

THE UNEASY CASE FOR COPYRIGHT EXTENSION

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I. INTRODUCTION

In February 2002, the U.S. Supreme Court granted certiorari to *Eldred v. Ashcroft*, a D.C. Circuit case that upheld the 1998 Copyright Term Extension Act ("CTEA") against a facial challenge brought by Eric Eldred and other parties ("Eldred" or "petitioners").¹ With the CTEA, Congress sought to conform U.S. copyright duration with international standards and aid American copyright interests by extending both future and existing copyrights by twenty years. The Court granted certiorari specifically to answer two questions that Eldred asked in his petition:²

Does Congress have the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

Is a law that extends the term of existing and future copyrights categorically immune from challenge under the First Amendment?³

1. *Eldred v. Ashcroft*, 534 U.S. 1126 (2002), and amended by 534 U.S. 1160 (2002).

2. *Id.* at 1160.

3. Petition for a Writ of Certiorari at i, *Eldred v. Reno sub nom. Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), cert. granted, 534 U.S. 1126 (2002), and amended by 534 U.S.

Eldred's questions betray a major gap, which appears by turns deliberate and muddled, in his arguments to the Court. Under the U.S. Constitution, the federal government cannot act without an enumerated or implied affirmative grant of power.⁴ Such grants of powers have limits,⁵ and the grants are generally specific to a particular branch of the federal government. Even when acting within such limits, however, the federal government cannot exercise the power where a Constitutional provision *bars* this exercise.

With regard to a grant of power, the petitioners argue that the Copyright Clause itself does not grant Congress the affirmative power to extend existing copyrights.⁶ With regard to barring the use of power, the petitioners argue that other constitutional clauses, namely the First Amendment protections for freedom of speech and press that should require Congress to pass *Turner/O'Brien* scrutiny,⁷ prohibit the CTEA extension of both existing *and* future copyrights.⁸

What the petitioners do *not* argue in these questions or in their briefs, though some of their amici do,⁹ is that the CTEA's extension of future copyrights exceeds Congress's affirmative Copyright Clause Power.¹⁰ The Government, which defends the constitutionality of the CTEA, similarly emphasizes in its own brief that the petitioners do not make this argument.¹¹

Nonetheless, the exclusion of this argument seems troubling, in part due to petitioners' own ambivalent relationship to the argument. The petitioners seem by turns clearly and explicitly to disavow a contention that the Copyright Clause limits Congress's prospective copyright powers, while at other times making statements that require such

1160 (2002) (No. 01-618), *available at* <http://eon.law.harvard.edu/openlaw/eldredvashcroft/cert-petition.pdf>.

4. *See, e.g.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ("that those limits may not be mistaken, or forgotten, the constitution is written").

5. *See* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

6. Neither party has suggested such a power would come from any other constitutional clause.

7. *See* *United States v. O'Brien*, 391 U.S. 367 (1968); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997).

8. Brief for Petitioners at 34–48, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618), *available at* <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/opening-brief.pdf>.

9. Brief of Amici Curiae National Writers Union et al. at 23–29, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

10. *Id.* at 14.

11. Brief for the Respondent at 9, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618), *available at* <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/government-brief.pdf> ("Petitioners . . . do not assert that the CTEA's copyright term, as applied to future works, exceeds the 'limited Times' requirement. On the contrary, they specifically disavow such a claim."); *see also id.* at 7 ("Petitioners suggest that . . . the CTEA's term is not impermissibly long.").

a limitation.¹² Petitioners *can* make the argument; despite some protracted controversy in the D.C. Circuit, it does not seem that Eldred was procedurally estopped from making this argument in the Supreme Court.¹³ So, the petitioners must have had other reasons for declining this line of argument.

Whatever the petitioners' reasons for not making this argument, this Note argues further that the Copyright Clause does not grant Congress the power to enact the CTEA's prospective extension. This Note will address both the retrospective and prospective grants (grants for existing and future copyrights, respectively), but will do so only with respect to the first question that petitioners raise on the affirmative grant within the Copyright Clause. Any First Amendment prohibition of the CTEA's exercise of Copyright Clause power is irrelevant if Congress lacks the power to make retrospective and prospective grants.

Arguing that Congress lacks the affirmative power to enact the CTEA (both the prospective and retrospective components) would not have been merely strategic, but could have had profound impact on the remedy the Court would fashion. If the Court agrees with all of Eldred's arguments, the Court would invalidate the retrospective grant for lack of affirmative power. The Court would also find the retrospective and prospective aspects of the CTEA inseverable and would thus strike down the whole law.¹⁴ If the Court disagreed with Eldred on the inseverability of the statute, then it would apply *Turner/O'Brien* scrutiny to the prospective grant. It would either determine that Congress did not have an important interest and decide that the CTEA burdened substantially more speech than necessary to reach those interests, or remand the case to the D.C. Circuit to make such a determination.¹⁵

However, either outcome would allow Congress to re-enact the statute with a prospective grant essentially identical to that of the CTEA. Congress could pass a prospective grant that was not tied to and inseverable from an unconstitutional retrospective grant. It could, in passing the law, set forth its purposes, deliberate, take evidence, and perhaps define Congressional interest as important enough and broad enough for a prospective grant to be narrowly tailored to the

12. See Brief for Petitioners at 14, 19–23, 32–33, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618). The Government commented on this apparent inconsistency; see Brief for the Respondent at 18–19, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

13. See Petition for a Writ of Certiorari at 25, n. 13, *Eldred v. Reno sub nom. Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 534 U.S. 1126 (2002), *and amended by* 534 U.S. 1160 (2002) (No. 01-618).

14. Brief for Petitioners at 48–49, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

15. See, e.g., *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 180–87 (1997).

goal.¹⁶ Thus, Congress would have broad discretion to determine any non-infinite duration for future copyrights. This is neither desirable nor consistent with constitutional mandate. This outcome highlights the fundamental flaw in Eldred's argument, at least with respect to Eldred's apparent purpose in challenging the law — that the public domain should remain fertile and not locked up in copyright monopolies. The public domain of the future cannot be protected without constraints on prospective copyright duration. Eldred argues that the Court must draw a line between retrospective and prospective grants to preserve the constitutional requirement that copyrights be of a limited time.¹⁷ I argue that the Court should actually limit how long the duration of the grant can be.

This Note has five parts. The first provides background on the CTEA's passage, particularly the legislative lobbying of those with commercial interests in the CTEA and Eldred's legal challenge to the bill. The second illustrates the CTEA's effects on certain copyright industries, focusing on the effects of the retrospective grant, which are more immediate, more certain, and larger. The third lays out the legal arguments made by both sides in the Supreme Court case. The fourth argues that, despite apparent agreement by the parties, the prospective grant exceeds the bounds of the Copyright Clause, and that duration length, not just retrospectivity, is constitutionally constrained. In this part, my primary argument is that the Copyright Clause phrase, "limited Times," should be read in light of the so-called purposive language, "To Promote the Progress of Science and useful Arts." I conclude that the limitation on the Copyright Clause requires a duration where the benefits of financial incentive outweigh the societal costs of monopoly. The fifth and final part suggests four potential methods Congress could use to determine copyright term lengths to maximize social efficiency, promote progress while limiting monopoly costs, and meet constitutional constraints.

II. CURRENT CONTROVERSY

On October 27, 1998, against the backdrop of the Starr Report and his possible impeachment hearings, President Clinton signed the Sonny Bono Copyright Term Extension Act (CTEA) into law.¹⁸ At

16. *See id.*

17. Brief for Petitioners at 14, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618) ("The line between prospective and retrospective extensions is a clear one. If 'limited Times' is to have any meaningful content, it is a line this Court must draw.")

18. Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, tit. I, § 101, 112 Stat. 2827, 2827 (1998) (codified as amended in scattered sections of 17 U.S.C. (Supp. IV 1998)); see Daren Fonda, *Copyright Crusader*, BOSTON GLOBE MAGAZINE, Aug. 29, 1999, at 12.

the time, the act received little media attention. Introduced in the House and Senate in 1995, it had stalled for three years because restaurant owners fought for a music exemption.¹⁹ Finally, in October 1998, “just before the end of the congressional term,” both Houses passed it unanimously.²⁰

Despite little media attention or legislative dissent, much was at stake in the bill, both financially and constitutionally. The act extended individuals’ copyright protection effectively from the life of the author plus fifty years to life-plus-seventy;²¹ works-for-hire were similarly increased twenty years, from 75 to 95 years.²² The act was both retrospective and prospective, applying to existing copyrights and future copyrights under Congress’s stated intent to conform U.S. copyright duration with duration in other industrialized nations.²³

Disney Corporation quietly led the push for the bill,²⁴ presumably because it had so much to gain. Its Mickey Mouse copyright,²⁵ through Disney’s consumer products division and theme parks, accounted for up to \$8 billion in revenue in 1998;²⁶ its *Winnie-the-Pooh* copyright was nearly as valuable.²⁷ Disney’s chairman, Michael Eisner, personally met with then-Senate Majority Leader Trent Lott.²⁸ A week after Lott signed on as a co-sponsor of the bill, the Disney Political Action Committee donated to Lott’s campaign chest.²⁹ In addition, Disney contributed to eighteen of the bill’s sponsors in the House and Senate.³⁰ Fellow lobbyists were impressed with Disney’s effort: a spokesman for the Motion Picture Association of America

19. Fonda, *supra* note 18.

20. *Id.*

21. For works copyrighted between 1923 and 1978, it added twenty years. The 1976 Copyright Act had already put these works on the life-plus-fifty term by increasing the renewal term. See Pub. L. No. 94-553 §§ 302–05, 90 Stat. 2541, 2572–76 (1976); see also *Symposia: The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651 (2000).

22. CTEA, § 101.

23. See *Eldred v. Reno sub nom. Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 534 U.S. 1126 (2002), and *amended by* 534 U.S. 1160 (2002) (No. 01-618).

24. Janet Wasko, *The Magical-Market World of Disney*, MONTHLY REVIEW, Apr. 2001, at 56 (“Disney waged a campaign . . . to support” the bill “[a]s part of its global strategy.”).

25. It was set to expire in 2003. Associated Press, *Disney Lobbying for Copyright Extension No Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years*, CHI. TRIB., Oct. 17, 1998, at 22N.

