

THE SUPREME COURT'S MICKEY MOUSE COPYRIGHT DECISION

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Recently decided by the Supreme Court is the case of *Eldred v. Ashcroft*,¹ which challenged the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act ("the CTEA").² In brief, the CTEA extended the duration of existing U.S. copyrights by an additional twenty years, just as many were otherwise about to expire. Some observers saw corporate copyright holders like the Walt Disney Company as beneficiaries (copyrights on the earliest Mickey Mouse cartoons would otherwise have begun expiring at the end of this year), and a group of citizens with interests in enlarging and preserving the public domain brought suit challenging the CTEA's constitutionality.

In the Supreme Court, Petitioners in *Eldred* contended that this Congressional extension of copyright terms, the eleventh in forty years, violates the Copyright Clause of the U.S. Constitution in at least three particulars and the First Amendment in at least two. Chief among their arguments was that the CTEA exceeds the limits of Congressional power under the Constitution, which provides that copyrights be for "limited" times.

The government and its many *amici*³ maintained, on the other hand, that the CTEA's copyright extension provisions represent a proper exercise of Congressional power, consistent with the Constitution and both legislative and judicial precedent. One *amicus* did not take sides substantively, but agreed with petitioners simply in urging the Supreme Court to clarify the law and the Constitutional limits on the power of Congress to extend copyright terms.⁴

I. A Brief History of the Copyright Act

Up until the Statute of Anne in 1710⁵, English copyright law gave a legal monopoly to publishers, not authors, for the works that they printed. Out of concern that American publishers might otherwise obtain the same kind of monopoly power, the framers of the U. S. Constitution designed the Copyright Clause to "prevent the formation of oppressive monopolies"⁶ by giving copyrights to authors, not publishers, and by limiting their duration. To this end, Article I, section 8, clause 8, of the U. S. Constitution empowers Congress in pertinent part "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ."⁷ The first U. S. copyright law, passed in 1790,⁸ limited the initial term of protection to 14 years, renewable for an additional 14, the same as the Statute of Anne. Since 1831, however, Congress has repeatedly extended the "limited Times" for which U.S. copyrights subsist. In 1831 it extended the initial term to 28 years, renewable for 14, for a total of 42 years of protection⁹; in 1909 it extended the renewal term to 28 years as well,

for a total of 56; and from 1962 to 1974 it extended the term incrementally nearly annually, reaching a maximum term of 70 years in 1976.¹⁰

In 1976, to conform more closely with international norms under the Berne Convention, Congress changed the methodology for computing copyright terms entirely, going to a "life plus" system for new works by individual authors and ensuring at least 75 years total protection for all other works, including those already published.¹¹ In 1998, the CTEA extended these terms by yet another twenty years, for a minimum of life plus 70 years for identifiable individual authors and to 95 years in most other cases.¹² In the sense that it extended the terms of subsisting copyrights, the CTEA applies both prospectively and retroactively.

II. A Brief History of the Eldred Litigation

In 1999, plaintiffs Eric Eldred and others¹³ sued in United States District Court for the District of Columbia for a declaration that the CTEA violates the text and spirit of the Copyright Clause, is inconsistent with the First Amendment, and violates the "public trust" doctrine,¹⁴ which in part prohibits redistributing public goods from broad public uses to restricted private benefit. After permitting plaintiffs to amend the complaint twice, Judge June Green on October 28, 1999, found the CTEA constitutional, granted judgment on the pleadings for the government, and denied Eldred's cross-motion for summary judgment. In her ruling,¹⁵ she found that (1) the First Amendment gives no right to use the copyrighted works of others; (2) the "limited Times" provision of the Copyright Clause is subject to the discretion of Congress; and (3) the public trust doctrine applies only to the context in which it originally arose, that of navigable waters.

Joined by several *amici curiae*,¹⁶ plaintiffs then appealed to the D. C. Circuit. First, they argued, the CTEA fails the intermediate scrutiny test required to protect freedom of expression under the First Amendment. Second, they said, the retroactive aspect of term extension violates the originality requirement of copyright by granting new monopolies to what are by then "unoriginal" works. Third, they argued, the CTEA violates both the preamble and the "limited times" requirement of the Copyright Clause because retroactive extensions do not promote the creation of new works and because a perpetual increase in terms is by definition not "limited."¹⁷

In a 2-1 decision by Judge Douglas Ginsburg, with Judge David Sentelle dissenting, the D. C. Circuit agreed with the government and upheld the District Court in its entirety.¹⁸ Relying on the Supreme Court's decision in *Harper*

& Row¹⁹ and its own decision in *United Video*,²⁰ the D.C. Circuit found that plaintiffs lacked any First Amendment right to exploit the copyrighted works of others; that if a work is sufficiently “original” to merit copyright protection in the first place, then it remains “original” for purposes of renewal; and that the introductory language of the Copyright Clause — “to promote the Progress of Science and useful Arts” — does not constitute a limit on Congressional power.

