

restriction on Congress's discretion, plaintiffs ask the Court to invalidate the Sonny Bono Copyright Term Extension Act ("CTEA") which, as its title reflects, extends the term of copyrights.

The difficulty with plaintiffs' argument, of course, is that the Copyright Clause does not contain the language plaintiffs prefer. Instead, the authority to determine the duration of copyrights (subject only to the requirement that copyrights be granted "for limited Times") is left entirely to the discretion of Congress. While the broad discretion conferred upon Congress by the express language of the Copyright Clause does not impose the "judicially administrable" limitations that plaintiffs seek in this case, that hardly provides a basis for the Court to rewrite the Copyright Clause to supply such limitations.

Plaintiffs' contention that the CTEA fails to advance the purposes of the Copyright Clause is equally without merit, and stems from plaintiffs' misconceptions regarding the means by which Congress may seek to "promote the Progress of Science and the useful Arts." As defendant explained in her initial memorandum (at 12), within the limits of the authority conferred by the Copyright Clause, Congress may select the policy which, in its judgment, best effectuates the objectives of the Constitution. Thus, while Congress may seek to promote progress in science and the arts by providing incentives solely for the creation of new works (as plaintiffs suggest), it may also seek to promote that objective by providing incentives for the preservation and dissemination of copyrighted works. Similarly, while Congress may

choose to promote the progress of science and the useful arts solely by advancing the public domain (as plaintiffs evidently prefer), it may also choose to promote that objective by providing incentives calculated to encourage the dissemination of copyrighted works long before they fall into the public domain. In addition, there can be little question that Congress may enact legislation designed to foster and encourage international cooperation in the protection of copyrighted materials, and thereby better secure the exclusive rights of authors as contemplated by the Constitution, regardless of whether such legislation directly stimulates the creation of new works.

Plaintiffs' attempt to reassert their Copyright Clause arguments under the guise of the First Amendment is likewise to no avail. As defendant previously established, both the Supreme Court and the D.C. Circuit have unequivocally held that established principles of copyright law, which preserve free communication of facts and ideas and permit copyright solely of a particular expression, give adequate protection to free expression under the First Amendment. These decisions are dispositive of plaintiffs' First Amendment claims in this case.

Finally, the public trust doctrine has no application in this case. As defendant explained previously, the doctrine was developed at common law to protect the sovereignty and dominion of the King of England, and subsequently the States, over the soils beneath navigable waters. The Supreme Court has emphatically and repeatedly rejected the notion, which plaintiffs continue to

advance in this case, that the common law public trust doctrine could ever operate as a limitation on the constitutional authority of the United States.

For all of these reasons, plaintiffs' claims are wholly without merit, and defendant is entitled to judgment in her favor as a matter of law based upon the pleadings in this case.

ARGUMENT

I. CONGRESS HAS BROAD DISCRETION UNDER THE COPYRIGHT CLAUSE TO ADJUST THE TERM OF COPYRIGHTS

A. The Phrase "limited Times" Does Not Prohibit Congress From Changing The Term Of Copyrights

For the past two centuries, it has been established that the Copyright Clause, which expressly grants Congress the power to secure to authors the exclusive right to their respective writings "for limited Times," Art. I, § 8, cl. 8, leaves the specific "Times" during which copyright protection will endure "subject to the discretion of Congress." Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.) 1, 16 (1829). Plaintiffs, evidently because they are dissatisfied with the manner in which Congress has exercised this discretion, seek to impose a different rule by urging the Court to "interpret" the phrase "limited Times" to mean a single "time that cannot be extended" (Pl. Mem. at 32).

As defendant demonstrated in her initial memorandum (at 19-20), plaintiffs' attempt to rewrite the Copyright Clause in a manner more supportive of the claims they assert in this case is irreconcilable with the Supreme Court's decision in McClurg v.

