

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

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

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No. 99-5430

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ERIC ELDRED, *et al.*,

*Plaintiffs-Appellants,*

v.

JANET RENO, In her official capacity as Attorney General,

*Defendant-Appellee.*

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Appeal From The United States District Court  
For The District Of Columbia (D.D.C. No. 99-0065 (JLG))

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**APPELLANTS' OPENING BRIEF**

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May 22, 2000

**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to Circuit Rules 26.1 and 28(a)(1), undersigned counsel for Appellants hereby provide the following information:

**PARTIES AND AMICI CURIAE**

The following are all parties and *amici curiae* who appeared before the district court:

Eric Eldred;

Eldritch Press: Eldritch Press is a non-profit unincorporated association that posts literary works on the Internet to make them freely available to the entire world. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Higginson Book Company: Higginson Book Company is a for-profit sole proprietorship that reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Jill A. Crandall;

Tri-Horn International: Tri-Horn International is a corporation in the business of developing and selling products involving the history and traditions of

golf. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Luck's Music Library: Luck's Music Library, Inc. is a corporation in the business of selling and renting classical orchestral sheet music. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Edwin F. Kalmus & Co., Inc.: Edwin F. Kalmus & Co., Inc. is a corporation in the business of publishing orchestral sheet music. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

American Film Heritage Association: American Film Heritage Association is a non-profit film preservation group that was established to represent documentary film makers, film preservationists, scholars, commercial archives and non-profit archives. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Moviestock, Inc.: Moviestock, Inc. is an incorporated commercial film archive. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Dover Publications, Inc.: Dover Publications, Inc. is an incorporated large-scale commercial book publisher. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Copyright's Commons: Copyright's Commons serves as a collective voice for students, professors, archivists and other members of the public who are concerned about the negative effects of copyright term extensions on the public domain. It has no parent companies and no publicly-held company has a 10% or greater ownership interest in the entity;

Janet Reno, in her official capacity as Attorney General of the United States;  
and

The Sherwood Anderson Literary Estate Trust; The Sherwood Anderson Foundation; American Society of Composers, Authors, and Publishers; AmSong, Inc.; Association of American Publishers, Inc.; Broadcast Music, Inc.; Motion Picture Association of America, Inc.; National Music Publishers Association, Inc.; Recording Industry Association of America, Inc.; and The Songwriters Guild of America (*amici curiae* for Defendant-Appellee).

The following are all parties or *amici curiae* in this Court:

Eric Eldred; Eldritch Press; Higginson Book Company; Jill A. Crandall; Tri-Horn International; Luck's Music Library; Edwin F. Kalmus & Co., Inc.;

American Film Heritage Association; Moviecraft, Inc.; Dover Publications, Inc.;  
Copyright's Commons;

Janet Reno, in her official capacity as Attorney General of the United States;  
The Sherwood Anderson Literary Estate Trust; The Sherwood Anderson  
Foundation; American Society of Composers, Authors, and Publishers; AmSong,  
Inc.; Association of American Publishers, Inc.; Broadcast Music, Inc.; Motion  
Picture Association of America, Inc.; National Music Publishers Association, Inc.;  
Recording Industry Association of America, Inc.; and The Songwriters Guild of  
America (*amici curiae* for Defendant-Appellee); and

L. Ray Patterson, Laura N. Gasaway, Marcia Hamilton, Edward  
Walterscheid, Eagle Forum Education, and Legal Defense Fund (*amici curiae* for  
Plaintiffs-Appellants).

### **RULINGS UNDER REVIEW**

The rulings under review in this case are United States District Court Judge  
June L. Green's October 28, 1999 Order and Memorandum, reported at 74  
F. Supp.2d 1 (D.D.C. 1999), and November 17, 1999 Judgment on the Pleadings  
for Defendant in case No. 99-0065.

## **RELATED CASES**

The case on review has not previously been before this Court or any other court. Appellants are unaware of any other related cases currently pending in this Court or in any other court.

May 22, 2000

Respectfully submitted,

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Publications, Inc., and Copyright's  
Commons*

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## **GLOSSARY**

### **Term**

### **Reference**

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Appellants

Eric Eldred; Eldritch Press; Higginson Book Company; Jill A. Crandall; Tri-Horn International; Luck's Music Library, Inc.; Edwin F. Kalmus & Co., Inc.; American Film Heritage Association; Moviecraft, Inc.; Dover Publications, Inc.; and Copyright's Commons

CTEA

The Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 304

Appellants Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., and Copyright's Commons appeal from a decision of the United States District Court for the District of Columbia (June L. Green, U.S.D.J.) that (A) granted judgment on the pleadings for the appellee and (B) denied Appellants' motions for judgment on the pleadings and for summary judgment. The District Court's decision thus sustained the constitutionality of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (the "CTEA").

Appellants demonstrated below, and maintain here, that the CTEA is unconstitutional. The CTEA extends by twenty years the terms of both subsisting and newly created copyrights. It is the eleventh time in thirty-seven years that Congress has extended the term for subsisting copyrights, and the second time it has extended the term prospectively in the same period. These extensions have overturned the constitutional balance between granting limited monopolies to authors and sustaining the vitality of the public domain.

The issue in this case is whether this constitutional balance is to have any force in the context of changes to the copyright term. The essence of the holding below is that Congress is free to extend the terms of copyright *without limit*. Neither the opinion of the district court, nor the arguments of the government



below, offers any limiting principle to Congress' power to set copyright duration.

According to the rule of the district court, Congress is as free to grant a term of 150 years as it is to grant a term of 1,000 years.

This cannot be the law. If Congress is limited by constraints *implied* in the Copyright Clause, *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (“originality” constitutional requirement), then it must also be limited by *express* constraints in the Copyright Clause (*e.g.*, “limited Times”). And if restrictions on the use of a single word, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), or prohibitions on copying of currency, *Regan v. Time*, 468 U.S. 641 (1984), are entitled to heightened scrutiny under the First Amendment, then so too should be the much more fundamental constraints on expressive and creative activity that copyright imposes.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1361 and 2201, because this declaratory judgment action challenges the constitutionality of a federal statute. This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. The district court issued an Order and Memorandum denying Appellants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment and granting Appellee's Motion for Judgment on the Pleadings on October 28, 1999 and entered

Judgment on the Pleadings for Defendant on November 17, 1999. The notice of appeal was filed on December 17, 2000, within 60 days of the district court's decision. Fed. R. App. P. 4(a)(1)(B).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the CTEA is beyond Congress' enumerated powers under the Copyright and Patent Clause of the United States Constitution.
2. Whether the CTEA violates the First Amendment under the principles enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997).

### **STATUTES**

The relevant statutes appear in the Addendum.

### **STATEMENT OF THE CASE**

*Nature of Case.* This is an action for a declaratory judgment that the Sonny Bono Copyright Term Extension Act is unconstitutional and for preliminary and permanent injunctions enjoining the CTEA's enforcement. Appellants are a group of individuals, corporations and unincorporated associations who have been adversely affected by the CTEA. Defendant Janet Reno is Attorney General of the United States. Reno is charged, among other things, with enforcing the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678, a statute that

imposes penalties upon persons who violate copyrights, including copyrights whose term has been extended by the CTEA.

***Course of Proceedings.*** The CTEA was signed into law on October 27, 1998, and began affecting the terms of the copyrights it covered on December 31, 1998. On January 11, 1999, Appellants filed their original complaint challenging the constitutionality of the CTEA. The Complaint alleged that the CTEA (1) exceeded Congress' power under the copyright clause, and (2) violated the Public Trust Doctrine. On May 10, 1999, Appellants filed a First Amended Complaint, adding certain plaintiffs. On June 28, 1999, Appellants filed their Second Amended Complaint, adding a claim under the First Amendment. (A 26.)

On June 25, 1999, the government filed a Motion for Judgment on the Pleadings. On July 23, 1999, Appellants filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

***Disposition Below.*** On October 28, 1999, the district court, without the benefit of oral argument, entered an Order (A 69) and a Memorandum (A 72) granting the government's motion and denying plaintiffs' motion. The court entered judgment on the pleadings in favor of the government, 74 F. Supp.2d 1 (D.D.C. Nov. 17, 1999). (A 80.)

The district court held that the CTEA was not unconstitutional. It rejected plaintiffs' argument that the CTEA violated the First Amendment, ruling that

“there are no First Amendment rights to use the copyrighted works of others.”

(A 76.) The court also ruled that the retrospective extension of copyright protection to subsisting copyrights was not beyond Congress’ enumerated powers. The district court concluded that Congress has the power to define the scope of the grant of copyrights to authors, that the period of “limited Times” is subject to the discretion of Congress, and that Congress has authority to enact retrospective laws under the copyright clause. (A 74-75.)