26. Fonda, *supra* note 18 (relying on information from the New York investment bank Salomon Smith Barney).

27. Mark A. Fischer & Aimeé Alise Nakfour, *Winnie-the-Pooh and Disney: The High Cost of Honey*, available at <http://www.palmerdodge.com/dspSingleArticle.cfm?ArticleID=350> (visited Dec. 6, 2001).

28. See Fonda, *supra* note 18.

29. See Jesse Walker, *Copy Catfight*, REASON, Mar. 1, 2000, at 44, 46. Also, within a month, Disney gave \$20,000 in soft money to the National Republican Senatorial Committee. *Id.*

30. See Associated Press, *supra* note 25.

commended Disney's effort, saying Disney "worked very hard on the issue."³¹

Lobbying against Disney, the studios, and the publishing interests, was "a far weaker coalition" of "college professors, constitutional lawyers, librarians[,] and small town school teachers."³² Of these disparate groups, only the library interests won concessions.³³

After its passage, much scholarly attention turned to the retrospective component. The retrospective component affected tens of thousands of copyrighted works. No works, as a result, would enter the public domain until 2019.³⁴ These included copyrights in cartoon characters (Mickey Mouse, Donald Duck), books (*The Great Gatsby*, *The Sun Also Rises*, *The Sound and the Fury*), films (*The Jazz Singer*), musicals (*Show Boat*), and songs (*Happy Birthday to You*).³⁵ The owners of these existing copyrights had much to gain from the retrospective component. Movie and music studios and large publishing houses would benefit immediately, as would successful writers, composers, and the estates and heirs of writers and composers. These supporters of the bill (who included Bob Dylan)³⁶ could secure through the retrospective component an income stream from royalties continuing for an additional twenty years.³⁷

Constitutional critics did not give up with the act's passage. Lawrence Lessig, then at Harvard Law School, came across an article about a retired programmer named Eric Eldred.³⁸ Eldred was the founder of an electronic press called Eldritch Press.³⁹ Initially an attempt to encourage his children to appreciate Nathaniel Hawthorne, the press expanded into a global electronic library of unusual and out-

31. *Id.* (quoting also a spokesman for Disney, Ken Green, "We strongly indicated our support for the measure.").

32. James Langton, *The Battle For Mickey*, SUNDAY TELEGRAPH LTD., Feb. 15, 1998, at 23. Restaurateurs also fought for, and won, favorable language with the bill, but this did not involve the copyright extension portion. See *Intellectual Property Rights: Film Industry Perspective: Hearings on H.R. 2589 Before the Subcomm. on Int'l Econ. Policy and Trade of the House Int'l Relations Comm.* 105th Cong. (1998) (statement of Bonnie J. K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America).

33. See Associated Press, *supra* note 25 ("Libraries and consumer groups did win some concessions. During the final 20 years of copyright protection, libraries, schools and archives were given broader use of copyright materials without having to get the permission of the copyright owner.").

34. See Fonda, *supra* note 18.

35. *Id.* (noting that "Happy Birthday" "technically cannot be performed in public without a license; waiters aren't supposed to sing it unless their restaurants pay royalty fees.").

36. See Brief of Amici Curiae the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430) available at http://cyber.law.harvard.edu/eldredvreno/amicus_br4.htm (last visited Dec. 4, 2001). Bob Dylan stated that he had always assumed perpetual copyright. *Id.*

37. See Fonda, *supra* note 18.

38. *Id.*

39. *Id.*

of-print public domain books. The Press's daily hit count reached 20,000, and the Nathaniel Hawthorne Society and the William Dean Howells Society included links to his pages on their sites. In 1997, the National Endowment for the Humanities named the press one of the twenty best humanities web sites.⁴⁰

Eldred planned to expand his library. But, with the CTEA, no new public domain material was available until 2019.⁴¹ Eldred announced an intention to commit civil disobedience,⁴² but Professor Lessig offered Eldred another course: "Lessig thought Eldred could make legal history" with a case challenging the law.⁴³ He believed the case would make it to the Supreme Court. He took Eldred's case *pro bono*,⁴⁴ engaged other professors at Harvard's Berkman Center for Internet & Society, enlisted Hale & Dorr (and later Jones Day Reavis & Pogue) "to handle the technical details," and gathered nine co-plaintiffs.⁴⁵

Eldred's attorneys filed a complaint in the District Court for the District of Columbia in 1999.⁴⁶ Two years later, the challenge to the CTEA, as Lessig predicted, made it to the Supreme Court.⁴⁷ However, the case came to the Court after three losses in the lower courts — in the district court, on appeal, and on an appellate petition for rehearing.

III. INDUSTRY EFFECTS

At the time of CTEA's passage, the copyright industries accounted for almost six percent of the U.S. gross domestic product.⁴⁸ All together, the industries represented the nation's largest⁴⁹ or second largest group of exporters.⁵⁰ The CTEA's retrospective portion is worth a great deal of money to the copyright holders.

40. *Id.*

41. See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1066 (2001).

42. *Id.*

43. Fonda, *supra* note 18.

44. See Lessig, *supra* note 41, at 1066.

45. See Fonda, *supra* note 18. The co-plaintiffs are: Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons. *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C., 1999).

46. Complaint, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C., 1999) (No. 1:99CV00065 JLG), available at http://eon.law.harvard.edu/openlaw/eldredvashcroft/cyber/complaint_orig.html (last visited October 8, 2002).

47. *Eldred v. Ashcroft*, 534 U.S. 1126 (2002), and amended by 534 U.S. 1160 (2002).

48. See Brief of Amici Curiae The Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430) (citing S. REP. NO. 104-31, at 9).

49. See Richardson, *supra* note 32.

50. See Brief of Amici Curiae the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430).

The following section discusses three copyright industries affected by the statute: book publishing, the film industry, and media conglomerates. Together with the music industry, these three copyright industries represent all of the co-plaintiffs and amici in the Eldred case.⁵¹ This section will examine the retrospective portion of the bill, focusing on specific examples in these representative industries. The prospective portion is discussed in detail in Part V.

A. Book Publishing

Non-owners of copyrighted books will be affected in two ways: 1) other media will have to continue paying for rights for an extra twenty years and 2) publishers, generally publishers of thrift editions, will not be able to publish new public domain books for an extra twenty years.

1. Effect Across Media

Books often inspire products in other media. A good example of this is J.K. Rowling's *Harry Potter* book series, which has inspired merchandise, art, and movies.⁵² Also affected by the CTEA is A.A. Milne's *Winnie-the-Pooh*, which Disney had been licensing exclusively.⁵³

The CTEA extended *Winnie-the-Pooh's* copyright until 2026.⁵⁴ The bill had a clear effect on the value of *Winnie-the-Pooh's* copyright, which was reflected in the purchase price. Disney had been licensing the copyright, but finally decided to purchase it. Its offer before the CTEA's passage was \$150 million. After the CTEA's pas-

51. Appellants' Opening Brief, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430) available at <http://eol.law.harvard.edu/openlaw/eldredvreno/appealbrief.html>. (last visited Dec. 4, 2001). Amici curiae for the government are: the Sherwood Anderson Literary Estate Trust, the Sherwood Anderson Foundation, and Association of American Publishers (book publishers); Motion Picture Association of America (film industry); and American Society of Composers, Authors, and Publishers, AmSong, Broadcast Music, National Music Publishers Association, Inc., the Songwriters Guild of America, Recording Industry Association of America (music industry). See Brief of Amici Curiae the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430). Co-plaintiffs, by industry are: Eric Eldred, Eldritch Press, Dover Publications, Higginson Book Company, and Tri-Horn International (book publishers); American Film Heritage Association, Moviecraft (film industry); Luck's Music Library, Jill A. Crandall, and Edwin F. Kalmus & Co. (music industry); Copyright's Commons (scholars). See *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C. 1999).

52. Another example is the controversy surrounding Barbara Chase-Riboud, Steven Spielberg, and *Amistad*. See PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW 50-51 (2000 Supp.).

53. See Fonda, *supra* note 18.

54. See Fischer & Nakfour, *supra* note 27.

sage, Disney agreed to pay more than double that, \$350 million.⁵⁵ Had the CTEA not passed, Disney could have paid much less, or simply waited and exploited the character like it does so many others in the public domain (e.g., Cinderella, the Hunchback of Notre Dame, etc.). However, it would not then have a monopoly. The \$200 million increase in offering price represents not the estimated value of the twenty-year extension, but a smaller value that will allow Disney to make a profit above that cost. Thus, the CTEA was worth at least \$200 million to the copyright holder for this copyright alone.

The likely effect of this monopoly in book rights is higher prices for products derived from these books. Disney can continue to monopolize Winnie-the-Pooh merchandise, video games, films, DVDs, etc. However, with Winnie-the-Pooh in the public domain, competitors would have been able to drive down the prices, and force Disney to produce more innovative products to meet the competitive market.

2. Public Domain Publishers

Generally, book industry economics involve high fixed costs and low marginal costs.⁵⁶ In recent years, publishers' operating margins have been decreasing.⁵⁷ One response is for publishers to rely more on proven sellers, such as copyrighted classics (like *The Great Gatsby*) to keep margins up.⁵⁸

B. Film Preservation

Although film will be affected in many ways analogous to books (such as borrowed characters across industries and movie remakes), a unique issue in the film industry is the preservation of old film. It has played a role in the *Eldred* cases: the appellate majority believed the

55. *Id.*

56. See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS (4th ed. 1998), at 207 (noting that a hardcover trade book can cost as little as \$1–3).

57. See *id.* at 208.

58. "In 1996 Bantam Books conducted a study and determined that almost 12 million literary classics are sold each year to high schools and colleges. One analysis concluded that if copyright were extended twenty years, consumers including schools and students would pay out an additional \$345 million in royalties. Moreover, firms like Scribners, publisher of Fitzgerald and Hemingway, long charged their educational customers high prices for reprints of modern classics." Brief Amici Curiae of the Association Of American Law Libraries et al., *Eldred v. Reno sub nom. Eldred v. Ashcroft*, 239 F.3d 372 (D.C. Cir. 2001), cert. granted, 534 U.S. 1126 (2002), and amended by 534 U.S. 1160 (2002) (No. 01-618), at 13 n.41 available at <http://eon.law.harvard.edu/openlaw/eldredvashcroft/cert/library-amicus.html> (last visited Oct. 9, 2002) (citing S. Rep. No. 104-315 at 34 (1996) (statement of Sen. Hank Brown)).

