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The Sonny Bono Copyright Term Extension Act: A Violation of Progress and Promotion of the Arts

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INTRODUCTION

In the enumerated powers vested in the federal government, the Constitution provides that Congress shall have the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[1] It is from this clause that the federal power to enact both copyright and patent legislation is derived.[2]

The historical progression of copyright legislation has resulted in the extension of copyright terms.[3] The maximum fifty-six year term under the 1909 Act was replaced by a term of life of the author plus fifty years under the 1976 Act.[4] However, on October 27, 1998, President Clinton signed the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) into law, which again expanded the term of copyright protection.[5] The CTEA effectively extended the term of all existing and future copyrights by a period of twenty years.[6] The CTEA extends the term of copyright protection prospectively to works created after its effective date—from the life of the author plus fifty years to the life of the author plus seventy years, or in the case of works made for hire[7], from seventy-five to ninety-five years from the year of its first publication,

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[1] U.S. CONST. art. I, § 6, cl. 8.

[2] *Morley v. Music Co. v. Café Continental, Inc.,* 777 F.Supp. 1579, 1582 (S.D. Fla. 1991) .

[3] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651 (2002).

[4] 17 U.S.C. §302(a) (2003).

[5] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17. U.S.C. §§108, 203, 301-304).

[6] Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act,* 30 U. MEM. L. REV. 363, 364 (2000).

[7] 17 U.S.C. §101 (2003). According to the definition, a work made for hire is "a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned for use as a contribution to a collective work."

or a term of 120 years from the year of its creation, whichever expires first.[8] The Act also extends the term of protection retroactively—to works existing under copyright, extending their term to a maximum of ninety-five years.[9] Therefore, numerous works that would otherwise have entered the public domain are now protected for an additional twenty years. The end result of the CTEA is that no copyrighted work will enter the public domain until January 1, 2019. Therefore, for the next sixteen years, not a single published U.S. copyrighted work will enter the public domain.

This Note argues that the CTEA is an improper exercise of congressional power under the Copyright Clause and a violation of the First Amendment, contrary to the U.S. Supreme Court's 2003 decision in *Eldred v. Ashcroft*.[10] Part II addresses the relevant history of copyright legislation in the United States, as well as the provisions and purposes of, and arguments for and against, the CTEA. Part III addresses the textual limitations of the Copyright Clause. Additionally, Part III also discusses the United States Supreme Court's arguments and rationales in *Eldred v. Ashcroft*. Part IV addresses the district and circuit court decisions in *Eldred v. Reno*[11] and *Eldred vs. Ashcroft*[12] respectively, particularly focusing on the constitutionality of the CTEA. Part IV analyzes the First Amendment challenge to the CTEA, term extensions and United States Supreme Court's 2003 decision in *Eldred v. Ashcroft.*

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[8] 17 U.S.C. §§302(a), 304(a), 304(b) (2003). §304(a) deals with works in their first term of 1/1/78. §304(b) deals with works in their second term of 1/1/78.

[9] *Id.*

[10] U.S. CONST. art. I, §8, cl. 8. This clause is commonly referred to as the Intellectual Property Clause, the Patent Clause, or the Copyright Clause, depending on the context in which it is used. However, this is misleading because the clause contains "no reference to 'property' itself (or to copyrights or patents)." Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* 129 (1967).

[11] *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999).

[12] *Eldred v. Ashcroft*, 255 F. 3d 849 (D.C. Cir. 2001).

PART II.

BACKGROUND

A. Historical Background

A brief review of the existence of copyright protection and what it entails is necessary to understand the application of the CTEA.

A copyright grants the copyright owners a number of exclusive rights that are modified by certain exceptions as provided in the Copyright Act of 1976.[13] A copyright holder has the exclusive rights of reproducing the work, preparing derivative works, distributing copies, performing the work publicly and displaying the work publicly.[14] To qualify for this protection, a work must satisfy three requirements: originality, work of authorship and fixation. The originality requirement mandates first that the work be an independent creation, meaning that it cannot have been copied.[15] Further, to satisfy the originality requirement, a work must have a "modicum of creativity."[16] The fixation requirement says that the original work must be fixed in a tangible medium of expression.[17] Finally, the work must be a qualifying work of authorship.[18]

A brief review of the history of copyright protection in the United States is also necessary in order to fully understand the provisions of the CTEA.

After the United States gained independence, most of the states passed copyright laws that contained complex and conflicting formal requirements. Problems with applying conflicting

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[13] 17 U.S.C. §106 (2003).

[14] *Id.*

[15] 17 U.S.C §101 (2003).

[16] Feis*t Publications, Inc. v. Rural Television Service Co.,* 499 U.S. 340, 345 (1991) (stating that "even a slight amount will suffice").