### **STATEMENT OF FACTS**

The CTEA blocks the flow of “writings” into the public domain; it thereby burdens the ability of Appellants, and others, to draw upon and advance work within the public domain to create new work. The nature of this burden, and the effect on Appellants, can be understood only in light of the Constitution’s original plan, and Congress’ current practice contrary to that plan.

#### **I. THE COPYRIGHT AND PATENT CLAUSE**

The Copyright and Patent Clause is set forth in Article I, § 8, cl. 8 of the United States Constitution:

Congress shall have power . . . [t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries.

The Clause gives Congress the power to “promote the Progress of Science and useful Arts.” It specifies two means by which this end is to be secured.

- (1) the power to grant “Authors” and “Inventors” “exclusive Right” for their “Writings” and “Discoveries”; and
- (2) the guarantee of a rich public domain, by requiring that any “exclusive Right” be granted for “limited Times” only.

Number (1) is the use of “intellectual property” to “promote . . . Progress.”

Number (2) is the use of the public domain as an “intellectual commons” to “promote . . . Progress.”

The exclusive rights conferred by copyright have come to include the rights to reproduce, distribute, perform, or display the copyrighted work or derivative works. *See* 17 U.S.C. § 106. Therefore, the posting of a copyrighted literary work on the Internet, the selling of a copyrighted literary work, the copying and selling of copyrighted music, the use of a copyrighted artistic work in creating a new work, or the restoration and selling of a copyrighted film, without the permission of the copyright owner, would be copyright infringement pursuant to 17 U.S.C. § 501 *et seq.*

Upon the expiration of a copyright, the work comes into the public domain. This means that it may freely be copied, performed, distributed, or used in the creation of derivative works by any person in the United States without the permission, license, or authorization of the copyright holder.

## II. COPYRIGHT LEGISLATION

*The 1790 Copyright Act.* Pursuant to the authority granted under Article I, § 8, cl. 8, Congress has enacted a series of laws providing for copyrights for a variety of literary and artistic works. 17 U.S.C. § 101 *et seq.* The original copyright statute, enacted in 1790, was quite limited. The 1790 Copyright Act regulated only the “printing” and sale of “map[s], chart[s] and . . . book[s]” and conferred an initial copyright term of 14 years. Act of May 31, 1790, § 1, 1 Stat. 124. Except for this narrow restriction, authors and citizens were generally free to draw upon aspects of our common culture in other writings, and publications.<sup>1</sup> Most early copyrights, in fact, were for scientific or instructional texts. John Tebbel, *A History of Book Publishing in the United States, The Creation of an Industry 1630-1865* 142 (R.R. Bowker, 1972).

Most writing was not even eligible for copyright protection, since it was not something that was “published.” And, because the requirements of registration were relatively severe, most work was simply in the public domain.<sup>2</sup> Over the

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<sup>1</sup> The statute regulated the “printing” as well as the vending of copyrighted works. While anyone in principle could violate the exclusive right to sell, in 1790, there were only 127 printing establishments in the United States. L. Cappon *et al.*, *Atlas of Early American History: The Revolutionary Era 1760-1790* 68 (Princeton Univ. Press, 1976).

<sup>2</sup> Between 1790 and 1799, 13,000 titles were published in America, but only 556 copyright registrations were filed. J. Tebbel, *supra*, 141.

The public domain for foreign works was complete. Until 1891, United States law exempted foreign publications from protection. T. Bender & D. Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. Int’l L. & Pol. 255 (1997). Americans were

course of the 19th century, Congress and the courts slowly increased the scope of copyright's reach. More "writing" was included within the scope of the copyright act, and the scope of the exclusive right protected under copyright increased as well. Benjamin Kaplan, *An Unhurried View of Copyright* 36 (1967).

Most early copyrights, moreover, did not extend for the maximum statutory term because they were not renewed. Upon the expiration of the initial term of a copyright, the copyright holder could apply for an extension, or "renewal" term, of the copyright. If the copyright holder did not do so, the work would fall into the public domain. The vast majority of copyrighted works, in fact, were not renewed and therefore came into the public domain after their initial term.

While the *scope* of copyright increased during the 19th century, Congress lengthened copyright's *duration* only once. In 1831, Congress extended the initial term for copyrights from 14 to 28 years, while leaving the renewal term at 14 years. Act of February 2, 1831, §§ 1-2, 4 Stat. 36. Thus, for the first 119 years of our republic, the maximum term of copyright was 42 years. (A 46.)

*The 1909 Copyright Act.* In 1909, Congress thoroughly revised the copyright laws. First, Congress codified and extended copyrights' scope, purporting to reach "all the writings of an author." Act of March 4, 1909, § 4, 35 Stat. 1075, 1076.

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(continued...)

free to copy English works without the permission of English authors and were free to translate foreign works without the permission of foreign copyright holders.

Second, it increased copyrights' length, extending the renewal term by 14 years, bringing it to a total of 28 years. *Id.* §§ 23-24. The maximum term under the 1909 statute thus became 56 years. *Id.*

The 1909 Act controlled copyright for the first three quarters of this century. Although it extended the duration of the copyright term, the Act maintained the device of renewal. And, as before, few copyrights extended to the maximum 56-year term because most copyrights were not renewed. In fact, the Copyright Office estimated that no more than 15% of initial copyrights were renewed under the 1909 Act. *See* Barbara A. Ringer, *Renewal of Copyright, in Studies on Copyright* 503, 514-16 (Arthur Fisher Memorial ed. 1963). Simple algebra reveals that the effective term under the 1909 Act was less than 33 years.

*Congress's Extension of Copyright Terms.* A vast amount of extraordinary work was created and copyrighted under the terms of the 1909 statute. This included all early motion pictures, the music of the Jazz Age, the fiction of Hemingway and Fitzgerald, and the poetry of Robert Frost. That work, if renewed, would have started to come into the public domain in 1965. Beginning in 1962, however, Congress began to extend the terms of subsisting copyrights, keeping them from passing from the control of the copyright holders.<sup>3</sup>

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<sup>3</sup> These laws were: Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No.



At first these extensions of subsisting rights affected relatively few “classes” of copyrights. The initial statute, passed in 1962, extended the term of subsisting copyrights until December 31, 1965. In other words, that statute affected only copyrights issued in 1906, 1907 and 1908. Congress’ second extension extended the term of subsisting rights to December 31, 1967. That statute thus benefited copyright holders whose initial rights were granted from 1906 to 1910. Each year in 1967, 1968 and 1969, Congress did the same thing again. This pattern repeated itself until 1974, by which time the terms of 14 years of copyright classes (1908 through 1921) had been so extended.

*1976 Copyright Act.* In 1976, Congress made a significant change in the structure of the Copyright Act. The 1976 Act codified certain important First Amendment values that courts had recognized as implicit, such as a protection for “fair use” and an express limitation of the scope of copyright to “expression” rather than “ideas.” 17 U.S.C. §§ 102(b), 107. But the Act also changed dramatically the nature of the copyright term. It eliminated the fixed copyright terms and the device of renewal that had been mainstays of copyright law since 1790. In the place of fixed terms, the 1976 Act established a single term for all copyrights issued after January 1, 1978. That term was for the life of the author, plus 50 years. For

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92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974).

“works made for hire” the term was fixed at the shorter of 100 years from creation or 75 years from publication. Finally, all subsisting copyrights were given term extensions to 75 years.<sup>4</sup>

These changes had a profound effect upon the public domain. First, by eliminating the system of renewal, Congress effectively ended a natural flow of work into the public domain before the expiration of the maximum term — copyrights no longer valuable to the author would automatically accrue to the benefit of the public. Second, the continuation of the practice of extending copyright terms ended the statutory flow of material into the public domain. In fact, except for a lapse caused by the initial failure of Congress to pass the CTEA in 1995, 1961 was the last time that a copyrighted work in its renewal term came into the public domain. That work had been originally authored in 1905.

*The Copyright Term Extension Act Of 1998.* On October 27, 1998, President Clinton signed into law the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. In general, the CTEA added twenty more years to the length of most copyrights. See Pub. L. No. 105-298, § 102(b). This term extension was made retroactive; in other words, twenty years were added to the copyright term of works that had already been created as well as works created

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<sup>4</sup> In 1992, Congress eliminated even this need to renew copyrights originating under the 1909 Act, but still in their term. P.L. 102-307, Title I, § 102(a), (d), 106 Stat. 264, 266. In other

after the CTEA became law. *See id.* § 102 (b) & (d). Thus, but for the CTEA, a work copyrighted in 1923 and properly renewed would have entered the public domain on December 31, 1998, because its term of 75 years would have ended. Because of the CTEA, however, the work now will not enter the public domain until December 31, 2018.

### **III. INJURY TO APPELLANTS**

Appellants depend upon the public domain for their work or livelihood. Some draw upon the public domain for commercial purposes, others for non-commercial purposes. Some of these purposes are transformative, others are not. But each depends fundamentally upon a rich and vibrant intellectual commons, and upon a constant supply of material passing into this public domain. The variety of Appellants' activities shows the extent of the injury the CTEA has caused.