In dissent, Judge Sentelle agreed with Eldred and urged the court to hold instead that Congressional power under the Copyright Clause, like that under the Commerce Clause,²¹ is subject to “outer limits.” According to Judge Sentelle, the CTEA exceeds those limits because there is “no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection.”²²

Following denial of rehearing and denial of rehearing *en banc*, Eldred on October 11, 2001, petitioned the U. S. Supreme Court for *certiorari*. On February 19, 2002, the U. S. Supreme Court granted Eldred’s petition.

III. Arguments Before the Supreme Court

Petitioners’ brief before the Supreme Court made three main arguments. First, they argued that the CTEA’s blanket retroactive extension of existing copyrights violates both the purpose (“to promote the Progress of Science and the useful Arts”) and the means (“by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries”) set forth in the Copyright Clause. Second, they argued that both the CTEA’s retroactive and prospective extensions of copyright terms violate the First Amendment. Third, they argued that the prospective and retroactive extensions of the CTEA are inseverable, so that the Court should invalidate the CTEA in its entirety.²³ The many *amicus* briefs in support of Eldred’s position dealt primarily with issues particular to each *amicus*, from First Amendment arguments in favor of a larger public domain to libertarian arguments against government-conferred monopolies to economic arguments that the benefits from the CTEA’s copyright extension will likely not outweigh its costs.²⁴

IV. Supreme Court Decision

1. Majority Opinion

On January 15, 2003, in a 7-2 majority opinion by Justice Ruth Bader Ginsburg, the Supreme Court telegraphed its holding in its opening sentence: “This case concerns the authority the Constitution assigns to Congress to prescribe the duration of copyrights.”²⁵ The Constitution having assigned to Congress the authority to prescribe the duration of copyrights, then as a matter of federalism one might presume that the Court should be disinclined to interfere — and in fact it was. In each of four previous major copyright extension — 1831, 1909, 1976, and 1998 — the Court noted, Congress had extended copyright terms retroactively as well as prospec-

tively. So in placing existing and future copyrights in parity in the CTEA, the Court held, Congress acted within its Constitutional authority.²⁶

a. Constitutionally - Copyright Clause

Moving first to Eldred’s contention that the retroactive aspect of the CTEA violates the language of the Copyright Clause, the Court found that text, history, and precedent all confirm that the Copyright Clause empowers Congress to prescribe the same “limited Times” for copyright protection for all copyright holders, present and future.²⁷ The Court saw at the outset no reason to interpret the word “limited” in the Constitution to mean anything other than “confined within certain bounds,” “restrained,” or “circumscribed,” rather than “fixed” or “unalterable,” as Eldred’s position would suggest.²⁸ It then cited the unbroken practice of Congress of extending the term of patent and copyright protection and of applying extensions retroactively to then-existing patent or copyright terms.²⁹ In sum, the majority found that an extension of a copyright term for a limited time was in itself a “limited Time.”

Having satisfied itself “that the CTEA complies with the ‘limited Times’” prescription, the majority then turned to whether the CTEA is “a rational exercise” of the legislative power conferred upon Congress, and on this point the majority was significantly deferential to Congress.³⁰ In substance, the majority accepted record suggestions that the primary motive of Congress in enacting the CTEA was to bring U. S. copyright law into harmony with the European Union, which provides copyright protection for life plus 70 years.³¹ In addition, the Court found, Congress was motivated by demographic, economic, and technological changes, chief among them the extended life spans of authors, their children, and copyrighted works themselves, thanks to improved communications technology. On these grounds, the majority found, “the CTEA is a rational enactment” that “we are not at liberty to second-guess ...” even if it might otherwise seem foolish or ill advised.³²

The majority then rejected, one by one, Eldred’s arguments that the CTEA’s extension of copyright terms was in effect perpetual³³ and that Congress cannot extend existing copyright terms without extracting some new consideration from the author.³⁴ With respect to the former, however, the majority did little other than to assert a conclusion: “[the 1831, 1909, and 1976] Acts did not create perpetual copyrights, and neither does the CTEA.”³⁵ With respect to Eldred’s consideration argument, the majority rejected all three of Eldred’s subsidiary points.