Kingsland, 42 U.S. (1 How.) 202, 206 (1843), which specifically reaffirms Congress's authority to enact laws under the Patent and Copyright Clause that are "retrospective in their operation."¹ Plaintiffs' proposed "interpretation" of the Clause also conflicts with the consistent understanding of the Congress over two centuries, as reflected in every copyright statute enacted since 1790. Each successive copyright statute, by its terms, applied both to copyrightable works yet to be created and works already in existence. Such a consistent, longstanding interpretation of the Copyright Clause by the Congress, which has controlled the rights of copyright holders for two centuries, is, in and of itself, "almost conclusive." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

Putting aside the fact that plaintiffs' position is unsupported by any authority and incompatible with controlling precedent, the "limited Times" language itself provides no support whatsoever for plaintiffs' suggested interpretation. If anything,

¹ Plaintiffs contend that the Supreme Court's decision in McClurg has been overruled by the Court's decision in Feist Publications v. Rural Telephone Service Company, 499 U.S. 340 (1991). Pl. Mem. at 82 n. 28. However, Feist does not even discuss the scope of Congress's authority to amend legislation governing copyrights. Alternatively, plaintiffs contend that McClurg applies solely to statutes governing patents, and not those governing copyrights. Id. Notwithstanding plaintiffs' assertion to the contrary, it is "appropriate to refer to [patent law cases] because of the historic kinship between patent law and copyright law." Sony Corp. v. Universal Studios, 464 U.S. 417, 439 (1984). The constitutional clause at issue in this case governs both patents and copyrights, and plaintiffs offer no principled reason why legislation that is "retrospective in its operation" would be constitutional for patents, but unconstitutional for copyrights.

the phrase "limited Times" is wholly inconsistent with plaintiffs' contention that the duration of copyrights must be immutably fixed and inflexible. Instead, the Clause is phrased in a manner which makes clear that Congress has broad discretion and flexibility to adjust the duration of copyrights as circumstances warrant, provided only that the periods selected by Congress are "limited Times."

Nor can the CTEA be invalidated based upon plaintiffs' claim that the statute represents one of a series of "endless extensions" that must inevitably lead to a perpetual copyright. Pl. Mem. at 31. As the report of the Senate Judiciary Committee reflects, such unsubstantiated speculation is groundless:

The Committee is aware of the criticism of the proposed extension by those who suggest that it marks a step down the road of perpetual copyright protection. The Committee is unswayed by this argument for three reasons. First, the greatest obstacle to a perpetual term of copyright protection is the U.S. Constitution, which clearly precludes Congress from granting unlimited protection for copyrighted works. Second, the emerging international standard, to which the bill purports to adhere, and the movement of international copyright in general are not toward perpetual protection, but to a fixed term of protection based on the death of the author. Third, the principal behind the U.S. copyright term - that it protect the author and at least one generation of heirs - remains unchanged by the bill. The 20-year extension proposed by the bill merely modifies the length of protection in nominal terms to reflect the scientific and demographic changes that have rendered the life-plus-50 term insufficient to meet this aim.

S. Rep. No. 104-315, 104th Cong., 2nd Sess. 11 (1996). Thus, Congress is keenly aware of the constitutional requirement that copyright protection endure for "limited Times" and, as the Committee's discussion reflects, there is no basis for concluding

that the CTEA runs afoul of that requirement.

**B. The CTEA Is Plainly Adapted To Advance The
Purposes
Of The Copyright Clause**

Plaintiffs urge the Court to look beyond the literal "limited Times" language itself to the purpose of the Copyright Clause (i.e., "To promote the Progress of Science and the useful Arts"), and infer from that purpose that retrospective changes in the term of copyrights are in excess of Congress's constitutional authority. They advance two arguments in support of this contention, both of which are without merit.

First, they contend that Congress may seek to achieve progress in science and the useful arts through a single means - - specifically, by offering copyright protection as an incentive to authors to create new works of authorship. Because "there is no way to incent backwards," plaintiffs insist that such an incentive must be provided to authors before a copyrightable work is created. Pl. Mem. at 30.

Plaintiffs' analysis entirely misses the point of copyright protection. It is undoubtedly true that one of the principal purposes of copyright protection is to stimulate creative activity by authors. Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 429 (1984); Goldstein v. California, 412 U.S. 546, 555 (1973); Twentieth Century v. Aiken, 422 U.S. 151, 156 (1975). And the legislative history underlying the CTEA makes clear that the Act was designed, in part, to serve that

objective by providing additional resources to authors to stimulate the creation of new works. Def. Mem. at 15-17.²

The purpose of the Copyright Clause does not stop, however, with providing incentives for the creation of new works, as plaintiffs evidently would have this Court believe. The Clause is designed not merely to stimulate creativity, but to "promote the Progress of Science and the useful Arts." As the Court explained in Sony, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting the broad public availability of literature, music and other

² Plaintiffs ridicule Congress's effort to stimulate the creation of new works by channeling additional resources to authors as "absurd as a matter of economics and common sense." Pl. Mem. at 75. However, the testimony before Congress suggests otherwise. As Jack Valenti, President of the Motion Picture Association, explained to the Senate Judiciary Committee, the ability of the American motion picture industry to finance the production of new films is dependent upon the availability of capital derived from prior works. Id. at 90. Similarly, as songwriter Alan Mencken explained in his testimony before the Committee:

There comes a point in most people's lives when one must make a practical decision about the choice of career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.