CTEA would support film preservation,⁵⁹ while a group that preserves films argues that the CTEA would not.⁶⁰

Old films for which the copyright holder has no present market will likely disintegrate, to some degree, in the next twenty years. It is clear that old film deteriorates and requires special care. CTEA proponents argue that copyright holders have the financial incentive to invest in preserving films, while nobody would have the interest if the copyright expires. Film archiving societies argue that the financial rewards are few, and that copyright holders do little *now* to preserve these films.⁶¹ Instead, they argue, film students would preserve these films if the films were in the public domain. With the CTEA, these films would enter into the public domain both delayed and degraded.

C. Conglomerates

Conglomerates compete by definition in many different media industries and derive great value from the value of copyrights. Conglomerates, due to the many media through which they operate, have more avenues to exploit a copyright, and thus can derive more value from the corresponding economies of scope.

Among the biggest conglomerates are AOL Time Warner, Disney, Viacom, Universal Vivendi, and Bertelsmann. AOL Time Warner for example, with billions in revenue,⁶² has significant interests in music, trade and magazine publishing, film, internet, radio, and cable around the world.⁶³ As a result, the conglomerate can exploit a copyright through all these different venues. This makes copyrights more valuable to a conglomerate firm than they would be to a small firm or an individual unable to exploit so many different markets. This is one of the “synergies” that help to drive cross-industry mergers. Thus, copyrights’ value increases with the number of different media available. Extensions to copyrights, especially a retrospective copyright covering works that have not yet been exploited in many of the new media, will involve still larger potential profits.

While synergies mean larger profits for conglomerates over single media companies, this added profit should not distract us from the fact that copyright remains a monopoly that should be limited. Works falling out of copyright and into the public domain would help other companies compete with these conglomerates, that already have many advantages, including capital, multiple distribution, and other copy-

59. See *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001).

60. See Appellants’ Opening Brief, *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430).

61. *Id.*

62. *AOL Time Warner*, HOOVER’S COMPANY PROFILE DATABASE, LEXIS (2002).

63. *Id.*

right monopolies. As the reward rises for conglomerates, costs to society from diminished competition also rise.

IV. THE PARTIES' ARGUMENTS

In this part, I will only address the arguments made by the parties in their briefs to the Supreme Court. I will address neither the amicus arguments, nor arguments that the parties made in the lower courts but seem to have abandoned, such as the public trust doctrine⁶⁴ and reliance on the Copyright Clause words "To Authors."⁶⁵ In Part V, I will discuss an argument against the CTEA that Eldred does not make.

A. Does the Copyright Clause Permit Congress to Extend Existing Copyrights?

The Constitution grants to Congress the power "To promote the Progress of Science and useful Arts ["progress part"], by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁶⁶ Some commentators believe this short phrase is a constrained grant to provide patents and copyrights. Others believe it is an unconstrained grant to provide patents and copyrights. Still others believe it is a grant to promote progress itself, with the powers to grant copyrights and patents as merely ex-

64. Under the public trust doctrine, Eldred had argued by analogy that the government holds the public domain in trust for Americans as the states hold navigable and tidal waters in trust for their people. Eldred's analogy was lost on the D.C. district court, which disposed of the argument with the pithy statement: "Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retrospective extension of copyright protection does not violate the public trust doctrine." *Id.* at 4. Eldred did not raise this argument on appeal and, though information about the doctrine remains on the website of one of the amici, the analogy will likely play no role before the Supreme Court. Copyright's Commons at <http://cyber.law.harvard.edu/eldredvreno/legal.html> (last visited Dec. 4, 2001).

65. The Constitution specifies that Congress can grant rights to authors. However, the CTEA grants a twenty-year extension to the current copyright holder, regardless of whether that holder is the author. Had an author assigned a copyright, with the expectation of it lasting only life-plus-fifty, then, Eldred argues, Congress is granting the assignee twenty years of extra copyright for which the assignee did not give adequate consideration. The Government responds that Congress granted the original copyright to the author and he assigned it, as he is entitled. The lower courts rightly agreed with the Government. If an author assigns the interest in general, as he is entitled, then Congress's potential future extensions may be deemed transferred as well. Eldred's argument seems to burden a copyright-holding author's right to dispose of his copyright as he sees fit. *See* *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 645 (1943). A speculating purchaser may pay a premium for the possibility that Congress will extend copyright duration (speculating, say, based on the Berne Convention), but the speculator will not pay this premium if the extension must return to the author.

66. U.S. CONST. art. I, § 8, cl. 8.

amples of how Congress can take advantage of the grant.⁶⁷ Only under the second theory would the CTEA pose no problems.

1. The Meaning of “Limited”

Eldred argues that the CTEA’s *retrospective* grant violates the Copyright Clause’s requirement that terms be “limited.”⁶⁸ Though it is clear even to Disney that Congress cannot pass a law to grant copyrights in perpetuity,⁶⁹ or infinity minus a day,⁷⁰ repeated extensions can be functionally equivalent. As Eldred argues, and as Judge Sentelle warned in his dissent, Congress can enact permanent copyrights merely by extending existing copyrights repeatedly.⁷¹

The Government responds first that the Constitution gives *Congress*, not the courts, discretion to set the term. As the term is limited at life-plus-seventy, the courts should not question Congress’s constitutionally-granted power to set the copyright term.

Second, the Government argues that the fears of perpetual copyright are unfounded in light of Congress’s history of extensions.⁷² The Government emphasizes that Congress has only changed the copyright term four times since 1790.⁷³ In one of those changes, in 1909, Congress refused to extend copyright duration to the then-prevailing international norm, opting instead for a shorter term.⁷⁴ And in another of the changes, the 1976 Act, Congress reduced the term for many works by requiring the copyright term begin not at publication (which provided perpetual common law protection for unpublished works) but at creation.⁷⁵ The Government argues that Congress has historically been prudent, and has responded to technological (new media), demographic (life-expectancy), and economic changes.⁷⁶

2. “Promote the Progress of Science”

Eldred argues that the CTEA’s retrospective grant is not a limited time that “promotes the progress of science.”⁷⁷ This argument is ex-

67. *See infra*, text accompanying notes 211.

68. Brief for Petitioners at 18–19, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

69. *See* Lessig, *supra* note 41.

70. *Id.* (noting that Sonny Bono’s widow suggested a term of infinity minus a day).

71. Brief for Petitioners at 13, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

72. Brief for the Respondent at 23, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

73. *Id.* at 23–24.

74. *Id.* at 25.

75. *See id.* at 24.

76. *See id.* at 25.

77. Brief for Petitioners at 18, 19–22, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

plicitly couched *only* in terms of the retrospective grant. As Eldred maintains in his brief, “[P]etitioners [do not] argue, as the Court of Appeals implied, that ‘50 years are enough to ‘promote . . . Progress,’ . . . [but] a grant of 70 years is unconstitutional.’ [This] is not a judgment meet for this Court The line between *prospective* and *retroactive*⁷⁸ extensions is a clear one. If ‘limited Times’ is to have any meaningful content, it is a line this Court must draw.”⁷⁹ Eldred reads Supreme Court case law as requiring copyrights to promote progress, and argues that a copyright on existing work cannot promote the creation of the existing work. Eldred relies heavily on *Feist Publications v. Rural Telephone Service Co.*,⁸⁰ which held that copyright could not extend to compilations of facts, such as, in that case, phone listings. In *Feist*, the Court held that “originality is a constitutional requirement,” and the “sine qua non of copyright.”⁸¹ The requirement can only come, Eldred maintains, from the progress part, as none of the other words in the Copyright Clause could be read to imply minimal originality.⁸²

The Government responds first that this is a textually incoherent reading that misplaces the progress part of the Copyright Clause. Just as Congress is not limited to protecting “Authors that promote progress” nor “Writings that promote progress,” Congress is not limited to times that promote progress.⁸³

The Government argues further that even if the term *must* promote progress, the CTEA term promotes progress in this nation by harmonizing copyright terms with European terms.⁸⁴ The European Union not only has a life-plus-seventy term, it also has a “rule of the shorter term” that limits a work’s protection to the length “fixed in the

78. The Government disagrees with the “imprecise” characterization of the extension as “retrospective,” stating that the act does not affect copying before the act’s passage. Brief for the Respondent at 10 n.3, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

79. Brief for Petitioners at 14, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618) (citation omitted).

80. 499 U.S. 340 (1991).

81. *Id.* at 346.

82. Brief for Petitioners at 21, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

83. Brief for the Respondent at 19, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618) (internal quotations and citations omitted).

84. *Id.* at 37–38. The first, and ostensibly overriding, purpose of the CTEA was the harmonization of U.S. copyright law with international standards. See Senate CTEA Hearing 4 (statement of Sen. Feinstein) (“Perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms.”), quoted in Brief of Amici Curiae the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno* D.C. Cir. 2001) (No. 99-5430). With the European Union adopting a life-plus-seventy term, Orrin Hatch called this duration the “prevailing worldwide standard.” Orrin G. Hatch, *Essay: Toward a Principled Approach to Copyright Legislation at the Turn of the Millenium*, 59 U. PITT. L. REV. 719, 728 (1998).

country of [the work's] origin.”⁸⁵ If the U.S. had the shorter term of life-plus-fifty, authors would seek to publish their works first in other jurisdictions, such as the E.U., where protection would be longer. This would be a disincentive to create in the U.S.⁸⁶

Both of these Government responses, however, seem incomplete. First, though “Authors” and “Writings” are elastic terms, “Limited” can *only* be defined in context. When a physicist discusses the “limited” duration of a star’s existence, it would mean something different than a “limited” duration of a family vacation. “Authors” and “Writings” are not quite as context-specific. Second, as Eldred argues, the harmonization does little more than reduce transaction costs.⁸⁷ This is insufficient to outweigh the loss to the public domain.

3. Quid Pro Quo

Eldred argues that the CTEA’s retrospective grant violates the Copyright Clause’s implied quid pro quo requirement — the author must provide a “writing” to the public in exchange for a limited term monopoly — while the CTEA is a mere naked wealth transfer.⁸⁸

The Government does not address this argument specifically; however, it points to the 1790 Act as proof that quid pro quo is not constitutionally mandated. Though Eldred asserts that the first federal copyright entailed a quid pro quo of state rights for federal rights,⁸⁹ the Government responds, compellingly, that this is inaccurate, as some states had yet to offer copyright protection.⁹⁰ This relates to Eldred’s next argument.