First, the majority rejected Eldred’s argument that the CTEA violates the “originality” requirement of copyright by granting new monopolies to what are by then “unoriginal” works simply by observing that the *Feist* case on which Eldred relied for the definition of originality “did not touch on the duration of copyright protection.”³⁶ Second, the ma-

jority conceded Eldred's point that the Copyright Clause is both a grant and a limitation on Congressional power, but stressed that "it is generally for Congress, not the courts, to decide how best to pursue" the Clause's objectives of promoting the "Progress of Science."³⁷

Finally, the majority also found that it "can demur to petitioners' description" of the Copyright Clause as establishing a *quid pro quo* for copyright protection and yet still find that part of that *quid pro quo* is that an author (or the author's heirs or estate) will receive the benefit of any retroactive extensions while the copyright is till extant.³⁸ The majority distinguished both *Stiffel Co.*³⁹ and *Bonito Boat*⁴⁰, on which Eldred had relied, on the grounds that both involved the patent (not copyright) laws, that neither involved term extensions, and that patents and copyrights do not entail the same exchange: immediate disclosure is not the objective of the patent's grant, but merely the bargained for exchange; whereas for copyright holders, immediate disclosure is the grant's objective.⁴¹ Moreover, the majority noted, a patent prevents another from making full use of the patent's knowledge until the patent term expires, whereas a copyright permits such use.

b. Constitutionally - First Amendment

The majority then quickly rejected Eldred's arguments that the CTEA violates the First Amendment. First, the majority said, the close proximity in time of adopting both the First Amendment and the Copyright Clause indicates that Congress saw the two as compatible, not in conflict.⁴² Second, as the Court of Appeals had observed, the majority found that copyright law contains its own free speech protections: the distinction between ideas, which are not protectible, and particular expressions of ideas, which are; and the "fair use" exception to copyright, which permits qualified uses of copyrighted material even during the copyright term.⁴³

Third, the majority observed, the CTEA itself supplements free speech protection by permitting libraries and similar institutions to distribute copies of certain published works during the last twenty years of any copyright term and by exempting small businesses from having to pay performance royalties on music played from licensed facilities.⁴⁴ Finally, the majority discounted Eldred's reliance on the *Turner* case⁴⁵ by noting that *Turner* refused to force cable television operators to carry the signals of broadcast stations, whereas the CTEA "does not oblige anyone to reproduce another's speech against the carrier's will."⁴⁶

In sum, a solid 7-2 majority of the Supreme Court said, both the prospective and the retroactive aspects of the CTEA represent rational exercises by Congress of its Constitutional authority under the Copyright Clause.

2. Dissents

In separate dissents, reaching different conclusions

from different reasoning, Justices Stevens and Breyer found fault with both Congress and the majority. Based on his reading of precedent, Justice Stevens would invalidate only the retroactive aspect of the CTEA; Justice Breyer, on the basis of a cost-benefit analysis, would invalidate the CTEA in its entirety.

a. Justice Stevens

The reasoning of Justice Stevens is straightforward, if suspect, proceeding from the assumption that the Court's role in reviewing Congressional grants of "monopoly privileges to authors, inventors and their successors" is less limited than understood by the majority.⁴⁷ Starting from that premise, Justice Stevens observes that, in 1964, the Court held that a State "could not 'extend the life of a patent beyond its expiration date'."⁴⁸ In his view, the same reasons apply to Congress as to the states, and "[i]f Congress may not expand the scope of a patent monopoly, it also may not extend the life of a copyright beyond its expiration date."⁴⁹

First, Justice Stevens says, both the Constitution itself and nearly two centuries of Supreme Court precedent demonstrate that the Patent and Copyright Clause, as applied to patents, has two and only two purposes: to encourage new inventions and to add knowledge to the public domain.⁵⁰ "Because those twin purposes provide the only avenue for congressional action under the Copyright/Patent Clause of the Constitution," he continues, "any other action is manifestly unconstitutional."⁵¹

Second, Justice Stevens cites three cases⁵² for the proposition that these twin purposes apply to copyrights as well: "the overriding purpose of providing a reward for authors' creative activity is to motivate that activity and 'to allow the public access to the products of their genius after the limited period of exclusive control has expired.' [citing *Sony*]"⁵³ *Ex post facto* extensions of copyright terms, such as those implemented by the CTEA, he concludes, "result in a gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest" and "do not even arguably serve either of the purposes of the Copyright/Patent Clause."⁵⁴ Therefore, to the extent that the CTEA "purport[s] to extend the life of unexpired copyrights, it is invalid."⁵⁵

The remainder of his dissent Justice Stevens devotes to rejecting the government's four arguments that retroactive extension of copyright is Constitutional: (1) that the 1790 Copyright Act applied to works already produced, (2) that later Congresses have repeatedly retroactively extended both patents and copyrights, (3) that retroactive extensions promote the useful arts by providing an incentive to restore old movies, and (4) that as a matter of equity, term extensions should be retroactive as well as prospective.