Eric Eldred is a computer programmer who began Eldritch Press in 1995. Eldritch Press produces electronic versions of books that are in the public domain for posting on the World Wide Web. His site contains hundreds of works of literature and science which he publishes to the world for free. *See* <http://eldred.ne.mediaone.net/>. (A 28, 35-37.) Because of the CTEA's

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words, after 1992, all copyright holders automatically received the benefit of the maximum copyright term.

extension of copyright terms, Eldred will not be able to produce or post electronic versions of countless books for another twenty years.

Higginson Book Company reprints books in fields such as genealogy, local and county history, and the Civil and Revolutionary Wars. The company focuses on books originally printed in small editions that are no longer in print and are therefore difficult to obtain from any other sources. (A 28, 37-38.) Like Eldred, Higginson Books produces books from works that have come into the public domain.

Appellant Jill Crandall is a choir director at a church in Athens, Georgia. She selects the music that her church choir will perform. Because of limited church resources, Crandall is required to draw primarily upon works that are in the public domain for her choir's weekly performances. (A 28, 38-39.) The CTEA's retroactive extension of copyright terms means that the body of choral music produced after 1922 will remain unavailable for two decades more.

Luck's Music Library sells and rents classical orchestral sheet music to approximately 7,000 orchestras and 12,000 individuals worldwide. Much of the music that Luck's sells is in the public domain, which makes the cost of such music significantly lower than copyrighted work. (A 28-29, 40-41.) But with the enactment of the CTEA, no copyrighted music written from 1923 on will enter the public domain until at least 2023.

American Film Heritage Association and Moviecraft, Inc. are both in the business of preserving and restoring old films. It is difficult to determine whether or not an older film is copyrighted, or even who holds the copyright. Thus, these two companies cannot freely restore old films if, even in theory, the films still could be within their copyright terms. Many of these films therefore become “orphaned,” meaning the physical film is deteriorating, yet the original copyright holder cannot be located. (A 29, 41-43.) With the CTEA’s twenty-year extension of copyright terms, these films may be lost forever.

Each Appellant is harmed by this increase in copyright term. The free speech costs that they incur are both obvious and non-obvious. First, Appellants will be barred for the next 20 years from copying works that, but for enactment of the CTEA, would have come into the public domain this year. Second, Appellants also are harmed by the added burden of determining whether old works satisfied formal requirements to remain under copyright. *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.02[C](1). Since the penalties for wrongful (and even accidental) copying of a copyrighted work can include both civil damages and substantial penalties, Appellants are required to forego use of older works that fall within the ambit of the CTEA, even if they do not know whether those works still are copyrighted. In this sense, the CTEA chills Appellants’ ability to go about their business. Third, after determining that a work

is still protected, Appellants are burdened by the difficulty of locating the current copyright holder for works practically a century old.<sup>5</sup>

Appellants are not alone in their dependence on the public domain. Popular culture is filled with works that are drawn directly from public domain resources. The Disney Corporation has based many of its popular films on public domain stories or music.<sup>6</sup> Many other popular plays and musicals have been based on, public domain works.<sup>7</sup>

### **SUMMARY OF ARGUMENT**

I. The CTEA's retrospective application is an improper exercise of congressional power under the Copyright and Patent Clause. That Clause permits Congress through the use of an "exclusive right" to a writing for "limited Times," to "promote . . . Progress in Science" by creating an incentive to produce new

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<sup>5</sup> Although Appellants can attempt to obtain the authorization of the copyright owner, it is frequently difficult or impossible to ascertain the copyright holder of older works, even assuming that he or she would offer a license on acceptable terms.

<sup>6</sup> These include *The Adventures of Ichabod and Mr. Toad*; *Aladdin*; *Alice in Wonderland*; *Beauty and the Beast*; *Cinderella*; *Hercules*; *The Little Mermaid*; *Mulan*; *Pinocchio*; *Pocahontas*; *Sleeping Beauty*; *Snow White and the Seven Dwarfs*; *Tarzan*; *The Three Musketeers*; *Twenty Thousand Leagues Under the Sea*. Aff. of Professor Dennis Karjala. (A 55.)

<sup>7</sup> For example: *2001, A Space Odyssey*; *The Brothers Karamazov*; *Clueless*; *Dracula*; *Godspell*; *Island of Dr. Moreau*; *Les Miserables*; *Miss Saigon*; *Of Human Bondage*; *Ragtime*; *Rosencrantz and Guildenstern are Dead*; *The Scarlet Letter*; *Sense and Sensibility*; *The Seven Percent Solution*; *The Sting*; *West Side Story*; *The Wings of the Dove*. *Id.*

For a collection of other examples (contributed by participants in the Berkman Center's OpenLaw program) see <http://eon.law.harvard.edu/openlaw/eldredvreno/examples.html>.

works. To effect this requirement of “progress” the Supreme Court has imposed a requirement of “originality” upon copyrighted works, meaning that the copyright laws cannot extend to works that already were in the public domain at the time the copyright was granted. If a work does not foster “innovation, advancement, and . . . add to the sum of useful knowledge,” it does not qualify as the type of “Writing[ ]” by the kind of “Author[ ]” that the Copyright Clause reaches, and Congress may not grant a monopoly upon it.

The CTEA applies retroactively to add an additional term of twenty years to all copyrights that were subsisting when the Act became law in 1998. Thus, the CTEA extends the term of the copyright monopoly, but without creating any new incentive to produce, and without “add[ing] to the sum of useful knowledge.” Instead, the CTEA grants the additional term to “something already in existence,” which is directly contradictory to the requirement of originality.

II. The CTEA’s retroactivity also violates the “limited Times” term of the Copyright Clause. Recognizing the need to strike a balance between motivating authors to create and maintaining a vibrant public domain, the Clause permits copyrights to be conferred only for limited times. Although the choice of an appropriate copyright term ordinarily is a judgment reserved for Congress, even Congress is constrained to set copyright terms in a manner that “promotes progress” by balancing motivations to authors against the needs of the public

domain. Yet the CTEA's retroactive extension of copyright terms neither "promotes progress" nor protects the public domain. The statute's retroactive extension of copyright terms creates no increase in motivation to authors because the works in question already have been created. At the same time, the extension of copyright terms unquestionably harms the public domain by keeping works out of the public's hands.

III. The CTEA violates the First Amendment. Copyright law is a content-neutral regulation of speech because it determines who can reproduce the particular expression of someone else, who may translate or make derivative works, and who may make public performances and displays of creative works. Content-neutral regulations of speech are governed by the test first announced in *United States v. O'Brien*, 391 U.S. 367 (1968), and reaffirmed in *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997). Under the *Turner* test, a content-neutral regulation of speech can be upheld only if it (1) "advances important government interests unrelated to the suppression of free speech" and (2) "does not burden substantially more speech than necessary to further [those] interests."

A. The "important government interest" here is the one expressly set forth in the preamble of the Copyright Clause, namely "to Promote the Progress of Science." That interest can be served by creating incentives for authors to produce new works by granting authors "exclusive Right[s]." But a retroactive extension of



copyright cannot possibly advance that interest, because the works whose copyright term has been retroactively extended have already been created. At the same time, by restricting the scope of the public domain, this retroactive increase burdens speech. Thus, since the CTEA creates no increase in incentives to create, but does further restrict speech, Congress cannot have concluded that the net effect of the CTEA's retroactive copyright term extension would be to "advance an important governmental interest."

B. Nor does the CTEA's granting of longer copyright terms prospectively meet the *O'Brien* test. First, the CTEA's increase of copyright terms from life-plus-50 to life-plus-70 (or in the case of corporate works, from 75 to 95 years from creation) creates incentives that, when reduced to present value, are miniscule. Second, it is untrue that the CTEA fulfills a government interest in harmonizing the copyright laws of the United States with those of foreign countries. To the extent that there is any harmonization at all, it is harmonization only with European countries, not with the many other countries that are signatories to the Berne Convention. Moreover, the CTEA creates *disharmony* with European Union countries in such areas as works by corporate authors, with respect to such works as films, sound recordings and photographs.

IV. The district court erred in holding that there should be no First Amendment review of the CTEA because "there are no First Amendment rights to

use the copyrighted works of others.” (A 76.) The district court relied upon cases where a defendant argued that it had a First Amendment right to use another’s valid copyright. But this case raises no such issue, and it clearly is not the law that all copyright statutes are immune from First Amendment review.

### **STANDARD OF REVIEW**

Whether the district court properly denied Appellants’ Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, granted Appellee’s Motion for Judgment on the Pleadings, and entered judgement on the pleadings in favor of Appellee is a question of law, which this Court reviews *de novo*. *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992).