4. Historical Context

Eldred argues that historical context confirms a prohibition on retrospective copyright. Eldred maintains that the occurrence of a few retrospective copyright extensions cannot make retrospective extension a constitutionally-ratified practice.⁹¹ Further, Eldred argues that the 1790 Act,⁹² which granted federal copyrights to existing work, does not refute this claim.⁹³ Eldred seems to endorse Judge Sentelle’s

85. Brief for the Respondent at 37–38, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

86. *Id.* at 39.

87. Brief for Petitioners at 44, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

88. *Id.* at 23, 43.

89. *Id.* at 28.

90. Brief for the Respondent at 12 n.5, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

91. Brief for Petitioners at 30, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

92. Act of May 31, 1790, ch. 15, 1 Stat. 124.

93. Brief for Petitioners at 28, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

position that “something had to be done to begin the operation of federal law under the new federal Constitution.”⁹⁴ Federal law *displaced* state law on the matter. Since *Wheaton v. Peters* in 1834,⁹⁵ the Supreme Court has acknowledged that the 1790 Act *created* a right, and did not retrospectively extend an existing right. Thus, Eldred argues, the 1790 Act does not imply that Congress can extend copyrights for existing federal copyrights.

The Government responds that drawing a line between retrospective and prospective grants is inconsistent with historical practice. Every time Congress has extended the copyright term for future works, it has also extended the copyright term for existing works.⁹⁶

Further, maintains the Government, the 1790 Act should command great deference as many of the Framers passed the Act, and the Act provided protection to existing work. Protecting existing work goes directly against Eldred’s theory that Congress cannot provide incentive for production by protecting existing works because such works have already been produced.⁹⁷

These arguments, especially Congress’s repeated retrospective grants, cast great doubt on Eldred’s arguments. Although it is true that no court has had to decide the retrospective issue, striking down the retrospective component would, by Eldred’s own admission, “cast into doubt” the earlier acts.⁹⁸ Eldred, somewhat unpersuasively, attempts to shift focus to the current act: “Whether or not two extensions in 150 years are excusable, the eleventh in forty years must be held to have crossed the line.”⁹⁹

5. Congruence and Proportionality

Eldred argues that even if the Court will not announce a per se rule against retrospective copyright extensions, the Court should adopt the heightened scrutiny of “congruence and proportionality” to the goals of a copyright regime.¹⁰⁰ It is highly unlikely that the CTEA could meet this scrutiny,¹⁰¹ in large part because it is such an exacting, nearly per se, standard.¹⁰² The Government, perhaps as a result, does not respond to this argument.

94. See *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001).

95. 33 U.S. (8 pet.) 591, cited in Walterscheid, *supra* note 117, at 383 (“Congress . . . instead of sanctioning an existing right, created it.”).

96. Brief for the Respondent at 8, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

97. *Id.* at 16 (citing Brief for Petitioners at 22, 28).

98. Brief for Petitioners at 30, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

99. *Id.*

100. *Id.* at 31.

101. *Id.* at 32–33.

102. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

B. Does the First Amendment Prohibit the CTEA's Prospective and Retrospective Extensions of Copyrights?

Eldred claims that the CTEA violates free speech rights.¹⁰³ By preventing certain works from falling into the public domain, the CTEA effectively prohibits Eldred and the general public from using these works, thereby limiting speech.

Eldred argues that, because copyright law is a content-neutral speech regulation, the CTEA is governed by *United States v. O'Brien*¹⁰⁴ and *Turner Broadcasting System, Inc. v. FCC*.¹⁰⁵ Under the *Turner* test, to withstand challenge, content neutral speech regulation must 1) “advance[] important government interests unrelated to the suppression of free speech” and 2) “not burden substantially more speech than necessary to further [those] interests.”¹⁰⁶

In response, the Government argues that the *Turner* test does not apply and that the CTEA has built-in safeguards for free speech that make it impervious to a challenge on First Amendment grounds.

Despite the emphasis that Eldred's team of constitutional scholars have placed on his First Amendment argument in speeches,¹⁰⁷ articles,¹⁰⁸ and before the courts,¹⁰⁹ this argument has major persuasive flaws, the majority of which have been noted by the lower courts.

First, neither the district nor appellate court considered copyright a content-neutral speech regulation that required *Turner* analysis. The district court dismissed the First Amendment argument with one sentence: “District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others.”¹¹⁰ The court of appeals similarly spent little time on the argument. After explaining Eldred's position, the court stated, as “this is all the support plaintiffs muster . . . we need not linger further in disposing” of the argument.¹¹¹

In dismissing this argument, the courts relied on two precedents. The district court cited them without further elaboration and the court of appeals called these same cases “insuperable bars” to the First

103. See Appellants' Opening Brief, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430), available at <http://eon.law.harvard.edu/openlaw/eldredvreno/appealbrief.html> (last visited Dec. 4, 2001).

104. 391 U.S. 367 (1968).

105. 520 U.S. 180, 189 (1997).

106. Appellants' Opening Brief, *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430).

107. See Lessig, *supra* note 41.

108. See Fonda, *supra* note 19.

109. See Appellants' Opening Brief, *Eldred v. Reno* (D.C. Cir. 2001) (No. 99-5430).

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

111. *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001).

Amendment claim.¹¹² According to the court of appeals, the first case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹¹³ stands for the proposition that the “regime of copyright itself”¹¹⁴ safeguards and promotes free speech through the expression/fact dichotomy and the fair use exemptions.¹¹⁵ In addition, the second case, *United Video v. FCC*,¹¹⁶ demonstrates that there is no free speech right to use another’s copyrighted work for commercial gain.

It seems highly unlikely that the CTEA could withstand the scrutiny that Eldred requests. Although the lower courts did not give the argument much consideration, it is possible that the Supreme Court will apply First Amendment scrutiny. The focus of this note, however, is whether the CTEA exceeds Congress’s affirmative power in the Copyright Clause.

V. THE COPYRIGHT CLAUSE LIMITS CONGRESS’S POWER TO GRANT PROSPECTIVE TERM EXTENSIONS

In this part, I discuss an argument against the CTEA that Eldred does not make. I argue that the prospective grant of the CTEA goes beyond Congress’s affirmative power. “[L]imited Times” in the Intellectual Property Clause should not be read against infinity but in conjunction with the progress part, “To Promote the Progress of Science and useful Arts,” so as to limit the length that Congress can set for a prospective copyright grant. I argue that the underlying purpose of copyrights is primarily economic and that the Framers supported a copyright monopoly only insofar as it encouraged creativity. The Framers understood both the economic costs and benefits of monopolies. Through the Constitution, they intended to create a copyright monopoly that limited these costs and their duration, while still providing the benefit of incentive. I assert that such a reading is consistent with extant evidence of the Framers’ intent, and historic Congressional and judicial interpretation of that intent.

A. The Framers’ Intent

To understand the Framers’ intent, we must look to three things: first, to the English law concerning copyrights that predated the American Constitution; second, to the status of copyrights during the

112. *Id.* at 375.

113. 471 U.S. 539, 556 (1985).

114. Eldred v. Reno, 239 F.3d at 375.

115. *Id.*

116. 890 F.2d 1173, 1191 (D.C. Cir. 1989).

time of the Articles of Confederation; and third, to the period of the Constitutional Convention itself and shortly thereafter.

1. Old English Law

The Framers were aware of and influenced by English patent and copyright practice.¹¹⁷ English patent and copyright practice grew out of the royal prerogative to grant monopolies, including patents. Early in the reign of Queen Elizabeth I, the Crown began to grant monopolies to encourage innovation.¹¹⁸ Elizabeth abused this power by granting monopolies in the form of patents for common items such as “saltpeter, alum, ovens and furnaces, window glass, ale, the mining of various metals and ores, sulfur, rapeseed oil, and salt.”¹¹⁹ The grants generally went to Elizabeth’s favorite courtiers, who mostly sought monopolies in established industries, not in innovative ones.¹²⁰ Not surprisingly, these “odious” monopolies led to shortages of goods and exorbitantly high prices.¹²¹ These acts were not only corrupt, but also ruinous for the nation, and a major cause of social unrest.¹²²

Two acts were intended to remedy this abuse: the Statute of Monopolies in 1623 and the Statute of Anne in 1710.¹²³ The Statute of Monopolies strongly condemned the monarchy’s monopolistic policies and acted to end them.¹²⁴ However, the statute provided a monopoly exception for “letters patent” of no more than twenty-one years if subsisting, with a possible fourteen year extension to the “first and true inventor and inventors.”¹²⁵

117. Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 347 (2000).

118. *Id.* at 321.

119. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint On Congress*, 2000 U. ILL. L. REV. 1119, 1144 (2000).

120. WILLIAM HYDE PRICE, *THE ENGLISH PATENTS OF MONOPOLY 16–17* (1906) (“The courtiers were not attracted by the patents for new inventions, leaving those for the poor . . . inventors, but they sought to secure the . . . lucrative new monopolies in old industries. . . . In the hands of the corrupt courtiers the system of monopolies, designed originally to foster new arts, became degraded into a system of plunder.”), *cited in* Heald & Sherry, *supra* note 119, at 1143.

121. Heald & Sherry, *supra* note 119, at 1144 (“The courts held monopolies generally illegal and detrimental . . . because they raised prices, reduced the availability of goods, and reduced competition.”).

122. Brief for Petitioners at 24, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618), *citing* CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1600–1800*, at 16 (1998).

123. Heald & Sherry, *supra* note 119, at 1144–45.

124. *Id.* at 1144.

125. 21 Jam., ch. 3, § 5 (1623) (Eng.), *cited in* Heald & Sherry, *supra* note 119, at 1144, *and* Walterscheid, *supra* note 117, at 325.

Similarly, the Statute of Anne attacked monopolies, but it was targeted at the specific monopoly in book publishing.¹²⁶ The Statute of Anne provided a fourteen-year term limit to future monopolies in books and a twenty-one-year term for existing monopolies.¹²⁷ Despite these provisions, controversy over whether the publishers' common law rights of perpetuity survived the statute persisted for the next sixty years. Eventually, in 1774, the English courts held they did not.¹²⁸

Of primary importance for understanding the Framers' intent is that generations of Englishmen understood firsthand the crippling societal effects of royal monopolies which were issued not to encourage innovation but to control existing trades. These Englishmen also understood the consequences of the choice between perpetual monopolies and limited duration monopolies, especially in books, and would naturally be inclined against the former type of monopolies.