[17] 17 U.S.C. §102(a) (2003).

[18] *Id.*

state laws led to a general consensus that a national law was necessary, and the Constitution granted explicit power to the federal government to create copyright laws. The Act of 1790 was the first United States Copyright Act to create a national system of copyright protection.

The Act measured copyright from an event other than the author's life.[19] The copyright protection set forth in the 1790 Act was derived from the 1710 English Statute of Anne[20] and provided for an initial copyright term of fourteen years, with a possible renewal period of fourteen years.[21] The Act provided for a two-term system of copyright duration, which would serve as a model for subsequent copyright legislation.[22] If the author died during the initial copyright term, the work fell into the public domain at the expiration of that term.[23] Also, if the author lived until the renewal term, but failed to renew, then the work fell into the public domain as well.[24] The 1790 Act was entitled "an Act for the encouragement of learning," and gave an author "the sole right and liberty of printing, reprinting, publishing and vending" his "map chart, book or books" for the duration of the copyright term.[25] In 1831, Congress extended the initial copyright period to twenty-eight years, but left the renewal period at fourteen years.[26] The purpose of the extension in the 1831 Act was "chiefly to enlarge the period for the enjoyment of

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[19] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 655 n.20 (2002).

[20] Haggerty, *supra* note 3, at 655.

[21] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 655 n.23 (2002).

[22] William F. Patry, *The Copyright Term Extension Act of 1995; Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L. J. 661, 669 (1996).

[23] *Id*.

[24] Patry, *supra* note 22, at 669.

[25] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 655 n.28 (2002).

[26] *Id*. at 656.

copyright, and thereby to place authors in this country more nearly upon an equality with authors in other countries."[27] The two-term structure of the initial period and renewal period provided benefits to the author by permitting renegotiation after a work had been marketed and to the general public by allowing works that are not profitable to enter the public domain at the end of the twenty-eight year period.[28] The Act also eliminated the author's ability to make assignments of the entire renewal rights concurrently with assignment of the initial term, and thus provided security for both the author and for the families of the author who died during the initial term by granting the renewal right to the surviving spouse or children.[29]

The next important change in copyright law occurred with the passage of the 1909 Copyright Act. Many authors complained to Congress that the existing term of protection was inadequate because the authors were outliving the protection, thereby denying them the proper fruits of their labor.[30] Congress reacted to these complaints by extending the renewal period to twenty-eight years, making protection possible for a total of fifty-six years. Many authors argued for the adoption of a term equal to the life of the author plus fifty years.[31] However, Congress refused to abandon the two-term system in part because of the belief that works with little commercial value should pass into the public domain at the end of the initial period of

[27] 7 Cong. Deb. App. CXIX (1830) (statement of Rep. William Ellsworth).

[28] William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 916 (1997).

[29] Patry, *supra* note 28, at 917-18.

[30] Jenny L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?,* 18 HASTINGS COMM. & ENT. L.J. 945, 957 (1996).

[31] *See Arguments on S. 6330 and H.R. 19, 853, Before the Comms. on Patents,* 55th Cong., 1st Sess. 116-21 (1906) (statement on Samuel Clemmons, (a/k/a Mark Twain), arguing that the term of protection was not long enough and advocated adopting a term of life plus 50 years, which was the standard in many countries).

protection, thereby stimulating further creativity.[32] Furthermore, only profitable works would warrant an additional period of protection and be worth filing for a renewal term.[33]

With extraordinary developments in technology and communications, the 1909 Copyright Act became inadequate for the needs of modern society.[34] After twenty years of congressional research, the 1976 Act was created.[35] This Act made the most sweeping changes in copyright law since the ratification of the Constitution more than 200 years earlier and formed the foundation for current copyright law.[36] The Act eliminated the two-term structure of fixed term and renewal term.[37] Instead of having the two-term structure, the 1976 Act established a single term for all copyrights created after January 1, 1978.[38] The term was the life of the author plus seventy years.[39] Works published or registered prior to January 1, 1978 were protected for a maximum of seventy-five years from the date of first publication or a hundred years from the date of creation, whichever was less.[40] This was accomplished by setting the renewal term of pre-1978 works at forty-seven years, giving them a total of seventy-five years of protection.[41] In addition, the Act provided a term of ninety-five years from first publication or a hundred and

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[32] See H.R. Rep. No. 60-2222, at 14 (1909); S. Rep. No. 60-1108, at 14 (1909).

[33] *Id.*

[34] See S. Rep. No. 94-473, at 47 (1975); H.R. Rep. No. 94-1476, at 47 (1976).

[35] Dixon, *supra* note 30, at 959.