Senate CTEA Hearings at 44. It cannot seriously be disputed that the Constitution permits Congress to use copyrights "to encourage people to devote themselves to intellectual and artistic creation." Goldstein v. California, 412 U.S. at 555. Although plaintiffs evidently believe that limitless capital will be available for production of new works based "solely upon the return from that work" (Pl. Mem. at 75), such a proposition is hardly self-evident, and Congress could reasonably conclude otherwise based upon the testimony of individuals knowledgeable about copyright-related industries.

arts." 464 U.S. at 431-432, quoting Twentieth Century v. Aiken, 422 U.S. at 156.

Consequently, Congress is justifiably concerned not only with providing incentives to an author to create new works, but also incentives which will "induce release to the public of the products of [the author's] creative genius." Sony, 464 U.S. at 429, quoting United States v. Paramount Pictures, 334 U.S. 331, 158 (1948); accord, Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 558 (1985) ("copyright supplies the economic incentive to create and disseminate ideas") (emphasis added).

"The very object of publishing a book on science and the useful arts is to communicate to the world the useful knowledge which it contains." Feist Publications v. Rural Telephone Service Company, 499 U.S. 340, 350 (1991), quoting Baker v. Selden, 101 U.S. 99, 103 (1880). See Ladd v. Law & Technology Press, 762 F.2d 809, 812 (9th Cir. 1985), cert. denied 475 U.S. 1045 (1986) ("provision of Copyright Act which sustains a national library" is necessary and proper means of achieving the objectives of the Copyright Clause). Thus, plaintiffs' suggestion that an incentive for the preservation and dissemination of existing copyrighted works "advances no interest recognized as legitimate by the Copyright Clause" (Pl. Mem. at 79) is simply erroneous as a matter of law.³

³ Contrary to the claims made in plaintiffs' memorandum (Pl. Mem. at 80), nothing in either the CTEA or the government's brief suggests that a copyright may be granted in a work that fails to satisfy the originality requirements in the Copyright Clause. See generally, Feist Publications v. Rural Tel. Service, 499 U.S. 340 (1991). The Act, by its terms, does not alter the

Plaintiffs' crabbed interpretation of the purposes of the Copyright Clause also ignores the fact that the constitutionally chosen means of advancing progress in science and the useful arts is "by securing for limited Times to Authors . . . the exclusive right to their respective Writings" Thus, protecting the integrity of the nation's copyright system by ensuring that copyright restrictions are meaningful and enforceable is a significant function of the Congress. Given that function, there can be little doubt that Congress may enact legislation designed to strengthen protections for copyrighted works. Dowling v. United States, 473 U.S. 207, 220 (1985).

The legislative history underlying the CTEA makes clear that one of the principal objectives of the Act was to harmonize the term of copyrights in the United States with those applicable in the European Union. Def. Mem. at 13-15. Congress believed that harmonization of the term of copyrights was an essential step in fostering international cooperation in the protection of copyrighted works. Such international cooperation was, in turn, viewed as "crucial" to the integrity of the nation's copyright system, because recent technological developments "make[] it possible to transmit copyrighted works directly to individuals

originality requirements of the copyright laws, and therefore applies solely to original works of authorship that otherwise satisfy the requirements for copyright. The CTEA merely provides incentives to authors to induce them to preserve and disseminate such original works of authorship to the public which, as discussed in the text, has long been recognized as a key means of promoting the progress of science and the useful arts. Consequently, plaintiffs' reliance on Feist is misplaced.

throughout the world" Senate CTEA Hearing at 20. In essence, copyright protection which stops at the border is no longer sufficient to protect the copyrights of American authors.

Although plaintiffs cavalierly suggest that fostering international cooperation through harmonization of copyright laws fails to rise to the level of an "important governmental interest" (Pl. Mem. 71), Congress has justifiably viewed the risk of international pirating of copyrighted materials as enormously important to the viability of the nation's copyright system. As the Supreme Court aptly cautioned in Sony, the courts should not attempt to second-guess Congress's judgment on the threat to copyrights posed by recent developments in technology:

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new

technology.