2. Articles of Confederation

The Framers were also influenced by intellectual property practice during the time of the Articles of Confederation. The Framers were "fully cognizant" of the patent and copyright situation that existed during this period.¹²⁹ During this time, the states, not Congress, had power over copyright. Thus, in order to draw any conclusions regarding the Framers' intent, we must look to the states' statutes.

The most striking aspects of these state statutes are 1) the resemblance of their durations to those in the Statute of Anne, likely indicating what the Framers may have considered "limited times"; 2) the *purposes* stated in the states' preambles to these statutes; and 3) the attempts made through statutory language to constrain the copyright monopoly.

a. Resemblance to English Duration

The various copyright durations passed by the states under the Articles were all fairly consistent with the English term. Between 1783 and 1786, twelve states enacted general copyright statutes.¹³⁰ All these states limited the initial and renewal terms either to those speci-

126. The monopoly was one of the Crown's methods of censorship. Walterscheid, *supra* note 117, at 336.

127. 8 Ann., ch. 19, § 1 (1710) (Eng.), *cited in* Heald & Sherry, *supra* note 119, at 1145.

128. Brief for Petitioners at 26, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618), *citing* *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

129. Walterscheid, *supra* note 117, at 347.

130. The exception was Delaware. Only South Carolina "provided statutory protection for inventions." Heald & Sherry, *supra* note 119, at 1147.

fied in the Statute of Anne or to a “fixed term of twenty or twenty-one years.”¹³¹

This similarity may indicate that the states chose the same term as the English statute because their copyright laws had substantially the same purpose: to promote innovation while limiting monopoly. If nothing else, it certainly indicates that all states decided against anything approaching a perpetual copyright. Furthermore, no state’s duration approached the current duration. Even making adjustments for the increase in life expectancy,¹³² it is difficult to see how life-plus-seventy in the present day is comparable to twenty years in the eighteenth century. As the maximum term in the states under the Articles was twenty-one years, and these states’ representatives chose the words “Limited Times” for the Constitution, it seems likely that these words were meant to imply durations similar to the state terms.

b. Purposes in Statutory Preambles

The preambles to many of the states’ copyright statutes indicate two purposes: promoting innovation and acknowledging the author’s moral property right in his own product.¹³³ From the time before the Statute of Anne to today, these two purposes have been dual rationales for copyright protection. According to judicial interpretation, the Constitution only recognizes the first purpose.¹³⁴

c. Anti-Monopoly Precautions

Third, the states’ statutes constrain copyright’s monopoly consequences occurring even during the short monopoly term. The Framers’ distrust of monopoly seems to have gone even beyond that of the English Parliament. The U.S. Supreme Court has noted the Framers’ “instinctive aversion to monopolies,” and that “[i]t was a monopoly on tea that sparked the Revolution....”¹³⁵ Similarly, many historians cite “antimonopoly sentiments as one of the roots of the struggle for American independence.”¹³⁶ Several of the original state constitutions contained provisions condemning the creation of monopolies.¹³⁷

131. Walterscheid, *supra* note 117, at 350.

132. Statement of Congressional intent indicated that one of the reasons for the CTEA was increase in life expectancy. See Brief of Amici Curiae the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430).

133. See, e.g., Acts and Laws of the Commonwealth of Massachusetts 236 (Boston 1781–83), cited in Heald & Sherry, *supra* note 119, at n. 227.

134. See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

135. *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966).

136. I THE ANTITRUST IMPULSE 5 (Theodore P. Kovaleff ed., 1994).

137. Walterscheid, *supra* note 90, at n15 (“According to the Maryland Constitution of 1776, §XXXIX, ‘monopolies are odious, contrary to the spirit of free government, and the

In the states' statutes, duration was not the only restraint on the copyright monopoly. Unlike today's restraints on copyright (such as fair use and the expression/fact dichotomy), these statutory limitations did not grow out of a concern for freedom of expression. Rather, they were unmistakably economic and were in keeping with classical economic theory regarding monopolies. Five states required the publication of copyrighted books in "sufficient numbers and at a cheap enough price to satisfy the public demands."¹³⁸ These two conditions are clearly countermeasures to monopolies' tendencies to underproduce and overprice. Further evidence that restrictions on intellectual property protections were driven by economic, rather than educational or expressive concerns is that the only state that provided statutory protection for inventions, South Carolina, required sellers to offer patented inventions at a reasonable price.¹³⁹ Thus, the state provisions display a concern about the economic monopoly effects even during the roughly twenty-year copyright term.

3. Framers' Correspondence

This legal history provided the backdrop for the drafting of the Patent and Copyright Clause. There is "no record of any debate over the Intellectual Property Clause at the Constitutional Convention."¹⁴⁰ Nonetheless, based on the state of the law prior to the Convention, the language of the resulting Constitution, and the Framers' discussion, specific conclusions regarding their intent may be drawn.

a. *Absence of Moral Right Language*

The Framers did not include any sort of moral right language in the Copyright Clause, probably because of their distrust of monopolies. Nothing in the Clause implies that Congress can confer rights in discoveries and writings in any way to acknowledge that these works are the progeny of the author.¹⁴¹ If an author were to possess a moral

principles of commerce...and ought not to be suffered.' See III THE FEDERAL AND STATE CONSTITUTIONS 160 (F. Thorpe ed., 1909). Similarly, the North Carolina Constitution of 1776, § XXIII stated "[t]hat perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.' See V THE FEDERAL AND STATE CONSTITUTIONS at 2788.").

138. Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 116 (1928) (listing Connecticut, Georgia, New York, and North and South Carolina).

139. *Id.*

140. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361 (1992).

141. Heald & Sherry, *supra* note 119, at 1148 ("[W]e note that the Preamble to the Intellectual Property Clause includes only the utilitarian ('To promote the Progress of Science') and not the natural-law rationale.").

right to his progeny in the progeny's youth, little would imply the progeny should stop being the author's at some point.¹⁴² The Framers may not have wanted to take this chance. The absence of moral right language is noteworthy as the states' statutes and the legislative history of the Continental Congress included such language.¹⁴³ At any rate, it is clear that the Framers did exclude the language while using language that embraced the other purpose in the state copyright laws' preambles: to promote progress.

b. Potential Codification of States' Practice

Although there is no record of debate on the Clause, the unanimous vote for the Clause by state delegates suggests that it was in general agreement with existing state laws.¹⁴⁴ Further, we know that all of the proposals for a Patent and Copyright Clause insisted on a *limited* duration.¹⁴⁵ There is little indication that the Framers intended to change the states' copyright practice beyond implicitly selecting a utilitarian rationale over a moral right rationale.

c. Defense for Ratification

Statements made following the Convention, especially during the ratification, help shed light on the Framers' and ratifiers' thoughts on the Clause. For example, one Virginia delegate refused to sign the Constitution, fearing that because of the Patent and Copyright Clause, "the Congress may grant monopolies in trade and commerce."¹⁴⁶ Several attendees of the ratifying conventions shared this fear.¹⁴⁷ Many

142. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 44 (1993) (noting the argument of English booksellers who supported unlimited copyright terms: "That if we have a Right for Ten Years, we have a Right for Ever. A Man's having possess'd a Property for Ten or Twenty years, is in no other Instance allow'd, a Reason for another to take it from him; and we hope it will not be in Ours.")

143. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326–27 (Gaillard Hunt ed., Washington Gov't Printing Office 1922) (1783) ("[N]othing is more properly a man's own than the fruit of his study....").

144. WILLIAM W. CROSSKEY, *1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 477 (1953) (arguing that the unanimous vote indicates the Framers' intent was "rather to clarify, than to change, the existing law").

145. Fenning, *supra* note 138, at 109–13.

146. *The Objections of the Hon. George Mason, One of the Delegates from Virginia, in the Late Continental Convention, to the Proposed Federal Constitution, Assigned as His Reasons for Not Signing the Same*, 2 AMERICAN MUSEUM OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, ETC. 534, 536 (AMS Press, Inc. 1965) (1789).

147. Walterscheid, *supra* note 90, at n.15 (citing Rev. Nicholas Cottin, D.D., *Remarks on the Amendments to the Federal Constitution Proposed by the Conventions of Massachusetts, New Hampshire, New York, Virginia, South and North Carolina, with the Minorities of Pennsylvania and Maryland by the Rev. Nicholas Cottin, D.D.*, 6 AMERICAN MUSEUM at

states proposed Bill of Rights amendments that indicated their opposition to any further congressional power to establish monopolies.¹⁴⁸

Thomas Jefferson supported such an amendment. In an August 1789 letter to James Madison, he said that he favored an amendment with an explicit year limit, such as: “Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding __ years but for *no longer term and no other purpose*.”¹⁴⁹ In another letter to Madison, Jefferson wrote:

It is better . . . to abolish . . . [m]onopolies, in all cases, than not to do it in any The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for *a limited time, as of 14 years*; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.¹⁵⁰

Madison responded in defense of limited monopolies, but conceded that “[m]onopolies are justly classed among the greatest nuisances [sic] in Government.”¹⁵¹ His only defense for them was that they act as “encouragements to literary works and ingenious discoveries.”¹⁵² Thus, both Madison and Jefferson tolerated monopolies only insofar as they provided incentives. Indeed, “one public comment contemporaneous with the drafting of the Constitution . . . suggests that granting patents and copyrights was considered a cheap way for the young government to foster scientific progress.”¹⁵³ During the ratifying conventions’ debates, the *primary defense* for the limited monopolies was to promote innovation.¹⁵⁴ It seems clear that the ratifiers would tolerate monopolies only insofar as they promoted innovation. Although the Framers granted discretionary powers to Congress, as Judge Sentelle noted in his dissent in the *Eldred* appeal, the Fram-

303 (Philadelphia, 1788) (commenting that “monopolies are in general pernicious and therefore not adopted but in extraordinary cases”).

148. 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382 (John P. Kaminski et al. eds., 1986).

149. 1 THE REPUBLIC OF LETTERS 630 (James Morton Smith ed., 1995) (emphasis added).

150. Heald & Sherry, *supra* note 119, at 1150 (citing 13 THE PAPERS OF THOMAS JEFFERSON 442–43 (Julian P. Boyd ed., 1956)).

