justice Ginsburg wasted little time in pointing out that the Court's review in this regard would involve paying considerable deference to Congress and that she disapproved of Justice Breyer's proposal for a form of heightened review. *Id.* at 205 & n.10. She asserted that her colleague's "stringent version of rationality is unknown to our literary property jurisprudence." *Id.* Justice Breyer's proposal receives discussion at *infra* notes 206-209, 409 and accompanying text.

99. *Eldred*, 537 U.S. at 205-206.

100. *Id.* at 205.

101. *Id.*

remained the duration set by U.S. law. Congress presumably concluded that extending the term of copyright by 20 years would afford U.S. authors the same protections in Europe as those provided to EU authors, and would make the U.S. a more attractive location for the creation and dissemination of copyrightable works.<sup>102</sup>

Justice Ginsburg also observed that Congress had certain “demographic, economic, and technological” trends in mind when it considered the CTEA.<sup>103</sup> For one, an extended term would give copyright owners added incentive to put out new editions of copyrighted works, to restore them, and to bring about their greater public distribution.<sup>104</sup> In light of new technologies, media, and means of distribution, this aim appeared especially important.<sup>105</sup> Some members of Congress, moreover, expressed concern that in view of increases in life expectancies and the tendencies of people to have children later in life, the life-plus-50 term could be insufficient to ensure that royalties from an author’s work would not be cut off before all of his or her children and grandchildren die.<sup>106</sup> Accordingly, Congress concluded that life-plus-70 would be a more enticing term to family-minded potential authors.<sup>107</sup> In reaching this conclusion, Congress evidently took into account the committee hearing testimony of “prominent artists” such as Quincy Jones, Bob Dylan, Don Henley, and Carlos Santana, who “expressed the belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive

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102. See *id.* at 205-06 (majority opinion). In his dissent, Justice Breyer stressed that contrary to the impression the Court may have left, the CTEA’s supposed harmonization of U.S. law with EU law was woefully incomplete. *Id.* at 257-60 (Breyer, J., dissenting). See *infra* text accompanying notes 243-245, 319-320.

103. *Eldred*, 537 U.S. at 206.

104. *Id.* at 207.

105. *Id.*

106. *Id.* at 207 n.14.

107. *Id.* Justice Breyer noted in his dissent that for would-be creators, the lengthened term would not furnish any meaningful work-creation incentive beyond what the already substantial copyright duration would have provided. *Id.* at 255-56 (Breyer, J. dissenting). He also stressed that the lengthened term could not possibly furnish an incentive for the creation of an already created work. *Id.* Discussion of Justice Breyer’s dissent appears at in Part III.C. For critical analysis of the *Eldred* majority’s treatment of the Copyright Clause’s incentive requirement and the incentive issues presented by the CTEA, see *infra* text accompanying notes 325-339.

to create.”<sup>108</sup> The Register of Copyrights, Marybeth Peters, also offered committee hearing testimony that extending the duration of existing copyrights could furnish additional income that would help finance the creation of new works.<sup>109</sup>

The *Eldred* majority made no attempt to determine whether the conclusions reached by Congress were unassailable or whether the supporting testimony and considerations taken into account by Congress reflected soundness in all respects. After noting that the inquiry into whether the CTEA was a rational exercise of Copyright Clause authority required the Court to “defer substantially” to the judgments of Congress, Justice Ginsburg stressed that the CTEA “reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside [its] domain.”<sup>110</sup>

Justice Ginsburg appeared to acknowledge that there was room for doubt about whether the 20-year duration extension called for by the CTEA was good public policy. She emphasized, however, that the Court was “not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”<sup>111</sup> Holding that the CTEA passed the lenient rationality test, the Court issued a less-than-ringing endorsement: “[W]e cannot conclude that the CTEA . . . is an impermissible exercise of Congress’ power under the Copyright Clause.”<sup>112</sup>

The Court then turned to other Copyright Clause arguments raised by *Eldred*—arguments that Justice Ginsburg regarded as resting on “several novel readings” of the clause.<sup>113</sup> Addressing *Eldred*’s concern that retroactive extensions of copyrights could be strung together in a way that would make

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108. *Eldred*, 537 U.S. at 207-08 n.15. This quartet’s comments and apparent influence on Congress will receive further attention later in the article. See *infra* text accompanying notes 277-285.

109. *Eldred*, 537 U.S. at 207-08 n.15. The comment attributed to Peters is a curious one. A general system of copyright protection may, of course, lead to income from a particular work—income that could help support a creator at the time he or she is creating another work. Any income from the extra 20 years of copyright protection on an earlier work, however, could not possibly help a long-deceased creator produce another work by writing from the grave. See *id.* at 255 (Breyer, J., dissenting).

110. *Id.* at 205.

111. *Id.* at 208.

112. *Id.*

113. *Id.*

for an effectively perpetual term, Justice Ginsburg wrote that there was no reason to suspect Congress of attempting to make an end-run around the “limited Times” constraint.<sup>114</sup> Earlier retroactive extensions, the Court emphasized, did not create perpetual terms, and the CTEA was no different.<sup>115</sup>

Justice Ginsburg dismissed Justice Breyer’s calculation that a CTEA-regime copyright is already “virtually perpetual” because the economic incentive provided by a term of 95 years is equal to 99.8% of a perpetual term’s value.<sup>116</sup> The 1976 Act, however, created an incentive that was 99.4% of the value of a perpetual term; the 1909 Act, 97.7%; the 1831 Act, 94.1%.<sup>117</sup> Justice Ginsburg suggested that if a figure near the 100% mark could make a duration extension unconstitutional because it supposedly would not be a limited time for purposes of the Copyright Clause, then not only the Sonny Bono Act but also the 1976 Act’s term extension would be invalidated.<sup>118</sup> Even the earlier statutory extensions of duration would be suspect.<sup>119</sup> The Court did not believe that such an approach would square with the intent of the Constitution’s framers.<sup>120</sup> “It is doubtful,” quipped Justice Ginsburg, “that those architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar.”<sup>121</sup>

Up next for consideration and rejection were three Eldred

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114. *Id.* at 208-09; *see id.* at 209-10 n.16. Later discussion in the article will focus on whether this statement by Justice Ginsburg leaves an opening for a constitutional attack on a later term extension, if Congress enacts another one. We will also consider whether the presence of congressional intent to evade the limited times requirement should be seen as a necessary element of a Copyright Clause-based challenge. *See infra* text accompanying notes 340-349, 442-454, 459-470.

115. *Eldred*, 537 U.S. at 209. Justice Ginsburg noted the government’s observation that the CTEA’s life-plus-70 term could be expected to yield a 95-year copyright term on average. *Id.* n.17. She also mentioned the government’s assertion that a 95-year term resembles accepted durations in other areas of the law, such as 99-year leases of real estate and bequests satisfying the rule against perpetuities. *Id.* Justice Ginsburg pointed out, however, that “[w]hether such referents mark the outer boundary of ‘limited Times’ is not before us today.” *Id.*

116. *Id.* at 255-56 (Breyer, J., dissenting).

117. *Id.* at 209-10 n.16.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* As we will explain later, both Justice Ginsburg and Justice Breyer missed a key point in the economic analysis. *See infra* text accompanying notes 325-347; *infra* note 326.

arguments centering, in the Court's view, around the contention that Congress "may not extend an existing copyright absent new consideration from the author."<sup>122</sup> The first of these arguments relied on *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>123</sup> a decision concerning the copyrightability of the white pages of a telephone directory. There, the Court wrote that "[t]he *sine qua non* of copyright is originality,"<sup>124</sup> and that copyright was unavailable only to "a narrow category of works in which the creative spark of originality is utterly lacking or so trivial as to be virtually nonexistent."<sup>125</sup> Works already in existence, Eldred asserted, are no longer original; therefore, they should not qualify for copyright protection of additional duration beyond what they were given at the time of copyright acquisition.<sup>126</sup> Justice Ginsburg responded by observing that *Feist* was concerned with copyrightability *per se* rather than with the duration of copyright.<sup>127</sup> Because the initial copyright-worthiness of the works receiving an extended copyright duration was not being—and could not credibly be—contested, Justice Ginsburg considered the originality argument irrelevant to the issues in *Eldred*.<sup>128</sup>

In the second of the three arguments grouped together by the Court for discussion purposes, Eldred focused on the "promot[ion] [of] the Progress of Science" language of the Copyright Clause.<sup>129</sup> Eldred contended that the CTEA did not comply with this constitutional provision because, in extending

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122. *Eldred*, 537 U.S. at 210.

123. 499 U.S. 340 (1991).

124. *Id.* at 345.

125. *Id.* at 359.

126. *Eldred*, 537 U.S. at 211.

127. *Id.*

128. *Id.* Justice Ginsburg's answer to Eldred's originality argument would seem to mean that once a work meets the originality requirement and qualifies for copyright protection, Congress is free in succeeding years to bestow on the copyright owner almost any added legal benefits it wishes to bestow, without expecting the copyright owner to create or provide anything new in return. *See id.* Although Congress of course could not enact a statute that would expressly make copyright perpetual, *see* U.S. CONST. art. I, § 8, cl. 8, the Court's disposition of the originality argument might be read as permitting Congress to string together enough duration extensions that copyright protection could become effectively perpetual. Perhaps, however, the Court's comments about intent to evade the limited times requirement—an intent the *Eldred* majority believed that Congress did not have with regard to the CTEA—might then come into play. *See Eldred*, 537 U.S. at 209.

129. *Eldred*, 537 U.S. at 211-12.

the duration of existing copyrights, Congress did not stimulate authors to create new works.<sup>130</sup> Instead, the CTEA merely added greater value to existing works.<sup>131</sup> The Court acknowledged that in earlier decisions, it had referred to the Copyright Clause as “both a grant of power and a limitation,”<sup>132</sup> and had stated that copyright’s “primary objective” is “[t]o promote the Progress of Science.”<sup>133</sup> However, Justice Ginsburg stressed, it is Congress and not the courts that should decide how best to accomplish this objective.<sup>134</sup> What mattered, for Copyright Clause purposes, was whether Congress had enacted a copyright “system” that would “promote the Progress of Science.”<sup>135</sup>

Noting again the supposed justifications that Congress had taken into account in enacting the CTEA, the *Eldred* majority considered it reasonable to conclude that the CTEA complied with the objective of the Copyright Clause.<sup>136</sup> Justice Ginsburg pointed once more to Congress’ long history of retroactive term extensions and emphasized that the previous lack of disputes regarding the rights created by the various extensions provided strong support for the constitutionality of lengthening the durations of existing copyrights.<sup>137</sup> Continuing to stress the importance of history to a proper determination of whether legislative action complies with a constitutional provision, Justice Ginsburg quoted a 1926 decision:

[T]his Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution’s] provisions.<sup>138</sup>

In the Court’s view, “Congress’s unbroken practice since

130. *Id.*

131. *Id.*

132. *Id.* at 212 (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966)).

133. *Id.* at 212 (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

134. *Id.* at 212-13.

135. *Id.* (quoting *Graham*, 382 U.S. at 6). For criticism of the Court’s focus on the overall copyright “system” as opposed to individual enactments within that system, see *infra* text accompanying notes 400-404.

136. *Eldred*, 537 U.S. at 213.

137. *Id.* The significance of the lack of previous disputes is open to question. See *infra* text accompanying notes 186, 387-389.

138. *Eldred*, 537 U.S. at 213 (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

the founding generation thus overwhelms [Eldred's] argument that the CTEA's extension of existing copyrights fails per se to 'promote the Progress of Science.'"<sup>139</sup>

Turning to the third of what it regarded as Eldred's three related arguments, the Court examined the contention that the Copyright Clause contemplates a quid pro quo arrangement under which the author of an original work is granted copyright protection for a limited time, in exchange for a dedication of that work to the public following the expiration of the copyright term.<sup>140</sup> The retroactive component of the CTEA, Eldred asserted, violates the terms of that arrangement by "bestow[ing] an unpaid-for benefit on copyright holders and their heirs."<sup>141</sup> Justice Ginsburg answered that a review of the long history of copyright term extensions reveals the benefit's paid-for nature.<sup>142</sup> Because there have been retroactive term extensions in the past, Justice Ginsburg maintained, the author of a work would reasonably expect that she was being offered legal rights whose duration would be measured not merely by the rules in effect at the time copyright was acquired but also by any later-enacted term extensions.<sup>143</sup> For the Court, therefore, the possibility of term extension is part of the quid that authors receive in exchange for the quo of dedicating the work to the public upon the copyright's expiration.<sup>144</sup> According to this view, the CTEA is not an unpaid-for benefit at all. Indeed, it was part of the deal when, for example, Gershwin's "Rhapsody in Blue" became eligible for copyright in 1924.<sup>145</sup>

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139. *Id.* at 213-14. In his dissent, Justice Stevens disagreed with the majority's assertion that Congress had displayed an "unbroken practice" since a time shortly after the ratification of the Constitution. *See id.* at 230-34 (Stevens, J., dissenting); *infra* text accompanying notes 174-184. Later in the article, we take the position that instead of applying the *Myers* principle to the question whether Congress could retroactively extend copyright duration, the *Eldred* majority should have applied it in an effort to determine what the Framers would have regarded as a "limited [t]ime[]" for purposes of the Copyright Clause. *See infra* text accompanying notes 410-415.

140. *Eldred*, 537 U.S. at 214.

141. *Id.*

142. *Id.*

143. *Id.* Justice Ginsburg found evidence for this expectation in copyright assignment agreements, a standard form that provides for the possibility of term extension. *Id.* at 214 n.21.

144. *See id.* at 214-15. For a criticism of this line of reasoning, see *infra* text accompanying notes 340-349.

145. *See Eldred*, 537 U.S. at 215 (stating that "the author of a work created

Justice Ginsburg also observed that any quid pro quo requirement in the copyright realm differs from the patent quid pro quo in two respects. First, a patent entitles a qualifying inventor to monopoly rights that are more sweeping than those received by the creator of a copyrighted work. Second, disclosure of the details of the patented invention is the “price” paid by the inventor for those sweeping rights, whereas disclosure of a work is the “desired objective” of copyright law.<sup>146</sup> These differences caused the *Eldred* majority to conclude that a patent’s quid pro quo may be “more exacting” than that of a copyright’s.<sup>147</sup> If so, the Court reasoned, the 19th Century congressional practice of “[repeatedly extending] existing patents without constitutional objection suggests even more strongly that similar legislation with respect to copyrights is constitutionally permissible.”<sup>148</sup>

Having discovered no Copyright Clause barrier to the CTEA’s extension of the duration of existing copyrights, the Court proceeded to make short work of *Eldred*’s argument that the CTEA violated the First Amendment rights of members of the public.<sup>149</sup> Justice Ginsburg emphasized that the close temporal proximity in which the Copyright Clause and the First Amendment were adopted indicates that the Framers regarded “copyright’s limited monopolies [as] compatible with free speech principles.”<sup>150</sup> She went on to quote *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>151</sup> for the proposition that “[t]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>152</sup>

The Court’s rejection of *Eldred*’s First Amendment argument depended heavily on the customary judicial view that copyright law contains built-in First Amendment

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in the last 170 years would reasonably comprehend, as the ‘this’ offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time”).

146. *Id.* at 216-17.

147. *Id.* at 217 n.22.

148. *Id.* For critical examination of the Court’s quid pro quo analysis, see *infra* text accompanying notes 340-372.

149. *Eldred*, 537 U.S. at 218-19.

150. *Id.* at 219.

151. 471 U.S. 539 (1985).

152. *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 539).

accommodations.<sup>153</sup> One such accommodation noted by the Court, again with a nod to *Harper & Row*, was the familiar idea-expression dichotomy.<sup>154</sup> This distinction makes clear that the copyright on a work protects only the work's expression, not the ideas, facts, themes, and general concepts addressed therein. All users are free to make whatever use they desire of the ideas, facts, and other unprotected matter contained in the work.<sup>155</sup> The second of the built-in First Amendment accommodations mentioned by the *Eldred* Court was copyright law's fair use doctrine. Under this doctrine, users of the protected expression in a copyrighted work may have a defense against infringement liability.<sup>156</sup> In the Court's view, the fair use doctrine furthers the interests of users of copyrighted works in much the same way that the First Amendment would, thus making it unnecessary to subject copyright law generally, and the CTEA specifically, to further First Amendment-based scrutiny.<sup>157</sup>

In the closing paragraphs of the majority opinion, Justice Ginsburg commented again on the Copyright Clause issues.<sup>158</sup> Though brief, the comments revealed what may have been a major concern that prompted the Court to rule as it did. Justice Ginsburg observed that if *Eldred's* "vision of the Copyright Clause held sway, it would do more than render the CTEA's duration extensions unconstitutional as to existing works."<sup>159</sup> *Eldred's* assertion that the CTEA provisions were not severable "would make the CTEA's enlarged terms invalid even as to tomorrow's work."<sup>160</sup> Then came what the majority may have seen as the clincher: "The 1976 Act's time extensions, which set the pattern that the CTEA followed, would be vulnerable as well."<sup>161</sup> The Court was unwilling to issue a

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153. *Id.*

154. *Id.* See also 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery."); *Harper & Row*, 471 U.S. at 556; *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

155. See 17 U.S.C. § 102(b); see e.g., *Eldred*, 537 U.S. at 219.

156. *Eldred*, 537 U.S. at 219-20.

157. See *id.*

158. *Id.* at 221-22.

159. *Id.* at 221.

160. *Id.* at 221-22.

161. *Id.* at 222.

decision that could produce such a domino effect.<sup>162</sup>

Further underscoring the deferential approach it had chosen to take, the Court observed that “the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”<sup>163</sup> Justice Ginsburg acknowledged Eldred’s having “forcefully urge[d] that Congress pursued very bad policy in prescribing the CTEA’s long terms,” but emphasized that “[t]he wisdom of Congress’s action . . . is not within our province to second guess.”<sup>164</sup>

## B. THE STEVENS DISSENT

Justice Stevens was not convinced by the majority’s characterization of the CTEA as a statute that may have been unwise but was not unconstitutional.<sup>165</sup> Instead, Justice Stevens emphasized that the Copyright Clause contemplates not only the furnishing of incentives for the creation of new works but also the existence of a rich public domain to which all persons have ready access.<sup>166</sup> He maintained that the

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162. *See id.* For the view that the *Eldred* majority was too concerned about the possible implications for the 1976 Act, see *infra* text accompanying notes 373-383.

163. *Eldred*, 537 U.S. at 222. With this statement, the Court again indicated that the focus of its Copyright Clause analysis would be on the general scheme of copyright, rather than on the individual enactment—here, the CTEA—within that scheme. *See id.* at 213. We examine the shortcomings of that focus at *infra* text accompanying notes 400-404.

164. *Eldred*, 537 U.S. at 222.

165. *See generally Eldred*, 537 U.S. at 223-37 (Stevens, J., dissenting).

166. *Id.* In asserting that the Copyright Clause promotes a vibrant public domain by encouraging the production of works whose copyrights expire as soon as reasonably possible, Justice Stevens relied on Supreme Court decisions dealing with patent law. He cited *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1 (1829), in which the Court held that an inventor who had been commercially exploiting his invention could not unreasonably postpone the filing of his patent application in an effort to delay commencement of his exclusive rights until he needed them to ward off competition, because allowing the inventor to do that would push back the time of the invention’s entry into the public domain. *Eldred*, 537 U.S. at 224-25 (Stevens, J., dissenting). Justice Stevens also cited *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), in which the Court wrote that “the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.” *Eldred*, 537 U.S. at 225 (Stevens, J., dissenting). Because the same clause in the Constitution provides Congress its copyright authority and its patent authority, Justice Stevens regarded the patent decisions’ emphasis on nourishing the public domain as equally applicable to the realm of copyright. *Id.* at 227.

CTEA's extension of the duration of existing copyrights promoted neither the production of new works nor the enhancement of the public domain.<sup>167</sup> Justice Stevens concluded, therefore, that the retroactive aspect of the CTEA found no support in the Copyright Clause.<sup>168</sup> Instead, it amounted to "a gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest."<sup>169</sup>

Continuing along the same analytical lines, Justice Stevens took the position that the bargain envisioned in the Copyright Clause involved creators, the public, and the government.<sup>170</sup> It would be impermissible for the government, before the expiration of a given's creator's copyright, to take away a particular right already guaranteed under that copyright.<sup>171</sup> Likewise, Justice Stevens asserted, it should be impermissible for the government to alter the terms of the bargain by increasing the duration of existing copyrights and thus delaying the public's ability to exercise its right to make unrestricted use of the underlying works of authorship.<sup>172</sup> That, according to Justice Stevens, was what Congress did, unconstitutionally, in the CTEA.<sup>173</sup>

Justice Stevens also disagreed with the majority's interpretation of the history of congressional extensions of patent and copyright duration. He noted that patent duration extensions had not always been applied retroactively.<sup>174</sup>

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167. *Eldred*, 537 U.S. at 226-27 (Stevens, J., dissenting).

168. *See id.*

169. *Id.* at 227.

170. *See id.* at 226-27.

171. Justice Stevens stated the following regarding patent law:

It would be manifestly unfair if, after issuing a patent, the Government as a representative of the public sought to modify the bargain by shortening the term of the patent in order to accelerate public access to the invention. The fairness considerations . . . would presumably disable Congress from making such a retroactive change in the public's bargain with an inventor without providing compensation for the taking. Those same considerations should protect members of the public who make plans to exploit an invention as soon as it enters the public domain from a retroactive modification of the bargain that extends the term of the patent monopoly.

*Id.* at 226. These arguments apply to copyright laws as well since, the "authority to issue copyrights stems from the same Clause in the Constitution that created the patent power." *Id.* at 223. Thus, "[i]f Congress may not expand the scope of a patent monopoly, it also may not extend the life of a copyright beyond its expiration date." *Id.* at 222-23.

172. *See id.* at 226-27.

173. *See id.* at 234-38.

174. Justice Stevens used as an example an 1861 statute that provided for

Moreover, Justice Stevens asserted, many of the 19th Century's retroactive extensions of the durations of individual patents had been applied to public domain items and thus were clearly unconstitutional.<sup>175</sup> Justice Stevens contended that the *Eldred* majority should not have relied on the supposed history of patent duration extensions when that history did not really reflect consistency on the retroactive application issue and, in any event, contained examples of extensions that would not pass constitutional muster today.<sup>176</sup>

Regarding the majority's focus on the congressional tendency to apply copyright term extensions to already existing works, Justice Stevens conceded that Congress had so applied the extensions provided for in the 1831, 1909, and 1976 Acts.<sup>177</sup> He refused to subscribe, however, to the majority's characterization of the 1790 Act as a retroactive extension of copyright duration.<sup>178</sup> That statute, he insisted, was different because it *created* an entirely new federal copyright system.<sup>179</sup> Justice Stevens noted that the 1790 Act, far from being a blanket extension of duration, actually had the effect of shortening the period of protection for many works that until then had been entitled to perpetual common-law protection.<sup>180</sup> He argued that even though it followed fairly closely on the heels of the adoption of the Copyright Clause, the 1790 decision of Congress to allow already existing works to qualify for the newly created federal copyright should not be regarded as a strong indicator of the constitutionality of a retroactive

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a longer patent duration but applied only prospectively (i.e., to inventions developed after the statute's effective date). *Id.* at 237.