[36] *See generally* Patry, *supra* note 22, at 671-88; Dixon, *supra* note 30, at 958-63.

[37] Haggerty, *supra* note 3, at 657.

[38] 17 U.S.C. §302 (2003).

[39] 17 U.S.C. §302(a) (2003).

[40] Haggerty, *supra* note 3, at 657-58.

[41] *Id.* at 658.

twenty years from creation, whichever was shorter, for anonymous works, pseudonymous works and works for hire.[42]

The shift from the two-term structure to a term of life plus fifty years was based on three rationales. First, the renewal system had proven difficult for authors: it was unclear and highly technical, resulting in both a substantial burden and expense to the author.[43] Second, increased life expectancy in the United States made shorter terms unable "to insure an author and his dependents the fair economic benefits from his works."[44] Finally, and most significantly, it became necessary for the United States to join the Berne Convention, the oldest international copyright agreement in existence.[45] The primary goal of the Berne Convention, which was established in 1909, is uniform international copyright protection.[46] The aim of the Convention was for a member country to provide the same protection for a foreign author as it would to one of its own authors.[47] In order to partake in the Berne Convention, a country was required to provide a minimum term of copyright protection of life of the author plus fifty years.[48]

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[42] 17 U.S.C. §302(c) (2003).

[43] 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright*, §9.02 (1995).

[44] H.R. Rep. No. 94-1476, at 134 (1976).

[45] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at* Paris, July 24, 1971, 25 U.N.T.S. 221 [hereinafter The Berne Convention], *reprinted in* PAUL GOLDSTEIN, INTERNATIONAL LEGAL MATERIALS ON INTELLECTUAL PROPERTY 100 (2000).

[46] Anne Moebes*, Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 302-03 (1992).

[47] Moebes, *supra* note 46, at 303.

[48] The Berne Convention, *supra* note 45, at Art. VII (1).

B. Purpose of Copyright Law

A textual analysis of the Copyright Clause of the United States Constitution provides insight as to how it should be interpreted.[49] The clause can be broken down into two sections: (1) "to promote the Progress of Science and useful Arts," and (2) "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[50]

The first section is known as the preamble, and it explicitly sets out the legislative purpose for the power granted. According to the preamble, the granting of rights is motivated by the goal of public benefit rather then rewarding the author or inventor.[51] "If the preamble specifies that granting of rights be driven by the goal of benefiting the public, then this section of the Clause could be read to bar Congress from granting 'exclusive rights' that would be harmful to the public good."[52]

Section two of the clause states the means by which the promotion of progress may be achieved. This clause reveals the Framers' intentions for promoting progress—to secure a limited monopoly for the author or inventor.[53] "The phrase 'by securing for limited times' could be read as a limitation on congressional power to grant copyright protection."[54] By limiting the protection, the Framers wanted to ensure that the public would benefit from the works placed in

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[49] Haggerty, *supra* note 3, at 663.

[50] *Id.* at 663; *see also* U.S. CONST. art. 1, §8, cl. 8.

[51] Haggerty, *supra* note 3, at 664.

[52] *Id.*

[53] *Id.*

[54] Haggerty, *supra* note 3, at 664.

the public domain.[55] "Congress has broad discretion in deciding the protection period; however, it is for the courts to decide whether this discretion has been abused."[56]

C. Sonny Bono Copyright Term Extension Act

One could argue that Congress' discretion has been abused with the signing of the Sonny Bono Copyright Term Extension Act (CTEA) into law. On October 27, 1998, President Clinton signed the CTEA.[57] The CTEA amended the 1976 Act to provide an additional twenty years for all works copyrighted in the United States.[58] The CTEA has four basic provisions that amend various sections of the 1976 Copyright Act.[59] The first provision deals with term extensions, the second alters transfer rights, the third creates a new infringement exception and the fourth addresses division of fees.[60]

CTEA applies both prospectively—applying to all future copyrights and retroactively—applying to previously granted copyrights. All works created after January 1, 1978 remain protected for the life of the author plus seventy years.[61] The term of anonymous works, pseudonymous works and "works made for hire" were extended for ninety-five years from first publication or one hundred and twenty years from creation.[62] The Act also grants a

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[55] *Id.*

[56] *Id.*

[57] Copyrights – Term Extension and Music Licensing Exemption, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended 17 U.S.C. §§ 108, 203, 301-04 (2003)).

[58] *Id.*

[59] Gifford, *supra* note 6, at 378.

[60] *Id.*

[61] 17 U.S.C. §302(a) (2003).