151. 14 THE PAPERS OF THOMAS JEFFERSON 21 (Julian P. Boyd ed., 1956).

152. *Id.*

153. Heald & Sherry, *supra* note 119, at 1149, citing *Remarks on the Amendments to the Federal Constitution*, 6 AMERICAN MUSEUM OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, ETC. 303 (AMS Press, Inc. 1965) (1789).

154. 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 148 at n.253.

ers also intended to convey that there are outer limits to these powers.¹⁵⁵

4. Conclusions of Framers' Intent

It seems likely the Framers would consider the CTEA the sort of odious monopoly that Parliament had condemned long before the Constitutional Convention.¹⁵⁶ Indeed, it is hard to distinguish these CTEA grants of long monopolies, especially the retrospective grants, from the sort of monopolies that Elizabeth I granted her courtiers in ale or salt.¹⁵⁷ Today's media interests, which control many of the most valuable copyrights, argue that they can reinvest their monopoly profits to produce, for example, more music. Similarly, in Elizabeth's time, courtiers argued that they could use their monopoly profits to produce, for example, a better tasting ale.¹⁵⁸ That argument failed in England and failed with the Constitutional Fathers. The two primary effects of the Elizabethan grants were a guaranteed income stream to the lucky recipient and higher prices paid by consumers.¹⁵⁹ The CTEA produces the same effects.¹⁶⁰

155. *Eldred v. Reno*, 239 F.3d 372, 381 (Sentelle, J., dissenting) ("It would seem to me apparent that this concept of 'outer limits' to enumerated powers applies not only to the Commerce Clause but to all the enumerated powers, including the Copyright Clause.") (D.C. Cir. 2001).

156. *See* Heald & Sherry, *supra* note 119 at 1169-70.

157. *See id.* at 1170.

158. *See id.* at 1169; *see also* Brief of Amici Curiae, the Sherwood Anderson Literary Estate Trust et al., *Eldred v. Reno*, 122 S. Ct. 1170 (D.C. Cir. 2001) (arguing that (1) CTEA would "encourage investments in existing copyrighted works" and (2) the artists' children can create due to the comfort of having an income stream, as opposed to the economic incentive of creating new copyrighted work: "The small income [my brother] derives from my father's copyrights have allowed him to pursue the difficult livelihood of the new songwriter."). This does not answer why the government should allow these individuals an advantage in this trade. "We note, however, that the mere potential for public benefit was not enough to save the practice from legal condemnation of the most famous sort." Heald & Sherry, *supra* note 119, at 1170; *see also*, Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, Apr. 25, 1998 (quoting Pete Seeger: "The grandchildren should be able to find some other way to make a living, even if their grandfather did write 'How Much Is That Doggie in the Window.'").

159. *See* Heald & Sherry, *supra* note 119, at 1169-70.

160. *See id.* 1170 ("[The] CTEA has precisely the same effects as the Elizabethan grant of a monopoly in ale or printing. It guarantees an income stream to a favorite of the legislature, in this case ASCAP, Disney, the Association of American Publishers, the Motion Picture Association of America, and the Music Publishers Association, among others.").

B. Congressional Caution

Prior to the last forty years, Congress showed great caution in expanding the copyright term.¹⁶¹ Congress changed the term only twice between 1790 and the 1960s; since then, Congress has extended the term eleven times.¹⁶² In 1790, Congress passed the first national copyright act, entitled “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.”¹⁶³ The Act’s intent is fairly clear from its name. It provided an initial term of fourteen years, with a possible fourteen-year renewal, provided that at least one author was living at the expiration of the first term.¹⁶⁴ The Act appears to be patterned after the Statute of Anne.¹⁶⁵

Following this original act, “[a]ll copyright legislation . . . through the 1909 Copyright Act adopted an approach that encouraged rapid expansion of the public domain.”¹⁶⁶ This was caused by the “regulatory scheme” which forced the author to expressly reserve his rights and to follow administrative rules that would likely dissuade an author from renewing unprofitable copyrights, leaving them to the public domain.¹⁶⁷

There was only one term extension prior to 1909. In 1831, Congress doubled the initial term to twenty-eight years and allowed authors’ heirs to claim the fourteen year extension.¹⁶⁸ The Copyright Act

161. “It was perhaps inevitable that the strong commercial interest in certain copyrights would result in extensive efforts in recent years to extend the term of these copyrights.” See Walterscheid, *supra* note 117, at 387; *see also*, Zeitlin, *supra* note 158 (stating, in reference to both the 1976 Act and the CTEA, “[i]ndeed, the powerful entertainment industry seems intent on never allowing copyrights to expire, repeatedly lobbying for extensions at the 11th hour.”).

162. Fonda, *supra* note 19 (quoting Lawrence Lessig).

163. Act of May 31, 1790, ch. 15, 1 Stat. 124.

164. *Id.*

165. *See* Walterscheid, *supra* note 117, at 381.

166. Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L. J.* 491, 513 (1999).

167. *Id.* at 513–14. (“Only those works that the author deemed worth protecting would be covered by the act, assuming the author fully complied with the statute.”) This implies a sort of two-tiered protection similar to what I propose in Part V.B.4. “[T]he length of the protection would be modest, unless the author remained diligent and renewed the right to the monopoly at the proper time.” *Id.* at 514.

168. *See* Walterscheid, *supra* note 117, at 381. (“During the nineteenth century almost two hundred copyright bills were introduced, and some twenty of these were enacted into law in some form or another. The only one to actually change the statutory term of copyright became law in 1831. It extended the initial term to twenty-eight years ‘from the time of recording of the title thereof’ and authorized a living widow or children of a deceased author to seek a renewal for fourteen years. The rationale for doubling the initial term has received almost no discussion in the literature, and it is not entirely clear why the extension occurred.” (citations omitted)).

of 1909 extended the renewal term to twenty-eight years, while leaving the initial term untouched.¹⁶⁹

Congress's understanding in 1909 of the constitutional aspects of copyright is documented in the House Report accompanying the Act. The report indicates that "the Intellectual Property Clause limits the power of Congress"¹⁷⁰ and further notes that certain legislation would be beyond the power of Congress:

The object of all legislation must be . . . to promote science and the useful arts....[T]he spirit of any act which Congress is authorized to pass must be one which will *promote the progress of science* and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, *it would be beyond the power of Congress*.¹⁷¹

Whereas the *Eldred* courts claimed that the progress part of the Patent and Copyright Clause does not in any way limit Congress's power,¹⁷² Congress explicitly recognized such a limitation in the 1909 House report. The report also stated that copyright law is "not primarily for the benefit of the author, but primarily for the benefit of the public."¹⁷³ The CTEA emphasis on benefit to the author conflicts with the previously accepted congressional view.

Finally, in the 1909 report, Congress implied that it should use cost-benefit analysis to determine the appropriate level of copyright protection. According to the report, "Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public."¹⁷⁴ Balancing these costs and benefits, Congress must use copyright to confer "a benefit upon the public that outweighs the evils of the temporary monopoly."¹⁷⁵ Though not a call for optimal efficiency (that is, a term that maximizes the gap between cost and benefit), it is a call for efficiency in general, recognizing that benefits must outweigh costs.¹⁷⁶

In 1976, Congress passed an act¹⁷⁷ that exhibited very different Congressional priorities, both in stated intentions and effects. The

169. Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1075.

170. *Id.*

171. *Id.* at 384 (quoting H.R. Rep. No. 60-2222 (1909)) (emphasis added).

172. *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

173. Walterscheid, *supra* note 117, at 384 (quoting H.R. Rep. No. 60-2222 (1909)).

174. *Id.*

175. *Id.*

176. *See* Part V, *infra*.

177. Walterscheid, *supra* note 117 at 385 (citing 17 U.S.C. § 304(a) (1994)).

House and Senate reports in the legislative history, which include “essentially identical language,”¹⁷⁸ make no mention of Patent and Copyright Clause limitations.¹⁷⁹ The legislative history instead emphasizes that “authors and their representatives [had] stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision.”¹⁸⁰

The seven rationales that Congress states for passing the 1976 Act are “almost entirely for the benefit of an author.”¹⁸¹ One rationale, much like the primary CTEA rationale, holds that other nations have life-plus-fifty terms, so adopting the same term for the U.S. would “expedite international commerce.”¹⁸² This rationale is of little import if the act itself is unconstitutional. Further, the term extension does not reconcile U.S. law very well with much of international law, or even with European law.¹⁸³

Another rationale of the 1976 Act was that the public did not “often” benefit from a shorter term in the way of cheaper prices.¹⁸⁴ This faulty “often” principle could cause any rule or standard to be dismissed with merely a few counterexamples of under-inclusiveness. For example, Congress could permit monopolies because natural monopolies demonstrate that customers “often” fail to receive lower prices with competition.

Nonetheless, the legislative history of the 1976 Act does not seem to indicate a permanent change in Congressional attitudes toward its limitations under the Copyright Clause. Twelve years later, the House

178. *Id.* (citing H.R. Rep. No. 94-1476 (1976)).

179. *Id.*

180. *Id.* (citing H.R. Rep. No. 94-1476 (1976)).

181. *Id.* at 386, quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.03[B] (The seven rationales are as follows: “1. The 56-year term under the 1909 Act was not long enough to assure an author and his dependents a fair economic return, given the substantial increase in life expectancy.”; “2. The growth in communication media has substantially lengthened the commercial life of a great many works, particularly serious works which may not initially be recognized by the public.”; “3. The public does not benefit from a shorter term, but rather the user groups derive a windfall, as the prices the public pays for a work often remain the same after the work enters the public domain.”; “4. A system based upon the life of the author avoids confusion and uncertainty, because the date of death is clearer and more definite than the date of publication, and it means that all of a given author’s works will enter the public domain at the same time instead of seriatim as under a term based on publication.”; “5. The renewal system is avoided with its highly technical requirements which often cause inadvertent loss of copyright.”; “6. A statutory term of life-plus-50 years is no more than a fair recompense for those who under the 1909 Act owned common law copyrights which continued in perpetuity as long as a work remained unpublished.”; “7. A majority of the world’s countries have a term of life plus fifty. To adopt the same term expedites international commerce in literary properties, and opens the way for membership in the Berne Convention.”).