Justice Stevens rejects the first argument after reviewing the history of the first U. S. patent and copyright

statutes, both adopted in 1790. The first copyright statute, says Justice Stevens, did not extend existing state or common law copyrights; it created an entirely new federal statutory right that in some cases may have increased pre-existing protections but in other cases reduced them.⁵⁶ As such, “the question presented by this case does not even implicate the 1790 Act, for that act created, rather than extended, copyright protection.”⁵⁷

Justice Stevens dismisses the government’s reliance on previous Congressional patent term extensions, some of them after the patents had already expired, on the grounds that those extensions were “patently unconstitutional” and therefore undermine rather than support the majority’s “reliance on this history as ‘significant.’”⁵⁸ Previous retroactive extensions of expired copyrights, although relevant, he finds, are not conclusive, especially since the Court has not previously passed upon their Constitutionality.⁵⁹ The 1831 copyright term extension, in particular, he finds, was flawed because its legislative history indicates that it was based on an assumption — that copyrights, resulting from the sweat of the brow of the authors, should be perpetual — that the Court declared improper just three years later.⁶⁰

Moving to the government’s next argument, Justice Stevens finds at least three reasons why providing an incentive to restore old movies does not justify the CTEA. First, he says, such restoration does not even arguably promote the creation of new works by authors or inventors; second, if valid, this justification would apply equally strongly to works whose copyrights have already expired, which no one seriously proposes doing; and third, the remedy offered -- a blanket extension of all copyrights -- simply bears no relationship to the alleged harm.⁶¹ Finally, Justice Stevens notes, rather than arguing for extending copyrights retroactively as well as prospectively, equity argues more strongly in favor of not altering the pre-established copyright bargain between authors and the public in the first place. In sum, he would invalidate the retroactive provisions of the CTEA.

b. Justice Breyer

For his part, Justice Breyer looks at the CTEA from both an economic and a legal viewpoint. Its economic effect, he says, “is to make the copyright term not limited, but virtually perpetual,” and its “primary legal effect is to grant the extended term not to authors,” as the Copyright Clause specifies, “but to their heirs, estates, or corporate successors.”⁶² Most important, he finds, “its practical effect is not to promote, but to inhibit, the progress of ‘Science’ — by which word the Framers meant learning or knowledge.”⁶³ And because legal distinctions, in Justice Breyer’s opinion, are often matters of degree, he would find that the CTEA’s failings of degree are so serious that they render it unconstitutional.⁶⁴

First, because the Constitution is a single document and both the Copyright Clause and the First Amendment seek the same ends (the creation and dissemination of

information), Justice Breyer proposes a more restrictive test than the majority when considering claims, as here, that a copyright statute seriously restricts the dissemination of speech. Such a statute would lack the constitutionally required rational support, Justice Breyer proposes, if (1) the significant benefits it bestows are private, not public; (2) it threatens significantly to undermine the “expressive values” that the Copyright Clause embodies; and (3) it lacks justification in any significant Copyright Clause-related objective.⁶⁵ Justice Breyer then finds that the CTEA fails this proposed test.

Justice Breyer begins applying this test by examining the economic costs of copyright term extension. After noting that the overriding justification of copyright law is to promote the common knowledge, not to reward individual authors,⁶⁶ he argues that the CTEA unacceptably imposes (1) higher than necessary royalties (by extending the term during which they are payable) and (2) the “prohibitive” cost of seeking permission to use older works for which the copyright holders may be expensive to track down, impossible to find, or obstinate or avaricious in considering whether to grant permission.⁶⁷ The CTEA’s exemption for limited reproduction during the last twenty years of an extended copyright term fails sufficiently to ameliorate these costs, he says, because the exemption is too limited and too expensive to apply. Moreover, neither that exemption nor the Copyright Act’s pre-existing doctrine of fair use will help those whose access to older works has already been lost from lack of preservation.⁶⁸