[62] Haggerty, *supra* note 3, at 659.

term of ninety-five years from the date the copyright was originally secured for copyrights that were in their renewal term at the time the Act became effective.[63]

There are numerous arguments for the CTEA. Passage of the Act is based on four rationales. First of all, proponents believed that the United States' copyright term should be harmonized with the European Union's copyright term, which is the life of the author plus seventy years.[64] The European Council Directive (EC Directive) contains a provision known as the "rule of the shorter term," mandating that member states recognize copyrights in foreign works for only as long as the work would be protected in its own country, or the European Community term, whichever is shorter.[65] Proponents of the Act argue that without passage of CTEA, American authors would receive twenty years less protection in Europe, therefore costing American authors vast amounts of revenue.[66]

Secondly, CTEA would protect the United States' favorable trade balance of intellectual property.[67] Because a large percentage of the nation's intellectual property exports is to Europe, the United States must conform to the copyright term mandated by the European Community to maintain a dominant position in the global intellectual property market.[68] Congress viewed the

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[63] Haggerty, *supra* note 3, at 659.

[64] See Council Directive 93/98, art. 1, 1993 O.J, (L 290) 9 (harmonizing the term of copyright protection and certain related rights), *reprinted in* SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS 29-35 (A. Booy & Horton eds., 1994).

[65] *Id* at art. 7(1).

[66] See 141 Cong. Rec. S3390-92 (daily ed. Mar. 2, 1995) (statement of Sen. Orrin Hatch); 141 Cong. Rec. E379 (daily ed. Feb. 16, 1995) (statement of Rep. Carlos Moorhead).

[67] Haggerty, *supra* note 3, at 660.

[68] Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 330-31 (1996).

potential loss of twenty years of income, at a time when the United States was at the height of the world intellectual property market, as particularly detrimental.[69]

Third, advocates believed that "copyright terms should be long enough to protect the author and two succeeding generations of heirs."[70] As life expectancy increases, the children and grandchildren of authors will outlive the term consisting of life of the author plus fifty years.[71] Further, recent technological advances have extended the commercial longevity of works.[72] This includes digital restoration programs, digital video recordings (DVDs) and the availability of equipment that can make sound recordings and videotapes. Therefore, the amount of time new works may be exploited is longer.[73] Authors assert that allowing works to fall into the public domain when their use is still commercially viable causes great hardship to themselves and their families.[74]

Fourth, others claim that a longer term of protection would serve as greater incentive for authors to create more works.[75] They argue that if the grant of a limited monopoly was the

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[69] Lavigne, *supra* note 68, at 331.

[70] *Id.* See, e.g. Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 212 (1995) (statement of Bruce A. Lehman, Assistant Sec'y of Commerce and Comm'r of Patents and Trademarks), *quoted in* Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act 0f 1998*, 70 U. CIN. L. REV. 651 n.64 (2002).

[71] Haggerty, *supra* note 3, at 661.

[72] Orrin Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium,* 59 U. PITT. L. REV. 719, 733-34 (1998).

[73] Hatch, *supra* note 72, at 733-34.

[74] Hearings, supra note 70, at 272-73 (statement of Mary Ellin Barrett, daughter of Irving Berlin).

[75] Hatch, *supra* note 72, at 734-37.

incentive to create, than expansion of the monopoly for a longer period of time would make creation more appealing for the author and therefore increase creativity.[76]

Those who oppose the CTEA disagree with each of the above arguments favoring copyright extension. First, opponents argue that harmonization of international laws is an unattainable goal.[77] In fact, they argue that CTEA creates discord. For example, the CTEA increases the copyright period for anonymous works, pseudonymous works and "works for hire" to the lesser of ninety-five years from its first publication or one hundred and twenty years from creation; whereas, the European Union now offers these authors only seventy years of protection.[78] Also, the CTEA does not require reciprocity.[79] For example, a Japanese author would enjoy a term of life of the author plus seventy years in the United States, while an American author would only enjoy a term of life of the author plus fifty years in Japan.[80] Furthermore, Europe follows the natural rights philosophy of copyright, whereas the United States does not recognize an author's natural right in his or her works after first publication.[81] Finally, Europe does not recognize the "fair use" doctrine that exists in the United States.[82]

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[76] Hatch, *supra* note 72, at 734-37.

[77] Lavigne, *supra* note 68, at 333-34.

[78] *Id.* at 335.

[79] Patry, *supra* note 22, at 693.

[80] *Id.* at 693-94.

[81] The United States has recognized a limited concept of moral rights. See 17 U.S.C. §106(A) (2003).

[82] Lavigne, *supra* note 68, at 337-38; *see also* 17 U.S.C. § 107 (2003). The Fair Use Doctrine allows for an author to use a limited amount of copyrighted material without permission from the original author under some circumstances. *Twin Peaks Prods., Inc. v. Publ'ns Int'l Ltd.,* 996 F.2d 1366, 1373 (2d Cir. 1993).