175. *Id.* at 233-35. The statutory extension of Oliver Evans' patent in 1808, for instance, restored patent protection to an invention that had spent more than four years in the public domain. *Id.* So it was, wrote Justice Stevens, for the great majority of the individual patent extensions granted by Congress during the 19th Century. *Id.* at 235. He argued that notwithstanding the usual presumption of validity attaching to acts of Congress, a history so obviously lacking in constitutional legitimacy should have no bearing on the matter at hand. *See id.*

176. *Id.* at 233-35.

177. *Id.* at 235 ("The federal Copyright Act was first amended in 1831. That amendment, like later amendments, not only authorized a longer term for new works, but also extended the terms of unexpired copyrights.")

178. *Id.* at 231 (Stevens, J., dissenting) (discussing the 1790 Copyright Act as a "general rule creating new federal rights that supplanted the diverse state rights that previously existed" but "did not extend or attach to any of those pre-existing state and common-law rights.")

179. *Id.*

180. *See id.* at 230, 234-35 (Stevens, J., dissenting).

extension of existing copyrights' duration.<sup>181</sup>

The *Eldred* majority also placed more weight than it should have, Justice Stevens contended, on the history of retroactive copyright term extensions.<sup>182</sup> As noted in the preceding paragraph, he regarded that history as having begun with the 1831 Act rather than with the 1790 Act. By 1831, none of the same persons who had been delegates to the Constitutional Convention were serving in Congress.<sup>183</sup> Justice Stevens asserted that the 1831 Act's application to existing copyrights should not receive any heightened presumption of constitutionality under the contemporaneous construction doctrine relied on by the majority.<sup>184</sup> Moreover, Justice Stevens pointed out that courts, particularly the Supreme Court, had not ruled on the constitutionality of the retroactive applications of the duration extensions in the 1831, 1909, and 1976 Acts.<sup>185</sup> The lack of prior judicial challenges should not somehow cloak the CTEA with protection against constitutional attack, he maintained.<sup>186</sup>

Justice Stevens was not impressed by the majority's offering of supposed justifications for the legislative judgment exercised by Congress when it made the CTEA applicable to existing copyrights. Noting that the Court had mentioned the CTEA's possible furnishing of incentives to restore and preserve certain copyrighted works, Justice Stevens observed

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181. *See id.* at 231-33 (Stevens, J., dissenting).

182. *See id.* at 231-36.

183. *Id.* at 237.

184. *Id.* at 236 (Stevens, J., dissenting). Justice Stevens identified another reason not to regard the 1831 Act as a strong indicator of the probable constitutionality of retroactive extensions of copyright duration. He noted that the legislative history of the 1831 Act reveals its having been predicated on an interpretation of copyright as the legal mechanism for protecting an author's supposed natural right, of a perpetual nature, to the "fruits of his labor" or the "sweat of his brow." *Id.* at 236. Such an interpretation of copyright, Justice Stevens observed, was "rejected by this Court in 1834." *Id.* at 236.

185. *Id.* at 235-37 (Stevens, J., dissenting).

186. *See id.* at 235 (Stevens, J., dissenting). According to Justice Stevens, "the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case." *Id.* at 235 (Stevens, J., dissenting) (citing *INS v. Chadha*, 462 U.S. 919 (1983)). He added that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." *Id.* at 236 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970)).

that this asserted justification for the CTEA applied mainly with regard to old movies.<sup>187</sup> He also pointed out that such supposed incentives would not promote the creation of any truly new works and that any new expression in a restored or preserved edition would be protected by a copyright on that edition anyway.<sup>188</sup> Justice Stevens stressed that even if the perceived need to preserve aging movies would warrant congressional action, “the remedy offered—a blanket extension of all copyrights” went far beyond what that need would justify.<sup>189</sup>

Justice Stevens also labeled the majority’s equity rationale—that Congress made the copyright duration extension apply to existing works in order to treat existing and future copyrights the same as a matter of simple fairness—a “classic non sequitur.”<sup>190</sup> He emphasized that “[t]he reason for increasing the inducement to create something new simply does not apply to an already-created work.”<sup>191</sup> If anything, Justice Stevens contended, the equity argument favored Eldred because “[m]embers of the public were entitled to rely on a promised access to copyrighted . . . works at the expiration of the terms specified when the exclusive privileges were granted.”<sup>192</sup> The owners of copyrights on already existing works have no entitlement to anything beyond “the exclusive terms that were promised as an inducement to their creativity, and have no equitable claim to increased compensation for doing nothing more.”<sup>193</sup>

Commenting on the issues actually before the Court and on the implications of the decision in *Eldred*, Justice Stevens noted that the grant of certiorari called for the Court to decide whether the CTEA’s retroactive application was

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187. *Id.* at 239-40 (Stevens, J., dissenting).

188. *Id.* at 239 (Stevens, J., dissenting).

189. *Id.* at 240. We offer a narrower “remedy” later in the article. See *infra* text accompanying notes 478-482.

190. 537 U.S. at 240.

191. *Id.* (Stevens, J., dissenting).

192. *Id.*

193. *Id.* According to Justice Stevens, the equity argument made by the government and endorsed by the majority requires the “untenable assumptions . . . that the public interest in free access to copyrighted works is entirely worthless and that authors, as a class, should receive a windfall solely based on completed creative activity.” *Id.* at 241. He therefore took the position that “[e]x post facto extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the [Copyright] Clause.” *Id.*

constitutional.<sup>194</sup> The case, therefore, did not really present the question whether the “extraordinary length” of the duration enhancements in the CTEA amounted to the “functional equivalent of perpetual copyrights.”<sup>195</sup> Even so, he observed, “a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights.”<sup>196</sup> He warned that “unless the [Copyright] Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges *ad infinitum* under the majority’s analysis.”<sup>197</sup>

Justice Stevens summed up his dissent by contending that the *Eldred* majority had failed to safeguard free access to the public domain and had ignored the key purpose of the Copyright Clause.<sup>198</sup> He expressed the concern that the Court had “quitclaimed to Congress its principal responsibility in this area of the law” and had effectively made the Copyright Clause-related actions of Congress “judicially unreviewable.”<sup>199</sup> This caused Justice Stevens to conclude that it was “not hyperbole to recall the trenchant words of Chief Justice John Marshall: ‘It is emphatically the province and duty of the judicial department to say what the law is.’”<sup>200</sup>

### C. THE BREYER DISSENT

In launching a dissent that prompted various comments from the justices in the majority,<sup>201</sup> Justice Breyer acknowledged the majority’s view that his conclusions

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194. *See id.* at 241-42. Evidently responding to the majority’s concern that holding the CTEA’s retroactive application unconstitutional would also call into question the validity of the 1976 Act, Justice Stevens emphasized that “the validity of earlier retroactive extensions of copyright protection [was] not at issue in this case.” *Id.* at 241-42 n.14. He also appeared to assert that even if a decision to strike down the retroactive aspect of the CTEA would have cast doubt on the 1976 Act, the Court could legitimately have found a way to protect the reliance interests that reasonably would have been built up during the more than 25 years since the enactment of that statute. No such reliance interests needed to be considered with regard to the CTEA, Justice Stevens stated, because the enactment was only four years old and had been subject to a judicial challenge for most of that time. *Id.*

195. *Id.* at 241.

196. *Id.* at 242.

197. *Id.*

198. *Id.* at 242.

199. *Id.* (Stevens, J., dissenting).

200. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

201. *See e.g., id.* at 193 n.1 (majority opinion); *see also id.* at 199 n.4, 205 n.10, 207 n.15, 209 n.16.

suggested only a lack of wisdom—but no unconstitutionality—in the congressional decision to enact the CTEA.<sup>202</sup> Legal distinctions, he observed, “are often matters of degree,” and in the CTEA’s case, “the failings of degree are so serious that they amount to failings of constitutional kind.”<sup>203</sup> Justice Breyer regarded the Copyright Clause as granting Congress broad powers that nevertheless had limits—limits exceeded by the CTEA.<sup>204</sup>

Justice Breyer contended that the Copyright Clause could not properly be interpreted without keeping in mind the promotion-of-expression objective it shares with the Constitution’s First Amendment.<sup>205</sup> He noted that the two constitutional provisions may “reinforce each other, the [Copyright Clause] serving as an ‘engine of free expression’ . . . [and the First Amendment] assuring that government throws up no obstacle to its dissemination.”<sup>206</sup> Sometimes, however, a statute enacted under the copyright authority “may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised.”<sup>207</sup> Justice Breyer asserted that when a copyright statute allegedly restricts speech, the statute should receive more careful examination than the *Eldred* majority gave the CTEA.<sup>208</sup> He therefore proposed a three-part test for use in such situations, writing that the statute should be regarded as “lack[ing] the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective.”<sup>209</sup>

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202. *Id.* at 243 (Breyer, J., dissenting).

203. *Id.* (Breyer, J., dissenting).

204. *Id.*

205. *Id.* at 243.

206. *Id.* (citation omitted) (quoting *Harper & Row, Publ’s, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985)).

207. *Id.*

208. *See id.* (Breyer, J., dissenting). Justice Breyer noted that it was not important to decide whether a label such as “intermediate scrutiny” should be given to the more careful examination he envisioned. *Id.* What was important, he stressed, was to “recognize that [the CTEA] involves not pure economic regulation, but regulation of expression, and [that] what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression.” *Id.*

209. *Id.* at 245 (Breyer, J., dissenting).

Next, Justice Breyer applied his test to the CTEA and sought to demonstrate that the CTEA met all three conditions. He began by discussing Supreme Court precedents establishing that “copyright statutes must serve public, not private, ends,”<sup>210</sup> and by pointing out similar statements in legislative history.<sup>211</sup> Then Justice Breyer identified two types of expression-related costs that the CTEA imposed on the public.<sup>212</sup> The first type comes in the form of royalties “that may be higher than necessary to evoke creation of the relevant work.”<sup>213</sup> Justice Breyer stressed that although only about 2% of copyrighted works between 55 and 75 years old retain a commercial value (i.e., generate royalties), that 2% produces roughly \$400 million per year in royalties.<sup>214</sup> He therefore offered the “conservative[] estimate that 20 extra years of copyright protection will mean the transfer of several billion extra royalty dollars to holders of existing copyrights.”<sup>215</sup> Rather than “com[ing] from thin air,” the added royalty payments “ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived.”<sup>216</sup>

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210. *See id.* at 247; *see generally id.* at 246-47 (citing *Stewart v. Abend*, 495 U.S. 207, 228 (1990), *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), and *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

211. *See id.* at 247 (Breyer, J., dissenting) (citing H.R. REP. NO. 60-2222, at 6-7 (1909) (House Report on Copyright Act of 1909) and H.R. REP. NO. 100-609, at 22 (1988) (House Report on Berne Convention Implementation Act)).

212. *Id.* at 248 (Breyer, J., dissenting).

213. *Id.* at 248. Justice Breyer observed that copyright statutes typically do this, but that “there are special reasons for thinking [such costs] especially serious here.” *Id.*

214. *Id.* at 248-49. Justice Breyer cited a Congressional Research Service study reporting the \$400 million figure and various other numbers used in his dissent. *Id.* at 248 (citing E. RAPPAPORT, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES, at 8, 12, 15 (1998) (hereinafter CRS REPORT)).

215. *Id.* at 249 (Breyer, J., dissenting). *See* CRS REPORT, *supra* note 214, at 16. Moreover, these same copyrights together would have produced “many billions of dollars in royalty ‘reward’” before the CTEA was enacted. *Eldred*, 537 U.S. at 249.

216. *Eldred*, 537 U.S. at 249 (Breyer, J., dissenting). Justice Breyer noted, as an example, the \$500,000 paid by United Airlines for a license to play George Gershwin’s 1924 “Rhapsody in Blue” in advertisements and for similar purposes. *See id.* That “cost of doing business,” Justice Breyer noted, would logically be “reflected in the ticket prices of those who fly.” *Id.* He stressed that lengthening copyright duration would likely lead to “unnecessarily high prices [that would] unnecessarily restrict distribution of classic works.” *Id.* In

The second type of expression-related cost, wrote Justice Breyer, is the permissions requirement, which involves identifying and communicating with holders of the rights to works that one may want to reproduce or otherwise use.<sup>217</sup> Vast numbers of older copyrighted works, both classics and the obscure or out-of-print, remain of interest to potential users who “include not only movie buffs and . . . jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds.”<sup>218</sup> Assuming they wish to avoid litigation, these potential users may find it necessary to expend time and money tracking down the copyright owner, perhaps only to learn that the owner is impossible to locate or is unwilling to give permission to use the work. Would-be licensees may simply give up on the idea of using the copyrighted work if the effort and costs involved in identifying and locating the copyright owner and working out a licensing agreement become too unattractive. The permissions requirement, Justice Breyer observed, thus stands as a significant obstacle to the ability of users of copyrighted works to “make the past accessible for their own use or for that of others.”<sup>219</sup>

Justice Breyer conceded that costs of the sort produced by the permissions requirement would be associated with any copyright law, regardless of the copyright term’s length.<sup>220</sup> “But,” he protested, “to extend that term, preventing works from the 1920’s and 1930’s from falling into the public domain, will dramatically increase the size of the costs just as—perversely—the likely benefits from protection diminish.”<sup>221</sup> Justice Breyer offered this further explanation:

The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder.

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contrast, lower-priced editions of classic works would be expected once those works enter the public domain. *Id.* (citing CRS REPORT, *supra* note 214 at 3).

217. *See id.* at 249.

218. *Id.* at 249-50. By using Congressional Research Service figures, Justice Breyer noted, one could estimate that as of 2018, approximately 350,000 copyrighted works would be 75 years old or older. *Id.* Eventually, the number of copyrighted works at least 75 years of age would be in the millions. *Id.*

219. *Id.* at 250. Justice Breyer noted various examples of the burdens imposed by the permissions requirement that are a necessary part of a copyright regime but that may become unreasonable if copyright duration becomes overly lengthy. *See id.*

220. *Id.* at 251.

221. *Id.*

The older the work, the more likely it will prove useful to the historian, artist, or teacher. The older the work, the less likely it is that a sense of authors' rights can justify a copyright holder's decision not to permit reproduction, for the more likely it is that the copyright holder making the decision is not the work's creator, but, say, a corporation or a great-grandchild whom the work's creator never knew. Similarly, the costs of obtaining permission, now perhaps ranging in the millions of dollars, will multiply as the number of holders of affected copyrights increases from several hundred thousand to several million.<sup>222</sup>

Contesting an assertion by the majority, Justice Breyer contended that the fair use doctrine does not meaningfully lessen the costs associated with the CTEA's 20-year extension of the permissions requirement.<sup>223</sup> The fair use doctrine sometimes permits uses of copyrighted materials without the copyright owner's permission, but the doctrine's application is neither routine nor sweeping.<sup>224</sup> It therefore cannot be counted on as a way of avoiding the costs about which Justice Breyer complained.<sup>225</sup> Moreover, as he noted, the fair use doctrine would not help "those who wish to obtain from electronic databases material that is not there."<sup>226</sup> This may occur when the permissions requirement has had the effect of keeping material out of the databases.

Justice Breyer then considered whether Congress could reasonably have concluded that the costs imposed by the CTEA were outweighed by legitimate countervailing considerations.<sup>227</sup> He left no doubt that in his view, the CTEA produced scant copyright-related benefit. The traditional "economic spur" rationale for copyright, he argued, cannot justify the CTEA.<sup>228</sup>

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222. *Id.* at 251-52. Justice Breyer predicted that the CTEA would produce huge costs for users of databases, and that the quality of education would suffer "as our children become ever more dependent for the content of their knowledge upon computer-accessible databases—thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge." *Id.* at 252.

223. *See id.* at 252-53 (Breyer, J., dissenting).

224. *Cf id.* at 252 (Breyer, J., dissenting) (noting that the exemption applies "only where the copy is made for the special listed purposes" and rhetorically asking "[who] can rely on so limited an exemption" in light of such open-ended limiting phraseology).

225. *See id.* at 252-53.

226. *Id.* at 253. Similarly, Justice Breyer did not regard copyright law's idea-expression distinction as likely to minimize the damage to be done by the CTEA. *See id.*

227. *Id.* at 254.

228. *Id.* (Breyer, J., dissenting).

“No potential author,” Justice Breyer contended, “can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”<sup>229</sup> He based this conclusion on the fact that only 2% of copyrighted works retain commercial value when they are between 55 and 75 years old, and on the assumption that the percentage of works remaining commercially viable beyond the 75-year mark “must be far smaller.”<sup>230</sup> In addition, Justice Breyer believed that “any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them.”<sup>231</sup> Relying upon the concept of present value, Justice Breyer argued that the marginal economic incentive provided by the CTEA to authors is so tiny as to approach zero, and that whatever copyright-related benefit the incentive would produce must be similarly puny.<sup>232</sup> Justice Breyer insisted that a “potential Shakespeare, Wharton, or Hemingway” who had not been stimulated to create under the pre-CTEA state of the law would not now be moved to create by the CTEA’s paltry additional incentive.<sup>233</sup>

The majority’s reliance on broad propositions about incentives in general was insufficient, in Justice Breyer’s view, to justify the CTEA’s significant lengthening of copyright duration. It should not be enough that “somehow, somewhere, some potential author might be moved by the thought of great-

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229. *Id.*

230. *Id.* Prior to the CTEA’s 20-year extension of copyright duration, 75 years was the maximum duration for pre-1978 works, 17 U.S.C. § 304 (1976) (amended 1998), and the average term for works created in 1978 or thereafter. 537 U.S. at 254.

231. 537 U.S. at 254 (Breyer, J., dissenting).

232. *Id.* at 254-55.

233. *Id.* at 255. “What monetarily motivated Melville,” Justice Breyer continued, “would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?” *Id.* As for the Court’s reference to testimony before Congress that income earned from one work may help support an author during his or her creation of other works, Justice Breyer found it “mysterious” that such testimony would be cited in support of the CTEA. *Id.* Given the retroactive application of the CTEA and the long duration extension for which it provided, the author who actually created the copyrighted work would no doubt be dead by the time the extra 20 years of royalties materialized—if they materialized at all. How, Justice Breyer asked, would the additional income traceable to the CTEA help a deceased author create any new works? *Id.*

grandchildren receiving copyright royalties a century hence.”<sup>234</sup> If that justification were sufficient to support copyright term extensions, then what about “some potential author [who might be] moved by the thought of royalties being paid for two centuries, five centuries, 1,000 years, ‘til the End of Time’ “<sup>235</sup> The problem was that “from a rational economic perspective the time difference among these periods *makes no real difference.*”<sup>236</sup> The 20-year extension provided for in the CTEA “will produce a copyright period of protection that, even under conservative assumptions, is worth more than 99.8% of protection *in perpetuity.*”<sup>237</sup> This effect of the CTEA raised serious questions, according to Justice Breyer, about whether the statute complied with the “limited Times” proviso in the Copyright Clause.<sup>238</sup>

Summing up his discussion of the economic incentives purportedly provided by the CTEA, Justice Breyer stated that “the incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension’s effect could justify the serious expression-related harms” produced by the CTEA.<sup>239</sup> He then emphasized that “in respect to works already created—the source of many of the harms previously described—the *statute creates no economic incentive at all.*”<sup>240</sup>

Next, Justice Breyer addressed the other alleged justifications for the CTEA. The CTEA’s purported harmonization effects, he contended, failed to pick up the slack

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234. *Id.*

235. *Id.*

236. *Id.* (Breyer, J., dissenting) (emphasis in original).

237. *Id.* at 255-56 (emphasis in original).

238. *Id.* (Breyer, J., dissenting). Justice Breyer questioned the relevance of the majority’s comments that nothing indicated an intent on the part of Congress to evade the “limited Times” directive when it enacted the CTEA. *Id.* at 256. Justice Breyer implied that whether Congress possessed such an intent should not be determinative. *See id.* Even so, Justice Breyer observed that Congress “may have sought to test the Constitution’s limits.” *Id.* He cited statements in which the late Sonny Bono, Mary Bono (Sonny Bono’s widow and successor in the House of Representatives), other representatives, and composer Quincy Jones indicated their desire to have copyrights last forever or as close thereto as possible. *Id.* Later in the article, we will comment further on the significance of these statements. *See infra* text accompanying notes 279, 293-296, 412.

239. *Eldred*, 537 U.S. at 257 (Breyer, J., dissenting).

240. *Id.* (Breyer, J., dissenting) (emphasis in original).

left by the weak incentive-related justifications.<sup>241</sup> Though conceding that the life-plus-70 rule called for in the CTEA was consistent with the prevailing copyright duration in the European Union (EU), Justice Breyer stressed that the CTEA achieved harmonization with the EU's copyright term only as to works created in 1978 or thereafter by natural persons.<sup>242</sup> The CTEA effected no harmonization with the EU regarding works-for-hire created in 1978 or thereafter because the life-plus-70 rule does not apply to such works.<sup>243</sup> Perhaps even more importantly, he noted, the CTEA did not achieve harmonization with the EU regarding pre-1978 works because the life-plus-70 rule does not apply to those works either.<sup>244</sup> "Despite appearances," Justice Breyer explained, "the statute does *not* create a uniform American-European term with respect to the lion's share of the economically significant works that it affects—all works made 'for hire' and *all* existing works created prior to 1978."<sup>245</sup>

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241. *See id.* (Breyer, J., dissenting).

242. *Id.* at 257-58.

243. *Id.* Under the CTEA, works-for-hire are protected for a term of 95 years from first publication or 120 years from creation, whichever comes first. 17 U.S.C. § 302(c) (2000). In the EU, some rights in works-for-hire carry a life-plus-70 duration, whereas others exist for periods ranging from 50 to 70 years. Council Directive 93/98, Harmonizing the Term of Protection of Copyright and Certain Related Rights, arts. 1-3, 1993 O.J. 290 [hereinafter EU Council Directive 93/98].

244. *Eldred*, 537 U.S. at 257 (Breyer, J., dissenting). The CTEA instead calls for a duration of 95 years for qualifying pre-1978 works. 17 U.S.C. § 304(a), (b). *Compare* EU Council Directive 93/98, *supra* note 243, arts. 1-3.