At the same time as these costs increase, Justice Breyer continues, the benefits of term extension diminish. First, the economic value of the CTEA’s 20-year term extension, he argues, is minuscule, amounting to a present value of 7 cents for every one percent chance of earning an annual \$100 royalty for the length of the twenty-year extension.⁶⁹ An economically-motivated author, he observes rhetorically, “could do better for his grandchildren by putting a few dollars into an interest-bearing account.”⁷⁰ And, of course, “in respect to works already created — the source of many of the harms previously described — *the statute creates no economic incentive at all.*”⁷¹

Likewise, in Justice Breyer’s view, Congress’s purported goal of increasing international uniformity in copyright terms does not afford a meaningful benefit. For all works made for hire, all works created before 1978, all anonymous works, and all pseudonymous works, he observes, the CTEA actually creates disharmony with copyright terms in the European Union; only with respect to new, post-1977 works attributed to natural persons do the new terms coincide.⁷² And even though the CTEA may promote a limited partial harmony with the European Union, the European Union is not subject to U. S. Constitutional constraints and the Union’s interest in copyright term uniformity reflects its own internal concerns, which the U. S. does not necessarily share. In

Justice Breyer's view, therefore, no rational legislature could find that the very limited benefit of partial international uniformity the CTEA advances justifies the costs of term extension.⁷³

The third suggested benefit of the CTEA's term extension – increased incentive to publishers to redistribute and republish older copyrighted works – Justice Breyer finds refuted by the basic purpose of the Copyright clause, which assumes that the disappearance, not the existence, of the copyright monopoly will encourage creation of new works; by the Court's own precedents (primarily *Sony*⁷⁴ and *Stewart*⁷⁵); by the words "limited" and "Authors" in the text of the Copyright Clause; by empirical record evidence suggesting that newer, less expensive versions of works can be expected when their copyrights expire; and by logic itself, which admits no stopping point to the argument — *i.e.*, the same arguments that justify a 20-year term extension would also justify perpetual copyright.⁷⁶

Justice Breyer rejects the fourth purported benefit of the CTEA — to help Americans sell their works abroad — as being grounded in the Commerce Clause, not in the Copyright Clause,⁷⁷ and therefore unable to withstand Eldred's Copyright Clause challenge. In his final argument on the benefits side, Justice Breyer sees no merit in the majority's reliance on demographic, economic, and technological changes to justify copyright term extension. Technological improvements in communication, Justice Breyer reasons, argue against term extension rather than in favor of it; the 1976 Act's "life plus" system already extends terms as lifespans increase; and the fact that adults may now have children later in life "is a makeweight at best" that still fails to explain why life plus fifty years is an insufficient bequest to an author's children and grandchildren.⁷⁸ In sum, in Justice Breyer's view is that, "[t]here is no legitimate, serious copyright-related justification for this statute."⁷⁹

In parts III and IV of his dissent, Justice Breyer makes plain that he shares the majority's concern with unduly intruding upon the decision-making powers of Congress but that he does not consider it an unwarranted intrusion to find the CTEA unconstitutional. In support of his position, he relies upon (1) his analysis of the Copyright Clause's objectives, (2) the total implausibility of any incentive effect of the CTEA's term extension, and (3) the CTEA's apparent failure to provide any meaningful international uniformity. Unlike Justice Stevens, Justice Breyer would therefore hold the CTEA unconstitutional in its entirety, not only as it applies retroactively.⁸⁰

Conclusion

In their particulars, both the majority's and the dissent's reasoning are subject to criticism. The majority seems unduly facile in refusing to acknowledge that a perpetually expandable "limited" time, whether measured by economic analysis or by common sense, amounts to the same

thing as an "unlimited" time, and in seeking refuge behind unchallenged previous extensions of copyright terms when it admits that it has never been called on to rule upon them. And in rejecting Eldred's three subsidiary arguments why Congress cannot extend existing copyright terms without extracting some new consideration from the author, the majority seemingly failed to grasp the subtlety of at least one of them.⁸¹

The Stevens dissent, on the other hand, makes a terrible gaffe in misreading *Stiffel* (a federalism case, not a term limitation case); as the majority notes, this reads out of context a portion of a sentence that says in its entirety that a State may not extend a patent beyond the term prescribed by Congress because, in the field of patents, federal law is supreme. In addition, Justice Stevens's rejection of the government's "old movies" argument is internally inconsistent: contrary to his assertion in the text, his own footnote suggests that restoration of old films does help promote new works by authors, because both DVD re-releases he describes include new (and presumably creative) derivative and ancillary works.⁸²

The strong point of the Stevens dissent, however, stems from his last observation: that neither judicial deference to Congress concerning the appropriate length of copyright nor the validity of earlier retroactive term extensions is at issue in *Eldred*.⁸³ Instead, "the question presented [under the Copyright Clause] by the certiorari petition merely challenges Congress' power to extend retroactively the terms of existing copyrights."⁸⁴ Just because Congress has acted (in Justice Stevens's view) unconstitutionally in the past without challenge, therefore, the Court need not permit Congress to do so when the question is squarely raised in a proper case.