### **ARGUMENT**

#### **I. THE RETROSPECTIVE APPLICATION OF THE CTEA IS BEYOND CONGRESS’S ENUMERATED POWERS**

The CTEA extends the terms of subsisting copyrights by twenty years. Thus works first copyrighted in 1923 under a regime that promised a maximum term of 56 years will now (after several interim extensions) receive a term of protection for 95 years. These additional years are granted without any obligation from the author, or his heirs: no additional creative work is required in exchange for this windfall. Nor is there any requirement that the benefits from this additional term be devoted to the “progress of Science.” The extension simply aborts the

scheduled entry of copyrighted work into the public domain, without creating any new incentives to “promote the Progress of Science.”

This is an improper exercise of power under the Copyright Clause. Congress’ power under that Clause is to create incentives to “promote . . . Progress.” The retrospective aspect of the CTEA cannot do that. It therefore is neither a grant that satisfies the “originality” requirement that the Supreme Court has found implicit in the meaning of “Authors” and “Writings”; nor is it consistent with a fair reading of the express limitation of “limited Times.”

#### **A. The Copyright and Patent Clause**

The Copyright and Patent Clause of Article I, § 8, is unique among Congress’ enumerated powers. While it shares with the Taxing Clause, Article I, § 8, cl. 1, the Bankruptcy Clause, Article I, § 8, cl. 4, and the Standing Army Clause, Article I, § 8, cl. 12, an express limitation on its reach, it is the only enumerated power that expressly states the purpose of its enumeration: to “promote the Progress of Science.”<sup>8</sup> As the Court stated in *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966), “the clause is both a grant of power and a limitation.” Its aim is *incentives* to “promote [] Progress.” A system of “exclusive Right[s]” that did not

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<sup>8</sup> “Science” does not limit the reach of the clause to what we today would call “scientific” material. “The use of ‘science’ is explained by the fact that in the latter part of the eighteenth century it was synonymous with ‘knowledge’ and ‘learning’ -- terms which could readily be encompassed within the general ambit of education.” E. C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 Harv. J. L. & Tech. 87, 92 (1999).

“promote [] Progress,” or a change to a system that did not “promote . . . Progress,” would be beyond this enumerated power.

Today we call these “exclusive Right[s]” “intellectual property.”<sup>9</sup> But the Clause expressly includes more than a congressional grant of intellectual property in its plan to “promote the Progress of Science.” By requiring that “exclusive Right[s]” be granted for only “limited Times,” the Constitution requires that at some point, “exclusive Right[s]” must come to an end. “Writings” once protected must pass into the public domain, thus forming an “intellectual commons” to balance the restrictions of intellectual property, and to provide resources for future work. See Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 966-67 (1990); David Lange, *Recognizing the Public Domain*, 44 Law & Contemp. Probs. 147 (1981).

The Framers thus linked *protection* with *access*. Writings would be protected for a limited time, but after that time they would continuously fill a commons with work that could be used by others. As Justice Story wrote:

It is beneficial . . . to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject . . .; [and beneficial] to the public, as it will promote the

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<sup>9</sup> Before World War II, the phrase “intellectual property” was rare. Copyrights and patents were more likely to be referred to as “monopolies” than “property” in the 19th century. See William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, [http://www.law.harvard.edu/Academic\\_Affairs/coursepages/tfisher/iphistory.html](http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/iphistory.html).

progress of science and the useful arts, and admit the people at large, *after a short interval*, to the full possession and enjoyment of all writings and inventions *without restraint*.

Joseph Story, *Commentaries on the Constitution of the United States* § 502, at 402

(R. Rotunda & J. Nowak eds. 1987) (emphasis added). The Supreme Court

described this balance in terms that express Appellants' conception of the Clause:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It 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.

*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

This design — using both intellectual property and an intellectual commons to create incentives to “promote Progress in Science and useful Arts” — was no accident. There were many, including Noah Webster, and possibly Justice Story himself,<sup>10</sup> who believed that copyright should be perpetual. Those jurists — however eminent — lost. A contrary view prevailed. The notion of a natural or

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<sup>10</sup> J. Tebbel, *supra*, 141; Joseph Story, *Familiar Exposition of the Constitution of the United States* 118 (Harper & Brothers 1854) (“It is, indeed, but a poor reward, to secure to authors and inventors, for a limited period only, an exclusive title to that, which is, in the noblest sense, their own property; and to require it ever afterwards to be dedicated to the public.”). These authors were writing after the adoption of the Constitution, though Webster’s arguments predate the Constitution. *See* Bender & Sampliner, *supra* note 2, at 256.

fundamental property right in copyright was rejected. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 660-61 (1834). The Framers embraced both (1) intellectual property and (2) an intellectual commons as the means by which an incentive to promote “progress” would be assured.

Congress has corrupted this original design. Through its repeated retroactive extension of subsisting copyrights, it has revoked the Constitution’s express *quid pro quo*. Rather than granting for, as Story described it, “a short interval,” exclusive rights that create incentives to produce something new and then allowing those works to pass into the public domain, in 35 of the 38 years since 1962, Congress has blocked the flow of “writings” into the commons. It has stopped the growth of the public domain as a resource upon which others might draw. In its stead, Congress has bowed to special interests, by revoking the original deal under which these subsisting copyrights were granted. As Professor Jaszi has put it, Congress now provides perpetual copyright “on the installment plan.” See Testimony of Professor Peter Jaszi, *The Copyright Term Extension Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995), available in 1995 WL 10524355, at \*6.

**B. The Retroactive Aspect of the CTEA Violates the Originality Requirement of the Copyright and Patent Clause**

Congress may only grant copyrights to “Authors” for their “Writings.” These terms have been interpreted by the Supreme Court in a precise way. In light

of the purpose “to promote . . . Progress,” the only “Writings” by “Authors” that can be protected by copyright are those that are “original.” *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). “Originality,” the Court stated in *Feist*, “is a constitutional requirement,” *id.* at 346, an implied restriction on the term “original” appears nowhere in the text of the Copyright and Patent Clause.

This requirement of “originality” flows directly from the unmistakable purpose of the Copyright and Patent Clause, to “promote . . . Progress.” By requiring “originality,” the Copyright Clause only grants monopolies as an incentive to produce something new. “Exclusive Right[s]” are to be incentives to promote “innovation, advancement, and . . . add to the sum of useful knowledge.” *Graham*, 383 U.S. at 6.<sup>11</sup> “A copyright,” as the Supreme Court stated in *Fox Film Corp. v. Doyal*, “is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, *and the incentive to further efforts for the same important objects.*” 286 U.S. 123, 127-28 (1932) (emphasis added, citations omitted). If a work does not do this — if it does not “add to the sum of useful knowledge,” and does not have a “minimal degree of creativity,”

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<sup>11</sup> “Novelty” and “non-obviousness” in the context of patents are different from the originality standard in the context of copyright, although both concepts express the constitutional requirement that exclusive rights “promote [] Progress.” *Cf. Graham v. John Deere Co.*, 383 U.S. 1, 10-15 (1966) (discussing 17 U.S.C. §103's non-obviousness statutory requirement in light of Congressional and Constitutional policies of not patenting trivial improvements of what already exists in the public domain).

*Feist*, 499 U.S. at 345 — then it does not qualify as the type of “Writing[]” by the kind of “Author[]” that the Copyright Clause reaches.

In its simplest sense, the term “originality” means that a copyrighted work must be original to the author. *Id.* at 345. The author must not have “copied” the work from someone else. *Id.* Nor can the author simply have copied the works from nature: “raw facts” are not copyrightable. *Id.* at 347. The creative act that copyright protects is the “activity of the mind” embodied in a tangible form — his or her adding to what was already in existence. The incentive copyright law creates is the incentive to produce something new.

But if (1) work copied from someone else is not original, and (2) work copied from nature is not original, then the issue in this case is whether a (3) work simply copied from an earlier copyrighted work can, in light of the purpose of the clause, be “original.” Can a work that adds nothing to what was already known or produced, or that includes no additional creative contribution by the author, nonetheless be “original”?

The reasoning of two unanimous decisions of the Supreme Court indicates that it is not. *See Graham v. John Deere Co.*, 383 U.S. 1 (1966); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). These cases imply that although a work at one time was “original,” if it adds nothing new, it cannot be considered original again for purposes of a new copyright. This conclusion



follows from the Court’s treatment of the question whether patents could issue to cover works in the public domain — works at one time patentable, or patented, but which later passed into the public domain. In *dictum*, the Court said it could not. “Congress may not,” the Court wrote, “authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” *Graham*, 383 U.S. at 6.<sup>12</sup> The Court unanimously reaffirmed the same point just a decade ago in *Bonito Boats*. There again, in describing the scope of Congress’ power under the Copyright and Patent Clause, the Court repeated the same language. *Bonito Boats*, 489 U.S. at 146.