245. *Eldred*, 537 U.S. at 257 (Breyer, J., dissenting) (emphasis in original). Justice Breyer emphasized that because "uniformity [in copyright duration] comes so late, if at all, . . . bringing American law into conformity with . . . European law will neither encourage creation nor benefit the long-dead author in any other important way." *Id.* at 258. He further noted that even if the CTEA's harmonizing effects were broader, most of the arguments for harmonization—such as those urging that Europe's then-superior terms of protection could have given pre-harmonization authors an incentive to publish overseas first instead of in the United States—would fall flat anyway. He believed that "few, if any, potential authors would turn a 'where to publish' decision upon . . . [differences] in the length of the copyright term." *Id.* at 259. In a present value sense, the commercial worth of the 20-year difference in terms "amounts at most to comparative pennies." *Id.* No "rational legislature" could give significant weight to such a trivial incentive-related justification. *Id.* Moreover, Justice Breyer observed, even if a work's publication in the United States were to come after publication in the EU, the Berne Convention still promises "full protection" as long as the second publication takes place at least 30 days after the first. *Id.* *See* Berne Convention, *supra* note 30, arts. 3(4), 5(4). In such a situation, the supposed

Commenting on the asserted justification that copyright term extension may provide incentives to publishers and filmmakers to revisit older works by re-releasing or restoring them,<sup>246</sup> Justice Breyer argued that the Copyright Clause did not permit Congress to act on a revisitation-by-publishers theory of progress promotion, regardless of its promise or lack thereof.<sup>247</sup> In his view, the Copyright Clause “assumes an initial grant of monopoly, designed primarily to encourage creation, followed by termination of the monopoly grant in order to promote dissemination of already-created works.”<sup>248</sup> The Clause also “assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance promote the dissemination of works already in existence.”<sup>249</sup>

Although Justice Breyer acknowledged “the empirical possibility” that a copyright term extension might in some instances help a publisher resurrect a still-copyrighted but not especially visible work, he asserted that the disappearance-of-the-monopoly rationale underlying the Copyright Clause prevented Congress from basing legislative action “primarily upon that empirical possibility.”<sup>250</sup> If Congress could use that possibility as a primary basis for legislation, there would be too great a danger that repeated copyright extensions would be granted in favor of publishers and that copyrights would

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disincentive to publish first in the United States would not even be present in theory. See 537 U.S. at 257-59 (Breyer, J., dissenting).

246. *Eldred*, 537 U.S. at 260 (Breyer, J., dissenting). This justification, offered by the Motion Picture Association of America as amicus curiae, see *id.* at 239 n.13, and at least implicitly endorsed by the majority, see *id.* at 206, is discussed later in the article. Although we leave some room for the assertion of this rationale in support of possible legislative action by Congress, we show it to be unpersuasive when offered in an attempt to justify a blanket extension of copyright duration. See *infra* text accompanying notes 315-318, 478-482.

247. *Eldred*, 537 U.S. at 260 (Breyer, J., dissenting).

248. *Id.*

249. *Id.* (emphasis in original).

250. *Id.* Justice Breyer came to these conclusions on the basis of the Copyright Clause’s “limited Times” and “to Authors” language, the anti-monopolistic attitudes characteristic of the intellectual environment in which the Copyright Clause was written, and Supreme Court precedent. *Id.* (citing *Stewart v. Abend*, 495 U.S. 207, 228 (1990), and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). Justice Breyer viewed the “to Authors” language as casting grave doubt on a legislative rationale that “rests entirely upon incentives given to publishers perhaps long after the death of the work’s creator.” *Id.* at 261 (Breyer, J., dissenting). For our view of the proper role and effect of the “to Authors” language, see *infra* text accompanying notes 445-454.

effectively become perpetual.<sup>251</sup> Justice Breyer therefore rejected the argument that extending copyright duration would generally promote, not hinder, the dissemination of existing works. He regarded any such rationale for copyright term extension as “constitutionally perverse” and as “unable, constitutionally speaking, to justify the blanket extension” contemplated by the CTEA.<sup>252</sup>

Justice Breyer made short work of other supposed justifications for the CTEA. He dismissed the CTEA’s possible export-related benefits and other boons of a financial nature for the entertainment industry as irrelevant for Copyright Clause purposes.<sup>253</sup> Such matters, he noted, are the business of Congress’ commerce authority, and not of its copyright authority.<sup>254</sup> Referring to Justice Ginsburg’s account of “demographic, economic, and technological changes” justifying term extension,<sup>255</sup> Justice Breyer wrote that technological changes seemed to weigh against term extension and that a life-plus-50 copyright regime would appear to have already corrected for a lengthening average life span.<sup>256</sup>

Having responded to each of the asserted rationales for the CTEA, Justice Breyer emphasized that there “is no legitimate, serious copyright-related justification for this statute.”<sup>257</sup> Therefore, in his view, the Court would not have been improperly intruding on congressional authority if it had struck down the CTEA. The *Eldred* majority’s deferential stance toward Congress involved inadequate consideration of the CTEA’s “rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment.”<sup>258</sup> Greater “vigilance” on the part of the Court,

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251. *Eldred*, 537 U.S. at 260 (Breyer, J., dissenting). The “difficulty of finding any kind of logical stopping place” was a further reason for the Court not to accept “such a uniquely publisher-related rationale.” *Id.* at 262.

252. *Id.* (Breyer, J., dissenting).

253. *Id.*

254. *Id.*

255. *See id.* at 207 & n.14 (majority opinion); *see also supra* text accompanying notes 103-109.

256. *Eldred*, 537 U.S. at 263 (Breyer, J., dissenting). He also observed that the CTEA’s proponents had provided “no explanation of why the 1976 Act’s term of 50 years after an author’s death—a longer term than was available to authors themselves for most of our Nation’s history—is an insufficient potential bequest.” *Id.*

257. *Id.* (Breyer, J., dissenting).

258. *Id.* at 264.

Justice Breyer contended, “is . . . necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation’s economy and the lives of its citizens.”<sup>259</sup>

Justice Breyer was unmoved by the majority’s concern that striking down the CTEA would have consigned the 1976 Act to the same fate. He observed that the 1976 Act, unlike the CTEA, served to accomplish an important international objective by satisfying a condition the United States needed to fulfill in order to join the Berne Convention, which required signatory nations to guarantee a life-plus-50 term.<sup>260</sup> This accomplishment thus yielded a balance of benefit and harm much more favorable than that produced by the CTEA.<sup>261</sup> After issuing a reminder that this case did not require the Court to consider the constitutionality of the 1976 Act, Justice Breyer observed that even if the 1976 Act’s validity were in question, “the law provides means to protect those who have reasonably relied upon prior copyright statutes.”<sup>262</sup>

Near the end of his dissent, Justice Breyer responded to a majority opinion footnote suggesting that his argument had pushed beyond the limits of the case by addressing the CTEA’s prospective application rather than only its retrospective application.<sup>263</sup> What appeared to Justice Ginsburg as a lack of argumentative restraint, Justice Breyer responded, served to show that even if one were to assent to the equity principle relied on by the majority, the CTEA could only be defensible in

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259. *Id.*

260. *Id.* at 264-65.

261. *Id.* See Berne Convention, *supra* note 30, art. 7(1). Justice Breyer also argued that the 1909 and 1831 copyright term extensions produced balances of benefit and harm that were similarly more favorable than that of the CTEA. The 1909 and 1831 Acts provided, according to Justice Breyer, significant marginal incentive to authors while minimizing the damage to the public domain by imposing a renewal requirement on copyright holders. An effect of the renewal requirement was that many works entered the public domain at the end of the basic 28-year period because no renewal application was filed. *Eldred*, 537 U.S. at 264.

262. *Eldred*, 537 U.S. at 265 (Breyer, J., dissenting). Noting that he did not share the majority’s “aversion to line-drawing” with regard to the permissible length of copyright term extensions, Justice Breyer contended that the difficulty of “draw[ing] a single clear bright line” need not have stopped the Court from striking down the CTEA. *Id.* He believed that the Court should simply have decided that “this particular statute goes too far. [S]uch examples . . . of what goes too far . . . sometimes offer better constitutional guidance than more absolute-sounding rules.” *Id.*

263. *Id.* See also *id.* at 193 n.1, 199 n.4 (majority opinion).

its retrospective application if it were likewise defensible in its prospective application.<sup>264</sup> By showing the prospective application to be indefensible, he simultaneously condemned the retrospective application and its supposed attempt to provide parity between existing copyrights and new copyrights. “Where the case for extending new copyrights is so weak,” Justice Breyer asked, “what ‘justice,’ what ‘policy,’ what ‘equity’ can warrant the tolls and barriers that extension of existing copyrights imposes?”<sup>265</sup>

Justice Breyer concluded by predicting that the CTEA would likely “cause serious expression-related harm,” hinder “traditional dissemination” of copyrighted works, “inhibit new forms of dissemination through the use of new technology,” and interfere with efforts to preserve, and teach students about, the nation’s history and culture.<sup>266</sup> “It is easy to understand,” Justice Breyer stated, “how the [CTEA] might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”<sup>267</sup>

#### IV. ASSESSING THE CTEA AND THE *ELDRED* DECISION

In the introduction to this article, we indicated that we take a dim view of the CTEA and the Supreme Court’s decision in *Eldred* to sustain it against constitutional attack. Although the *Eldred* majority appeared to recognize that Congress took an unwise step in enacting the CTEA, the Court mishandled the constitutional issues.<sup>268</sup> In this section, we subject the CTEA and *Eldred* to close inspection and lay out the reasons for our harsh evaluations of the actions of Congress and the

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264. This refers to the notion that in making the CTEA and other duration extensions applicable to existing copyrights, Congress was simply attempting to place existing copyrights in parity with those that would come into existence after the enactment of the duration extension. *See id.* at 204-05, 208 (majority opinion). For further analysis of this asserted rationale for the CTEA, see *infra* text accompanying notes 390-399.

265. *Eldred*, 537 U.S. at 266.

266. *Id.* (Breyer, J. dissenting).

267. *Id.* Justice Breyer stressed that with regard to existing works, “the serious public harm and the virtually nonexistent public benefit could not be more clear.” *Id.*

268. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“[P]etitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms.”).

Court.

#### A. WHAT WAS CONGRESS THINKING?

Occasionally, legislation can be a long-overdue update of an existing statute, the effectiveness of which would be seriously compromised had the legislature declined to take action. Such a description does not fit the CTEA, however. The CTEA, which was the fourth copyright duration extension in a series of extensions that began 167 years earlier, took effect only two decades after the extension provided in the Copyright Act of 1976.<sup>269</sup> Moreover, the CTEA provided a record-length term extension of 20 years, surpassing, by one year, the length of the previous extension.<sup>270</sup>

In a period of less than a quarter-century, the CTEA and the 1976 Act lengthened copyright duration by 39 years, in marked contrast to the previous go-it-slow tendencies of Congress with regard to term extensions. The first extension, a 14-year increase beyond the previous maximum duration of 28 years, came in 1831,<sup>271</sup> 41 years after Congress created copyright protection at the federal level. After the 1831 extension, it would be another 78 years before Congress would lengthen the maximum copyright term, again by 14 years.<sup>272</sup> More than six more decades would pass until the 1976 Act and its extension of 19 years.<sup>273</sup>

What, then, was Congress's justification for allowing the CTEA's 20-year bonus so closely on the heels of the 1976 Act's lengthy extension? Congress and the proponents of the CTEA pointed to the supposed rationales detailed elsewhere in this

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269. Besides the CTEA, the series includes the (1) Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439; *supra* notes 24-25; (2) Copyright Act of 1909, *supra* note 1; and (3) Copyright Act of 1976, *supra* note 2. We have followed the lead of Justice Stevens in not including the 1790 Act in the series, because that statute, rather than being an extension of copyright duration, created the federal copyright regime. See *Eldred*, 537 U.S. at 231 (Stevens, J., dissenting). The series also does not include the various annual extensions that Congress enacted beginning in 1962, in anticipation of what became the Copyright Act of 1976. See *supra* note 41.

270. Compare 17 U.S.C. §§ 302, 304 (CTEA's 20-year extension) with Copyright Act of 1976, Pub. L. No. 94-553, §§ 302, 304, 90 Stat. 2541 (1976) (increasing duration of copyright on pre-1978 works by 19 years and substituting new rule contemplating longer average duration for copyrights on works created in 1978 or thereafter).

271. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

272. Copyright Act of 1909, *supra* note 1.

273. Copyright Act of 1976, *supra* note 2.

article.<sup>274</sup> The asserted justifications passed constitutional muster—though in our view, they should not have—because they were evaluated by a Supreme Court majority that was not bowled over by the government’s arguments in favor of the CTEA but was nevertheless inclined to give Congress exceedingly broad latitude. Regardless of whether one believes that the CTEA was constitutional, though a bad idea,<sup>275</sup> or that it was unwise *and* unconstitutional, one cannot escape the conclusion that Congress did not serve the public well when it enacted the CTEA. Our lawmakers set up a massive giveaway to private interests and imposed that giveaway’s considerable, long-enduring costs on a public that neither received nor will receive any new benefit in return.<sup>276</sup>

The CTEA’s legislative history and the recitation of justifications in the *Eldred* majority opinion offer indications that Congress was star-struck.<sup>277</sup> Disney, other similarly interested corporate copyright owners, and the organizations

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274. See *supra* text accompanying notes 94-112, 136-139.

275. See *Eldred*, 537 U.S. at 208 (“[W]e cannot conclude that the CTEA . . . is an impermissible exercise of Congress’ power under the Copyright Clause.”).

276. See *id.* at 223-42 (Stevens, J., dissenting); see also *id.* at 242-67 (Breyer, J., dissenting). In their separate dissents, Justice Stevens and Justice Breyer both rely on the assertion that the Copyright Clause requires the interest in private protection to be balanced against the interest in public access. *Id.*; see also Karjala, *supra* note 44 at 201 (referring to the CTEA as providing favored copyright owners with “a windfall at an incalculable but heavy cost” to the public). For a discussion of that cost, see *id.* at 233. Other commentators have referred to the CTEA as “guarantee[ing] an income stream to . . . favorite[s] of the legislature,” such as Disney and the Motion Picture Association of America, among others. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. ILL. L. REV. 1119, 1170 (2000).

277. See *Eldred*, 537 U.S. at 206-07 & nn. 11, 14 & 15; 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch, co-sponsor of the CTEA); 141 CONG. REC. S3390 (daily ed. Feb. 22, 1995) (statements of Sen. Hatch and Sen. Feinstein when extension bill was first considered in 1995); *Hearing on H.R. 989, supra* note 50; *1995 Senate Hearings, supra* note 50. See also Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 656 (1996) (commenting that after the 1995 introduction of term extension bill, “[i]t is almost as though Congress cannot hear any copyright voices beyond that of the entertainment industry”).

Note that the hearings dealing with what later became the CTEA occurred in 1995, when congressional committees first considered extending existing and future copyrights by 20 years. See S. 483, 104th Cong. (1995); H.R. 989, 104th Cong. (1995). For explanation of the delay between the 1995 bill proposing a copyright duration extension and the 1998 enactment of the CTEA, see *supra* note 41.

allied with them (referred to here, for convenience purposes, as simply “Disney”) possessed institutional star power, not to mention the financial resources and political influence that made for a powerful lobbying campaign. In carrying out that campaign, Disney resourcefully stressed the full list of stakeholders who could benefit from a 20-year extension of copyright duration. The proposed extension would apply to all copyright owners, not merely corporate owners such as Disney. The sales pitch emphasized the creative process and the individual authors, songwriters, composers, and visual artists who deserved extended copyright protection. A copyright term extension, the argument continued, would be good for all creators and, of course, for their heirs who ultimately will own the relevant copyrights.<sup>278</sup>

So, Disney the institutional star, hoping to widen the appeal of the proposed term extension and make the CTEA less closely resemble special-interest legislation drafted for Disney’s benefit, let human stars take much of the public lead in the promotional push. Celebrities weighed in, for instance, with congressional hearing testimony in support of the CTEA. Few in Congress would disagree when Quincy Jones calls the CTEA “a good start” toward copyright protection of even greater duration,<sup>279</sup> when Bob Dylan comments on the importance to creators of knowing that they may benefit their heirs numerous years hence,<sup>280</sup> or when Don Henley and Carlos Santana indicate that they would like their far-removed descendants to have a chance to collect royalties stemming from their creations of many decades earlier.<sup>281</sup> Senator Orrin Hatch (R-Utah), a

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278. See Fonda, *supra* note 44; McAllister, *supra* note 44; Smith, *supra* note 44, at B9; Solomon, *supra* note 44.

279. *Hearing on H.R. 989, supra* note 50 at 277 (statement of Quincy Jones) (observing that “[i]f we can start with 70, add 20, it would be a good start”). See *id.* at 234 (statement of Quincy Jones) (commenting on Representative Hoke’s “Why not forever?” remark, by noting that “I’m particularly fascinated with [the representative’s] statement. . . . Why not forever?”).

280. See *1995 Senate Hearings, supra* note 50 at 55-56 (statement of Bob Dylan).

281. See *id.* at 56-57 (statements of Don Henley and Carlos Santana). Of course, their far-removed descendants would have had that chance even without the CTEA’s 20-year bonus. Copyrights on those artists’ works, whether pre-1978 or dating from 1978 on, were already subject to very long durations. See 17 U.S.C. § 304 (2000) (75-year duration for copyrights on pre-1978 works; now 95 years after CTEA); *id.* § 302 (life-plus-50-years duration for works created in 1978 or later; now life-plus-70 after CTEA). In his *Eldred* dissent, Justice Breyer correctly noted that remarks such as those made by

successful songwriter on the side,<sup>282</sup> may have shared a special sense of identification with Dylan.<sup>283</sup> But Senator Hatch and his party deserve no more blame than other senators and representatives. Senator Dianne Feinstein (D-Cal.), for example, and others of her party were equally enthusiastic and uncritical backers of the CTEA.<sup>284</sup>

The clincher for Congress may have been that the CTEA also appeared to benefit copyright owners who were “little guys” or were the heirs of such figuratively diminutive persons. With the CTEA applying across the board to all owners of copyrights on new works and pre-existing works still under copyright as of the CTEA’s 1998 effective date,<sup>285</sup> Congress could reason that not only was it taking care of Disney *et al.*, it was protecting Jones, Henley, Dylan, and Santana (and their grandchildren, great-grandchildren, and so forth), and it was doing a great thing for “regular” creators (and their distant-time heirs) who would remain largely unknown to the public.

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Dylan, Henley and Santana in supposed support of the CTEA were really only comments about general incentives furnished by a scheme of copyright protection. See *Eldred v. Ashcroft*, 537 U.S. 186, 255 (2003) (Breyer, J., dissenting) (“The Court . . . refers to testimony before Congress . . . that the copyright system’s incentives encourage creation . . . [but this] amounts to no more than a set of undeniably true propositions about the value of incentives in general.”). The musical artists’ remarks did not speak directly to the incentive value of the added 20 years. Therefore, the comments should not have been given credence in the determination of whether the CTEA was a permissible exercise of Copyright Clause authority. See *id.* 255-56 (Breyer, J., dissenting). It seems highly unlikely that Dylan, Henley, Santana, or Quincy Jones would have been moved by the CTEA’s 20-year bonus to write any piece of music that he would not otherwise have written.

282. For a listing of the Senator’s many songs, see <http://www.hatchmusic.com/songs>. Background on Sen. Hatch’s musical pursuits appears at <http://www.hatchmusic.com/history>.

283. Senator Hatch was a co-sponsor of the bill that became the CTEA and was probably its most outspoken advocate in the Senate. During the legislative process, he commented at length on the supposed merits of copyright duration extension and punctuated his remarks with references to various copyrighted songs that would soon enter the public domain if not saved from that fate. 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Senator Hatch regarding bill that became CTEA); 141 CONG. REC. S3390 (daily ed. Feb. 22, 1995) (statement of Senator Hatch regarding 20-year extension bill considered in 1995).

284. See *id.*

285. 17 U.S.C. §§ 302, 304(a), 304(b) (2000). According to Professors Heald and Sherry, the retroactive aspect of the CTEA “has the same effect as a direct subsidy to Disney or ASCAP but takes a form that diminishes public awareness of the effect of the law and therefore erodes political accountability.” Heald & Sherry, *supra* note 276, at 1175.

It would be unlikely that any copyright owner would object to such a term extension, unless he is inclined to consider the bigger picture we address later in the article.

Not having heard protests from copyright owners, human or corporate, Congress probably was too inclined to assume that the CTEA was a largely uncontroversial bill. Certainly, there were objections raised in congressional hearing testimony by academics and others who voiced concerns about the effect on the public domain.<sup>286</sup> But those objections, made by less well-known—not to mention less well-financed and less glamorous—spokespersons,<sup>287</sup> could be discounted as seeking to further the interests of users of works rather than those of the works' creators. Users of works, after all, may sometimes seem less worthy of legal protection than those who actually produced the copyrighted works and gave them value—especially if the observer is not inclined to pay much attention to the balance drawn by the Framers in the Copyright Clause.<sup>288</sup> It appears that the objections to the CTEA were listened to politely and then summarily dismissed. The CTEA passed with essentially no opposition and took effect, by its terms, immediately upon being signed into law by President Clinton.<sup>289</sup>

Congress thus did Disney's bidding and enacted what was effectively special-interest legislation to further private concerns, perhaps all the while thinking that it had benefited society by striking a blow for creativity. In the process, Congress was frighteningly uncritical in its acceptance of the arguments and rationales offered by the CTEA's proponents. Concern about what was really contemplated by the Copyright Clause appeared to be confined to the narrow issue of whether copyright protection could be made to last forever.<sup>290</sup> Perpetual

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286. *E.g.*, the Dennis Karjala-led group of professors who provided Congress the *Statement of Copyright Law Professors*. See *supra* note 51.

287. We are referring here, remember, to a group of professors. See *id.*

288. With its admonition that copyright protection must endure for a "limited [t]ime[.]" the Copyright Clause contemplates the existence of a public domain. U.S. CONST. art. I, § 8, cl. 8. This means that the rights of users of formerly copyrighted works have constitutional stature, and that the passage of works into the public domain, an event that Senator Hatch considered so undesirable, see *supra* note 283, is the fate ordained by the Constitution. Moreover, the rights of creators and those of users of works need not be regarded as mutually exclusive. See *infra* text accompanying notes 473-475.