Second, some argue that the "balance of trade argument is nothing more then rhetoric."[83] The favorable balance of trade the United States has obtained was achieved by adhering to the system of copyright enumerated in the Constitution.[84] "Furthermore, opponents of the CTEA argue that the United States' dominance in the world market is because of the quality of its current products of authorship, all which were possible because of a rich public domain."[85]

Third, they argue that the idea that copyright was intended to support that author and two succeeding generations is inaccurate. "The protection of two generations of heirs has never been a goal of the United States copyright law."[86] The true goal of the copyright law is "to promote the progress of science and useful arts by securing a monetary reward sufficient, but no greater then necessary, to encourage authors to create works for the public good."[87] Further, opponents claim that the increase in life expectancies argument is nonsense.[88] With an increase in life expectancies, the current law is adequate because it protects copyrights for life of the author plus fifty years.[89] Therefore, as life expectancies increase, the author will live longer, therefore allowing for longer terms of protection.[90]

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[83] Lavigne, *supra* note 68, at 343-44.

[84] *Id.*

[85] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act 0f 1998*, 70 U. CIN. L. REV. 651, 655 n.86 (2002).

[86] *Id.* at 347.

[87] Lavigne, *supra* note 68, at 348.

[88] *Id.*

[89] Hearings on H.R. 989, *supra* note 70, at 272-73 (statement of Mary Ellin Barrett, daughter of Irving Berlin).

[90] *Id.*

Fourth, opponents contend that the incentive for creativity argument is fundamentally flawed.[91] "There is no way that the twenty-year extension for works already in existence can serve as an incentive to create something that has already been created."[92] Furthermore, there is no evidence that suggests the extension would encourage authors to produce a work they would not have produced had there not been a twenty-year extension.[93] "Assuming that there is a marginal increase in the incentive to create works, this increase is clearly outweighed by the harm to the public 'in the form of higher royalties and impoverished public domain.'"[94]

PART III.

ELDRED V. ASHCROFT

A. District Court's Opinion

In January 1999, Eric Eldred, creator of Eldritch Press, an Internet provider of public domain works, filed a constitutional challenge to the CTEA.[95] Eldred alleged that the statute violated his First Amendment rights, and that the extension of the copyright protection term exceeded Congress's enumerated powers under the Copyright Clause of the Constitution.[96] Eldred also alleged that the constitutional purpose of "promoting the progress of science and useful arts" was not furthered by CTEA's retroactive extension of copyright in existing works, particularly for deceased authors for whom the increased incentive to create would be

[91] Haggerty, *supra* note 3, at 663.

[92] Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act 0f 1998*, 70 U. CIN. L. REV. 651, 663 n.93 (2002).

[93] *Id.*

[94] *Id*.

[95] *Eldred v. Reno*, 74 F.Supp. 2d 1 (D.D.C. 1999).

[96] *Eldred*, 74 F.Supp. 2d at 2.

irrelevant.[97] Furthermore, Eldred argued that the CTEA violated the "public trust doctrine," a theory traditionally applied in cases of transfer of public lands to private ownership.[98] The court rejected this argument and concluded that the public trust doctrine was not relevant because it applied only to navigable waters, not copyrights. [99]

The United States District Court for District of Columbia rejected Eldred's arguments and held that the CTEA was constitutional. The court first held the First Amendment claim was not supported by case law.[100] It stated that the First Amendment does not provide a right to use the copyrighted work of others.[101] The court then held that retrospective extension of copyright protection did not violate the "limited times" provision of Copyright Act because Congress has the right to define the scope of the copyright period and can enact laws retrospectively.[102] The court finally held that CTEA did not violate the "to authors" language of the Copyright Clause because an author may agree in advance to transfer future benefits that ultimately my be conferred by Congress.[103]

B. United States Court of Appeal's Opinion

Upon appeal, the United States Court of Appeals for D.C. held that the CTEA was a constitutional exercise of Congress' copyright power.[104] The appellate court stated that the

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[97] *Eldred,* 74 F.Supp. 2d at 3.

[98] *Id.*

[99] *Id.* at 4.

[100] *Id.* at 3.

[101] *Id.* The court cited *United Video v. FCC*, 890 F.2d 1173, 1191 (C.A.D.C. Cir. 1989) for the proposition that there are no First Amendment rights to use the copyrighted works of others.

[102] *Id.*

[103] *Id.*

[104] *Eldred v. Reno,* 239 F.3d 372, 373 (C.A.D.C. 2001).