These cases have a clear import. If Congress cannot remove “knowledge” from the public domain in the context of patents, this can only be because knowledge in the public domain is not “novel” or “nonobvious” — the parallel concepts in patent law to copyright’s “originality.” Even if such an invention was at one time “novel” or “nonobvious” at the time the new patent would extend to the “Discover[y],” the novelty has worn off. At that time, the “Discover[y]” is no longer patentable.

The same must be true of “originality” in the context of copyright. It, too, restricts the reach of works that can be copyrighted. And as the Copyright and

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<sup>12</sup> This dictum is in tension with one early 19th century Supreme Court case, where the court rejected the argument that a retrospective extension of patents violated the Contracts

Patent Clause is parallel in the power and limits it extends to copyrights and to patents, *Graham* and *Bonito Boats* must mean that work once in the public domain cannot subsequently be removed from the public domain by being copyrighted.

This conclusion is supported by the *Trade-Mark Cases*, 100 U.S. 82 (1880). The issue there was whether Congress' Trade-Mark Act could be sustained under the Copyright and Patent Clause. The Court held that it could not. Although the trade marks at issue were certainly in some sense "Writings," and even writings at one time produced by an "Author[]," the Court noted that many of the trade marks covered by the Act predated the passage of the statute. The mark therefore "may be, and generally is, *the adoption of something already in existence.*" *Id.* at 94 (emphasis added). Thus, the trade marks were not sufficiently creative, and neither principles of copyright nor patent could sustain the Act protecting them.

These cases are fatal to the retrospective operation of the CTEA. That aspect of the statute plainly purports to grant additional exclusive rights to works "already in existence." *Id.* It does not give these additional rights in exchange for "add[ing] to the sum of useful knowledge." *Graham*, 383 U.S. at 6. And just as a patent cannot cover "existent knowledge from the public domain" even if it is granted to the person who first invented that knowledge, so too may a copyright

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Clause or the Ex Post Facto Clause. The challenge did not rest on the Patent Clause. *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813), *aff'd*, 1 U.S. 199, 203-04 (1815).

not extend to “existent knowledge” even if granted to the original author of that knowledge. Unless Congress has the right to remove work from the public domain, then the core of the power that the Copyright and Patent Clause creates is the power to create an incentive to *promote creative activity*. A further grant of copyright to work that has already been produced cannot be justified under that power.<sup>13</sup>

**C. The Retroactive Aspect of the CTEA Violates the “Limited Times” Term of the Copyright and Patents Clause.**

The CTEA’s retroactivity also violates the “limited Times” term of the Copyright and Patent Clause by choking off the supply of previously protected works into the public domain. The text of the Copyright and Patent Clause plainly expresses a commitment to the public domain. Terms are to be “limited,” which means any protection must come to an end. The public domain was not simply the space that “fair use” or the protection of “expression” — rather than “ideas” — populated. Instead, it was clearly intended to be filled by previously protected works. The Constitution gave Congress the power to offer a *quid pro quo* only: in exchange for protection for “limited Times,” copyrighted material would pass into

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<sup>13</sup> It could be argued that the renewal term of copyright was a grant of a copyright to a work already in existence. But this pattern of copyright protection is not inconsistent with this rule. This is because the right to renew many years in the future was already part of the *quid pro quo at the time of authorship* and therefore was part of the package of incentives offered to an author to induce his or her writing.

the public domain. Intellectual property and an intellectual commons were to work in tandem to assure “progress” in “Science and useful Arts.”<sup>14</sup>

This purpose of feeding the public domain guides the meaning of the words “limited Times,” and that definition is confirmed by the preamble to the Clause. Reference to the preamble of the Clause is the method the Supreme Court has used to interpret “Authors” and “Writings” in narrowing those terms to cover writings that are “original.”<sup>15</sup> *See Feist*, 499 U.S. at 345-46; *Trade-Mark Cases*, 100 U.S. at 94. So, too, is this the method this Court should use to determine the meaning of “limited Times.” Copyright terms are appropriately “limited Times” only if they are terms that “promote the Progress of Science.”

Whether a particular copyright term “promote[s] progress” is a judgment ordinarily reserved to Congress. When a term is prospective, then it is at least plausible that an extension of the term will create incentives that will outweigh the cost to the public domain.

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<sup>14</sup> Indeed, the status of the public domain is higher in the constitutional order than intellectual property itself: while there is no obligation on Congress to grant any intellectual property rights at all, there is a clear requirement that any grant of intellectual property rights must not be to the exclusion of the public domain. As the Supreme Court said in *Bonito Boats*, “implicit in the Patent Clause itself is that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception.” 489 U.S. at 151.

<sup>15</sup> This Court has stated that the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power. *Schnapper Public Affairs Press v. Foley*, 667 F.2d 102, 111-12 (D.C. Cir. 1981). We do not question that statement. Our claim is that the Supreme Court has interpreted the terms “Authors” and “Writings” in light of that preamble, and that this Court should do the same with “limited Times.”

But when a term is retrospective, there can be *no increase* in incentives to balance the restriction of the public domain. As this Court said in *United Christian Scientists v. Christian Science Board of Directors*, 829 F.2d 1152, 1168 n.84 (D.C. Cir. 1987), “[a] grant of copyright protection after the author’s death to an entity not itself responsible for creating the work provides scant incentive for future creative endeavors.” A retrospective extension thus presents the rare case where Congress’ judgment cannot stand.

On the government’s reading of “limited Times,” there could be no limit to Congress’ grant of a copyright, so long as each term was fixed in length. A term of 1,000 years would be as valid under the government’s reading as a term of 10 years. And a term that retrospectively extends the copyright by 1,000 years, or that recovers material from the public domain and re-protects it under the copyright clause is also valid on the government’s reading.<sup>16</sup>

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<sup>16</sup> And this, ultimately, is exactly what the CTEA’s House sponsor, Congresswoman Mary Bono, maintained:

Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [Motion Picture Artist Association President] Jack Valenti’s proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress.

144 Cong. Rec. H9946, 9951-52 (October 7, 1998).

But this reading makes no sense of the plainly limiting text in the Copyright and Patent Clause, or of the Supreme Court’s interpretation of that clause. The Copyright and Patent Clause does not say:

Congress shall have the power to secure to Authors and Inventors exclusive Right to their respective Writings and Discoveries.

Such a clause *would* have given Congress the power to create copyrights and patents without internal constraints — perpetual copyrights for whatever purpose Congress deemed just.

Nor does the Constitution say:

Congress shall have the power *to promote the Progress of Science and useful Arts*, by securing to Authors and Inventors exclusive Right to their respective Writings and Discoveries.

That clause would have given Congress the power to create perpetual copyrights and patents that “promote . . . progress.”

Instead 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 exclusive Right to their respective Writings and Discoveries.

This clause requires a public domain of formerly protected works, and limits exclusive rights to those that “promote [ ] Progress.” The government’s reading does neither.

The government’s interpretation is also plainly inconsistent with the Supreme Court’s practice when interpreting terms in the Copyright and Patent Clause. The Supreme Court has never interpreted terms in the Clause in a vacuum, abstracted from the preamble of the Clause. As we have shown above, the Supreme Court’s *implied* limitation of “originality” only makes sense in light of the preamble to the Clause. Absent that express purpose, there would be no principled reason for restricting the scope of “Writings” or “Authors” to “original.” The same principle should guide the interpretation of “limited Times.”

## **II. IN BOTH ITS RETROACTIVE AND ITS PROSPECTIVE APPLICATION, THE CTEA VIOLATES THE FREE SPEECH AND THE PRESS CLAUSES OF THE FIRST AMENDMENT**

Copyright law is a regulation of speech. It determines who can say what — not just who can reproduce the particular expression of someone else, but who may translate or make derivative works (meaning works substantially derived from a copyrighted work, such as the Disney movie *Tarzan* from Edgar Rice Burrough’s 1914 book *Tarzan of the Apes*), and who may make public performances and displays of creative works. *See* 17 U.S.C. § 106.

The CTEA extends this regulation of speech by twenty years for all current and future copyrighted works. It therefore increases state-imposed burdens on speech. Like any regulation that even incidentally burdens speech, *see, e.g., San Francisco Arts & Athletics, Inc.*, 483 U.S. at 536 (intermediate scrutiny for

assignment of term “Olympic”); *Regan*, 468 U.S. at 655-56 (intermediate scrutiny for regulation about copying currency), this expansion of speech regulation must be tested under the ordinary analysis of the First Amendment.

**A. The CTEA is a Content-Neutral Regulation of Speech**

The level of First Amendment scrutiny depends upon whether copyright regulation is content-based or content-neutral. While some have argued that copyright regulation is content-based,<sup>17</sup> there is no need for this Court to choose between these two levels of scrutiny in this case. Even under the lesser standard of review under which content-neutral regulations are scrutinized, the CTEA cannot survive.