289. See *supra* note 41. Testimony against the CTEA simply "fell on deaf ears." Hamilton, *supra* note 277, at 656.

290. See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep.

protection had been the goal of Sonny Bono, the deceased representative to whom tribute was paid in the CTEA's official name.<sup>291</sup> Mary Bono, who succeeded her late husband in the House and helped lead the successful push for the CTEA, had to be "informed by staff" that a law expressly protecting copyrights forever would be unconstitutional.<sup>292</sup> She remarked that perhaps at a later time, Congress should take up a copyright duration proposal of the "forever, less one day" variety—a suggestion supposedly made by Motion Picture Association of America executive Jack Valenti.<sup>293</sup> Finally, in enacting the CTEA, Congress appeared to give little thought to the implications of granting another term extension to huge numbers of copyrights that had already received a lengthy extension under the 1976 Act.

Adopted by a Congress that paid insufficient attention to the full range of issues at stake and seemed overly concerned about preserving the potential stream of royalties for far-removed heirs and other eventual owners of copyrights,<sup>294</sup> the CTEA has placed a noteworthy freeze on the public domain. No works will enter the public domain until January 1, 2019. In this sense, the CTEA has drastically thrown off the balance contemplated by the Copyright Clause.<sup>295</sup> Nevertheless, the Supreme Court held in *Eldred* that any failings of Congress in regard to the enactment of the CTEA fell on the permissible

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Mary Bono, noting that her late husband, Sonny Bono, had favored perpetual copyright protection but that she had been "informed by staff" of the unconstitutionality of such a move by Congress); *Hearing on H.R. 989, supra* note 50, at 94 (citing Rep. Sonny Bono as asking why copyrights should ever expire and cited by the *Eldred* Court at page 256); *Hearing on H.R. 989, supra* note 50, at 94 (statement of Rep. Berman, expressing his "guess [that] we could . . . just make a permanent moratorium on the expiration of copyrights"); *cf. Eldred*, 537 U.S. at 230 (quoting statement of Rep. Hoke, asking "Why 70 years? Why not forever? Why not 150 years?").

291. See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono); see also *Hearing on H.R. 989, supra* note 50, at 94.

292. See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono).

293. See *id.*

294. See, e.g., 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Senator Hatch regarding bill that became CTEA); 141 CONG. REC. S3390 (daily ed. Feb. 22, 1995) (statement of Senator Hatch regarding 20-year extension bill considered in 1995); Karjala, *supra* note 44 at 199, 235.

295. See *Eldred*, 537 U.S. at 223-28, 240-41, 242 (Stevens, J., dissenting); *id.* at 243-46, 265-67 (Breyer, J., dissenting). See also Heald & Sherry, *supra* note 276, at 1165 (observing that the Copyright Clause contemplates an "inviolable" public domain).

side and resulted in a statute that probably was not wise public policy but did not violate the Copyright Clause.<sup>296</sup> We now explore the Copyright Clause more fully, in order to expose the CTEA's unconstitutional nature and the errors committed by the Court in *Eldred*.

#### B. THE COPYRIGHT CLAUSE AND POSSIBLE PROMOTION-OF-PROGRESS THEORIES

It has been asserted by some that the policy arguments against the CTEA are stronger than the constitutional ones.<sup>297</sup> This claim, however, can be misleading. Even though the bulk of the constitutional arguments may resemble policy arguments, the presentation of the debate as a constitutional one provides an effective means of responding to “moral rights” policy arguments that, at first glance, might seem to weigh in the CTEA's favor. The Copyright Clause specifies the end that the statutory regime of copyright must serve: promotion of the “Progress of Science.”<sup>298</sup> Therefore, auxiliary policy aims—such as harmonization and ensuring that the author's great-grandchildren have control over the author's work—must either be dismissed as constitutionally inappropriate or be shoe-horned into some larger, more utilitarian scheme.

For the most part, this article works with the traditional view of copyright as furnishing an incentive for the production of creative works that, at the appropriate time, will pass into the public domain. Under this view, the term of copyright can be thought of as the fulcrum of a scale balancing private licensing against public access with the aim of producing the greatest quantity of publicly accessible creative work.<sup>299</sup> This traditional view is admittedly narrow, however, in its

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296. *Eldred*, 537 U.S. at 221.

297. See, e.g., Symposium, *Mickey Mice? Potential Ramifications of Eldred v. Ashcroft*, 13 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 771, 797 (2003) (comments of David O. Carson); Marci Hamilton, *Mickey Mouse versus Wired Magazine: The Supreme Court Considers Whether a Law Extending the Copyright Term is Constitutional*, FINDLAW'S WRIT: LEGAL COMMENTARY (Oct. 24, 2002), at <http://writ.findlaw.com/hamilton/20021024.html>.

298. U.S. CONST. art. I, § 8, cl. 8. For a careful examination of the Copyright Clause language, see generally Lawrence B. Solum, *Intellectual Property, Congressional Power, and the Constitution: Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1 (2002).

299. For the classic account, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989).

perspective on intellectual property and its benefits. Before delving into criticism of the majority opinion in *Eldred*, we should concede that the Copyright Clause's "progress" provision, in and of itself, does not shut out other nontraditional views altogether.<sup>300</sup> These nontraditional views would take copyright to "promote the Progress of Science" in ways that have nothing to do with inducing authors to create new works. In doing so, these views would expand the notion of the "Progress of Science" beyond its traditional Copyright Clause sense, which tends to equate it with public access, or perhaps even more strictly, with the public domain.<sup>301</sup>

William M. Landes and Judge Richard A. Posner give a lucid airing to such a view in a recent article<sup>302</sup> in which they discuss the economic bases for property as such and proceed to draw an analogy to intellectual property in particular. Take a parcel of land, for instance. The land has existed forever, yet someone is allowed the exclusive right to it. Obviously, the exclusive right was never an incentive for the land's creation. Nevertheless, granting someone the exclusive right to the land produces a more desirable social outcome. Now imagine that everyone had rights to the land. Everyone would have free, unlimited use of it, and the land would quickly become "overgrazed," drained of all value, useful to no one.<sup>303</sup>

The principle's applicability to copyright is questionable, however, and it should be noted that Landes and Posner do not place too much weight on it. They also point out that there are notable counterexamples. For instance, the works of Shakespeare seem to retain their "value" despite endless

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300. Below, we propose that a new emphasis be placed on the Clause's "to Authors" provision—to the effect that most conceivable non-incentive-related means of "promot[ing] the Progress of Science" would be judged impermissible. It is important to note, however, that even though completely ruling out the nontraditional theories of "progress" would produce the same effect, we do not propose such a ruling-out. See *infra* text accompanying notes 445-454.

301. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228 (1990); see also *Eldred*, 537 U.S. at 245-46 (Breyer, J., dissenting). In taking a broad view of the copyright power's scope, though, we should be wary of going too far. Even if the Framers could have accepted theories of "promot[ion of] Progress" beyond the incentive-for-creation model, the "limited [t]imes" restriction indicates that the public domain was central to the Framers' idea of "Progress." See U.S. CONST. art. I, § 8, cl. 8.

302. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003).

303. *Id.* at 485.

rehashing and recycling.<sup>304</sup> In our view, though, the “overgrazing” principle’s problems come yet closer to the fore when Landes and Posner name works that *would* conform to it: “the *Mona Lisa*, the opening lines of Beethoven’s *Fifth Symphony*, and several of Van Gogh’s most popular paintings.”<sup>305</sup> One is compelled to ask what “value” these classic works have really lost. The *Mona Lisa*’s “devaluation,” for instance, results merely from its having become, in part, an article of kitsch in the popular mind. Here, the devaluation refers solely to consumers’ response to the work (or possibly even the number of less refined consumers who can identify it readily) and not to any change in the *Mona Lisa* itself. The overgrazed parcel of land, on the other hand, is devalued because it literally undergoes an unfavorable physical transformation. This discrepancy is crucial. In his discussion of *It’s a Wonderful Life*, a film the rights over which went unenforced for a time, one commentator unwittingly calls its significance into sharp and painful detail: “Before [certain parties] began enforcing their claim to the underlying rights in the film, local stations and cable channels looking for no-cost programming broadcast the film endlessly, with the result that, ‘to put it politely, the film’s currency was being devalued.’”<sup>306</sup>

To put it less politely, some people watched *It’s a Wonderful Life* a few too many times on TV, and they grew tired of it. But a desire to prevent such a “devaluing”—effectively a desire to restrict access to works so that the public’s opinion of them is not adversely affected by over-exposure to them—should not be used to justify expansions of the exclusive rights afforded by copyright. It seems doubtful, for instance, that society would be better off if our access to the *Mona Lisa* were more restricted and if that work had remained solely one of fine art rather than also becoming an oft-encountered item of popular culture. Creativity, after all, is more likely to be promoted by freedom to use the *Mona Lisa* as one sees fit than by restrictions on access to it.<sup>307</sup> A rationale of

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304. *Id.* at 488.

305. *Id.*

306. Scott Martin, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Extension*, 36 LOY. L.A. L. REV. 253, 273 (2002) (quoting Bill Carter, *Where Have You Gone, Tyrone Power?*, N.Y. TIMES, Dec. 19, 1994, at D10).

307. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

preventing “overgrazing” of works of authorship thus appears not to correspond well with the constitutional notion of promoting the “Progress of Science.”<sup>308</sup>

Admittedly, exclusive rights may have certain supposed benefits to the “Progress of Science” that are more material in nature, and it would be unfair for us not to acknowledge that the writer quoted above in regard to *It’s a Wonderful Life* went on to note that during the movie’s period of no exclusivity, many of the versions being shown had fallen into disrepair and were substandard in quality.<sup>309</sup> It can be argued, for instance, that if one has the exclusive rights to a certain film, then the film is more likely to be restored when that becomes necessary and more likely to be distributed in new digital formats. What about films in the public domain? Suppose, for the sake of argument, that restored editions of public domain films received legal protection under an enactment separate from copyright law.<sup>310</sup> If a firm were to restore a public-domain film, then it would have the exclusive rights to the restored edition under the hypothetical legal rule being assumed here, and would charge a price high enough to cover the costs of restoration. Other firms, though, would continue to distribute lower-quality (i.e., non-restored) editions of the old film. They would have no restoration costs to cover and they would be able to charge a price lower than that charged for the restored edition. Given the choice, consumers might place greater importance on price than on quality. If this were so, then no firm would have an incentive to restore the work.<sup>311</sup> The demand for the restored edition would be undercut by the demand for the cheaper, albeit lower-quality, editions.

The natural reaction to this hypothetical is to conclude that if demand is insufficient to give the restored edition a significant market niche, the restoration is unimportant in any

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308. See U.S. CONST. art. I, § 8, cl. 8; *Stewart*, 495 U.S. at 228.

309. Martin, *supra* note 306, at 273.

310. This hypothetical enactment would address restored editions with no new expression added—no insertion of commentary by film experts, no inclusion of new footage, etc.—because the presence of new expression in the restored edition would trigger copyright protection for that new expression. See *Eldred*, 537 U.S. at 240 n.13 (Stevens, J., dissenting).

311. Obviously, there would be no economic incentive to restore the film if exclusive rights were not enforced over the restored edition. In the absence of such rights, prices on the restored edition would quickly be bid down by copiers to a price lower than that necessary for the restorers to recoup the investment made in restoration.

case. If in the long run consumers would prefer that a restored edition exist, it might seem to make sense for the restorers to be granted temporary exclusive rights not only to the restored edition of the film, but also to the film itself. This would allow the restorers to cut off the supply of all the lower-quality, lower-priced editions. Until expiration of the restorer's rights in the film under this hypothetical legal regime, all consumers of the film would pay a kind of "tax" in the form of monopoly pricing and would thereby subsidize a restoration project whose benefits would be felt long after the tax disappeared.

The above argument, a variant on Landes' and Posner's,<sup>312</sup> offers substantial support to the theoretical system of renewals discussed in their article, for under that system the burden of renewal would ensure a narrowing of copyright's coverage to works that remain commercially viable.<sup>313</sup> The argument in support of a narrowly defined restorer's right—even one that would not present the constitutional difficulties of the hypothetical right discussed in the preceding paragraph<sup>314</sup> — does not provide support, however, for the legal protection provided by the CTEA's late-in-the-game blanket term extension. As Justice Breyer emphasized in his *Eldred* dissent, only 2% of all works published continue to generate royalties by the time their copyrights enter CTEA territory.<sup>315</sup> The remaining 98% have little chance of being revisited by the rights-holders during the final years of copyright. At the same time, many of them, though not cost-effective investments for their current rights-holders, would stand a far better chance of restoration or other revisitation if they were in the public domain. Eric Eldred, the plaintiff in *Eldred*, is one such disseminator of public domain works.<sup>316</sup> The film *Metropolis*, long in the public domain, was recently remastered and restored by the Murnau Foundation and given a small-scale theater and DVD release<sup>317</sup> that may not have been cost-

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312. See Landes & Posner, *supra* note 302, at 488-90.

313. See *id.* at 517.

314. The hypothetical right under discussion would present serious constitutional problems to the extent that it would grant protection over an underlying work that was already in the public domain. See U.S. CONST. art. I, § 8, cl. 8; *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

315. *Eldred*, 537 U.S. at 248 (Breyer, J. dissenting).

316. Brief for Petitioners at 5, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) available at 2002 WL 1041928. See Fonda, *supra* note 44.

317. Press Release, Kino International, Kino on Video to Release Digitally

effective for a large-scale corporate rights-holder of the type that owns most copyrights on films.

Even if the CTEA does fund certain works' revisitation, it does so only at a significant price to the vast majority of other works—the 98% of works whose chances of revisitation would be greater if they entered the public domain sooner. It seems reasonable, moreover, to project that as more and more works are stored in digital formats, restoration and other kinds of revisitation will become cheaper and less necessary. If this is indeed the case, then the CTEA, which will apply to innumerable future works in no need of revisitation, looks even more overbroad.<sup>318</sup>

Another nontraditional theory holds that greater international harmonization of and cooperation concerning copyright policy promotes the “Progress of Science.” Harmonization, for instance, simplifies licensing and distribution agreements somewhat. In addition, making some concessions and playing an active role in the negotiation of international treaties may allow the United States considerable sway over other nations' copyright policies. Such effects may influence the “Progress of Science” abroad, and the benefits could be felt domestically.<sup>319</sup> The problem, however, is that the benefits, as far as the “Progress of Science” is concerned, may be great or may be small; it is a question that has yet to be answered with good empirical data.

On the other hand, there can be no question as to the considerable costs of an additional 20 years of copyright. Any sincere argument for term extension employing the “international copyright system” rationale would have to take account of data demonstrating that its benefits were at least as substantial as the duration extension's costs. But the CTEA does not even reach the point of making such a showing relevant, for as Justice Breyer observed, the CTEA's “harmonization” of U.S. copyright duration with that of the

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Restored Metropolis with Orchestral Soundtrack, at <http://www.silentera.com/info/kinoMetropolis.html> (e-release June 5, 2002) (last visited Apr. 9, 2004).

318. Cf. *Eldred*, 537 U.S. at 240 (Stevens, J., dissenting) (commenting that even if providing incentives to restore old films would merit action by Congress, CTEA is far too sweeping to be justified on such basis).

319. Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and the Useful Arts*, 36 LOY. L.A. L. REV. 323, 329-30 (2002).

European Union is pitifully incomplete.<sup>320</sup> The CTEA harmonized only the terms of copyright on post-1977 works created by natural persons. These works comprise a mere subset of commercially viable works, and only a tiny subset of works belonging to that subset will still be in print by the time the harmonized period begins.<sup>321</sup>

It can be granted that the copyright power, as an “engine of free expression,”<sup>322</sup> could conceivably operate otherwise than as a means of setting incentives for authorship. Though the argument would be weak, one could contend that these kinds of effects will result from the CTEA’s grant of incentives to certain rights-holders to “revisit” old films and from its inter-continental harmonization of the terms of copyright on post-1977 works attributed to natural persons.<sup>323</sup> But the CTEA’s application is not so restricted. If there remains a case to be made for the full sweep of the CTEA’s term extensions, the possible nontraditional arguments we have just examined will not do. Therefore, we now turn to the traditional copyright model. In order for the bulk of the CTEA to pass even a rational basis test, it must have its grounding in the standard “incentive for creation” model.<sup>324</sup> As we shall show, such grounding is nowhere to be found.

### C. THE CTEA, THE TRADITIONAL INCENTIVE MODEL, AND *ELDRED’S* ERRONEOUS ANALYSIS

The creation-incentive value of even the prospective application of the CTEA (i.e., the application to works created after the CTEA’s effective date) is questionable at best. Recall that the creation-time value given by a CTEA-regime copyright equals 99.8% that of a hypothetical perpetual term.<sup>325</sup> Justice Ginsburg misrepresents the economic analysis as culminating in a ludicrous assertion that the term of copyright is somehow 99.8% perpetual,<sup>326</sup> and with a reasonable but misplaced

320. See *Eldred*, 537 U.S. at 257-58 (Breyer, J., dissenting).

321. See *id.* at 258 (Breyer, J., dissenting).

322. Harper & Row, Publ’s, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

323. See *Eldred*, 537 U.S. at 206. But see *id.* at 239-240 (Stevens, J., dissenting); *id.* at 253-54, 225-58 (Breyer, J., dissenting).

324. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

325. See *Eldred*, 537 U.S. at 210 n.16 (majority opinion); *id.* at 256 (Breyer, J., dissenting).

326. *Id.* at 210 n.16 (majority opinion). Justice Ginsburg’s

remark about calculators and calendars, wholly dismisses the numbers.<sup>327</sup> Contrary to Justice Ginsburg's suggestion, the economic analysis does not directly apply to the "limited [t]imes" question. Instead, it relates to the copyright power's utilitarian basis.<sup>328</sup> The figure of 99.8%, then, speaks to incentive rather than term length and does not, in and of itself, point to any great evil. Indeed, even a much shorter term of copyright could yield this figure if interest rates were higher.<sup>329</sup> A proper look at the economic analysis would also take account of two other figures, namely, the length of the term extension and the average percentage of a perpetual term's creation-time value—99.4%—provided by a pre-CTEA copyright. Under this view, the public gives up 20 years' full access so that the creation-time value of copyright *on an ideal work* can increase by about 0.4%.<sup>330</sup>

We write of "creation-time value" rather than "incentive-value" because it is unlikely that the two values are directly correlated. One should recall that works tend not to collect a steady stream of royalties up through their 95th year and that only 2% of all works survive to the 56th.<sup>331</sup> The 0.4% of additional incentive would have to be adjusted downward by the likelihood of premature commercial death and the near-certainty of commercial slowdown.<sup>332</sup>

By this rational-economic measure, the CTEA's prospective application provides little additional incentive. We should be careful, however, to account for other possible frameworks. A

misrepresentation involved her treatment of the numbers, but Justice Breyer made the same misstatement in an outright manner, writing that "[t]he economic effect of this 20-year extension . . . is to make copyright not limited, but virtually perpetual." *Id.* at 243 (Breyer, J., dissenting).

327. *Id.* at 210 n.16 (majority opinion).

328. The economic analysis of a work's incentive value may inform the "limited times" analysis indirectly, though, if one regards as unlimited any term outliving a work's ability to produce substantial retroactive incentive value. See *infra* text accompanying notes 410-415, 439-454.

329. For the sake of demonstration, if the interest rate, absurdly, were set at 25%, then a 28-year term would yield the 99.8% figure.

330. We mean, in other words, roughly a 0.4% increase on the old premium. See Heald & Sherry, *supra* note 276, at 1173-74 (asserting that the prospective application of the CTEA furnishes no added economic incentive beyond what prior law provided, and noting that "adding . . . 20 years [to the copyright term] buys the public nothing").

331. See *Eldred*, 537 U.S. at 248, 254 (Breyer, J., dissenting).

332. This would be so unless, of course, the creator has reason to expect significant enough inflation in the next 95 years to offset the improbability's rarefying effect.

“boundedly rational” artist, for instance, may lose sight of the role of interest, overlook the possibility of accruing money over time by saving, and assume that the 20 years of term extension will give him revenues proportional to those that he expects to make in the first 20 years.<sup>333</sup> But then, few artists would dare hope that their works’ commercial viability would live out the entire 95 years, and not even they would have the audacity to attempt to negotiate any kind of long-term financial agreement based on so highly speculative a projection of commercial longevity. And the extra years of term length would scarcely improve the artist’s bargaining position with publishing houses, which we could reasonably expect to possess the rational-economic view of things.

Even so, another artist may, irrespective of economics, simply take pleasure in the thought of his or her estate owning the rights to his or her work for a long time. But the “moral” incentive here would not likely be furthered greatly by the CTEA, which merely postpones the date of passage into the public domain by 20 years. A look to the history of copyright renewals suggests, moreover, that the moral incentive was not of great importance to the majority of authors anyway. Regarding works registered for copyright between 1883 and 1965, only 11% of authors took the opportunity to renew their copyrights, even though the price of renewal was slight.<sup>334</sup> Interestingly, renewals during that period would have prolonged the life of their copyrights by 28 to 47 years, longer than the CTEA’s 20-year prolongation.<sup>335</sup> We have no way of knowing what proportion of these authors chose to renew for moral reasons, but it is a conservative wager that some of the aforementioned 11% were motivated by royalties to be gained from the additional years of duration. Yet it would appear that at least 89% of authors cared little for the moral or economic value of a significantly long period of copyright effective during their lifetimes. Thus, if 28 to 47 years’ income gain were insufficiently attractive motivation for renewal, the CTEA’s additional 20 years appears overly broad for the moral incentive it delivers, namely, the knowledge that one’s family will continue to exercise some measure of control over one’s

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333. From this view, the CTEA would sweeten the pot by 26.6%, in sharp contrast with the 0.4% discussed at *supra* note 330 and accompanying text.

334. Landes & Posner, *supra* note 302, at 473.

335. See *supra* note 2 for review of the 1909 and 1976 Copyright Acts’ duration terms.

work for an additional 20 years from the fiftieth year after death.

The citation by Congress and the Supreme Court of demographic trends toward a longer life span<sup>336</sup> should have little impact on the analysis of the CTEA's incentive effect. Recall that only 2% of works retain commercial viability after their 55th year.<sup>337</sup> The works of venerated graybeards Bob Dylan, Carlos Santana, and Quincy Jones may indeed outlast their creators' grandchildren, but a shrewder Congress would have recognized that those works are in the minority. Had Congress listened to other artists, particularly contemporary artists who rely more heavily on sampling than their predecessors did, it might have learned that many artists are more concerned with heightened access than with heightened protection. Hip-hop artist Chuck D of Public Enemy, for instance, has railed against tight restrictions on sampling<sup>338</sup> while aligning himself with file-sharing services such as Audiogalaxy.com.<sup>339</sup>

Thus, the CTEA's *prospective* application has questionable creation-incentive value in terms of the actual economic and moral rewards it would give artists. The CTEA's *retrospective*

336. See *Eldred*, 537 U.S. at 206-07, 207 n. 14.

337. See *id.* at 254. (Breyer, J., dissenting).

338. In the audio track *Caught, Can I Get a Witness?*, Chuck D takes a Jeffersonian view of audio recordings:

Caught, now in court 'cause I stole a beat  
 This is a sampling sport  
 But I'm giving it a new name  
 What you hear is mine  
 P.E. [Public Enemy] you know the time . . .  
 I found this mineral that I call a beat  
 I paid zero  
 I packed my load 'cause it's better than gold  
 People don't ask the price, but its [sic] sold . . .  
 We ain't goin' for this  
 They say that I stole this  
 Can I get a witness?