Constitution requires that the copyright statute Congress enacts be designed to do three things: promote learning, because the clause so states; protect the public domain, because copyright is available to authors only for a limited time; and facilitate of public access to works.[105]

The court relied on the approach used in *United Video*[106] that copyrights are categorically immune from challenges under the First Amendment.[107] The court stated that there is no fundamental right to commercially use the copyrighted works of others.[108] The court also rejected the petitioner's plea for interpretation of the "limited Times" prescription, not discretely, but with a view to the "preambular statement of purpose" contained in the Copyright Clause: "To promote the Progress of Science."[109] The court found nothing in the Constitution or its history to suggest that "a term of years for a copyright is not a 'limited time' if it may later be extended for another 'limited time.'"[110]

Thus, the *Eldred* case "constitutes judicial approval of the legislative moratorium of the constitutional mandate that copyright protect the public domain, a policy in partial fulfillment of the fact that copyright, as the United States Supreme Court has repeatedly stated, is primarily to benefit the public, only secondarily to benefit the author (as copyright holder)."[111]

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[105] Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, INTELL. PROP. L. 223, 221 (2001).

[106] *United Video v. FCC*, 890 F.2d 1173, 1191 (C.A.D.C. Cir. 1989).

[107] *Eldred*, 239 F.3d at 375.

[108] *Id.* at 376.

[109] *Id*. at 377-78.

[110] *Id.* at 379.

[111] Patterson, *supra* note 105, at 224; see also *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 432 (1984).

Although Judge David B. Sentelle concurred with much of the majority opinion, he dissented from the majority's holding that the twenty-year extension on copyright protection for existing works was constitutional.[112] Judge Sentelle focused on the breadth of the enumerated powers granted to Congress by the Copyright Clause.[113] The dissent analogized the United States Supreme Court's opinion in *United States v. Lopez*[114] to the present case. In *Lopez*, the court recognized that "congressional power under the Commerce Clause…is subject to outer limits."[115] The dissent found that this concept of "outer limits" to enumerated powers applies to all such powers, including the Copyright Clause.[116] Judge Sentelle concluded that extending existing copyrights is not promoting the progress of science and useful arts, nor is it securing exclusivity for a limited time.[117] Therefore, Judge Sentelle would have held the CTEA unconstitutional because the retrospective term extensions are beyond the outer limits of Congress' enumerated powers. [118]

C. United States Supreme Court's Opinion

On October 9, 2002, the United States Supreme Court heard arguments in *Eldred v. Ashcroft*. The Court addressed two issues: whether the Court of Appeals erred in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing

[112] *Eldred*, 239 F.3d at 380. (Sentelle, J., dissenting).

[113] *Id*. at 380-81.

[114] 514 U.S. 549 (1995) (considering the validity of the Gun-Free School Zones Act).

[115] *Lopez,* 514 U.S. at 556-57.

[116] *Eldred*, 239 F.3d at 381 (Sentelle, J., dissenting).

[117] *Id.* at 381-82.

[118] *Id.* at 381.

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

The Court affirmed the judgment of the Court of Appeals. The Court noted that history and precedent suggest that extending the duration of existing copyrights is not beyond Congress' authority under the Copyright Clause.[119] The Court also held that "though the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment,' because Congress has not altered the traditional contours of copyright protection,"[120] the First Amendment challenge is flawed.

The plaintiffs argued "extending existing copyrights would not promote new creativity, and a duration that is virtually perpetual in effect violates the meaning of 'limited times.'"[121] Justice Ginsburg said that history refuted the plaintiff's argument. She noted if one went back two centuries, every time Congress extended the duration of copyrights, it granted the new terms to existing copyrights as well as new works, thus reflecting a Congressional judgment that all copyright holders should be "governed evenhandedly under the same regime."[122]

Dissenter Justice Breyer argued, "the economic effect of this 20-year extension, the longest blanket extension since the nation's founding, is to make the copyright term not limited, but virtually perpetual."[123] Justice Breyer also stated that the CTEA's practical effect is not to promote, but to inhibit the "progress of Science."[124] Additionally, he argued the effect of the

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[119] *Eldred v. Ashcroft,* 53 U.S. 186 (2003).

[120] *Id.*

[121] Linda Greenhouse, *20-Year Extensions of Existing Copyrights Is Upheld*, N.Y. TIMES, Jan. 16, 2003, at 24.

[122] *Id.*

[123] *Eldred,* 53 U.S. at 97.

[124] *Id.*

extension "is to grant the extended term not to authors, but to their heirs, estates or corporate successors."[125]

Dissenter Justice Stevens stated that Congress does not have the power to extend preexisting federal protections retroactively. He argued that Congress was failing to protect the public interest of free access to products of inventive and creative nature. He said "by virtually ignoring the central purpose of the Copyright Patent Clause, the Court has quitclaimed to Congress its principal responsibility in this area of the law."[126]

PART IV.