182. *Id.*

183. See Appellants’ Opening Brief, *Eldred v. Reno*, 239 F.3d 371 (D.C. Cir. 2001) (No. 99-5430).

184. Walterscheid, *supra* note 117, at 385.

Report on the Berne Convention Implementation Act of 1988 emphasized once again Congress's limits under the Copyright Clause: "Congress must weigh the public costs and benefits derived from protecting a particular interest . . . [T]he primary objective of our copyright laws is *not to reward the author*, but rather to secure for *the public* the benefits from the creations of authors."¹⁸⁵

Thus, it seems that Congress generally recognizes the constitutional constraint that it must balance societal costs against societal benefits. The constraint should be, as Jefferson and Madison favored and as Congress stated with its cost-benefit language, that monopoly be tolerated only insofar as it encourages innovation.¹⁸⁶

C. Supreme Court Recognizing Limitations

The Supreme Court, likewise, has repeatedly recognized that the copyright monopoly is merely to encourage innovation and not to reward authors or special interests. In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁸⁷ the Court stated:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹⁸⁸

The Court elsewhere wrote that:

[P]rivate motivation *must* ultimately serve the cause of promoting broad public availability of literature, music, and other arts . . . [T]he *ultimate aim* is by this incentive, *to stimulate* artistic creativity for the *general public good*.¹⁸⁹

185. *Id.* at 387 (citing H.R. Rep. No. 100-609 (1988)) (emphasis added).

186. See Heald & Sherry, *supra* note 119, at 1170 ("The Intellectual Property Clause restrains Congress by the same means the English courts restrained the monarchy: it mandates that an exclusive right be granted only as the purchase price for a new invention or writing.")

187. 464 U.S. 417 (1984).

188. *Id.* at 429 (emphasis added).

189. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphasis added).

Thus, the Supreme Court agrees that the Congress's mandate extends only insofar as copyright provides adequate incentive for creation.

In 1966, in the patent context, the Supreme Court declared that the Intellectual Property Clause "is both a grant of power and a limitation."¹⁹⁰ The Court called Congress's authority "qualified" and "limited to the promotion of advances in the 'useful arts.'"¹⁹¹ It said, finally, that "Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."¹⁹² The Court deferred greatly to Congress choice of a patent term, but only "[w]ithin the limits of the constitutional grant."¹⁹³

Although the Court in *Graham v. John Deere* specifically refused to rule on the Copyright grant in the Intellectual Property Clause,¹⁹⁴ little in the case, or elsewhere, distinguishes the economic purposes of the copyright monopoly from the purposes of the patent monopoly. Both grants are intertwined in the same clause, suggesting that they share a common purpose.¹⁹⁵ Indeed, the Framers who grouped them together provided for identical durations in the first act.¹⁹⁶ The Supreme Court did not read the progress part out of the Patent Clause, and it should require compelling reasons to consider reading out the same language from the intertwined Copyright Clause.

D. Putting It Together

1. Preamble as a Constraint¹⁹⁷

Despite discussed evidence of Framer intent, Congressional recognition, and Supreme Court language, the district and circuit courts

190. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

191. *Id.*

192. *Id.* at 5–6 (emphasis added).

193. *Id.* at 6.

194. *Id.* at n.1 ("The provision appears in the Constitution spliced together with the copyright provision, which we omit as not relevant here.").

195. See *Wheaton v. Peters*, 33 U.S. 591, 657–58 (1834), (asking and answering in the negative, "In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine?"). See also Heald & Sherry, *supra* note 119, at 1153–1155 for a linguistic analysis of the clause.

196. *Graham v. John Deere Co.*, 383 U.S. at 7.

197. Eldred and I disagree on this point. "Petitioners do not argue that the Copyright Clause preamble is an independently enforceable limit on Congress's power; in the court of appeals, petitioners conceded it is not." Brief for the Respondent at 18, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618). Nonetheless, as the Government points out, Eldred still maintains that the meaning of limited times "must be determined in light of [the preamble's] specified end," that is to promote progress. Brief for the Respondent at 19 *Eldred* (No. 01-618) citing Brief for Petitioners at 19.

in *Eldred* relied on a D.C. Circuit case, *Schnapper v. Foley*,¹⁹⁸ to conclude that the Intellectual Property progress part of the intellectual property clause does not constrain the power of Congress in copyright.¹⁹⁹ *Schnapper*'s statement on this point, however, does not necessarily read the progress part out of the Clause. In *Schnapper*, the D.C. Circuit rejected an argument, that the progress part is a "substantive limit" that "only refers to the need to provide economic incentives in the form of royalties."²⁰⁰ The *Schnapper* court rejected this argument, which is unrelated to any of Eldred's arguments, with a quote from a Fifth Circuit case, citing Nimmer: "[T]he introductory phrase, rather than constituting a limitation on Congressional authority, has for the most part tended to expand such authority."²⁰¹ Neither Nimmer's quote nor the Fifth Circuit case imply that Congress can ignore the preamble altogether. Rather, Congress can use the preamble to expand the authority granted to them in the copyright clause.

However, the case authority that Nimmer includes as support is unconvincing. For example, he cites a case²⁰² involving the general preamble of the Constitution that has no bearing on the Copyright Clause.²⁰³ Further, the progress part could expand Congressional authority without expanding duration. The progress part may indicate that Congress can authorize more than patents and copyrights, for example it could authorize government grants to promote arts and sciences. However, this does not mean there is no limitation on the copyright term itself. Under this reading, the copyright and patent clauses are meant to be limitations on the preamble and therefore the duration limits are meant to limit the expansive powers.

The Fifth Circuit case that Nimmer cites²⁰⁴ also fails to read the progress part out of the copyright clause. The case pertained to Congress's grant of copyright to pornographic works, though pornography rarely, if ever, promotes science or the arts. The Fifth Circuit held that Congress "need not 'require that *each* copyrighted work be shown to promote the useful arts.'"²⁰⁵ Rather, what it would require is that copyright as a whole promotes the useful arts.

198. 667 F.2d 102, 112 (D.C. Cir. 1981), (stating "we cannot accept appellants' argument that the introductory language...constitutes a limit on congressional power").

199. *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001); *Eldred v. Reno*, 74 F.Supp.2d 1, 3 n.6 (D.D.C. 1999).

200. *Id.*

201. *Schnapper*, 667 F.2d at 111 (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.03[B]).

202. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

203. Walterscheid, *supra* note 117, at 360 (discussing "Jacobson v. Massachusetts, wherein the Supreme Court stated only that the Preamble to the Constitution itself 'has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.'").

204. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979).

205. *Id.* at 859 (emphasis added).

The strongest reading of the preamble is that of Judge Sentelle in his dissent in the *Eldred* appeal. Sentelle's view is that the progress part is in fact the grant itself. One commentator argues that "[t]he Framers deliberately refused to use the terms 'patents' and 'copyrights' because they did not want to limit or tie the clause to the technical meaning of these two terms."²⁰⁶ Another, in agreement, argues, based on the list of proposed powers from the Records of the Convention, that the Clause is not two but three "separate and distinct proposals presented by Madison and Pinckney."²⁰⁷

The third distinct proposal envisioned in the Clause, and the likely reason Congress did not limit the language to copyrights and patents, is that the government can provide other "premiums and provisions" to advance "useful knowledge."²⁰⁸ Thus, the Framers may have seen the so-called progress part as "broader in scope" than the mere proposal to provide patents and copyrights.²⁰⁹ As a result, the grant of power to Congress is not a grant to create copyrights and patents; it is a grant to promote arts and sciences and specifies that one means to achieve this purpose is the creation of limited patent and copyright monopolies.²¹⁰

This argument would be of mere academic interest if Judge Sentelle, in his dissent, had not explicitly stated that he too considered the constitutional grant to be for the promotion of arts and sciences. He wrote:

That clause empowers the Congress to do one thing, and only one thing. That one thing is "to promote the progress of sciences and useful arts." How may Congress do that? 'By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'²¹¹

206. Malla Pollack, *Unconstitutional Incontestability?: The Intersection of the Intellectual Property and Commerce Clauses of the Constitution*, 18 SEATTLE U. L. REV. 259, 290 (1995).

207. Walterscheid, *supra* note 117, at 352, quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321–22 (Max Farrand ed., 1911). "To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; [and] To establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, trades, and manufactures." *Id.*

208. *Id.* at 354.

209. *Id.*

210. *See id.* at 358–59.

211. *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001).

Thus, Judge Sentelle holds the less conventional, yet reasonable, view—that the grant to Congress is the power to promote progress and not the power to grant copyrights and patents.

If Judge Sentelle is correct, then courts would need to consider the preamble or else they would be ignoring the grant of power itself. If, on the other hand, the conventional view is correct, then the Framers’ intent, Congressional history, and Supreme Court language all indicate that Congress must grant monopolies only to promote progress. Both lead to the same result.

2. “Limited Times” With “To Promote Progress”

Once we retain the progress part’s language, the words “limited Times” must be read hand in hand with this language. “[L]imited Times” must mean a duration limited to one that will promote arts and sciences by balancing incentive and monopoly costs to society. When the term gets so long that the monopoly costs outweigh the societal benefits, then Congress has gone too far. Congress must set a term that is limited to this socially efficient point — just enough to promote innovation. As one commentator has stated: “[T]here is a term beyond which the progress of useful arts is no longer promoted and beyond which such progress may actually be said to be hindered. At that point the discretion of Congress . . . becomes constitutionally limited.”²¹²

Because Eldred did not make this argument, the Government did not spend much time attempting to refute it. In a footnote, however, the Government lists some objections to shorter terms.²¹³ I will address each in turn.

1. “Shorter Terms discriminate against serious works of authorship, whose value is often discovered only long after they are written and initially published.” This is not a constitutional objection. Just as dictatorship could be more efficient than a presidency, because the value of a great president may be discovered long into his term, the Constitution cannot bear such a result. Nonetheless, this argument could imply the opposite: that authors of serious works of authorship generally do not count on the financial benefit of their work. Without empirical data, it is difficult to see which principle is dominant, though, constitutionally, it does not matter.

2. “The longer term enhances the value of all works, since purchasers (e.g. publishers) cannot predict which will be successful, much less which will be successful after a long delay.” This objection does not quite address economists’ concern. The copyright economic

212. Walterscheid, *supra* note 117, at 361.

213. Brief for Respondent at 26, n. 17, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

models use generous assumptions that all works will be successful during the duration of their term. Even with this assumption, however, the value of “all works” is only marginally improved.