PUBLIC ENEMY, *Caught, Can I Get a Witness?*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Columbia/Def Jam Recordings 1988), available at <http://www.lyrics.net.ua/song/133388> (last visited Apr. 9, 2004).

339. Biography of Keynote Speaker, *Chuck D*, First Joint Convening of Americans for the Arts and the National Assembly of State Arts Agencies, July 28-31, 2001, at <http://www.participate2001.org/innerpages/keynotes/d.html> (last visited Feb. 22, 2004); see also Audiogalaxy, at <http://www.audiogalaxy.com> (last visited Apr. 9, 2004) (Audiogalaxy.com is a music search and file sharing web site).

application, viewed within the confines of the economic model only, is of even more questionable value, particularly if its primary goal is to augment the incentive of a lengthened prospective term with a further incentive for future authors: that they might benefit *even more* from later-enacted term extensions.<sup>340</sup> This further incentive fails on two grounds. First, if future authors bet on later extensions to their copyright term as their incentive to create, the bet would have to be of enough value to overcome the probability that the benefit would never be received. Yet as discussed above, a majority of authors would probably find the “moral value” of even a significant term extension to be minimal, and the marginal economic value would be extremely small even if the term were extended to perpetuity.<sup>341</sup> Second, in order for Congress to maintain a reasonable expectation of extension, Congress would have to extend existing copyright terms regularly and make sure each time that a significant number of copyrights benefited from the extension.<sup>342</sup> These periodic extensions, strung together, would seem dangerously close to an effectively perpetual copyright. Viewed in the fairest light,

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340. Sen. Orrin Hatch suggests that the CTEA delivers just that:

Contrary to the argument made by the CTEA's detractors, this extension was not a naked windfall to copyright holders. Rather, it fulfills the justified expectation that Congress will periodically review and revise the copyright term. In so doing, Congress not only confirmed the expectation of existing copyright holders, it also preserved its ongoing good faith in the eyes of the creators of copyrightable works. Accordingly, such an extension does advance the goal of enhancing the incentive for the creation of new copyrighted works.

Orrin Hatch & Thomas R. Lee, “*To Promote the Progress of Science*”: *The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 21 (2002). The Senator's attempt to justify the CTEA in this fashion merely clothed, in transparent semantics, what the authors assert is a “naked windfall.” His rationale that copyright holders have a “justified expectation” of extensions would seem to require Congress to string together extension after extension, but even the *Eldred* majority would not approve of such action by Congress. See *supra* text accompanying notes 86-88, 110-115; *infra* text accompanying notes 342-343, 400-415, 459-467.

341. See Brief of Amici Curiae George A. Akerlof et al. at 10, *Eldred* (No. 01-618) (remarking that overall, a twenty-year extension “seems unlikely to have a significant effect” on both pre-creation and post-creation incentives).

342. See Michael H. Davis, *Extending Copyright and the Constitution: “Have I Stayed Too Long?”*, 52 FLA. L. REV. 989, 1031 (2000) (arguing that because such a “bet” on retroactive extensions would be a “bizarrely rarefied long shot” for authors, repeated extensions would not necessarily produce more incentives to create nor correspondingly more copyrights that would benefit).

the retroactive component's incentive to future authors simply approaches nil. Viewed more harshly, it suggests something akin to the congressional bad faith of which Justice Ginsburg, in the *Eldred* decision, professed to find no trace.<sup>343</sup> Surely at some level Congress was influenced by overt requests for perpetual copyright.<sup>344</sup>

In his challenge to the retroactive component, petitioner Eldred asserted just this concern. He alleged that the Copyright Clause “imbeds a *quid pro quo*,” and that the CTEA, in light of arguments similar to those we have just advanced, represents a “*quid pro nihilo*.”<sup>345</sup> As noted above, Justice Ginsburg disagreed, arguing that the CTEA involved a *quid pro quo* and, in effect, that the beneficiaries of the CTEA's term extensions paid for the CTEA before they knew they would be receiving its benefit.<sup>346</sup> Given Congress' history of retroactive term extensions, she countered, an author could have a reasonable expectation at the time of creation that he or she would eventually benefit from some extension of copyright.<sup>347</sup>

Certainly, some authors would know that Congress has extended durations in the past and would hope that Congress might do so again in the future. But it makes neither legal nor practical sense to speak of a possible future extension as if it were part of a contract with the authors. Having reason to

343. Justice Ginsburg focused instead on the lack of clear evidence in the House and Senate reports that Congress intended copyright protection to be perpetual, and on assertions in the congressional debates that copyright duration should be limited. She therefore concluded that the CTEA does not establish an unlimited duration. *Eldred*, 537 U.S. at 209 n.16, 209-10.

344. Shortly before the enactment of the CTEA, Rep. Mary Bono made telling remarks regarding the CTEA, the copyright duration preference of her late husband (former Rep. Sonny Bono), and a future course of action she wished to see Congress undertake:

Copyright extension is a very fitting memorial for Sonny. . . . Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. . . . As you know, there is also Jack Valenti's proposal for the term to last forever less one day. Perhaps the Committee may look at that next Congress.

144 CONG. REC. H9951-52. Quincy Jones almost certainly would like the idea of a continuing pattern of duration extensions. See *Hearing on H.R. 989*, *supra* note 50 at 277 (“If we can start with 70, add 20, it would be a good start”); *id.* at 234 (approving an earlier speaker's suggestion that copyright duration last forever).

345. Petitioner's Brief at 23, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) available at 2002 WL 1041928.

346. See *supra* notes 140-145 and accompanying text.

347. See *Eldred*, 537 U.S. at 214-15.

hope for a possible future benefit does not amount to payment for the hoped-for benefit. No strict expectation would be violated if an author did not receive a hoped-for extension, and no one would accuse Congress of not upholding its end of the bargain if it left copyright duration set at the level guaranteed to authors at the time their works acquired copyright protection.<sup>348</sup> If future extensions were truly part of the public's bargain with authors, Congress might be constitutionally bound to a perpetual series of retroactive term extensions.

In order for Justice Ginsburg's characterization of the CTEA's retroactive component as a *quid pro quo* to make sense, Congress must be seen as having an intent to string together an effectively perpetual copyright. One would prefer to believe Justice Ginsburg when she noted that this "clearly is not the situation before us."<sup>349</sup> Yet if this "is not the situation," then either Congress intends to violate the terms of its supposed agreement with the creative community,<sup>350</sup> or Justice Ginsburg's *quid pro quo* theory is bankrupt.

Presumably conscious of the CTEA's doubtful conformity with any *quid pro quo* requirement, the Court attempts to shift some weight away from its earlier argument by noting that its use of *quid pro quo* language has typically appeared in patent cases rather than in copyright cases.<sup>351</sup> Patents are distinguishable from copyrights, Justice Ginsburg argued, so the *quid pro quo* point may be misplaced in the copyright context.<sup>352</sup> She observed that a copyright is effective from the time of creation, whereas a patent is effective only from the point of the disclosure required as part of the patent approval process.<sup>353</sup> In the patent context, then, disclosure is the *quo* exacted from the inventor; in the copyright context, disclosure is the desired objective but is not formally required for copyright protection to adhere to a work.<sup>354</sup>

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348. See *Eldred*, 537 U.S. at 240-41 (Stevens, J. dissenting).

349. See *Eldred*, 537 U.S. at 209 (quoting *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)).

350. See *id.* at 214-15 (noting that congressional history of granting retroactive extensions of copyright duration could give rise to expectations on part of creators that further such extensions would be enacted).

351. See *id.* at 216.

352. See *id.* at 216-17.

353. See *id.* (noting that the Patent Act first requires disclosure for the grant of a patent; copyright runs from the date of creation).

354. See *id.*

Justice Ginsburg seemed to suggest that copyright law has no *quo* comparable to that of patent law.<sup>355</sup> The Justice quibbles over semantics, for even though copyright vests in the author at creation when the work is *fixed*,<sup>356</sup> the copyright owner normally has little need to enforce his or her rights against another party until the work has been disclosed, that is, published. The exclusive right over an unpublished work gives the author little reward, because typically no one unsanctioned by the author has access to the work. To the extent the author holding exclusive rights can reap rewards from the public for the work's use, payment does not begin until the author discloses his or her work.<sup>357</sup> In this respect, then, copyright and patent are similar. Furthermore, it should make no difference that patent disclosure requires completion of a formal legal procedure,<sup>358</sup> whereas copyright disclosure does not.<sup>359</sup> The patent approval process serves to ensure that an invention has been fully disclosed, i.e., that all of its relevant details are made plain to the public. Copyrighted works, on the other hand, are fully disclosed from the point of publication; no further formal disclosure scheme is required.<sup>360</sup> Copyright and patent thus both exact disclosure in order for creators to reap benefits; the differences between their respective objects simply allow the process of extraction to be less formalized in the context of the former than in that of the latter. Therefore, contrary to Justice Ginsburg's apparent suggestion, it would be incorrect to deduce from this formality gap that patent contemplates a meaningful *quid pro quo* but that copyright

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355. See *id.*; see also *id.* at 217 n.22 (conceding that patent and copyright law involved different exchanges).

356. *Id.* at 217; 17 U.S.C. §§ 101, 102, 201 & 302(a) (2000).

357. A copyright owner has exclusive rights with regard to the use of one's work. 17 U.S.C. § 106 (2000). The owner may enforce such rights against unauthorized users. *Id.* at §§ 501-06. Such use necessarily presupposes the disclosure of the work before others can use it, either with permission or without.

358. Sections 111-154 of the Patent Act describe the process for application for and issuance of a patent. 35 U.S.C. §§ 111-154 (2000) (as amended at 35 U.S.C.A. §§ 111-154 (West 2001 & Supp. 2003)).

359. See *supra* text accompanying notes 353-354, 356.

360. Although there is a copyright registration process that furnishes certain legal benefits to copyright owners who complete it, see 17 U.S.C. §§ 408-412 (2000), registration with the United States Copyright Office is not required for copyright protection to begin. *Id.* at § 408. Rather, copyright begins once an eligible work has been created and placed in a tangible medium of expression. *Id.* at §§ 101, 102, 201, 302(a).

does not.

The Court further attempted to distance the treatment of copyright duration from patent law's *quid pro quo* exchange.<sup>361</sup> The Court noted that patent and copyright grants differ, because unlike copyright owners, patent holders effectively obtain temporary monopolies over their knowledge.<sup>362</sup> Copyright owners do not gain a similar monopoly.<sup>363</sup> Therefore, in the Court's view, patent law's *quid pro quo* was "more exacting than copyright's."<sup>364</sup> The majority seemed to suggest that because copyright was not a "monopoly of knowledge,"<sup>365</sup> judging the CTEA's extended copyright duration according to the same *quid pro quo* balance contemplated by patent law would be incorrect.<sup>366</sup> However, the Court's argument breaks down. It is true that patent law does not feature the explicit expression-versus-idea dichotomy established in copyright law.<sup>367</sup> Contrary to what the Court suggests, however,<sup>368</sup> this is not because patent protection somehow reaches beyond the expression of an idea to a monopoly on the underlying idea, i.e., the idea beneath the invention's concept. Patent law reaches no further than a particular embodiment of an invention.<sup>369</sup> Patent and copyright therefore cover similar ground. Even though the Court may have intended the difference in copyright's coverage to devalue the petitioners' *quid pro quo* arguments, the effort fails, for patent and copyright bear too many conceptual similarities as primary guardians of

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361. *Eldred*, 537 U.S. at 217.

362. *See id.*

363. *See id.* (the author gains no monopoly on any knowledge; a reader of an author's writing may make full use of any fact or idea she acquires from her reading).

364. *Id.* at 217 n. 22.

365. *Id.* at 217.

366. *See id.* ("In light of these distinctions, one cannot extract from language in our patent decisions . . . support" for the petitioners' claim that CETA is an improper violation of an implicit copyright *quid pro quo* bargain).

367. Compare 35 U.S.C. § 101 (2000) ("[w]hoever invents . . . any new and useful process, machine, manufacture, or composition off matter . . . may obtain a patent therefor") with 17 U.S.C. § 102(b) (2000) (copyright on original work of authorship does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery").

368. *See Eldred*, 537 U.S. at 217 (arguing copyright law differs from patent law in that it does not protect ideas).

369. *See* 35 U.S.C. § 101; *see also* § 100 (2000) (defining invention as "invention or discovery," and defining process as "process, art or method" and new uses of existing processes, machines, manufacture, etc.).

intellectual property rights.<sup>370</sup>

In sum, the Court, instead of settling affirmatively on a response to Eldred's *quid pro quo* argument, presents us with two disjoint responses. We may either accept Justice Ginsburg's demonstration of the retroactive term extension's *quid pro quo* effect, or accept her argument that the *quid pro quo* balance articulated in earlier patent decisions is not applicable in the copyright context. The first option is unacceptable.<sup>371</sup> The second asks that we assent to an argument based on a questionable distinction between patent and copyright law, one that Justice Ginsburg herself stops short of fully embracing.<sup>372</sup>

#### D. OTHER DEFICIENCIES IN THE *ELDRED* MAJORITY OPINION

It is difficult to come away from a reading of the *Eldred* majority opinion without a feeling that the primary reasons for the decision received less attention in the opinion than the rationales actually articulated by the Court. Indeed, Justice Ginsburg used considerable ink commenting instead on Justice Breyer's dissent, which the majority repeatedly referenced and refuted.<sup>373</sup> The Court seemed motivated by two underlying, and related, concerns: first, if the CTEA were held unconstitutional in its application to existing copyrights, the term extension set forth in the Copyright Act of 1976 would be vulnerable as well;<sup>374</sup> second, striking down the CTEA would open up a proverbial can of worms featuring the upsetting of

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370. Moreover, it should not be forgotten that the same constitutional clause provides Congress its authority to enact patent and copyright legislation, and that regardless of whether Congress legislates regarding patents or regarding copyrights, the *Progress of Science* and *limited Times* provisions in the clause operate as constraints on congressional power. See U.S. CONST. art. I, § 8, cl. 8.

371. See Heald & Sherry, *supra* note 276, at 1169 (observing, in regard to the CTEA, that "it is difficult to imagine a more overt violation" of the *quid pro quo* principle). "The retroactive extension of the copyright term cannot possible provide any incentive for [authors] to create an already existing work." *Id.*

372. Justice Ginsburg rejects the *quid pro quo* argument where it would limit Congress's ability to extend copyright terms, see *Eldred*, 537 U.S. 217, yet continues to analogize copyright term extensions to patent law's, see *id.* at 217 n.22 (if patent's *quid pro quo* allows extensions, by analogy, it should allow copyright's).

373. On at least five occasions, Justice Ginsburg commented on or answered statements in Justice Breyer's dissent. See *id.* at 193 n.1, 199 n.4, 205 n.10, 207 n.15 & 209 n.16.

374. *Id.* at 209 n.16.

many parties' expectations and the prospect of numerous legal proceedings challenging licensing and transfer agreements entered into in reliance on the CTEA.<sup>375</sup> The *Eldred* majority reiterated the first concern, albeit briefly, near the end of Justice Ginsburg's opinion after raising it earlier.<sup>376</sup> Although the Court did not expressly note the second concern, it may be, in part, the rationale that drove the Court to defer to Congress repeatedly in its opinion.<sup>377</sup> Both dissenters referred to it explicitly, suggesting that any such concern on the part of the majority was overblown.<sup>378</sup>

On the first concern, the Court was more worried than it needed to be about the fate that supposedly would have befallen the 1976 Act's term extension if the retrospective aspect of the CTEA had been held unconstitutional. Although the Supreme Court of course must be cognizant of the potential long-term implications of issuing a certain holding in a case, the Court must also be careful not to allow an issue that is not before it to dictate the resolution of the issue it must actually decide. The *Eldred* case did not call for a ruling on the constitutionality of the 1976 Act's term extension.<sup>379</sup> Nevertheless, concern about that non-issue almost certainly, and regrettably, played a pivotal role in the Court's decision to sustain the CTEA against constitutional attack.<sup>380</sup>

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375. See *id.* at 210 (noting that if CETA's application to existing works were unconstitutional, the same would be true of "extending the protections of U.S. copyright law to [foreign authors'] works . . . that had already been created" by the time of the relevant U.S. copyright enactment) (quoting Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?* 26 COLUM. J.L. & ARTS 17, 56 n.13 (2002)) (internal quotations omitted); *id.* at 221-22 (if the CETA's *retrospective* application to existing works were struck down under the Copyright Clause, it might make the *prospective* application vulnerable as well); see also Solum, *supra* note 298, at 62 (predicting that the Court could have such concerns prior to the *Eldred* decision).

376. *Eldred*, 537 U.S. at 209 n.16, 222.

377. See *id.* at 193, 196, 208, 212-13, 221-23.

378. See *id.* at 241 n.14 (Stevens, J., dissenting) ("we need not consider whether the reliance and expectation interests . . . established by prior extensions . . . would alter the result"); *id.* at 265 (Breyer, J., dissenting) ("the law provides means to protect those who have reasonably relied upon prior copyright statutes").

379. See *id.* at 241 n.14 (Stevens, J., dissenting) ("the validity of earlier retroactive extensions of copyright protection is not at issue"); *id.* at 265 (Breyer, J., dissenting) ("we are not here considering . . . the constitutionality of other copyright statutes").

380. See *id.* at 209-10 (declining to find the CTEA unconstitutional when it had not found the previous term extensions in the 1831, 1909, and 1976 Acts unconstitutional).

Even if striking down the CTEA would have led to a later judicial determination that the 1976 Act's extension was unconstitutional—a supposed eventuality that is far from certain—a court deciding a case regarding the 1976 Act could have devised an appropriate decree to allow for the interests of those who for many years had relied on the statute's validity.<sup>381</sup> Moreover, there is no guarantee that a later court would have struck down the 1976 Act's term extension, despite the apparent relevance of some of the same arguments leveled against the CTEA. A court determining the constitutional fate of the 1976 Act's duration extension could have distinguished it from the CTEA (assuming the CTEA had been held invalid) by pointing out that: (1) the 1976 Act's term extension was only one part of a fundamental and multi-faceted restructuring of U.S. copyright law;<sup>382</sup> and (2) in altering the copyright duration rules, the 1976 Act helped enable the U.S. to sign on to the Berne Convention, the most important international agreement regarding copyright.<sup>383</sup>

Having become too focused on what it mistakenly believed would be inevitable consequences of a holding that the CTEA was unconstitutional, the *Eldred* majority resorted to rationales that were not developed convincingly. We have already explored the flaws in the Court's treatment of incentive and *quid pro quo* issues in regard to the Copyright Clause.<sup>384</sup> Equally glaring flaws appear in the Court's heavy reliance on the history of congressional extensions of copyright and patent duration on a retrospective basis. As Justice Stevens stressed in his dissent, that history, besides being less consistent than the majority made it out to be, contained what today would clearly be seen as unconstitutional resurrections of formerly patented items from the public domain.<sup>385</sup> Justice Stevens

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381. See *id.* at 241 n.14 (Stevens, J., dissenting); *id.* at 265 (Breyer, J., dissenting). Justice Stevens asserted that any reliance interests in regard to the CTEA were not worthy of such consideration, however, in view of the short number of years since passage and the fact that it had been the subject of litigation since shortly after it took effect. *Id.* at 241 n.14 (Stevens, J., dissenting).

382. *Id.* at 264 (Breyer, J., dissenting). The CTEA, in contrast, was simply a bonus for copyright owners.

383. *Id.* The 1976 Act thus served a very important end that was far more meaningful than the token international harmonization supposedly accomplished by the CTEA. See *supra* text accompanying notes 243-245, 319-320.

384. See *supra* text accompanying notes 325-372.

385. *Eldred*, 537 U.S. at 233-39 (Stevens, J., dissenting).

made sense when he asserted that the majority had placed too much weight on the historical analysis.<sup>386</sup>

Even more troublesome is the Court's suggestion that the lack of legal challenges to earlier copyright duration extensions somehow supports a conclusion that the CTEA should be held constitutional.<sup>387</sup> The absence of legal challenges to previous term extensions, however, does not furnish the CTEA a stronger presumption of constitutionality than any other enactment of Congress would normally receive. Neither does it estop parties such as *Eldred* from raising constitutional objections to the CTEA. Assuming for the sake of argument that a previous term extension would have been held unconstitutional if it had been challenged shortly after its enactment, the failure of affected parties to launch a prompt challenge cannot convert an unconstitutional statute into a constitutional one.<sup>388</sup> Moreover, as mentioned earlier, even if the previous copyright duration extensions could have withstood constitutional challenges, such outcomes would not dictate the same result for the CTEA.<sup>389</sup>

In connection with its reliance on term extension history and the lack of previous judicial challenges, the *Eldred* majority approvingly noted that when it made the CTEA applicable to existing copyrights, Congress utilized an equity rationale under which existing copyrights would receive the same benefit as copyrights coming into existence after the CTEA's effective date.<sup>390</sup> The equity rationale, however, is both flimsy and transparent. Most statutes have only prospective effect. As a result, a new statutory rule usually applies only to later-occurring subject matter, with the "old" rule still governing similar subject matter that dates back to a time preceding the new rule's effective date. Lines must inevitably be drawn, and when they are drawn at the prospective-

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386. *See id.* at 230-33 (Stevens, J., dissenting).

387. *See id.* at 217 n.22 (majority opinion).

388. As the Court has observed, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970).

389. For instance, if the 1976 Act had been challenged on constitutional grounds but was upheld for reasons of the sort noted earlier, *see supra* text accompanying notes 382-383, the supposed precedent would not necessarily mean much in a later challenge of the CTEA, because the justifications supporting the 1976 Act would not apply to the CTEA.