Content-neutral regulation of speech is governed by the test first announced in *United States v. O’Brien*, 391 U.S. 367 (1968). As articulated most recently by the Supreme Court in *Turner Broadcasting*, a content neutral regulation of speech can be upheld only “[1] if it advances important governmental interests unrelated to the suppression of free speech and [2] [if it] does not burden substantially more speech than necessary to further [those] interests.” *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (“*Turner II*”).

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<sup>17</sup> See, e.g., M. Lemley & E. Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 186 (1998).



## 1. “Important Governmental Interests”

A content-neutral speech restriction must advance an “important governmental interest.” In the ordinary case, a court may face a difficult task determining which “interests” are “important governmental interests” for purposes of the *O’Brien* test. But here, the Constitution explicitly provides that “important governmental interest:” it is “to Promote the Progress of Science.” For the same reason that the preamble has been used to define the proper scope of the Copyright and Patent Clause power, so too should it guide the Court in testing the impact of a copyright regulation on free speech. Promoting progress is plainly an important governmental interest; it is, as *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 588 (1985), indicates, unrelated to the suppression of free speech; and it sets the standard against which the regulations of the copyright act must be tested. As the Court stated in *Feist*, the “primary objective . . . is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” 499 U.S. at 349. The first step of the *O’Brien* analysis, then, must resolve whether the regulation at stake actually advances this “important governmental interest.”

Congress must pursue this interest by drawing a balance between the “exclusive Right[s]” of copyright and the public domain. As the Supreme Court has recognized, both are essential to the “progress of Science.” *Bonito Boats*, 489

U.S. at 146 (recognizing “that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”)

But the increase in one comes at the expense of the other.

While an exclusive right is plainly a restriction on speech, its effect, within a well-crafted system of copyrights, is to produce more speech. As the Supreme Court indicated in *Harper & Row*, 471 U.S. at 588, a well-crafted copyright law functions as “an engine of free expression.” Without the exclusive right, publishers would be unlikely to compensate authors for their work, and authors would be less able to produce original work. Thus this temporary monopoly aims “to afford greater encouragement to the production of literary works,” *Washington Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939), than would exist in an unregulated market.

But the public domain also promotes this “progress” by making cultural resources available to others to build upon or transform as a culture’s tastes and interests change. W. Landes & R. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 332-33 (1989). When the Disney Corporation adapts Victor Hugo’s “The Hunchback of Notre Dame” to the screen, or uses the music of Beethoven in its film, *Fantasia*, Disney is properly using cultural resources to build new works. Modern culture is filled with just such derivative work — including the musicals *Les Miserables*, *Jesus Christ Superstar*, and *West Side*

*Story*, as well as literary classics such as Joyce's *Ulysses*. Free culture has always depended upon this supply of uncontrolled speech.

## 2. “Not Burden Substantially More Speech Than Necessary”

If a Court concludes that Congress could reasonably have believed that its speech-restricting regulation would advance an “important governmental interest,” then it must ask whether that speech restriction is more restrictive than necessary to achieve the legitimate end. *Turner II*, 520 U.S. at 189. Thus, for example, as members of the Court have indicated, a copyright regulation that protected “ideas” rather than “expression” would be more restrictive than necessary to achieve the government’s interest. *See, e.g., Lee v. Runge*, 404 U.S. 887, 892 (1971) (Douglas, dissenting from denial of cert.). *Cf. New York Times v. United States*, 403 U.S. 713, 726, n. (1971) (Brennan, J., concurring) (copyright laws are not restrictions on freedom of speech because copyright protects only form of expression and not the ideas expressed). No doubt providing protection for ideas might, in some contexts, “advance” the government’s interest — this, after all, in effect is what patent law does for inventions. But protecting ideas is a restriction greater than necessary to achieve the government’s legitimate interest, and would therefore conflict with the second requirement of *O’Brien*.

**B. The CTEA Does Not Advance “Important Governmental Interests” without Burdening “Substantially More Speech than is Necessary.”**

The government has the burden of demonstrating that the CTEA’s restrictions on speech will actually achieve the “important governmental interest” without burdening “substantially more speech than is necessary.” *Turner II*, 520 U.S. at 189. This inquiry is not speculative. While it is Congress that in the first instance must make this judgment about the relationship between the benefits of term extension and its free speech costs, deference to Congress in First Amendment cases “does not foreclose . . . independent judgment of the facts bearing on an issue of constitutional law.” *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994) (“*Turner I*”). This Court must assure itself that “Congress has drawn reasonable inferences based on substantial evidence.” *Id.*

**1. The Retroactive Aspect of the CTEA**

The CTEA increases the term of subsisting copyrights — copyrights already granted and in effect for up to three quarters of a century — by 20 years. These copyrights are for work created and published in the past, the earliest in 1923. The CTEA therefore increases the restrictions on speech by extending the period of time in which it would be illegal to copy these works.

The question under *O’Brien* is whether this regulation “advances” the government’s “important interest.” Could Congress reasonably believe that the

balance it was striking between “exclusive Right[s]” and the public domain would “promote the Progress of Science”?

Plainly not. By extending the term for copyrights granted in 1923, Congress *cannot* increase any incentives *in 1923*. The incentives to produce work in 1923 are forever fixed. Causation is prospective, a fact not even the United States Congress can change. As copyright scholar Melville Nimmer put it,

Neither of the reasons . . . justifying first amendment subordination to copyright can justify [an] extension of an existing copyright term. It can hardly be argued that an author’s creativity is encouraged by such an extension, since the work for which the term is extended has already been created.

M. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1195 (1970). Accord R. L. Bard & L. Kurlantzick, *Copyright Duration*’ 181-84 (1999); Y. Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. Rev. 354, 387 (1999).

On the other hand, the retroactive aspect of the CTEA plainly does restrict the scope of the public domain. Less work will be available for others to use and build upon with the CTEA than without it. The effect is to block a resource that would otherwise be available to Appellants and others.

The CTEA’s retrospective features cannot survive the combination of these two effects. The Act produces no increase in incentives to “promote the Progress

of Science,” yet it also plainly decreases the resources of others to promote such progress. Each of these two effects can only be restrictive. Congress therefore could not reasonably conclude that the net effect would “advance an important governmental interest.”

## **2. The Prospective Aspect of the CTEA**

The CTEA also extends the terms of future copyrights. “Writings” fixed after the CTEA will receive a copyright term of life-plus-70 years, rather than life-plus-50, or in the case of works for hire, a term of 95 years rather than 75 years. Although, in principle, increasing the term of copyright prospectively could increase incentives, the government cannot show that this increase will advance “important governmental interests” without “burden[ing] substantially more speech than [is] necessary to further [those] interests.” *Turner II*, 520 U.S. at 189.

To sustain its burden, the government must show that Congress could reasonably believe that an increase in a copyright term at least 50 years in the future will have an effect on today’s incentives sufficient to outweigh the restriction on speech. Common sense suggests, and simple economics confirms, that this future benefit will have no meaningful effect on present incentives.

In the district court, Appellants presented the uncontroverted affidavit of Dean Hal Varian, which demonstrated that even under the strongest case for the government, the increase in present economic value is tiny. (A 64-67.) Because

the term of protection for copyright already is so long, any additional term will have almost no effect on present incentives. Dean Varian testified that the increase in present value for a change from 75 to 95 years at an interest rate of 10% is .1% of the return from the first fifty years. (*Id.*) An extension for a work, for example, that earned \$1,000 in royalties each year would be worth a total of \$10 today.

The present value of any change in incentives this many years into the future is therefore, as Dean Varian demonstrated, invisible.

The government has not contested Dean Varian's affidavit, nor offered any evidence of its own to show the prospective aspect of the CTEA would increase present incentives to produce new work. The government simply claimed instead that the CTEA advanced other interests beyond increasing speech incentives — such as “harmonization” with European law and film restoration — and that those other interests should suffice to justify the statute.<sup>18</sup>

Perhaps these other interests are important, and surely Congress would be entitled to advance them under some other enumerated power. Congress could, if it wished, grant tax benefits to promote film restoration; it could give funding to the arts if it believes there is insufficient support for a particular kind of work or works; and it could fund a delegation to Europe to argue for copyright laws that

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<sup>18</sup> The government did claim the changes would increase the profits to existing copyright holders. We address this and these other interests that the government alleges in Part II.C.2, *infra*.

conform to our Constitution. But the question in this case is whether these interests can be pursued through the *speech* restrictions of copyright. Content-neutral speech restrictions must survive *O'Brien*. The relevant interest under *O'Brien* is whether the restriction advances the “progress of Science.” As the Varian affidavit shows, any increase due to the CTEA’s extension of copyright terms is “too speculative a gain,” *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 760 (1996), to justify the significant burden on speech at stake.

**C. The “Interests” Offered to Justify CTEA Are Insufficient as a Matter of Law**

In the court below, the government advanced three interests that it argued justified the CTEA. None of these interests is an “important governmental interest” for purposes of the Copyright Clause, because none “promote[s] the Progress of Science.” Alternatively, if this Court were to view these interests as “important,” then it must remand this case to the district court to apply the *O'Brien* analysis. As the Supreme Court has indicated, the inquiry under *O'Brien* is not speculative. The Court must convince itself that the interests asserted are real, and that they outweigh the free speech costs. *Turner I*, 512 U.S. at 664.