3. Authors will want to provide for their “children and grandchildren.” This argument is fairly silly, as most people want to provide for their children and grandchildren. There is no justification on either side, merely based on this desire, for the federal government to force a wealth transfer from authors to the public, or from the public to authors based on this desire.

VI. EFFICIENCY AND CONSTITUTIONAL MANDATE: PROPOSALS

We must ascertain whether the CTEA duration, in economic terms, provides adequate incentive while being limited, as much as possible, to this adequate term. The economic analysis must inform constitutional policy here, because copyright’s ability to promote arts and sciences is predicated on achieving a proper balance of economic incentive to authors and monopoly costs. Thus, the constitutional mandate should be socially optimal, with no tradeoff between efficiency and constitutional mandate.

A. *Economic Analysis*

A cost-benefit analysis suggests that both the CTEA’s retrospective aspects and prospective aspects are indefensible economically.

1. Retrospective Grant

It seems fairly clear that retrospective copyrights cannot encourage innovation. To begin, most obviously, the work is already created and thus there is no economic incentive to encourage creation.²¹⁴

William Landes and Richard Posner developed an economic model of copyright that reaches the same conclusion. This model included, naturally, determining the present discounted value of a copyright income stream.²¹⁵ The authors argue that society as a whole will likely be worse off with a retrospective copyright, because increased monopoly would increase the costs (what they called the expression

214. See Hal R. Varian, Affidavit of Hal R. Varian (July 1999), available at <http://eol.law.harvard.edu/openlaw/eldredvashcroft/cyber/varian.pdf>. (“If the work is already created, then there is no incentive effect at all from lengthening the term of protection.”)

215. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

costs) for all works while increasing benefits for only a subset of those works.²¹⁶ That is, the costs will most likely outweigh the benefits: “[t]his is a strong argument against making increases in copyright term retroactive.”²¹⁷ It is, in fact, a fairly conclusive argument.

2. Prospective Grant

Although some commentators, most notably Justice Stephen Breyer, argue that lead time and strategic pricing may render copyright economically unnecessary,²¹⁸ the prevailing view is that the economics of low marginal costs and high fixed costs necessitate a term of copyright protection.²¹⁹

To determine the optimal term, however, one must balance the costs to society with the benefits. The costs to society are higher prices and fewer choices, as well as expression costs, for the copyright term. Expression costs include the inability to rework older works. Expression costs are multiplied across industries; the works in the public domain could provide additional content across entertainment industries. For example, books could inspire movies or educational CD-ROMs thereby “spurring additional growth and economic development.”²²⁰

The prospective extension would only stimulate the production of new works for those authors who would not produce work under a life-plus-fifty term but would be encouraged to produce work by a life-plus-seventy term. This is because, discounted to present value, this CTEA extension provides little added incentive. As a result, this extension “cannot possibly stimulate the creation of any new works.”²²¹

If we evaluate copyright as an income stream over the life of the copyright, calculating the current value reveals very little extra benefit from the CTEA extension due to “the powerful effect of discounting on income so far into the future.”²²² Hal Varian, The Dean of the School of Information Management and Systems at Berkeley, made this point in his affidavit to the D.C. District Court.²²³ Based on his analysis, he concluded that “extending current copyright terms by

216. *Id.* at 362.

217. *Id.*

218. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299–300 (1970).

219. See Landes & Posner, *supra* note 215, at 326 (suggesting, in response to Breyer, that though literature had once flourished without copyright, marginal costs were not so much lower than average costs then as now).

220. Garon, *supra* note 166, at 600.

221. Heald & Sherry, *supra* note 117, at 1173.

222. *Id.*

223. Hal R. Varian, Affidavit of Hal R. Varian (July 1999).

[twenty] years for new works has a tiny effect on the present value of cash flows . . . and will therefore have an insignificant effect on the incentives to produce such works.”²²⁴

Varian’s actual numbers help to elucidate this point.²²⁵ He assumed (conservatively)²²⁶ a constant and certain income stream over the life of the copyright at a fairly low interest rate. He used the works-for-hire term, which had been 75 before the CTEA and was increased to 95. With these assumptions, the discounting math requires one to simply add the same amount year after year, diminished yearly by the interest rate. Or:

$$\sum_1^t \frac{Q}{(1+r)^n}$$

where “t” is the copyright term, “r” is the interest rate; “n” is the number of years; and “Q” is the royalty per year. Varian then used four different interest rates. At the low end of the interest scale, five percent interest yielded ninety-three percent of its discounted benefit in the first fifty years. The highest interest rate, which was itself perhaps still too conservative for the “relatively risky” investment of a copyright, resulted in an accrual of 99.7% of its economic benefit in the first fifty years. In the last twenty of the ninety-five years, the CTEA extension years, no benefit whatsoever accrued.²²⁷ Thus, the twenty years, added prospectively, provide either very little or zero added incentive to balance the costs to society.

B. Proposing Possible Terms for Efficiency and Incentive

Since the length of copyright protection is too long from both a constitutional standpoint and an economic standpoint, we should consider a shorter term for copyright monopoly.

1. Recover a Percentage of Discounted Income

The first option is a term limit that retrieves a certain percentage of present discounted income. This would provide Congress leeway, as they would choose the numbers for the analysis. Congress could provide a term that ensures ninety percent of the projected income

224. *Id.* at 1.

225. A calculator specifically designed for similar calculations may be found at <http://eon.law.harvard.edu/cgi-bin/opencode/extension.cgi> (last visited Dec. 1, 2001).

226. Hal R. Varian, Affidavit of Hal R. Varian (July 1999) (explaining that assumptions of constancy, certainty, and low interest rates are all unlikely for copyrights).

227. *Id.*

stream; alternatively, they could choose seventy percent or one-hundred percent. One-hundred percent would be a poor choice, however, because due to the effect of discounting income in the distant future, the last few percentage points take a disproportionate amount of time to accrue. For example, at a five percent interest rate, it takes forty-five years to accrue the last nine percent of projected income; at a ten percent rate, the last forty-five years returns only nine-tenths of one percent.²²⁸ Thus, pegging the number at one-hundred percent forces society to trade many years of monopoly for very little economic incentive to the author. Congress could choose reasonable numbers, based on conservative assumptions that would ensure an incentive.

2. Patent Term

Commentators wonder, “[i]f the present statutory patent term of twenty years is presumed ‘to promote the Progress of Science and useful Arts,’ what then is the constitutional justification for a copyright term that is typically four to five times longer?”²²⁹ In England, the Statute of Monopolies and the Statute of Anne had the same terms for patents and copyrights. At the origin of our current intellectual property regime, both the patent and copyright terms were fourteen years.²³⁰ Since then, the patent term “has increased by 43%,” while the “copyright term has increased by almost 580%.”²³¹ The longest U.S. patent ever, due to private legislation in the nineteenth century, extended to only one man, and lasted forty-two years.²³² The Irving Berlin copyright for “Alexander’s Ragtime Band,” by contrast, lasts 144 years, and even longer copyrights are possible under the CTEA.²³³ Congress must adequately justify why a twenty-year term can provide incentive “to promote the useful arts” with inventors, but not “science” with writers, musicians, and poets. If it cannot, it should adopt a term roughly comparable or equivalent to the patent term.

3. Tax Code Analogy

Thirty years is a term that the government has used in another context to approximate ownership benefit. The IRS Regulations for Tax Code § 1031 state that for purposes of like-kind transactions, a

228. *Id.*

229. Walterscheid, *supra* note 117, at 394.

230. *Id.* at 388.

231. *Id.* at 389.

232. *Id.* at 377–78.

233. See Garon, *supra* note 166, at 520.

thirty-year leasehold is economically equivalent to a fee simple.²³⁴ Specifically, a fee simple and a leasehold in excess of thirty years are considered, all else equal, like-kind property, so thirty years is considered to confer the benefit of full ownership.

There may be significant differences between real property and intellectual property, thus it may not be wise to adopt it for copyright without independent reasons. This is one more indication, however, that the government, or at least one agency with economic expertise, the IRS, considers a term substantially shorter than the current copyright term to confer equivalent benefits of full ownership.

4. Multiple Copyright Terms

My final proposal is to vary the terms by medium. I believe this is the economically optimal solution. For example, most agree that the current near-century protection for computer programs is probably greater than incentive requires, considering the rapid changes in the industry. That is, computer programs written as recently as ten years ago have little market value. Also, as films tend to make most of their revenue early in their copyright term, perhaps the term can account for this. One would expect a longer copyright in books, if publishing economics require a blockbuster book to generate revenue longer than a blockbuster film. The term would affect the industry; setting a shorter film copyright term, for example, would produce incentive for studios to create fewer great films rather than to gamble on many movies, in hopes of one blockbuster. A final benefit is that copyright terms could then take technological advances into account. The distribution channels of modern book publishing allow much quicker distribution, even worldwide, than Eighteenth Century distribution allowed. Thus, the copyright monopoly could be shortened to account for this economic and technological reality.

The problem with this novel system is that it can be subject to abuse. Perhaps Congress would attempt to give one medium, cartoon characters, a 200 year term and face much less opposition than a term applied across all copyrightable works. This would also, unfortunately, tend to favor the owners of highly profitable copyrights who could perhaps press Congress for specific extensions.

However, the differing durations would fortunately ensure that archiving copyrights, in media forms requiring less duration for adequate incentive, which companies would not fight to ensure, could enter the public domain and perhaps improve society in new incarnations. Society would benefit if Congress inefficiently lengthened a

234. I.R.C. § 1031 and Reg. § 1-1031 (a)-1(c).

few copyrights rather than all of them. Further, abuse under a differing copyright term might be easier to discern through term contrasts. Finally, assuming that the terms must be prospective and not retrospective, lobbyists and Congress would have less incentive to inappropriately set lengthy terms by industry, as the prospective extensions, when discounted, are worth much less than a retrospective extension of the same length.

VII. CONCLUSION

Congress should repeal the CTEA or the Supreme Court should hold the CTEA unconstitutional. Neither the CTEA's prospective nor retrospective components fall within constitutional mandate as evidenced through Framers' intent, Congressional history, and Supreme Court case law: to promote progress through limited-term copyrights. There are several methods of determining a constitutional and economically efficient prospective copyright term. Congress should adopt one of them.