390. *Eldred*, 537 U.S. at 200, 204 (majority opinion).

application-only point, Congress and the courts typically do not lose sleep over equity-related concerns. Why should copyright law be any different? As Justice Stevens suggested in his dissent, there is nothing inequitable about not giving existing copyrights a term extension, so long as the term promised by law at the time of copyright acquisition is respected.<sup>391</sup>

Although Congress has made copyright duration extensions apply to existing copyrights as well as to future ones because of supposed concerns about equity, Congress has produced results that hinge to a great extent on fortuity and seem more inequitable than those that would result from use of the standard legislative approach of line-drawing at the prospective-application-only point. Consider again our two opening hypotheticals, with the addition of two assumed facts: (1) that the 1922 work came under copyright in the closing days of 1922; and (2) that the 1923 work acquired copyright protection early in 1923. As earlier explanation revealed,<sup>392</sup> the copyright on the 1922 work expired at the end of 1997—75 years from when it began. Under pre-CTEA law, the copyright on the 1923 work would have expired at the end of 1998, but because the copyright still existed in 1998 and was thus “alive” when the CTEA took effect late that year, the duration of the copyright on the 1923 work was extended to the end of 2018. Therefore, even though the two works came under copyright within a very short time of each other, the second work received 20 more years of copyright protection than the first did. So much for equity. It is also worth noting that the differing treatments extended to the copyrights on the 1922 and 1923 works depended upon the fortuity of when Congress enacted the statute. Had Congress debated the CTEA longer and not enacted it until early 1999, the copyright on the 1923 work would have been consigned to the same fate as the copyright on the 1922 work: expiration after 75 years and an ever-so-close failure to qualify for the CTEA’s 20-year bonus.

It may be argued that the former owner of the expired copyright on the 1922 work should not be seen as having much of an equity-related objection because, after all, he, she, or it did at least benefit from the duration bonus provided for by the

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391. See *id.* at 240 (Stevens, J., dissenting).

392. For explanation of the reasons for the significantly different durations of the respective copyrights on the 1922 and 1923 works, see *supra* notes 7, 9, 42, 58-59 and accompanying text.

Copyright Act of 1976.<sup>393</sup> Therefore, the argument might continue, the ex-copyright owner could be told to “be satisfied that you received 75 years of protection when you originally were supposed to have only 56 years.” Try telling that to Disney, which clearly was not content to receive “only” 75 years of protection instead of the 56 to which it originally was entitled under then-applicable law. Disney also wanted the 20 additional years of protection tacked on by the CTEA, as did the owner of the copyright on the 1923 work in the hypothetical we have been discussing. The mid-1970s conferral of a 19-year duration bonus may make it hard to feel especially sorry for the former owner of the expired copyright on the 1922 work, but it is understandable why such a party might not see it as equitable that the copyright on a work very nearly as old received not only the earlier duration bonus but also the CTEA’s 20-year windfall. When the government is handing out gifts, should the identities of the recipients and non-recipients be so arbitrarily determined?

Of course, the fortuity factor of when bill passage occurs is also present when Congress enacts a statute and gives it the usual prospective-only effect. Some parties will have the bad luck to miss out narrowly on the benefit that the new rule confers on others who qualify for the treatment called for by the new rule. When Congress draws the standard line of prospective operation, however, the differential treatment of future activities and past activities, of “new” and “old,” at least seems more logical. Perhaps because that standard line is familiar, the outcome it produces also seems more equitable.<sup>394</sup>

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393. 17 U.S.C. § 302 (2000). Because the copyright on the 1922 work remained “alive” as of January 1, 1978, the renewal term that began in 1950 became a 47-year term rather than the 28-year term it had been under prior law. *See id.* at § 302(b).

394. The above should not be taken as an argument that Congress acted unwisely and unconstitutionally only insofar as the CTEA’s retrospective operation is concerned, and that the CTEA’s prospective operation is unassailable. As we indicate elsewhere in the article, the prospective aspect of the CTEA is also vulnerable to serious public policy and constitutional objections. *See supra* text accompanying notes 263-265, 325-372; *infra* text accompanying notes 400-415. Neither are we advocating that Congress should feel free to enact future copyright term extensions, so long as they are made purely prospective in operation. Instead, as we urge later, Congress should bring the copyright duration extension train to a halt. *See infra* text accompanying notes 455-456, 471-476. Our real point in this section is that the supposed equity rationale for the retrospective operation of the CTEA was superficial and so riddled with deficiencies that the *Eldred* majority should not have given it credence in the analysis of the CTEA’s constitutionality.

The equity rationale's problems are not restricted to the previously identified ones associated with distinguishing among different holders of existing copyrights. There is also the public interest, which any credible equity analysis should consider and which must be taken into account because of the Copyright Clause.<sup>395</sup> Yet when Congress employed the equity rationale, it seemingly gave no consideration to the public interest, which centers around the public domain from which all may freely borrow.<sup>396</sup> How is it equitable to delay by 20 years the entitlement of the public to have unrestricted ability to use certain works—especially when that entitlement had already been delayed by 19 years under a previous duration extension? How is it equitable to freeze the public domain so that no works will enter it until January 1, 2019? With the Copyright Clause contemplating the existence of a vibrant public domain, the congressional failure to consider the public interest in its equity analysis raised constitutional red flags that the *Eldred* majority should not have overlooked.

Congressional utilization of the equity rationale in regard to the CTEA provided convenient cover for an enactment that would benefit the statute's outspoken proponents. Let's face it, there would have been no CTEA if not for the efforts of Disney *et al.*, whose desire to lengthen the duration of their otherwise soon-to-expire copyrights triggered the lobbying push.<sup>397</sup> Congress, on its own, would not have come to the conclusion that another extension of copyright duration was necessary. Individual artists and associations representing their interests were not clamoring for a term extension, at least not until Disney engaged them in the effort. Neither had scholars issued calls for another duration extension. Disney succeeded, however, in convincing a compliant Congress that the CTEA was a critically important step to take.

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395. The "limited [t]imes" language of the Copyright Clause, U.S. CONST., art. I, § 8, cl. 8, furnishes a clear indication that the interests of copyright owners are not to be the sole focus of legislative efforts in the copyright realm. *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

396. *See Eldred*, 537 U.S. at 240 (Stevens, J., dissenting); *id.* at 266 (Breyer, J., dissenting). *See also Stewart*, 495 U.S. at 228 (noting that copyright duration is limited so that the public "will not be permanently deprived of the fruits of an artist's labors").

397. For discussion of the lobbying blitz, see *supra* text accompanying notes 44-54, 277-289. Others' accounts of the lobbying effort appear in the sources cited at *supra* note 44.

By making the CTEA applicable to existing copyrights, Congress treated Disney in a manner similar to a court's treatment of a successful plaintiff who convinces the court that a new legal rule or interpretation is necessary: the plaintiff gets the benefit of the new rule as a reward, of sorts, for having brought the case. But Congress is not a court, and Disney was not a litigant. Congress did not need to reward Disney by making the CTEA apply to existing copyrights. In doing so and in also rewarding other holders of existing copyrights, Congress granted a purely private gift at an enormous public cost in terms of the freezing of the public domain and the 20 additional years of licensing and search expenses for users whose interests have constitutional legitimacy under the Copyright Clause.<sup>398</sup> The *Eldred* majority chose not to nullify that gift, and in the process ignored clear indications of its unconstitutionality. That Congress would pay so little attention to the public interest aspect of the Copyright Clause is disappointing, if not surprising. It is both disappointing and surprising that the Supreme Court, the ultimate arbiter of what is and is not constitutional, went to great lengths to recast a statute raising serious Copyright Clause problems as merely an unfortunate enactment of the sort we have to expect now and then from our senators and representatives.<sup>399</sup>

The *Eldred* Court was extremely deferential to Congress and its judgments regarding incentives to creators and other justifications for the CTEA. Writing for the majority, Justice Ginsburg noted that the appropriate test for Copyright Clause compliance is whether the "system" of copyright enacted by

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398. See *Eldred*, 537 U.S. at 227, 240, 242 (Stevens, J., dissenting); *id.* at 244-250, 266-7 (Breyer, J., dissenting). There is a certain irony in the gift Disney received when the CTEA lengthened copyright duration just in time to keep the Steamboat Willie copyright and other early Disney copyrights from falling into the public domain. Disney, after all, has made heavy—and highly successful—use of public domain material as the basis of its creative efforts in movies and the like. See Solomon, *supra* note 44 at E2 (listing, as examples, *The Little Mermaid*, *The Hunchback of Notre Dame*, *Cinderella*, *Pocahontas*, and *Beauty and the Beast*). Thanks to an accommodating Congress, Disney can have its cake and eat it too. On a similar note, Professor Lessig has pointed out that even in the Steamboat Willie cartoon whose copyright Disney was so eager to preserve, Disney based its creative efforts in part on those of others. Steamboat Willie was a take-off on, and commentary about, a Buster Keaton character known as "Steamboat Bill." Lawrence Lessig, Keynote Address at the Open Source Convention (July 24, 2002), at <http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html> [hereinafter Lessig, Keynote Address].

399. See *Eldred*, 537 U.S. at 199-202.

Congress would tend to furnish an incentive to create.<sup>400</sup> Justice Ginsburg later stated that the focus should be on the whether the copyright regime “overall” tends to promote the purposes of the Copyright Clause.<sup>401</sup> The Court thus saw no need to conduct a careful review of the relationship (or lack thereof) between a particular copyright statute such as the CTEA and the Copyright Clause, so long as the general copyright regime enacted by Congress seems consistent with the objectives of the constitutional provision.<sup>402</sup> By keeping the analysis largely restricted to whether the general copyright system is in tune with the Copyright Clause, the Court allowed Congress remarkable latitude concerning individual enactments within that general system. One cannot imagine any court ever holding that our overall copyright regime does not promote Copyright Clause objectives. Indeed, the Clause itself contemplates that any system of copyright enacted by Congress will get the job done constitutionally, assuming that the exclusive rights guaranteed by the system exist only for “limited [t]imes.”<sup>403</sup>

It was therefore disingenuous for the Court to say that the real concern is over whether the general copyright regime complies with the Copyright Clause when the Clause itself indicates that a general regime will almost by definition comply. To be a meaningful check on congressional authority within the intellectual property realm, the Copyright Clause must logically be seen as concerned with whether individual enactments within the general copyright scheme are consistent with the Clause’s objectives. The approach taken by the Court in *Eldred*, however, drains the Clause of its meaning and significance and hands Congress a free pass to do almost anything it wishes regarding individual copyright enactments without having to worry about whether that enactment would pass muster under the Copyright Clause. Justice Stevens therefore may not have been exaggerating when he observed that the *Eldred* majority had “quitclaimed” to Congress the Court’s proper role in deciding Copyright Clause issues.<sup>404</sup>

The extremely lenient review conducted in *Eldred* resulted in part from the Court’s payment of insufficient attention to the

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400. *Id.* at 212.

401. *Id.* at 222.

402. *See id.* at 204-05, 207-08, 212-13, 221-22.

403. *See* U.S. CONST. art. I, § 8, cl. 8.

404. *Eldred*, 537 U.S. at 242 (Stevens, J., dissenting).

relationship between the Copyright Clause and the First Amendment. In their own respective ways, these constitutional provisions promote and encourage expression.<sup>405</sup> The Court accurately noted the existence of precedents indicating that a formal First Amendment privilege or defense is unnecessary in copyright infringement cases because copyright law's fair use doctrine and expression-versus-ideas distinction adequately safeguard the same interests arising under the First Amendment.<sup>406</sup> Even so, the Court missed the point. Although it may be understandable that these precedents would make the Court hesitant to recognize a First Amendment privilege or defense in the copyright context, the *Eldred* majority could have allowed free speech concerns to inform the Copyright Clause analysis without creating a First Amendment defense to copyright infringement liability.

In infringement cases, the fair use doctrine and the expression-versus-idea principle indeed are viable means of protecting the free speech interests of users of copyrighted works.<sup>407</sup> However, the freedom-of-expression concern in the context of the CTEA and the Copyright Clause is different. The Copyright Clause's requirement that works enter the public domain after a "limited [t]ime[]" means that upon the expiration of the copyright, the public may use all or any portion of the work for whatever purpose, including (but not limited to) expressive uses and uses that would not be protected by the fair use doctrine if the work were still under copyright.<sup>408</sup> With its two-decades-long freezing of the public domain at its 1998 composition and its 20-year delay in the

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405. *Id.* at 243, 265-66 (Breyer, J. dissenting).

406. *Id.* at 219-20 (majority opinion). The *Eldred* Court cited *Harper & Row, Publ's, Inc. v. Nation Enter.*, 471 U.S. 539, 556, 560 (1985), for its discussions of the fair use doctrine and the expression-versus-ideas distinction, and *Feist Publ's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991), for its discussion of the latter subject. The relevant statutory sections are 17 U.S.C. § 107 (2000) (outlining types of uses that may be good candidates for fair use doctrine and specifying factors courts must use in making fair use determinations) and 17 U.S.C. § 102(b) (2000) (ideas and facts in copyrighted work not protected).

407. *See, e.g., Harper & Row*, 471 U.S. at 556, 560; *Feist*, 499 U.S. at 349-50. *See also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (indicating that parody of copyrighted work may be strong candidate for fair use treatment).

408. *See* U.S. CONST. art. I, § 8, cl. 8.; *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003); *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

entry of works into the public domain, the CTEA raises a substantial freedom-of-expression concern to which the *Eldred* majority's citation of the fair use doctrine and the expression-versus-ideas distinction is an unsatisfactory answer. To account for the free speech concern presented by the CTEA and to recognize the relationship between the Copyright Clause and the First Amendment, the Court should have employed some sort of heightened review when it determined whether the CTEA was a rational exercise of Copyright Clause authority.<sup>409</sup>

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409. Justice Breyer suggested a test that would have been appropriate. See *Eldred*, 537 U.S. at 245 (Breyer, J., dissenting). Justice Breyer noted that he would hold the CTEA unconstitutional "(1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective." *Id.* In Justice Breyer's view, each element of his proposed test was satisfied. *Id.* at 266-67. *Eldred*'s brief proposed an alternate form of heightened review that presumably would have led to a striking-down of the CTEA's retroactive component as an unjustifiable exercise of Copyright Clause authority. Brief for Petitioners at 31-32, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) available at 2002 WL 1041928. In an abbreviated and unsatisfactory discussion late in the majority opinion, Justice Ginsburg rejected *Eldred*'s proposal. See *Eldred*, 537 U.S. at 217-18. *Eldred* urged the use of "congruence and proportionality" review, of the sort employed in cases dealing with congressional enactments pursuant to § 5 of the Fourteenth Amendment. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Justice Ginsburg maintained, however, that the congruence and proportionality standard was purely a Fourteenth Amendment-related test that had never been applied in a case dealing with an exercise of a power given to Congress in Article I of the Constitution. *Eldred*, 537 U.S. at 218. Justice Ginsburg stated that whereas § 5 of the Fourteenth Amendment gives Congress the power to enforce the substantive provisions of the amendment, the Copyright Clause "empowers Congress to define the scope of the substantive right." *Id.* With Congress having the power to define the right at issue under the Copyright Clause, Justice Ginsburg reasoned, it would be inappropriate for the Court to employ a standard of review that was designed for a determination of whether Congress employed appropriate (i.e., "proportionall] or congruen[t]") means to enforce rights contemplated by the relevant constitutional provision. See *Flores*, 521 U.S. at 533. Therefore, she concluded that congruence-and-proportionality review should not be utilized. *Eldred*, 537 U.S. at 218.

Justice Ginsburg's cursory treatment of the congruence-and-proportionality proposal, however, relies on a distinction ill-drawn. Properly made, the comparison between the Fourteenth Amendment and the Copyright Clause would show that each grants a certain power to Congress, and that each contains an end toward which that power must be aimed. Just as the Copyright Clause allows Congress to define a certain right such that it "promote the Progress of Science," U.S. CONST. art. I, § 8, cl. 8, the Fourteenth Amendment allows Congress to define enforcement measures that promote the realization of the rights established elsewhere in the amendment. U.S. CONST. amend. XIV, § 5. The Copyright Clause and the Fourteenth

The *Eldred* majority also failed to give adequate consideration to the full range of issues raised by the Copyright Clause's "limited [t]imes" provision. According to the Court, the longer duration called for by the CTEA was still "limited" because it would end at some point.<sup>410</sup> Under this form-over-substance approach, a huge duration extension would be permissible if it stopped somewhere short of "forever."<sup>411</sup> One suspects that the Valenti/Bono proposal of "forever, less one day"<sup>412</sup> might go too far, even for the *Eldred* majority, but how does one know what crosses the line?

Help in answering that question would be provided by an approach the Court failed to take in *Eldred*: examining the "limited [t]imes" provision of the Copyright Clause in light of what the Framers probably intended regarding permissible lengths of time when they used that language. In her discussion of the history of copyright duration extensions, Justice Ginsburg noted that statutes enacted by Congress shortly after the Constitution was ratified should be seen as reliable indicators of what the Constitution permits (and of what the Framers intended), because some of the same persons who served as Framers of the Constitution were members of Congress at the time of those enactments.<sup>413</sup> Instead of attempting to use this almost-contemporaneous-construction principle as a way to bolster its conclusion that the Copyright Clause allows Congress to apply duration extensions to existing copyrights, the Court should have employed the principle in an effort to determine what sort of copyright duration the Framers

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Amendment may seem dissimilar if viewed with respect to "rights." But when the constitutional provisions are viewed with respect to means and ends—the true objects of the congruence-and-proportionality test—no meaningful difference appears. See Brief for Petitioners, *supra*, at 31-32.

Just as Congress lacks the power to redefine the ends specified in the Fourteenth Amendment, see *Flores*, 521 U.S. at 519, 534, so it is with the Copyright Clause. With its single-minded focus on copyright owners and its neglect of the public interest portion of the copyright bargain, however, the CTEA effectively amounts to such a redefinition.

410. *Eldred*, 537 U.S. at 199, 210.

411. See *id.* The Court appeared, however, to leave an opening for a challenge to a future extension if it were part of a stringing-together of extensions evincing an intent to evade the "limited [t]imes" constraint in the Copyright Clause. See *id.* at 209 n.16.

412. See *supra* text accompanying note 293; see also *supra* note 343. It seems "unlikely that [the Framers] intended the limited-time provision to be rendered a dead letter by linguistic manipulation." Heald & Sherry, *supra* note 276, at 1172.

413. See *Eldred*, 537 U.S. at 200-01, 213.

likely had in mind when they placed the “limited [t]imes” provision in the Copyright Clause.

The Copyright Act of 1790 clearly qualifies for the almost-contemporaneous-construction principle because of its close proximity to the drafting and ratification of the Constitution. The 1790 Act is noteworthy for a feature that the *Eldred* majority did not stress: its provision establishing that copyright protection would last for a basic term of 14 years, with the prospect of a 14-year renewal term.<sup>414</sup> Twenty-eight years thus could serve as a reasonable benchmark for what the Framers probably intended as a “limited [t]ime[.]” This is not to say that 28 years is any kind of maximum, or that each of the term extensions enacted from 1831 on was unconstitutional. It is to say, however, that if the Framers had something along the lines of 28 years in mind, the CTEA’s establishment of copyright durations more than three, four, or even five times that long seems a far cry from what the Framers meant by “limited [t]imes.” No such discussion appears, however, in *Eldred*.

With its posture of extreme deference toward Congress, its adoption of a lenient standard of review, and its failure to pay adequate attention to Copyright Clause language and objectives, the *Eldred* Court interpreted a relatively narrow, condition-restricted grant of congressional power in the Copyright Clause as contemplating sweeping, almost unrestricted regulatory authority on the part of Congress. This seems ironic, coming as it did from a Court that in recent years has not hesitated to engage in careful scrutiny and second-guessing of enactments of Congress pursuant to the Commerce Clause, which provides a seemingly much broader and less restricted grant of power than the grant specified in the Copyright Clause.<sup>415</sup> We are stuck with *Eldred*, however. It

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414. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (“An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned.”).

415. Compare U.S. CONST. art. I, § 8, cl. 8, (Copyright Clause, which sets forth promotion-of-progress, “to Authors,” and “limited [t]imes” constraints regarding copyright power) with *id.* cl. 3 (Commerce Clause, giving Congress power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the federal Gun-Free School Zones Act as a violation of the Commerce Clause, because the statute did not have a sufficient connection with interstate commerce. *Lopez*, 514 U.S. at 551, 560-65, 567. The *Lopez* Court indicated that even when the Constitution’s grant of

therefore becomes important to consider where we go from here.

## V. IN *ELDRED'S* WAKE: WHAT'S NEXT?

In the subsections that follow, we survey the post-*Eldred* landscape, identify emerging issues and developments stemming from the decision, suggest analytical approaches for courts to use if Congress enacts another copyright term extension and a constitutional challenge is brought, and offer recommendations for future action on the parts of Congress, copyright owners, and the public. We begin by examining a proposed bill that would re-inject a renewal requirement into U.S. copyright law.

### A. THE PROPOSED PUBLIC DOMAIN ENHANCEMENT ACT

In an op-ed piece published shortly after the *Eldred* decision, Lawrence Lessig proposed an "Eric Eldred Act" that would reintroduce a renewal requirement to the copyright regime.<sup>416</sup> Professor Lessig's proposal provided that if a work's copyright owner wished to keep the copyright in force, he, she, or it would be obligated to pay a small tax 50 years after the

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power to Congress is broad, the grant of power is not without limits, and that the Court will not sustain congressional enactments that could be upheld only if the relevant enumerated power were unlimited. *See id.* at 552-53, 556-57, 567-68. Professor Lawrence Lessig, who represented the petitioners in *Eldred*, believed that the justices who signed on to *Lopez* would be hard-pressed to sustain the CTEA because doing so would seem to indicate that the copyright power granted in Article I, § 8 is essentially unlimited. Such an indication would be inconsistent with *Lopez*, not to mention the significant constraints placed on the copyright power by the literal language of the Copyright Clause. The petitioners in *Eldred* made a *Lopez*-based argument, with Professor Lessig believing that the justices who had formed the majority in that decision could be moved to lean the petitioners' way in *Eldred* in order to maintain intellectual, conceptual, and jurisprudential consistency. Professor Lessig regarded the argument as the probable key to the case. *See* Lessig Blog, Jan. 16, 2003 entry posted by Lawrence Lessig, at [http://www.lessig.org/blog/archives/2003\\_01.shtml](http://www.lessig.org/blog/archives/2003_01.shtml) (last visited, Apr. 9, 2004). But the *Eldred* majority, populated largely by those who had been in the majority in *Lopez*, sidestepped the *Lopez* argument by avoiding all mention of it in the *Eldred* decision. *See id.* A dismayed Professor Lessig offered this assessment shortly after *Eldred* was decided: "The impossible thing is, How do people on that court [who] believe Congress's power is so constrained sign onto an opinion that says Congress's power is not constrained?" Linda Greenhouse, *20-Year Extension of Existing Copyrights Is Upheld*, N.Y. TIMES, Jan. 16, 2003, at A24 (quoting Lawrence Lessig).