Of all the opinions, Justice Breyer's dissent is probably the most satisfactory, for both its conclusion and its analysis. If "limited Times" is to mean anything in the Copyright Clause, then it must mean some length of time (non-trivially) less than perpetual. Yet, from a rational economic standpoint, the CTEA's lengthened copyright terms are virtually perpetual — the difference is indeed trivial.⁸⁵ (Although the majority rightly notes that, if it accepted this argument, then earlier copyright extensions may have been unconstitutional too, Justice Stevens's dissent would rescue the Court — temporarily — from this dilemma by noting that the Constitutionality of the earlier Acts is not before the Court.) And the Court's failure to intervene at this late stage — when the economic value of the extended copyright term may be as high as 99.99999% of a perpetual term⁸⁶ — may effectively stop it from ever intervening.

From the standpoint of federalism, of course, the only proper focus of the Supreme Court's inquiry is whether, in enacting the CTEA, Congress exceeded the authority that the Constitution grants it. And here the Court's *Eldred* deci-

sion offers cause for both hope and dismay. In recognizing that its own power is limited in areas the Constitution assigns to Congress, on the one hand, the Court respects the federal scheme. In effectively letting the Congress police the limits of its own power under the Copyright Clause, on the other, the Court effectively abandons its duty of judicial review under *Marbury v. Madison* and erodes, at least ever so slightly, the framers' Constitutional scheme of checks and balances.

If, in particular, the Congress should continue its nearly unbroken practice of extending copyright terms again in, say, another fifteen years – just as the earliest Walt Disney cartoons are again about to enter the public domain – then the Supreme Court may find that it has truly authored a Mickey Mouse copyright decision.

* The views expressed in this article are those of the author, and should not be taken as an expression of opinion, if any, of Williams Montgomery & John Ltd., nor of any of its clients or members.

Footnotes

¹ *Eldred v. Ashcroft*, 537 U.S. ____ , 123 S. Ct. 769 (2003), *reh'g denied*, 123 S. Ct. 1505 (2003).

² S. Res. 505, 105th Cong. (codified at 17 U.S.C. § 101, *et seq.*).

³ Weighing in as *amici* on behalf of the government were the Sherwood Anderson Literary Estate Trust; The Sherwood Anderson Foundation; the American Society of Composers, Authors, and Publishers; AmSong, Inc.; the Association of American Publishers, Inc.; Broadcast Music, Inc.; the Motion Picture Association of America, Inc.; the National Music Publishers Association, Inc.; the Recording Industry Association of America, Inc.; and The Songwriters Guild of America.

⁴ See Brief of *Amicus Curiae* Intel Corporation in Partial Support of Petitioners at 2-3.

⁵ 8 Ann., c. 19.

⁶ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); see Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L. J. 655, 659 (1996).

⁷ U. S. CONST., art. I, § 8, cl. 8. Contrary to modern usage, the reference to “science” is actually the predicate for the copyright authority; “useful Arts” is the underpinning of the patent laws.

⁸ Act of May 31, 1790 § 1, 1 Stat. 124, 124.

⁹ Act of Feb. 3, 1831 §1, 4 Stat. 436, 436.

¹⁰ See Pub. L. 87-668 (1962); Pub. L. 89-142 (1965); Pub. L. 90-141 (1967); Pub. L.

90-416 (1968); Pub. L. 91-147 (1969); Pub. L. 91-555 (1970); Pub. L. 92-170 (1971); Pub. L. 92-566 (1972); Pub. L. 93-573 (1974).

¹¹ See H.R. Rep. No. 94-1476 at 135 (1976). For works created on or after January 1, 1978 (its effective date), the 1976 revision increased the term of U. S. copyright to the life of individual authors plus 50 years, or in the case of nonidentifiable authors or works made for hire, to the earlier of 75 years from the year of publication or 100 years from the year of creation. For works created before 1978, Congress extended the renewal term from 28 to 47 years, thus allowing 75 years of total protection from the time the copyright was “secured.”