The only “important governmental interest” justifying speech regulation under the Copyright and Patent Clause is the “progress of Science.” Whatever



other benefit a copyright law might advance, this requirement is necessary. As the Supreme Court has indicated,

[t]he *sole* interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.

*Fox Film Corp v. Doyal*, 286 U.S. 123, 127 (1932) (emphasis added). The only “general benefit[]” produced by “the labors of authors” is the production of more creative speech. This is the interest that justifies the speech restrictions of copyright law.

By contrast, the interests identified by the government — to the extent they are general benefits at all — are not “general benefits derived by the *public*” produced by the “labor of authors.” They are instead benefits produced by, and accruing to, publishers and film producers. Whatever advantages these benefits confer upon private holders of copyrights, they are not benefits that flow from the creative process, and they are not general benefits that justify a restriction on speech.

### **1. Need for Harmonization of Copyright Laws**

The government argues (1) that the CTEA harmonizes United States copyright law with European law, and (2) that harmonized copyright laws are an “important governmental interest” since they will advance international trade in copyrighted material. The first claim is false; the second unsupported.

Numerous commentators and witnesses before Congress demonstrated that the CTEA does not, in fact, “harmonize” United States law with the law of European Union.<sup>19</sup> To be sure, this is what Congress said it was doing. But this Court is not permitted simply to accept the *ipse dixit* of Congress. There is no reasonable sense in which the changes of the CTEA can be said to “harmonize” American and European law.

The United States is a party to the Berne Convention. It is not a member of the European Union. The Berne Convention requires member states to provide a term of protection for the life of an author plus 50 years. That was the law in the United States before the CTEA. See J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 *Cardozo Arts & Ent. L. J.* 625, 628-31 (1996). The European Union has now directed its members to adopt a life-plus-70 term for copyright duration. Under the “rule of the shorter term” as applied by the European Union, if the United States protected European copyrights for life-plus-50, then members of the European Union would protect United States copyrights for life-plus-50 as well.

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<sup>19</sup> See *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*, 104<sup>th</sup> Cong. 282 (1995) (statement of Prof. John Belton, Rutgers Univ.); *Id.* at 305-06 (statement of Prof. Dennis S. Karjala, Ariz. State Univ.); *Id.* at 313 (statement of Prof. William F. Patry, Benjamin N. Cardozo College of Law).

There are many weaknesses in this claim of “harmonization,” all suggesting that it cannot support the scope of the change that the CTEA advances.

1. As the difference between the Berne Convention and the EU Directive suggests, the choice to harmonize on the EU standard is a choice to deviate from the Berne standard. In some cases, then, our law may become more in line with the EU, but it simultaneously becomes less in line with the practice in other nations, such as Asian countries. *See, e.g.,* 3A Steven Z. Szczepanski, *Eckstrom's Licensing in Foreign and Domestic Operations* § 31.07 (term of Japanese copyright protection is life-plus-50 years for individual authors and 50 years for works for hire). This does not advance harmonization.

2. More fundamentally, the CTEA actually *increases* disharmony with respect to certain authors, certain kinds of work, and some works in particular. The CTEA increases disharmony, for example, with respect to “corporate authors.” The EU offers “corporate authors” (in countries like the United States where that concept is recognized) a term of protection for 70 years. The CTEA would expand the term of protection for “corporate authors” to 95 years (or 120 years if the work is unpublished). *See* Jane C. Ginsburg, *Copyright Legislation for the “Digital Millenim,”* 23 Colum.-VLA J.L. & Arts 137, 172 (1999).

3. The CTEA also increases disharmony with respect to certain types of works. After the CTEA, the United States will provide longer protection for

photographers, creators of applied art, broadcasters, sound recording and film producers than the European Union. N. W. Netanel, *Copyright and Democratic Civil Society*, 106 Yale L.J. 283, 367 (1996).

4. Finally, the CTEA increases disharmony with respect to certain individual works. As Professor Dennis Karjala testified before Congress, under existing law, the works of George Gershwin were about as “harmonized” as they could be. Gershwin died in 1937, so his entire oeuvre goes into the public domain in Europe no later than 2008, no matter what we do here. Prior to the CTEA, his works were scheduled to enter the public domain in the United States during the period 1999 to 2013. Now, under the CTEA they will enter the public domain in 2019-2033. Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, “The Copyright Term Extension Act”*: Submitted to the Senate and House Committees on the Judiciary, 105th Cong. 16 (1998). Thus for at least 11 years, Europeans will have the benefit of free access to one of America’s greatest composers while Americans will not. “Harmonization” is therefore a red herring in this case. The CTEA does not harmonize.

Even if the CTEA did “harmonize” international copyright law, however, there is nothing in this record to explain why harmonized law advances an “important governmental interest.” If disharmony increased the transaction costs

and thereby inhibits otherwise beneficial exchanges, then there would be a marginal benefit in reducing those transaction costs. But in a regime that ties the life of a copyright to the life of the author, the costs of tracking foreign national law are trivial compared to the burden of determining the life of a copyright.<sup>20</sup>

Finally, even if the government did demonstrate some connection between “harmonized law” and copyright compliance, the district court would still need to weigh that benefit against the free speech cost. If the EU forbid copyright for “hate speech,” Congress would not escape First Amendment review merely by pleading “harmonization.” There is no evidence in the record that permits the Court to apply *O’Brien* to this alleged “interest.”

## **2. Providing Increased Resources to Stimulate Creation of New Works**

The government has argued that the CTEA will “promote the development of new works of authorship by allowing American authors, and U.S. copyright-related industries generally, to benefit from increased resources that result from the extension of the copyright term.” (*See Memorandum In Support Of Defendant's Motion For Judgment On The Pleadings 15 (June 25, 1999).*) But this argument is

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<sup>20</sup> A moment’s reflection reveals just how burdensome this must be. In order to determine if a work is in the public domain, a potential user of that work must determine the precise identity of the author (*e.g.*, exactly which John Doe was the author), then engage in the genealogical exercise of finding where the author lived (or, more appropriately, died) and the year of death. Since there may be criminal prosecution of a copyright violator, moreover, the user as a practical matter also must track down and obtain a death certificate. This, too, will be a challenging task, since in most cases the relevant vital statistics will be at least 95 years old.

persuasive only if the link between “new works of authorship” and “increased resources” were plausible. It is wholly implausible to believe that Congress “reasonably believed” that any such link exists.

Stated most simply, the government’s argument has come to this: by giving the grandchildren of past authors money today (while removing creative resources from a pool available to other writers and readers today), we are likely to create more “new works of authorship” than we would have created had the resources of the public domain not be reduced. Benefiting the remote descendants of creators, by restricting speech to others, will, the argument continues, produce more speech than it will restrict.

This argument is simply wrong. Its flaw is causation. Unlike the *quid pro quo* of ordinary copyright law, which, by conditioning “increased resources” on the production of “creative works,” doesn’t pay until the creator performs, the windfall of the CTEA is given *whether or not the descendents of authors produce anything at all*. There is no more reason to believe that this windfall will induce descendents to produce new work than to believe it will induce them to take a vacation in the Caribbean. There is not, in other words, any connection between the grant and the incentive to produce. But there is a clear economic burden on the incentive for others to produce. One economic effect that is certain to occur is the increase in the costs to creative individuals today (say, a playwright), by requiring

them to license materials they need in the course of their own creative enterprise (say, a short story that would, but for the extension, have been in the public domain).

In proceedings below, the government cited the testimony before Congress of Jack Valenti, President of the Motion Picture Association, in support of its claim that this unconditional windfall will in fact produce more new works. (*See* Defendant's Memorandum In Opposition To Plaintiffs' Motion For Judgment on the Pleadings or in the Alternative for Summary Judgment and Reply in Support of Defendant's Motion for Judgment on the Pleadings 9 n.2 (August 23, 1999).) But it is at best implausible to believe that Hollywood is waiting for the income from films released in 1923 before deciding to invest in the latest edition of *Star Wars*. And in any case, a speech restriction must be supported by something more solid than the testimony of lobbyists. The government must demonstrate how this restriction will in fact produce the "progress of Science."

### **3. Preservation of Existing Works**

Finally, the government argues that the retroactive aspect of the CTEA is justified by the need to preserve some types of existing works which may, because of time, decay or be destroyed. In particular, the government points to old films, or music, which require restoration to preserve. This restoration requires an

additional monopoly, the government argues, to make worthwhile the investment in these old media.

This interest too fails to justify the sweeping scope of the CTEA. The CTEA does not limit itself to old media that requires restoration to preserve. Even if Congress might have the power to pass a targeted protection measure for such copyrights,<sup>21</sup> it would not justify the extension of copyright in poems, or music, or books.