416. Lawrence Lessig, *Protecting Mickey Mouse at Art's Expense*, N.Y. TIMES, Jan. 18, 2003, at A17.

work was published.<sup>417</sup> If the copyright owner failed to pay the tax within an appropriate grace period, the work would enter the public domain.<sup>418</sup> Since then, Representatives Zoe Lofgren (D-Cal.) and John Doolittle (R-Cal.) have proposed the similar Public Domain Enhancement Act (PDEA),<sup>419</sup> which would require, beginning 50 years into a copyright's term, that the copyright owner pay a fee of \$1 every ten years in order to keep the copyright in force.<sup>420</sup> Under the PDEA, the Copyright Office would be expected to make the fee's payment as convenient as possible, and would be required to make information concerning copyrighted works' status and ownership readily accessible to the public.<sup>421</sup>

The PDEA would be a step in the right direction, although it could signify a compromise with those who would have copyright last forever. For as Professor Lessig noted in his op-ed, even though 98% of works would likely be freed to the public domain after those first 50 years, the Mickey Mouse copyright would remain intact.<sup>422</sup> So would it be with many more works—the Gershwin pieces, the “Happy Birthday” song, and others—that have served as rallying points for the CTEA's opposition.<sup>423</sup> There is thus some danger that the PDEA, by easing the public burden of copyright while leaving open an avenue for copyrights to remain intact for very long periods of time, could give a backhanded push to an effectively perpetual copyright.

So long as the predicted 2% renewal rate does not rise dramatically, though, this danger should appear insignificant to those, ourselves included, who would support the PDEA. Of course, further term extensions are less likely to meet strong opposition if the copyright regime is less oppressive. But a decision to forego the PDEA's significant promise on the basis of that principle would be nearly as insensible as a decision to

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417. *Id.*

418. *Id.* Professor Lessig suggested that the tax be “very small, maybe \$50 a work.” He regarded his proposal as one that would cause a sizable number of works—those as to which the tax had not been paid, probably because the works were no longer earning a commercial return—to enter the public domain. *Id.*

419. H.R. 2601, 108th Cong. (2003).

420. *See id.*

421. *See id.*

422. Lessig, *supra* note 416, at A17.

423. *See, e.g.,* Solomon, *supra* note 44, at E2; Heald & Sherry, *supra* note 276, at 1169.

advocate something rash—say, an abandonment of the “fair use” doctrine—as a means of galvanizing the opposition to the next proposed term extension. (We have no intention, of course, of proposing anything of that nature.) And at any rate, the CTEA’s history shows that Congress did not take the ills of term extension very seriously when it was considering a term extension of huge length and sweeping applicability. It would be foolish to presume that Congress would not consider enacting yet another blanket extension. In the post-CTEA era, the PDEA would be a viable means of lessening the damage caused, and to be caused, by the CTEA and its possible progeny.

Of course, there is a remote worst-case scenario for the PDEA. We refer to the possibility that the predicted renewal-rate of 2% would prove, in reality, to be much larger. Recall that the 2% figure is based on the percentage of works published more than 50 years ago that remain in print.<sup>424</sup> Given the CTEA’s ease of passage in Congress and the statute’s having survived constitutional attack, copyright owners have better reason than ever before to believe that the working term of copyright will be extended additional times, in the direction of perpetuity. A rights-holder, facing the option to renew, might therefore renew in 2010 even though he, she, or it might not have bothered to do so if, say, a 1970-like environment still existed. It is thus a decent bet that under a PDEA regime, the renewal rate will be somewhat larger than 2%. The difference’s magnitude is unforeseeable, but the possibility that the renewal rate could grow enormous—the very worst-case scenario, which we discuss below—shows that even if the PDEA does become law, preventing further term extensions should still be at the top of copyright activists’ long-term agenda.

#### B. WILL PRIVATE PUBLIC DOMAIN SUBSTITUTES BE DEVELOPED?

It has been said that the Disney corporation pushed for the CTEA in the hope that “nobody could do to Walt Disney what Walt Disney did to the Brothers Grimm.”<sup>425</sup> For at least the next 20 years, that hope will be a reality. The obvious problem

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424. See Lessig, *supra* note 416, at A17; *Eldred*, 537 U.S. at 248 (Breyer, J., dissenting).

425. Lessig, Keynote Address, *supra* note 398.

for Disney, though, is that the CTEA has fenced off a wide range of works that were not under Disney's copyright, thus delaying Walt Disney from being able to do to Wanda Gag's *Millions of Cats* (a 1928 children's book) what Walt Disney did to the Brothers Grimm. Disney was no doubt aware of this effect but, seeing that private legislation *a la* Oliver Evans<sup>426</sup> would be a tougher sell, decided to promote the blanket extension because for Disney, the CTEA's benefits outweighed its costs.

Disney's cost-benefit analysis was sensible, for the intellectual property that the CTEA has allowed Disney to retain remains profitable. Although the CTEA has stunted the growth of the stock of public domain works from which Disney may draw, that stock, as it now stands, is already large. As for those copyrighted works from which Disney may wish to borrow in the future, Disney should, in most cases, have little trouble summoning up the resources needed to negotiate a licensing deal.

Moreover, Disney, as a major rights-holder, now has a sizable library of its own copyrighted material. In a sense, this library may become a private substitute for the public domain, which, thanks to the CTEA, will receive no new entries until the ageless Dick Clark announces the arrival of the year 2019. If the going gets tough, say, if the CTEA-frozen public domain does not furnish attractive options for Disney to re-work or other parties refuse *en masse* to allow Disney access to their copyrighted works, Disney may always draw on its own as a basis for new creative efforts. Disney frequently revisits works that are readily identified with the company—the film *Fantasia 2000*, the TV series *Goof Troop*, and the straight-to-video *Lion King II: Simba's Pride* come quickly to mind—but the company, owning more and more copyrights on well-aged works, has the increasingly attractive option of creating works that, though derived from Disney's own storehouse, will not appear so conspicuously to be rehashes. Consider the film *Aladdin*, which Disney borrowed from the public domain. The film was a derivative work, but because the source material was so old, *Aladdin* did not suffer from the same sequel-stigma that some of Disney's straight-to-video fare might. Now suppose that the source material *had* been under Disney's copyright. Disney would have been able to prevent the release of any cheaper,

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426. See *supra* note 175.

straight-to-video *Aladdin* “knock-offs,” and it would have been able to collect all the royalties from any resurgence of interest in the original along with a freshly repackaged *1001 Nights* to boot. To Disney, this kind of scenario would have been optimal, and as the term of copyright grows ever longer, such a scenario grows more and more plausible.

Let us suppose, for the sake of argument, that the working term of copyright were extended long enough to approach perpetuity. An entity as wealthy as Disney, we have shown, would be able to negotiate access to most works. Yet so long as the relevant copyright owners were various, those rights-holders’ demands would likewise vary, and Disney’s creative and marketing freedom would be hindered somewhat. Furthermore, even if Disney were borrowing from older public domain works, Disney would not be able to keep others from borrowing from those same public domain works. It would thus be in Disney’s best interest to hold the copyrights on as many works as possible, whether immediately marketable or not, or at least to ensure that the rights over them are in the hands of friendly entities. The result would be another type of “private public domain” of works to which Disney has unlimited rights. Through agreements among friendly rights-holders, private public domains could be networked into a larger enclosure accessible at low cost only by participants in the agreement.

To be sure, this is the very worst-case scenario. But it is possible, and it shows that the PDEA, though a commendable proposal, leaves open certain disturbing possibilities that a solid term ceiling or extension prohibition would not.

### C. THE *GOLAN* CASE: IS THE CTEA STILL VULNERABLE TO CONSTITUTIONAL ATTACK?

In 2001, before the Supreme Court’s decision in *Eldred*, a Denver conductor named Lawrence Golan filed suit against the government.<sup>427</sup> He alleged that the CTEA, by extending the protections on works expected to enter the public domain, had made the costs of renting certain orchestral scores prohibitive.<sup>428</sup> In its initial form, Golan’s complaint regarding the CTEA contained contentions similar to those raised in

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427. See Complaint, *Golan v. Ashcroft*, (D. Colo. filed Sept. 19, 2001) (No. 01-B-1854).

428. See *id.* at 22-26.

*Eldred*.<sup>429</sup> Since *Eldred*, Golan has amended his complaint so that it challenges not merely the CTEA's retroactivity, but rather the CTEA-regime term itself.<sup>430</sup>

We believe that a challenge to current copyright terms as such could have great promise but that Golan's particular argument does not.<sup>431</sup> It starts with the economic rationales presented in Justice Breyer's *Eldred* dissent and stresses the current average-length copyright's incentive-value, which is 99.8% that of a perpetual copyright.<sup>432</sup> Golan takes a work's total value to be equal to the incentive-value of a perpetual copyright.<sup>433</sup> Under the terms of the current regime, then, copyright holders receive at least 99.8% of a work's total value, and the public therefore is left, at best, with a paltry 0.2%.<sup>434</sup> The "limited [t]imes" requirement of the Copyright Clause, says

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429. See *id.* at 39-45.

430. See First Amended Complaint at 3-4, 13, 18-19, 40-41, *Golan v. Ashcroft*, (D. Colo. filed Sept. 19, 2001) (No. 01-B-1854).

431. A claim brought by Golan regarding another aspect of copyright law may have far more merit, however. In § 514 of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 1994 U.S.C.A.A.N. (108 Stat. 4809) 3773 (codified at 17 U.S.C. § 104A (1996)), Congress restored copyright protection to certain foreign works that remained under copyright protection in their source countries but had fallen into the public domain in the United States because of certain designated reasons, including a failure to file for a necessary renewal of copyright and a pre-1989 failure to use the then-required copyright notice on copies distributed in the United States. *Id.*; see also Copyright Act of 1909 *supra* note 1; Copyright Act of 1976, *supra* note 2.

Prior to 1989, U.S. law provided that copyright protection on a work was lost if the copyright owner failed to employ a proper copyright notice on publicly distributed copies of the work. 17 U.S.C. §§ 401, 405 (as amended 1988). Since a change that took effect in 1989, such a failure to use a copyright notice does not jeopardize the validity of the copyright. 17 U.S.C. §§ 401, 405 (2000). Golan contends that Congress acted unconstitutionally in removing certain works from the public domain and in restoring them to copyright protection. First Amended Complaint at 2-3, 4, 8-11, 14, 17, 35-40, *Golan* (No. 01-B-1854). The fact that the works affected by the Uruguay Round Agreements Act were in the public domain—as opposed to being near the public domain entry point, as in the CTEA scenario—may give Golan's claim in that regard a strong chance of success. See U.S. CONST. art. I, § 8, cl. 8. See also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003) (once formerly copyrighted work enters public domain, any party may make unrestricted use of work). Further discussion of the claim regarding the Uruguay Round Agreements Act is beyond the scope of this article.

432. See First Amended Complaint at 2, 6-7, 8-13, *Golan* (No. 01-B-1854).

433. See First Amended Complaint at 12, *Golan* (No. 01-B-1854) (noting that only a small fraction of all copyright work received the maximum term of protection, which also indicates that most work lose their commercial value within the maximum copyright term).

434. See *id.* at 2-3, 4, 8-11, 14, 17, 35-40.

Golan, means that a work's total value is to be divided between the author and the public.<sup>435</sup> If authors are receiving 500 times the public's share, then it is hardly a division at all. This unevenness results, Golan contends, from the term's length; therefore, the "time" is not "limited."<sup>436</sup>

Golan mistakenly assumes that authors and public are interested in, and entitled to, the same thing: the incentive-value of all the royalties collectible under a work's hypothetical perpetual copyright. This assumption leads to absurd consequences. It suggests, for example, that a 28-year copyright term on a work that lost its commercial viability before the copyright's expiration would also be effectively perpetual. In such a case, the author would have collected all of the work's value, and the public none of it. The merit of a renewal requirement, which is meant to allow commercially depleted works to fall into public domain, would also be called into question.<sup>437</sup> Interestingly, however, some of the strongest supporters of a renewal requirement have involvement with Golan's case.<sup>438</sup>

Another hypothetical reveals the flaws in Golan's argument. Suppose that the interest rate were 2%. In that case, the average term of copyright under the current regime would be dividing works' value about as "fairly" as the old 28-year terms would under a 7% interest rate.<sup>439</sup> Should we really take the deal between author and public to rise and fall with the interest rate in such a way? One suspects that we should

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435. See *id.* at 40.

436. See *id.* at 2-3, 4, 8-11, 14, 17, 35-40.

437. Golan would surely respond—correctly—that even commercially dead works can retain significant non-pecuniary value. But in that case, the 0.2% estimate of the public's share in a work's value loses a great deal of its meaning, as the economic estimation of who gets what is smothered in unquantifiables.

438. The Cyberlaw Clinic at the Stanford Law School Center for Internet and Society (CIS) filed the case on behalf of Golan and the other plaintiffs in the case. See *Golan v. Ashcroft Case Page*, at [http://cyberlaw.stanford.edu/about/cases/golan\\_v\\_ashcroft.shtml](http://cyberlaw.stanford.edu/about/cases/golan_v_ashcroft.shtml) (CIS website) (last visited Apr. 9, 2004). Professor Lawrence Lessig is the director of the CIS. See *id.* at <http://cyberlaw.stanford.edu/about> (last visited Apr. 9, 2004). As noted earlier, Professor Lessig suggested shortly after the *Eldred* decision that Congress should lessen the *Eldred's* long-term damage by requiring copyright owners to pay a nominal tax 50 years after their works were published, if they wished to have copyright protection continue. See *supra* text accompanying notes 416-421.

439. On Golan's terms, the division would be roughly 85% to the author and 15% to the public.

not, and for a number of reasons. For one thing, the public benefits from, and has some ability to use, works even before they enter the public domain. And once the works have entered the public domain, the public is indifferent as to the much smaller past value of whatever resources it is able to retain due to the works' being competitively priced. Granted, the public does suffer when a work's competitively priced (i.e., post-public-domain-entry) accessibility is delayed, but common intuition tells us that the suffering, which worsens with the wait, is a function of the passage of time rather than of the interest rate.

Moreover, it is questionable at best that the public is even entitled to any part of the creation-time-value of a work's hypothetical royalties. The great majority of works have commercial life spans so short that even a founding-era copyright would outlive them.<sup>440</sup> So far as these works are concerned, the public, under a 1790 regime, would collect not 0.2%, but 0%, of the works' creation-time value. Yet even with respect to those short-lived works, the 1998 regime presents a rougher deal to the public than the 1790 regime would, for the public is concerned with things other than the works' creation-time values. If the public were entitled to any part of them, then only an exceedingly short copyright term would be permissible, for only that kind of term would expire soon enough for exceedingly short-lived works to spend any commercially viable time in the public domain.

The Copyright Clause presumably seeks to allow authors a chance to be reimbursed for the costs involved with authorship and to earn other sums if their works carry value in the marketplace. The "limited [t]imes" provision ensures that the monetary rewards will end at some point. What entices the author to write, it should be remembered, is not money itself, but rather (among other motivating factors) the *possibility* of monetary gains. So far as it is useful to the "progress of Science," this possibility is considered only before the time of publication, and in assessing the value of the sum total of all royalties, that sum total must be "gathered up" and assessed before publication. Interest rates and the concept of present-value enable this gathering-up and thus are critical to a determination of the incentive-value of a term of copyright. But while an author's inducement to write can be realized at

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440. See *supra* text accompanying notes 214-216, 337.

only one point in time—namely, the time when the author decides whether to write—the public’s interest in having the period of possible monetary rewards ended is the same at all points in time. So far as the prospective author is concerned, then, the interest rate is quite relevant to the consideration of term length. To the public, however, only the term’s length itself matters. The economic analysis of perpetual copyright’s incentive-value, we fear, speaks nothing of a term’s limited or unlimited nature.<sup>441</sup>

We find Golan’s argument inadequate. This is not to say, however, that the CTEA-regime term of copyright is beyond critique. One commentator has suggested an appealing, intuitive sort of limit: that a “limited [t]ime” be defined in reference to life span.<sup>442</sup> In his *Eldred* dissent, Justice Breyer suggested that the common-law rule against perpetuities might be used as a reference point for limitedness.<sup>443</sup> And of course, one should consider that the original duration of copyright was limited to 28 years, and to only 14 if the author did not live long enough to qualify for the renewal term. Perhaps some simple perspective would be instructive. Would the Framers ever have regarded a life-plus-70-years duration as a “limited” time?<sup>444</sup>

In our view, whether the copyright term is a “limited” time should be determined in the context of a renewed emphasis on the Copyright Clause’s “to Authors” provision.<sup>445</sup> We would take the “to Authors” language to mean that the benefits of copyright are meant to target only prospective authors, and that any copyright-related benefit bestowed upon any party must work, at least in part, to better prospective authors’ view of the benefits of producing a work. Our interpretation of “to Authors,” then, would not rule out reasonable post-death

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441. It says a great deal, however, about the CTEA’s prospective *fruitlessness*.

442. See Solum, *supra* note 298, at 31-38.

443. See *Eldred v. Ashcroft*, 537 U.S. 186, 251-52 (2003) (Breyer, J., dissenting). In the majority opinion, Justice Ginsburg noted that “[w]hether such referents mark the outer boundary of ‘limited Times’ is not before us today.” *Id.* at 210 n.17.

444. We address this question in more depth elsewhere in the article. See *supra* text accompanying notes 410-415; *infra* text accompanying notes 457-458.

445. The Copyright Clause authorizes Congress 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.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

protection, for those extra years of future rights may be seen as by the prospective author as a benefit when he or she is considering authorship. Neither would our interpretation go so far as to make copyright nontransferable, for without the right of transfer, the prospective author would see scarce potential benefit in authorship.

Our “to Authors” doctrine would, however, demand that the grant to the prospective author be reasonably *efficient*. For example, suppose that one is a prospective author, that the interest rate is 7%, and that if he publishes, he can expect to pull in a \$100 royalty payment one year from now. Application of the present value concept tells us that those royalties are, at this time, worth \$93.46.<sup>446</sup> This is the value of the grant to the author, for a year from now, when the grant would be worth more, the prospective author would be past considering authorship of the work in question. Let us say, then, that the grant “to [the] Author[]” is approximately 93.5% efficient, with the difference between that figure and 100% being considered, for Copyright Clause purposes, a deadweight loss to society.

It can be seen from this example that even an optimal term of copyright can only be so efficient. For purposes of illustration, the 28th year of copyright could only be about 15% efficient,<sup>447</sup> given a 7% interest rate, and over the entire term, the copyright could only be 46% efficient.<sup>448</sup> But now consider the extra 20 years added to the term by the CTEA—in a typical case, the last 20 years of a 95-year copyright. Assuming constant revenues, the royalties given over that 20-year span could be only 0.33% efficient.<sup>449</sup> This means that only one-third of a cent from every CTEA dollar would go to an author of a perfectly enduring work. In fairness, though, we should point out that the later years of extension bring down the overall

446. If invested at an annual interest rate of 7%, \$93.46 would yield a fraction of a cent more than \$100 after a year.

447. We reach this figure through the following formula, in which  $e$  represents the efficiency rating,  $r$  the interest rate, and  $n$  the year:  $e_n = [1 / (1 + r)^n]$ . The formula is identical to that for the present value of a future dollar.

448. We reach this figure by adding the efficiency ratings for each year in an interval and then dividing by the number of years. The idea is to divide the sum of the present values, which decline, by the sum of the future values, which remain constant. But the figure is also a mean efficiency rating. The variables retain their prior meanings, *see supra* note 447, but we introduce  $m$ , which represents the first year of the interval. If we were to gauge the efficiency of the renewal term under the 1790 regime,  $m$  would be 14, and  $n$  28. Thus:  $e_{(m, n)} = \{ [1 / (1 + r)^m] + [1 / (1 + r)^{m+1}] \dots [1 / (1 + r)^n] \} / (n - m)$ .

449. *See supra* note 448.

efficiency rating significantly, and that copyright owners who see 75 years of commercial viability for their works will collect the bulk of the royalties in the more profitable earlier years. If the copyright owner were to cease collecting royalties *entirely* after the 75th year, for example, the efficiency of his or her CTEA grant could be as high as 0.63%.<sup>450</sup>

To be sure, these are ugly numbers, but even so, any additional year of copyright gives *some* benefit to authors. The authors provision itself, moreover, does not demand efficiency.<sup>451</sup> The limited times provision, however, does require that the exclusive rights come to an end. It thus requires that exclusivity's costs, so far as they are affected by the length of the interval of exclusivity, be minimized. When a term's length causes the public to be charged \$300 in the form of monopoly pricing for every \$1 that goes to the prospective author, there is reason to question seriously the term's compliance with the "limited [t]imes" provision.

Shifting emphasis from the progress of Science provision to the authors provision strengthens the case against the CTEA's constitutionality in a number of ways. For one, it rules out any possible revisitation theory of copyright-related benefit.<sup>452</sup> For another, it allows critics of the CTEA's constitutionality to get by on much less than they could if they were emphasizing the progress provision. The standard progress of Science argument involves a discussion of the public domain and its progress-related centrality as a repository of material for derivative works.<sup>453</sup> We, of course, do not intend to dispute that progress may necessitate a healthy public domain, and we in no way wish to understate its importance. We do, nonetheless, believe term extension opponents face an uphill battle if they seek to establish to a wary judiciary that progress is dependent on the

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450. *Id.* In that case, of course, the term of the right, reaching past the profitable years, would have other problems.

451. This seems so unless one appeals to intuition. To draw an analogy, consider a hypothetical salad dressing company—say, “Alfred Neumann’s”—that advertises its policy of passing on a portion of its profits to charity and encourages consumers to “do their part” by stocking up. Neumann’s, however, does not disclose that under this policy, it passes on only 0.3% of its profits. Most people, upon learning out how little of the profits went to charity, would seem likely to regard the Neumann’s marketing strategy as misleading.

452. To be more precise, the emphasis on the “to Authors” language does not rule out the upkeep theory entirely. But where an incentive-theoretic justification is absent, an upkeep-theoretic one alone will not do.