¹² The pre-1978 and post-1977 dichotomy of the 1976 Act makes the mechanics slightly complicated, but in essence the CTEA extends copyright terms: (1) for works created in or after 1978, to which an individual or individuals hold the copyright, to the life of the last surviving author plus 70 years, 17 U.S.C. § 302(a); (2) for anonymous works, pseudonymous works, and works made for hire created in or after 1978, to the earlier of 95 years from publication or 120 years from creation 17 U.S.C. § 302(c); (3) for works created before 1978

and still in their first term on January 1, 1978, to an initial term of 28 years plus a renewal term of 67 years, for a maximum of 95 years 17 U.S.C. § 304(a); and (4) for works created before 1978 and already in their renewal term on January 1, 1978, to a fixed term of 95 years. 17 U.S.C. § 304(b). See 17 U.S.C. §§ 302-304, inclusive, especially §§ 304 (a)-(d).

¹³ The original plaintiffs were “various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood.” *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 3. Besides Eldred personally, they included Eldritch Press, which posts public domain literary works on the Internet; a sole proprietorship that reprints books on demand; a choir director in Athens, Georgia; a not-for-profit film preservation group; a commercial film archive; a large-scale commercial paperback book publisher; several small publishers; and Copyright Commons, a not-for-profit coalition in Cambridge, Massachusetts formed to support the public domain. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at ?? 2-11 (U.S. Dist. D.C. 1999); see *id.*, 27-55.

¹⁴ Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999).

¹⁵ *Eldred v. Reno*, 74 F.Supp. 2d 1 (1999).

¹⁶ Eldred's *amici* included numerous library and other associations, law professors, economists, for-profit and not-for-profit archivists and publishers, several foundations and prominent citizens, the National Writers Union, The Domain Name Rights Coalition, and several historians.

¹⁷ See generally, Appellants' Opening Brief, *Eldred v. Reno*, No. 99-5430 (D. C. Cir.), filed May 22, 2000.

¹⁸ *Eldred v. Reno*, 239 F.3d 372 (2001).

¹⁹ *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), held that First Amendment protections are already embodied in the Copyright Act's distinction between copyrightable expression on the one hand and uncopyrightable facts and ideas on the other, and by the fair use exception to copyright.

²⁰ *United Video, Inc. v. FCC*, 890 F.2d 1173 (Fed. Cir. 1989), in the view of Judge Ginsburg, holds that “copyrights are categorically immune from challenges under the First Amendment.” *Eldred v. Reno*, 239 F.3d at 375 (2001).

²¹ See *United States v. Lopez*, 514 U.S. 549 (1995)

²² *Eldred v. Reno*, 239 F.3d 372, 382 (2001) (Sentelle, J., dissenting).

²³ See generally, Brief for Petitioners, *Eldred v. Ashcroft*, No. 10-168 (S. Ct.), filed May 20, 2002.

²⁴ Assuming a constant revenue stream at a 7% interest rate, for example, *amici* economists calculated that the CTEA would yield a mere one-third of one percent increase in present-value payments as additional compensation to authors or their heirs. See Brief of George E. Akerloff, *et al.*, as *Amici Curiae* in Support of Petitioners at 5-7 and Appendix B; see also, Affidavit of Hal R. Varian, Plaintiff's Response to the Government's Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C.), July 23, 1999.

²⁵ 537 U.S. at ____ (majority opinion at 1).

²⁶ *Id.* at ____ (majority opinion at 2).

²⁷ *Id.* at ____ (majority opinion at 8).

²⁸ *Id.*

²⁹ *Id.* at ____ (majority opinion at 9-13).

³⁰ *Id.* at ____ (majority opinion at 14).

³¹ *Id.* at ____ (majority opinion at 14-15).

³² *Id.* at ____ (majority opinion at 17).

³³ *Id.* at ____ (majority opinion at 18-19).

³⁴ *Id.* at ____ (majority opinion at 20-28).

³⁵ *Id.* at ____ (majority opinion at 19). The closest the majority came to explicating its reasoning on this point was in its criticism of dissenting Justice Breyer's acceptance of economic calculations provided by *amici* economists showing that the extended term the CTEA provides is worth 99.8% of a perpetual copyright, but that the 1976, 1909, and 1831 extensions, the constitutionality of which has been accepted, created copyright terms worth, respectively, 99.4%, 97.7%, and 94.1% of a perpetual copyright. *Id.* at n. 16.