And even if so narrowed, this justification could not, consistent with *Feist*, sanction an extension in the copyright term. For either the restoration would qualify as an “original work” or it would not. If it did, then there would be no need to extend the old copyright to protect this new work; existing copyright law would automatically protect the restoration. But if the restoration were not an “original work,” then under the rule of *Feist*, copyright could not extend to it anyway. This justification therefore as a matter of law fails to sustain the extensions of the CTEA.

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<sup>21</sup> Congress alternatively might be able to adopt a measure such as England. The United Kingdom accords publishers of new editions a 25-year right to prevent unauthorized facsimile copies of the typographical arrangement of those editions. Copyright, Designs and Patents Act 1988, §§ 1(c), 15, 17(5) (Eng.).



### **III. FIRST AMENDMENT REVIEW OF COPYRIGHT LAW IS NOT LIMITED TO THE QUESTION WHETHER CONGRESS HAS PROTECTED IDEAS RATHER THAN EXPRESSION**

The district court rejected Appellants’ First Amendment argument in a single sentence, concluding that “[t]he District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others.” *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999). (A 76.) The district court was fundamentally mistaken both about Appellants’ argument and about the law. Appellants do not argue that there is a First Amendment right to use “the copyrighted works of others.” We argue instead that the copyright in the works at issue *cannot constitutionally be extended*.

The district court missed this crucial distinction. In cases raising a “free speech defense to a copyright infringement action,” courts have applied in effect a special First Amendment rule. A copyright, of course, protects the form of expression, but not the underlying idea itself. This expression/idea bifurcation protects the author’s work, while allowing ideas to circulate freely. Because Congress has built these free speech protections into the *scope* of every particular copyright — that is, by protecting “expression” rather than “ideas,” 17 U.S.C. §107 — courts have not been required to apply ordinary First Amendment review where the challenger asserts a right to use an otherwise legitimately copyrighted work. Technically, of course, the First Amendment continues to apply to such claims, but

the prophylactics that Congress has provided are considered to satisfy free speech interests — at least in the vast majority of cases.<sup>22</sup>

But questions about the *scope* of an individual copyright do not exhaust every First Amendment issue that a copyright statute might raise. If Congress purported to copyright the American Flag to prevent flag-burning, there would be no doubt that a First Amendment issue would be raised, even though Congress would be regulating “expression only.” M. A. Lemley & E. Volokh, *supra*, at 182-83. Likewise, if Congress denied copyright to “indecent” works, *cf. Reno v. ACLU*, 521 U.S. 844 (1997), or to works written by convicted felons, *cf. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105 (1991), there would be no doubt that First Amendment interests would be implicated in each of these cases. None of these cases could be dismissed with the simple argument that copyright protects expression rather than ideas, any more than “[saying that] Paul Robert Cohen could have worn a jacket saying ‘I Strongly Resent the Draft’ would [ ] have justified a law forbidding Cohen to use the word he chose.” *San Francisco Arts & Athletics, Inc. v. United States Olympic*

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<sup>22</sup> Several courts and commentators have suggested contexts where in fact First Amendment review might be required. See *Triangle Publications, Inc. v. Knight Ridder Newspapers, Inc.*, 626 F.2d 1171, 1184 (5<sup>th</sup> Cir. 1980) (Tate, J., concurring); M. B. Nimmer, *Does Copyright Abridge The First Amendment Guarantees Of Free Speech And Press?*, 17 U.C.L.A. L. Rev. 1180, 1200 (1970).

*Committee*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting), *aff'd*, 483 U.S. 522 (1987).

**A. The District Court Misconstrued *Harper & Row* and *United Video***

The district court rested its decision upon two cases — *Harper & Row* and *United Video, Inc. v. F.C.C.*, 890 F.2d 1173 (D.C.Cir. 1989). Neither case supports the court’s abridgment of ordinary First Amendment analysis.

In *United Video*, the petitioners demanded a right to rebroadcast otherwise legitimately copyrighted material. They were not claiming that the material at issue could not be copyrighted; nor were they challenging the statute under which copyright was granted. They were instead simply asserting the right to use someone else’s property on the grounds that the First Amendment immunized their conduct.

This Court rejected “a first amendment right to express themselves using the copyrighted materials of others,” 890 F.2d at 1190, but it did not go so far as to say that the First Amendment had no place when it came to copyright law. Instead, it suggested the opposite. As Judge Wald noted, “cases in which a first amendment defense is raised to a copyright claim do not utilize an *O’Brien* analysis.” *Id.* Thus, “[t]his crucial fact,” she explained, “distinguishe[d] the case from *Century Communication*,” where this Court did apply *O’Brien* to police regulations

affecting the press. *Id.* See also *Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C.Cir. 1987).

The very same fact distinguishes *United Video* here. Appellants are not asserting the right to use otherwise legitimately copyrighted material, or a First Amendment right to trespass on someone else's property. *Cf. Hudgens v. NLRB*, 424 U.S. 507 (1976). Instead, this challenge is to the constitutionality of the statute under which the property at stake was granted.

*Harper & Row* neither holds nor even suggests anything different. In *Harper*, the *Nation* was sued by Harper & Row for copyright infringement. The *Nation* had scooped *Time* magazine's exclusive right to publish excerpts from President Ford's biography; *Time* therefore cancelled a contract to publish excerpts from the book. In defending against a copyright infringement suit, the *Nation* claimed a "first amendment right" to use this otherwise legitimately copyrighted material. The Court rejected that right, stating that the First Amendment interest that the *Nation* raised had been adequately protected by Congress when Congress extended copyright protection to expression, but not ideas. There was, in other words, no "first amendment defense."

The district court misread these limited holdings to state a general First Amendment copyright exception — in effect that any First Amendment challenge to the copyright act must fail so long as Congress protects "expression" rather than

“ideas.” But these cases do not establish that extraordinary general proposition. Again, the Supreme Court would not reject a First Amendment challenge to a copyright act that copyrighted the United States flag simply because it copyrighted “expression” only.

Nor did the Second Circuit dismiss a First Amendment challenge to the “Manufacturing Clause” of the Copyright Act on the ground that “idea/expression” distinction exhausted the First Amendment interest. *See Authors League of America v. Oman*, 790 F.2d 220 (2d Cir. 1986). Rather the court reached the substantive merits of the First Amendment claim. And while the court ultimately rejected the First Amendment claim, it did not view either the Supreme Court, or any other circuit court, as having established a rule that the only First Amendment issue for copyright law is whether the law reaches “ideas” rather than “expression.”

Where a litigant claims a free speech right to use the intellectual property of someone else, it is perfectly unexceptional that the Court would defer to the free speech protections built into the statute granting the property right. But where the challenge is to the statute granting the property right itself — raising issues distinct from the free speech issues about copyright’s scope — then cases from the narrow context of “free speech defenses” cannot generalize to every context where a First Amendment claim might be made. Outside of the context of “free speech defenses,” ordinary First Amendment analysis is required.

## **CONCLUSION**

For the foregoing reasons, the district court's decision should be reversed, the Copyright Term Extension Act declared unconstitutional, the enforcement of the No Electronic Theft Act against persons whose infringement of a copyright would not have happened but for the CTEA's amendment of 17 U.S.C. § 304(b) enjoined, and the Appellants awarded costs of this action, including reasonable attorneys' fees.

Dated: May 22, 2000

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2), this brief includes \_\_\_\_\_ words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word 97 in 14 point Palatino font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

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Geoffrey S. Stewart

Dated: May 22, 2000



## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2000, I caused a true and correct copy of the foregoing Appellants' Opening Brief to be served by first-class mail, postage pre-paid, on each of the following:

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## **ADDENDUM**

## **UNITED STATES CONSTITUTION, ARTICLE I, § 8**

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.

### **17 U.S.C. § 506 (1997), NO ELECTRONIC THEFT ACT**

(a) Criminal Infringement.--Any person who infringes a copyright willfully either --

- (1) for purposes of commercial advantage or private financial gain, or
- (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000,

shall be punished as provided under section 2319 of title 18, United States Code.

### **18 U.S.C. § 2319 (1997)**

(c) Any person who commits an offense under section 506(a)(2) of title 17, United States Code--

- (1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of \$2,500 or more;
- (2) shall be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and
- (3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.

**17 U.S.C. § 304 (1998), AS AMENDED BY THE  
COPYRIGHT TERM EXTENSION ACT**

(a) Copyrights in Their First Term on January 1, 1978.--

(1) (A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of--

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work--

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2) (A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which--

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the

person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which--

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3) (A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office--

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4) (A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the

facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) Copyrights in their renewal term at the time of the effective date of the Sonny Bono Copyright Term Extension Act.--Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.--In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's

share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) Termination rights provided in subsection (c) which have expired on or before the effective date of the Sonny Bono Copyright Term Extension Act.--In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.