453. See *supra* text accompanying notes 299, 324.

public domain to such a degree that *no* term extension impoverishing the public domain while creating no new incentive could ever be progressive, or that the progress of Science language refers specifically and exclusively to the public domain's enrichment. Term extension opponents could ask much less of a judge by arguing, closer to the text of the Copyright Clause, that: (1) as long as an exclusive right in a work endures, its continuation must be meaningful to the author; and (2) the longer the period of exclusivity, the wider the gap between the right's benefit to the author and its costs to the public in the form of monopoly pricing—costs that may be imposed only for the purpose of rewarding the author, and that at some point must be lifted.<sup>454</sup>

#### D. NO MORE TERM EXTENSIONS, PLEASE

The above subheading's recommendation, which might more accurately be termed a plea, follows logically from the earlier discussion and analysis in the article. It remains logical even if one rejects our view that the CTEA violated the Copyright Clause and, instead, prefers the *Eldred* majority's

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454. What might seem at first glance a weakness in our efficiency argument is actually not a problem. Because efficiency deteriorates so quickly, the duration extension included in the Copyright Act of 1976 looks nearly as constitutionally questionable as the CTEA. Recall that the 1976 Act extended the copyright duration for pre-1978 works from 56 years to 75 years. On average, then, the 1976 extension was a mere 0.81% efficient, *see supra* notes 447-448, meaning that over the extension period, the average dollar delivered to the prospective author cost the public \$123.46. Because the CTEA and the 1976 extension are inefficient on the same order of magnitude, a challenge to the CTEA based on its inefficiency might risk, for some, proving too much: that the 1976 Act, only twice as efficient as the CTEA, is itself invalid. The authors doctrine points meaningfully to a downward slope, but the slope is smooth, and lacks any sort of spike or downward pitch that would single out a point when the copyright no longer belonged to the author. As noted earlier, however, other considerations may indicate that the 1976 Act's term extension was constitutional even if the CTEA is not, and that even if the 1976 extension was also unconstitutional, given the minor economic incentive, a court would be able to fashion a decree in such a way that any longstanding reliance interests of potentially affected parties would be protected. *See supra* text accompanying notes 262, 381; *supra* note 194. It should also be noted that *Eldred* may pose minor difficulties for our theory. In *Eldred*, the Court cited "upkeep" arguments as part of Congress' "rational basis" for enacting the CTEA. *See Eldred*, 537 U.S. at 207. These arguments, which have little to do with incentive, may be hard to reconcile with our emphasis on the Authors provision. Nevertheless, they were not primary points of emphasis in *Eldred* and, in any event, are further removed from the Copyright Clause's text than is our approach.

position that the CTEA was unwise but not unconstitutional.<sup>455</sup> Notwithstanding our many criticisms of the Court's handling of the constitutional issues, *Eldred* will have done some good if it helps expose the lack of wisdom demonstrated by Congress when it enacted the CTEA.

When the expected push for another copyright duration extension begins a few years before 2018, Congress will need some institutional memory in regard to the CTEA debacle. It must remember that the public interest is a key component of the copyright balance. If it does so, Congress will decide that enough is enough, and that yet another term extension would be beyond the pale. Being realistic, however, we cannot predict with confidence that Congress will reject the extension overtures that are sure to come. We therefore offer, in the next subsection, suggestions for courts faced with deciding a constitutional challenge to a future extension of copyright duration.

#### E. WHAT IF CONGRESS AGAIN EXTENDS COPYRIGHT DURATION?

If Congress again takes the unfortunate step of lengthening copyright duration, the enactment should be attacked on constitutional grounds. In deciding the constitutional challenge, the lower courts and ultimately the Supreme Court must take proper account of the Copyright Clause as a whole and must give effect to all of the language therein. Doing so will involve heeding our earlier criticisms of *Eldred's* treatment of incentive-related issues and of that decision's adoption of a lenient, overly deferential standard of review.<sup>456</sup>

It will also be important to interpret the Copyright Clause's limited times language in light of the meaning the Framers reasonably would have contemplated. As explained earlier, the almost-contemporaneous-construction principle should be applied. Under that principle, the Copyright Act of 1790 and its establishment of a maximum duration of 28 years would be seen as a reliable indication of the general length the Framers probably had in mind when they used the limited times phrase in the Copyright Clause.<sup>457</sup> If the drastically

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455. See *Eldred*, 537 U.S. at 221-22.

456. See *supra* text accompanying notes 325-372, 386-415.

457. See *supra* text accompanying notes 410-415. See also Karjala, *supra* note 44 at 244-45 (discussing importance of considering 28-year duration

lengthened durations called for by the CTEA are supplemented by yet another extension, that extension would place the copyright term at a point exceedingly far removed from what the Framers presumably envisioned when they spoke of limited times. Such a state of affairs should not be ignored by a court (or the Court) in the quest to give meaning to constitutional language.

Judicial examination of the next copyright duration extension, if there is one, should involve another feature we suggested earlier: a more careful consideration of the “to Authors” language in the Copyright Clause. As indicated in our earlier explanation, a focus on the “to Authors” phrasing would complement the analysis of the “limited [t]imes” language, would inform the analysis of incentive issues arising under the Copyright Clause, and would help give effect to the Clause’s overall language and objectives.<sup>458</sup>

Worth noting, also, is Justice Ginsburg’s narrow handling of the concern in *Eldred* that retroactive term extensions could be strung together to create an effectively perpetual term. She wrote that “[n]othing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint,”<sup>459</sup> but offered no elaboration on the point. She did not attempt to dismiss the stringing-together argument altogether. It could be simply that demonstrating the argument to be inapplicable to this case was more economical than demonstrating it to be impermissible in any case regardless of its context, and Justice Ginsburg acted accordingly. But it could also be that Justice Ginsburg and the Court wished to leave open the possibility of a determination that Congress, in passing some future term extension, was consciously providing the next “installment”<sup>460</sup> on a perpetual term, and was thereby acting

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established by 1790 Act in determining what limited times means).

458. See *supra* text accompanying notes 445-454.

459. *Eldred*, 537 U.S. at 209.

460. *Hearing on S. 483 Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Peter Jaszi, Professor of Law, American University) (voicing the suspicion that the CTEA “represents a down payment on perpetual copyright on the installment plan”). In *Eldred*, Justice Ginsburg observed that whether referents such as the rule against perpetuities “mark the outer boundary of ‘limited Times’ is not before us today.” *Eldred*, 537 U.S. at 210 n.17. This statement may be a further indication that another copyright duration extension by Congress could present such an “outer boundary” issue. See *id.* at 208-10.

unconstitutionally.

Such a determination would be difficult to make. If nothing else, the length of the intervals that may pass between term extensions may complicate an attempt to identify legislative misbehavior. By the time Disney and the Gershwin estate begin working on the next term extension,<sup>461</sup> enough new faces will occupy Congress that it will be difficult to single out a continuous group of legislators to whom the conspiracy can be attributed.<sup>462</sup> But even if there is no conscious congressional intent to subvert the limited times provision, Congress may do so inadvertently, and likely will unless checked by the judiciary.<sup>463</sup>

In our view, courts revisiting the issues of the sort considered in *Eldred* should take note of one point frequently overlooked: namely, that even as the theoretical reasons to extend the term of copyright diminish with each successive extension, the practical reasons *not* to extend the term of copyright diminish likewise. That is, as the baseline term of copyright grows longer and longer, two things occur. First, the public domain becomes more and more literally a thing of the past. Recall one of the article-opening hypotheticals, concerning which we wrote that a work authored in 1923 would, under the CTEA's terms, enjoy a 95-year term of copyright and would not enter the public domain until the year 2018 ends. By that time, the work of course would be significantly older than it would have been at the end of 1998, when it would have become public domain-property if not for the CTEA, and far older than it would have been in 1979, the public domain entry year originally scheduled under the

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461. Let us say 2015, 20 years after the CTEA's initial prototype was proposed. *See supra* note 50.

462. Of course, there is the institutional memory that Congress should be expected to have regardless of the identities of the individuals who make up that body at any given point. Some courts, however, might be reluctant to regard mere institutional carryover as furnishing a sufficient basis for congressional accountability on an attempt-to-evade basis.

463. As suggested by the textual statement to which this footnote is appended, whether Congress intended to act unconstitutionally may not be nearly as important, in the end, as Justice Ginsburg's statement in *Eldred* seemed to indicate. Whether a government action is unconstitutional should depend primarily on the action's effect rather than on what the underlying intent was or was not. *Cf. Eldred*, 537 U.S. at 256 (Breyer, J., dissenting) (questioning "why the Court considers it relevant" that Congress supposedly was not involved in an attempt to evade the limited times constraint).

Copyright Act of 1909.<sup>464</sup> When the public domain becomes occupied only by the ancients, the relevance of the public domain to the citizenry appears so slight that retroactive term extensions receive little notice. This surely accounts in large part for the relative silence surrounding the CTEA's passage. By way of contrast, imagine the noise that a 20-year retroactive extension could generate now if, for instance, the maximum term of copyright were still 28 years, and the movie *Star Wars* were slated to enter the public domain in 2005.

A longer and longer baseline duration may have a second effect: that the baseline term becomes so long as to drain all practical significance from objections to further extensions. Suppose, for instance, that in 2018, Congress extends copyright duration another 100 years. By 2115, if Walt Disney himself, roused from cryogenic slumber, petitions for another extension, legislators would likely be unconcerned about slowing future works' entry into the public domain. For after all, the average term of copyright would then already be 195 years,<sup>465</sup> an interval in which anything could happen, and projections so basic as the survival of the intellectual property system, of the U.S. Constitution, and even of the human race itself, become speculative to varying degrees. If the date of entry into the public domain were already so far off, a further postponement would seem only to have theoretical importance. Additionally, although the baseline term of copyright is not yet 195 years, one could reasonably characterize the 95-year term as already so long that the additional century of protection would make only a theoretical difference to the prospective application.

These factors add up to make term extension a less consequential decision each time. There is no sign, however, that the copyright owners' lobby will ease its pressure. Furthermore, if the Supreme Court requires that a finding of intent to create a perpetual term must be found in order for a term extension to be invalidated,<sup>466</sup> then legislators will see little reason not to support new term extensions every time the matter comes up.

One possible remedy for this domino effect would be to disallow any argument in supposed justification of a particular extension if that argument would seem to apply to term

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464. For the earlier explanation, see *supra* text accompanying note 59.

465. This assumes no changes in life expectancy.

466. See *Eldred*, 537 U.S. at 209 n.16.

extensions generally. In order to determine whether an argument for term extension was permissible, a court would abstract from the particulars and suppose a baseline term of length  $x$ , an extension of length  $y$ , and only the contextual factors that can reasonably be expected never to change. If an asserted basis for term extension appears to apply just as well to any term extension as to the one at hand, then that basis would not be given credence. For example, if it were argued before a court that Congress had chosen to extend the term of copyright from 95 years to 100 years in order simply to afford authors a greater incentive to publish, the court should ignore that justification, for *any* extension of *any* finite term would increase the incentive somewhat. If it were argued, on the other hand, that the above-mentioned extension was meant to increase the incentive to authors by 0.046%,<sup>467</sup> the court should examine the argument on its negligible merits.

This test would have to be at least indirectly based on these acknowledgments by courts: that the pressure on Congress to stop extending copyright durations will not increase as a function of the term length, but may indeed decrease; that, so long as the word "limited" in the Copyright Clause is taken to mean merely finite, then any one term will be just as limited as the last; and that, if a certain line of reasoning justifying an extension this time around could reasonably be expected to work equally well next time, and the next, and so on, then it would be likely to carry the working terms of currently copyrighted works into perpetuity. If courts are unwilling to specify how far Congress can go and still have a copyright duration that is a limited time, the courts must be careful not to approve of any particular term extension on grounds that could be generalized to any future extension. To allow use of such generalized grounds would be to give tacit approval to a hypothetical indefinite series of term extensions, and thus a perpetual working copyright.

A difficulty in implementing such a scheme would be to decide when a term extension is really justified by special circumstances. Some examples may be helpful. The 1831 and 1909 extensions would both be justifiable on the specific ground that they provided *significant* marginal incentive.<sup>468</sup> The 1976

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467. See *supra* notes 447-448.

468. Significant marginal incentive is non-generalized because it focuses on the meaningfulness of the incentive provided by the extension at issue, as opposed to the largely theoretical added incentive that any extension might be

extension could be justified on the ground that the requirements of the Berne Convention, a unique event, made it imperative.<sup>469</sup> Notwithstanding *Eldred's* unconvincing reliance on the minimal harmonization with European Union copyright duration as a supposed justification for the CTEA,<sup>470</sup> we believe that courts are generally up to the task of distinguishing between meaningful special circumstances and those of the makeweight variety.

#### F. OTHER RECOMMENDATIONS

Elsewhere in the article, we have predicted that as the year 2018 approaches, there will be efforts to persuade Congress to enact yet another copyright duration extension.<sup>471</sup> We would be pleased if that prediction does not prove accurate. If such efforts occur, however, the public will have to be vigilant in order to make certain that Congress does not enact Bono II. By *the public*, we mean not only ordinary citizens but also a broad range of associations, organizations (for-profit and not-for-profit), and educational institutions. All of these parties share the interest in a proper copyright balance and in a vibrant public domain from which to draw. This broadly defined public will have to watch for signs of extension-related lobbying efforts and for other early rumblings that might signal future legislative developments in that regard. It must weigh in with senators and representatives regarding the lack of need or justification for another term extension, in case Congress forgets in the intervening years about the shortchanging of the public interest that the CTEA accomplished.

Perhaps it is idealistic to think that the public will assume this monitoring role, but perhaps not. Even if *Eldred* was wrongly decided, the Court's lukewarm approval of the CTEA and the media coverage generated by the decision<sup>472</sup> probably

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asserted to have.

469. See *Eldred*, 537 U.S. at 257-61, 263-64 (Breyer, J., dissenting).

470. See *id.* at 256-61 (Breyer, J., dissenting). For further discussion of this point, see *supra* text accompanying notes 319-320.

471. See *supra* text accompanying notes 422-424, 455-456.

472. See *Eldred*, 537 U.S. at 221-22 (crediting the petitioners for having "forcefully urge[d] that Congress pursued very bad policy," but holding that a supposed lack of "wisdom" on the part of Congress did not render the CTEA unconstitutional). For examples of post-*Eldred* media coverage that gave attention to the objections raised against the CTEA, see Greenhouse, *supra* note 415, at A22; Amy Harmon, *A Corporate Victory, But One That Raises Public Consciousness*, N.Y. TIMES, Jan. 16, 2003, at A24. See also Lessig,

have made the public more aware of copyright issues and of the reality that term extensions are not cost-free. One assumes, moreover, that media attention to a future move to extend copyright duration would be greater than the minimal press coverage given to the CTEA prior to its enactment.

Creators, would-be creators, and copyright owners could also be part of the broadly defined public that would send a no-more-extensions message to Congress. These parties, however, will not decide to join in that message unless they develop a more expansive vision of what is good public policy regarding copyrights.<sup>473</sup> Those who create and those who own copyrights should recognize that what goes around comes around. One's CTEA-lengthened copyright may operate in a certain instance to prevent another party from using the work or to require that the user pay a licensing fee. In another instance, however, the creator or copyright owner who "benefited" from the CTEA will be disadvantaged by it when that party wishes to use, for creative purposes, another's work that would have been in the public domain for free use if not for the CTEA. The good public—and constitutional—policy of maintaining a rich and accessible public domain thus may be seen as consistent with, not contrary to, the interests of creators.<sup>474</sup> Perhaps as we get closer to 2018, the venerable quartet of Quincy Jones, Bob Dylan, Don Henley, and Carlos Santana will come to that realization and decline to provide congressional testimony in support of a possible Bono II.<sup>475</sup>

Regarding Congress, we have already made plain our primary recommendation: Congress should get out of the copyright term extension business.<sup>476</sup> In addition, we recommend the previously discussed PDEA, or an enactment similar thereto, as a sensible way of lessening the harm done by the CTEA.<sup>477</sup> We now close this section with a proposal for a

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*supra* note 416, at A17.

473. Though they may not think of it in that sense, the more expansive vision would also be closer to the constitutional policy established by the Copyright Clause, which contemplates rights not only for creators but also for the public. *See* U.S. CONST. art. I, § 8, cl. 8 (creators' exclusive rights must expire after limited time).

474. *See generally supra* parts III.B, III.C, IV.A, IV.B.

475. As noted earlier, Jones, Dylan, Henley, and Santana testified before Congress on the pro-CTEA side. *See supra* text accompanying notes 108, 279-281; *supra* note 50.

476. *See supra* text accompanying notes 455-456.

477. *See supra* text accompanying notes 416-424.

narrow statute that speaks to a specific situation touched upon by the Supreme Court in *Eldred*.

When works such as films or audio recordings are “restored” in one way or another, copyright protection often extends to some new element of expression present in the restored edition.<sup>478</sup> Protection does not extend, however, to the grunt work—the cleaning of the print, the remastering of the soundtrack—that is likely the most arduous and costly, and in the case of older films with deteriorating prints, the most urgent, part of the restoration project.<sup>479</sup>

We suggest here that a new, narrow right be recognized for restorers of public-domain works. This exclusive right, which would exist for a definite period of time such as 20 years, would extend *only* to the restored edition of the work; the right-holder would have no rights over the underlying public domain work itself. Nor would the holder of the restorer’s right be able to prevent others from making their own restored editions.<sup>480</sup> Digital watermarking technologies<sup>481</sup> could serve to safeguard against free-riders who would simply copy the protected restoration and market it as their own.

One of the principal justifications advanced in favor of the CTEA was that 20 more years of exclusivity in the oldest works would give those works’ copyright owners an incentive to

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478. For instance, the restorer might produce a DVD that includes not only a restored version of the underlying film but also commentary on the film by an expert.

479. See 17 U.S.C. § 102(b) (2000). Earlier, we referred to the film *Metropolis* as an example of a restored public-domain film. See *supra* text accompanying note 317. The film’s restorers would have copyright protection regarding a number of their additions and changes—for instance, some “intertitles” that explain what is happening between scenes—but they have no copyright rights regarding the physical restoration labor and process. See 17 U.S.C. § 102(b). For more information regarding the restored edition of *Metropolis*, see Michael Janusonis, *Fritz Lang’s Classic Metropolis is Captivating*, PROVIDENCE JOURNAL-BULLETIN, Nov. 1, 2002, at E2.

480. By “making their own restored editions,” we mean employing film-restoration technology and equipment to the public domain film in a manner that reflects time, effort, and expense comparable to what the previous restorer would have had to devote to the project, as opposed to simply making copies of the earlier restorer’s version.

481. See, e.g., *Sarnoff Lab Says Studios are Interested in Copy-Tracing Watermark*, AUDIO WEEK, February 17, 2003. Typically, digital watermarking is discussed in the anti-piracy context as a means of tracing a file back to a particular user. In the context of our proposal, the invisible watermark would be used to trace a file back to its true restorer.

restore them.<sup>482</sup> With its narrower scope, the restorer's right would provide the same incentive to prospective restorers while leaving valuable material available to the public. Through allowing diverse parties the opportunity to restore a work, the restorer's right would allow for a degree of competition among restorers that copyright term extension cannot, while also doing a better job of seeing that a greater and more diverse number of works would likely be restored. Finally, by coming into play whenever the restorer decides to restore the work, the incentive of the restorer's right would outpace the temporary, ever deteriorating, and largely theoretical incentive of a term extension.

## VI. CONCLUSION

When Congress enacted the CTEA, it set two dubious records: first, the shortest length of time since a previous extension of copyright duration (22 years) and second, the longest single duration extension (20 years). Applying both prospectively and retrospectively and coming so closely, in a relative sense, on the heels of the 19-year extension granted in the Copyright Act of 1976, the CTEA has produced striking effects. Copyright duration is now set at 95 years for pre-1978 copyrighted works that qualified for the CTEA's duration, even though the law in existence at the time those works came under copyright called for a maximum duration of 56 years. For works created in 1978 or thereafter, the average post-CTEA duration is presumably 95 years, with many works receiving a far longer period of protection. Ninety-five or more years of copyright protection stands in marked contrast with the maximum of 28 years of protection established in the Copyright Act of 1790. That statute, of course, was enacted shortly after the ratification of the Constitution, whose Copyright Clause sets the ground rules with which congressional enactments regarding copyright must comply.

In enacting the CTEA, Congress demonstrated a disturbing willingness to do the bidding of Disney *et al.*, the outspoken CTEA proponents whose concern was that some of their copyrights on important properties would soon expire if

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482. See *Eldred*, 537 U.S. at 206-07. As Justice Stevens suggested, however, the need to furnish incentives to restore old works could have been accomplished by a measure that stopped far short of a blanket extension of the duration of all copyrights. See *id.* at 239-40 (Stevens, J., dissenting).

no duration extension were granted. Preoccupied with the interests and wishes of copyright owners, Congress seemingly gave little or no thought to preservation of the proper Copyright Clause-mandated balance in this area of intellectual property. That balance calls for a rich public domain from which all may freely draw. The CTEA, however, has frozen the public domain at its 1998 composition until January 1, 2019, and has established a massive giveaway to copyright owners at considerable costs—economic and non-economic—to the public.

Congress acted both unwisely and unconstitutionally, in our view, when it established the CTEA jackpot for copyright owners. In *Eldred v. Ashcroft*, the Supreme Court upheld the CTEA against constitutional attack but suggested strongly that the CTEA was not an example of good policymaking. As we have shown here, the Court erred in holding that the CTEA passed constitutional muster. The Court's overly deferential approach paid insufficient attention to the flimsiness of the justifications offered for the CTEA. Sacrificing analytical soundness for expediency, the Court did not properly address the controlling components of the Copyright Clause, including its incentive requirement, its "limited [t]imes" requirement and other relevant language placing checks on congressional power, and its contemplation of a vibrant and accessible public domain.

Despite its extremely deferential thrust and its seemingly broad sweep, *Eldred* may not have resolved all questions regarding the CTEA's constitutionality. Moreover, *Eldred* appears to have allowed an opening for possible constitutional challenges of later copyright extensions (should they be enacted by Congress). Perhaps the embarrassment factor produced by media coverage of *Eldred's* commentary on an apparent lack of congressional wisdom will cause Congress not to enact further extensions of copyright duration; perhaps Congress will otherwise recognize the error of its duration-extending ways. But this may be wishful thinking. If Congress fails to learn from the CTEA debacle and again succumbs to the term-extension lobbying machine that seems likely to be cranked up as 2018 draws nearer, courts—and possibly the Supreme Court—will become involved in determining the constitutionality of yet another term extension. We have therefore offered recommendations for proper judicial handling of the constitutional analysis. If Congress sensibly decides to reject any future duration-extension overtures, it should also

consider the recommendations we have offered for legislation that may lessen the damage done by the CTEA and simultaneously further the creative process.

Because of the CTEA, the copyright on this article will last for the duration of the co-authors' lives plus 70 years. Would we still have had ample incentive to write if the controlling legal rule had continued to call for a copyright duration of life plus "only" 50 years? Of course, though the article would have dealt with some other topic. We would not have written *this* article, for if the rules were still life-plus-50, there would have been no CTEA, no *Eldred*, and, accordingly, no related article. So, in that sense, the CTEA did provide us an "incentive" to write. Perhaps we owe Congress a thank-you note after all.