ANALYSIS

A. First Amendment Challenge to the CTEA

The First Amendment provides that "Congress shall make no law…abridging the freedom of speech…"[127] Without doubt, copyright law's potential for burdening speech has been recognized in United States case law and scholarly commentary.[128] "However, courts have rarely imposed First Amendment principles because they presume that these principles are adequately protected by limitations imposed on copyright owners' rights."[129]

In the district court decision of *Eldred*, the court relied on Melville Nimmer's "definitional balance" in support of copyright's "categorical immunity."[130] In copyright law,

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[125] Greenhouse, s*upra* note 121, at A25.

[126] *Eldred,* 537 U.S. 186.

[127] U.S. CONST. amend I.

[128] Haggerty, *supra* note 3, at 682-83.

[129] *Id.* at 681-82.

[130] *Eldred*, 239 F.3d at 375.

Nimmer argued that the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy, the doctrine of fair use and copyright's limited term.[131] Professor Netanel points out that Nimmer's article was written over thirty years ago and has been rendered moot by fundamental changes in copyright and First Amendment doctrine.[132] Therefore, the court's continued reliance upon Nimmer's argument is misconceived.

Copyright should be subject to First Amendment scrutiny.[133] This proposition finds support in the recent case of *Universal City Studios, Inc. v. Corley,*[134] in which the Second Circuit upheld §1201(a)(2) of the Copyright Act only after clearly subjecting that provision to heightened First Amendment scrutiny, following the standard announced in Turner I.[135] The relevant standard for First Amendment scrutiny in this case is the content-neutral standard. This is because in enacting copyright law and enforcing copyright owner's rights, the government does not take a particular viewpoint of the restricted expression.[136] Therefore, the CTEA is a content-neutral regulation of speech.

A content-neutral regulation on speech must advance an "important governmental interest."[137] The Constitution expressly empowers Congress to grant exclusive rights in writings for limited times in order "to promote the Progress of Science."[138] The Supreme Court has

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[131] Haggerty, *supra* note 3, at 682.

[132] Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

[133] *Id*. at 37-47.

[134] *Universal City Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

[135] *Id.* at 453-54.

[136] Netanel, *supra* note 132, at 49.

[137] See generally *Turner II*, 520 U.S. 180 (1997).

[138] U.S. CONST. art. I, § 8, cl. 8.

consistently construed this mandate of copyright law to mean that "creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[139] Therefore, in order to serve the fundamental purpose of copyright law, "to promote the Progress of Science," Congress must strike a balance between the "exclusive rights" of copyright and the public domain without extending the copyright terms.[140]

B. Term Extensions

1. Retroactive Term Extensions

The retroactive term extensions limit and restrict the public domain. Prior to CTEA, works that would have entered the public domain will now remain protected for an additional twenty years, and fewer works will be available for use in creating new works. Therefore, the CTEA fails to "promote the progress of Science," because it decreases the sources that others could use to produce new works and thereby promote progress. Consequently, the retroactive portions of the CTEA do not advance an important governmental interest.

In the district court's decision on *Eldred*, the Government advanced four justifications for the CTEA.[141] However, the only credible argument that the Government made was that CTEA harmonizes United States copyright law with European copyright law. This argument is erroneous because many commentators have demonstrated that the CTEA does not harmonize United States copyright law with the European Union copyright laws.[142] Furthermore, even if

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[139] *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975).

[140] *See generally* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press,* 17 UCLA L. REV. 1180 (1970).

[141] *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001); see also Haggerty, *supra* note 3, at 687.

[142] Hearings on H.R. 998, *supra* note 70, at 290.

the court found that the CTEA did harmonize international copyright law, there is no support for the proposition that harmonizing international law is an "important governmental interest." Finally, CTEA is not narrowly tailored to serve the goal of harmonization.

The retroactive portion of the CTEA provides financial incentives for private holders, which does not benefit the public as a whole. "The CTEA results in higher prices for consumers because of transfer payment demands by copyright holders."[143] The retroactive portion of the CTEA extends the term of copyright monopoly without creating any new incentive to produce and without benefiting the public. This extension can provide no incentive for authors to create because the works have already been created. Moreover, works that would have entered the public domain are further delayed for an additional twenty years, which leads to fewer works entering the public domain. Additionally, the public will not enjoy new works because current writers will be denied free access to materials that they could use to produce new works or expand on existing works.

By extending the copyright term, the retroactive portion of the CTEA creates a copyright monopoly without creating a new incentive to produce or a public benefit. "Instead, the CTEA grants an additional term to something already in existence, which is directly contrary to the Copyright Clause and the Supreme Court copyright jurisprudence."[144] For two centuries, the Supreme Court has proven both functionally and textually that the Copyright Clause limits what Congress can accomplish and that the "promotion of progress" phrase helps enhance the public domain.[145] To be constitutional, the CTEA must "promote" the future creation of copyrightable

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[143] Haggerty, *supra* note 3, at 678.