³⁶ 537 U.S. at ____ (majority opinion at 20).

³⁷ *Id.* at ____ (majority opinion at 21-22).

³⁸ *Id.* at ____ (majority opinion at 24-25).

³⁹ *Sears, Roebuck and Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

⁴⁰ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

⁴¹ *Id.* at ____ (majority opinion at 25).

⁴² *Id.* at ____ (majority opinion at 28-29).

⁴³ *Id.*

⁴⁴ Strictly speaking, small business exemption from performance royalties is unrelated to term extension, but is a free speech accommodation nonetheless.

⁴⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

⁴⁶ *Id.* at ____ (majority opinion at 30).

⁴⁷ *Id.* at ____ (Stevens dissent at 2).

⁴⁸ *Id.* at ____ (Stevens dissent at 1), citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964).

⁴⁹ *Id.*

⁵⁰ *Id.* at ____ (Stevens dissent at 5-6).

⁵¹ *Id.* at ____ (Stevens dissent at 6).

⁵² In the text, Justice Stevens cites *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948), and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). 537 U.S. at ____ (Stevens dissent at 6). In a footnote, he cites *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). *Id.* at n. 4.

⁵³ *Id.* at ____ (Stevens dissent at 6).

⁵⁴ *Id.*

⁵⁵ *Id.* at ____ (Stevens dissent at 1).

⁵⁶ 537 U.S. at ____ (Stevens dissent at 10-12).

⁵⁷ *Id.* at ____ (Stevens dissent at 11).

⁵⁸ *Id.* at ____ (Stevens dissent at 14).

⁵⁹ The majority in fact acknowledges this point early in its opinion. 537 U.S. at ____ (majority opinion at 11).

⁶⁰ *Id.* at ____ (Stevens dissent at 16), citing *Wheaton v. Peters*, 8 Pet., at 661.

⁶¹ *Id.* at ____ (Stevens dissent at 19-20).

⁶² *Id.* at ____ (Breyer dissent at 1).

⁶³ *Id.*

⁶⁴ *Id.* at ____ (Breyer dissent at 1-2).

⁶⁵ *Id.* at ____ (Breyer dissent at 2-3).

⁶⁶ *Id.* at ____ (Breyer dissent at 4-6).

⁶⁷ *Id.* at ____ (Breyer dissent at 6-9).

⁶⁸ *Id.* at ____ (Breyer dissent at 11).

⁶⁹ *Id.* at ____ (Breyer dissent at 14).

⁷⁰ *Id.*

⁷¹ *Id.* at ____ (Breyer dissent at 16, emphasis in original).

⁷² *Id.* at 17.

⁷³ *Id.* at ____ (Breyer dissent at 18-19).

⁷⁴ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), which Justice Breyer cites for the proposition that the Copyright Clause is “intended . . . to allow the public access . . . after the limited period of exclusive control.”

⁷⁵ *Stewart v. Abend*, 495 U.S. 207, 228 (1990), which Justice Breyer cites for the proposition that copyright terms are “limited to avoid ‘permanently depriv[ing]’ the public of ‘the fruits of an artist’s labors.’”

⁷⁶ *Id.* at ____ (Breyer dissent at 20-21).

⁷⁷ *Id.* at ____ (Breyer dissent at 21).

⁷⁸ *Id.* at ____ (Breyer dissent at 22).

⁷⁹ *Id.* at ____ (Breyer dissent at 23).

⁸⁰ *Id.* at ____ (Breyer dissent at 23-25).

⁸¹ It is certainly true, as the majority observes, that *Feist v. Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), on which Eldred relied for his “originality” argument, “did not touch on the duration of copyright protection,” 537 U.S. at ____ (majority opinion at 20), but this observation ducks rather than answers the question: how is a pre-existing copyrighted work still “original” at the time of a retroactive term extension? An answer exists, as Judge (Douglas) Ginsburg showed in the Court of Appeals, but the sophistication of Eldred’s argument deserved a more sophisticated response that it received in the Supreme Court.

⁸² *Id.* at ____ , n. 13 (Stevens dissent at 19).

⁸³ *Id.* at ____ (Stevens dissent at 21 and n. 14).

⁸⁴ *Id.* at ____ (Stevens dissent at 21).

⁸⁵ For a persuasive argument not cited in any of the opinions, see Richard A. Posner, “The law & economics of intellectual property,” *Daedalus*, Spring 2002, at 5 *et seq.*

⁸⁶ See 537 U.S. at ____ (Breyer dissent at Appendix A).