[144] Haggerty, *supra* note 3, at 679.

[145] *Id.*

works, and the retroactive term extension has no rational means for enhancing the public domain, thereby making it unconstitutional.

2. Prospective Term Extensions

Contrary retroactive term extensions, the prospective term extensions could increase incentives for authors to create new works. However, the Government must show that this twenty-year increase in term protection will advance an important governmental interest without "burdening substantially more speech then is necessary to further those interests."[146] Thus, the benefit of the incentive must outweigh the restriction on speech imposed by the increased copyright term.

The incentives produced by the prospective term extensions are too speculative to justify the significant burdens on speech. Simply, the prospective term extensions do not "promote the progress of Science"[147] in a manner consistent with the requirements of the First Amendment.

C. United States Supreme Court's opinion regarding *Eldred v. Ashcroft*

The Supreme Court's decision to uphold the twenty-year extension on the copyright term is flawed. The Court rejected the petitioner's arguments that (1) the copyright extension was a congressional attempt to evade or override the "limited times" constraint, (2) Congress could not extend an existing copyright absent new consideration from the author, and (3) the extensions should have been subject to heightened judicial review. The Court also rejected the argument that the CTEA violated the First Amendment.

First, the majority was erroneous by refusing to analyze whether Congress had acted in the public's best interest when extending the copyright term. The public's best interest includes having access to works and materials in the public domain, which ultimately enhances the

[146] *Turner II*, 520 U.S. at 189.

[147] U.S. CONST. art. I, § 8, cl. 8.

incentive to create new works. Once a work is in the public domain, it may be used without payment of royalties or restrictions on the use. Since almost every creative work is built on others, limiting stories, songs and images for an extended period of time eventually diminishes creativity and reduces free expression. The public domain serves as a wealth of creative material that may be reproduced, sampled, altered, or incorporated into works by artists, resulting in the creation of new and innovative works.

Furthermore, the rise in the Internet and increased technology makes the issue more important because works in the public domain are now easily accessible for millions to enjoy and incorporate into their own new works. Copyright protection is designed to give one access and public access to creative works is necessary in order to further the creation of new works. By having access to works in the public domain, it helps promote science and the development of knowledge. Copyrights exist only for "limited times", after which the work must be admitted into the public domain for all to freely use and enjoy. By extending the term, it is not "limited" and it prevents others from improving existing works.

Second, the Court was mistaken when it stated that copyright extension is an expressed exercise of Congress' power under the Copyright Clause. The Court stated that "CTEA is a rational enactment; and we are not at liberty to second-guess Congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."[148] This argument can be widely criticized. As early as 1867, courts recognized that the "power to pass copyright and patent laws is given not generally, but only as a means to this particular end 'to promote the progress of science and useful arts'…hence, it expressly appears that Congress is

[148] *Eldred,* 537 U.S. at 186.

not empowered by the Constitution to pass laws for the protection or benefit of authors and inventors, except as means of promoting the progress of 'science and useful arts.'"[149] Thus, the Court's upholding of the CTEA does not promote the "progress of science."

Despite the upholding of the CTEA, suggestions have been made to increase works and ideas in the public domain. Arthur Miller, a Harvard Law School professor who filed a brief at the Federal District Court level supporting the CTEA, suggested that Congress could consider a compulsory licensing system that would require copyright holders to let people use their work for a set price.[150] Other ideas include allowing copyrights to lapse on works unless owners make an effort to renew them so people can have access to material that has no commercial value after a short time.[151]

CONCLUSION

The CTEA has created numerous problems within copyright law. The CTEA fails to achieve the purpose of the Copyright Clause and it stands on unconstitutional grounds. At the very least, Congress must eliminate the retroactive extension of the Act for it to be constitutional. Additionally, Congress should provide some guidance as to the duration of "limited times" and refrain from extending the copyright term. As stated earlier, the continuous extension of the copyright term decreases the incentive to create due to limited works and resources in the public domain. Therefore, the intrusion on the public domain caused by the CTEA is not justified by the benefits that will be received by individual authors and large corporations.[152]

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[149] Dennis Harney, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno*, 27 DAYTON L. REV. 291, 299 (2002).

[150] Amy Harmon, *A Corporate Victory, But One That Raises Public Consciousness*, N.Y. TIMES, Jan. 16, 2003 at 24.

[151] *Id.*

[152] *Copyright Term Extension Act: Hearings on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. (1995).