464 U.S. at 431.

Plaintiffs' second attack on the purposes of the CTEA rests on an equally flawed premise. Specifically, plaintiffs urge that the Copyright Clause is designed to promote progress in science and the useful arts "[b]y releasing copyrighted works to the public domain after 'limited Times'" Pl. Mem. at 25. Consequently, plaintiffs surmise that copyright legislation is constitutionally valid only if it is "consistent with the objective of advancing the public domain." Pl. Mem. at 29.

Legislation which extends the term of copyrights is said to be unconstitutional because it "removes work that, but for the [extension], would have passed into the public domain." Pl. Mem. at 31.

Once again, plaintiffs' arguments are premised upon the erroneous notion that there is but a single means by which Congress may promote the progress of science and the useful arts - - this time, by advancing the public domain. However, as the Supreme Court's decision in Feist makes clear, the Copyright Clause is designed to promote progress in science and the useful arts long before a particular work enters the public domain.

The primary objective of copyright is not to reward the labor of authors, but to "promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.Ct. 2040, 2044, 45 L.Ed.2d 84 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely on the ideas and information conveyed by a work. *Harper & Row, supra*, 471 U.S., at 556-557, 105 S.Ct., at 2228-2229. This principle, known as the idea/expression or fact/expression dichotomy applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.
499 U.S. at 349-350.

Through the copyright term extension authorized by the CTEA, Congress provided incentives designed to ensure that original works of authorship that form an important part of the nation's heritage are preserved and disseminated so that "others [may] build freely on the ideas and information conveyed by [the] work." Id. For that reason, while extension of the term of copyright,

like all copyright restrictions, delays entry of the work into the public domain, it is, nonetheless, fully consistent with the constitutional objective of promoting progress in science and the useful arts.

C. The CTEA Grants To Authors The Exclusive Right To Their Writings

As defendant established in her initial memorandum (at 21-23), the Copyright Act expressly vests all of the rights associated with a copyright "initially in the author or authors of the work." 17 U.S.C. § 201(a). Nothing in the CTEA alters or repeals this provision. Thus, in the absence of some independent action by an author to sell or assign his copyright, all of the rights associated with that copyright, including the extended term of protection provided by the CTEA, remain in the author.

If an author does assign his or her copyright interest, the terms of the parties' agreement would control the scope of the assignment and, more particularly, whether the assignment encompasses an extended term. The author may agree to transfer his or her exclusive rights to a third party for only a limited period or, alternatively, subject to any applicable statutory termination right, the author may agree in advance (before a renewal period or term extension commences) to transfer or assign future rights of copyright conferred upon that author by Congress. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 773 (1943). In either case, Congress has granted to the author the exclusive right to the author's writings, and only the author (or his or her

heirs and assigns) has the authority to transfer that right to a third party. As the Supreme Court has recognized, such assignments of copyright interests have occurred throughout the nation's history, and represent the means by which authors obtain compensation for their writings:

If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell.

Fred Fisher, 318 U.S. at 657; accord, CCC Information Serv. v. Maclean Hunter Mkt. Rep., 44 F.3d 61 (2d Cir. 1994) ("The financial incentives to authors consist of exclusive rights to their writings, that may be sold or licensed for money, so that authors may earn a living from the creations that benefitted the public.").

If publishers reap the benefits of a copyright, Pl. Mem. at 33, they do so by virtue of the actions and agreements of the author, not the underlying statute conferring assignable rights upon the author. Accordingly, such assignments have no bearing upon the constitutionality of the statute. Rather, they represent nothing more than the manner in which the author has chosen to take advantage of the exclusive rights which the Constitution expressly authorizes Congress to confer upon that author.⁴

⁴ In certain circumstances, the Copyright Act grants the author, and his or her heirs, a statutory right to terminate a prior assignment of a copyright. 17 U.S.C. §§ 203, 304(c) and 304(d). As explained in the text, an author's decision to assign a copyright does not alter the fact that Congress granted the exclusive rights associated with that copyright to the author. That remains true regardless of whether the author has a statutory or contractual right to terminate the assignment. Just as an

II. The CTEA COMPLIES FULLY WITH THE FIRST AMENDMENT

As defendant previously explained (see defendant's initial memorandum at 27-29), plaintiffs' First Amendment challenge to the Copyright Act is wholly insubstantial and, in fact, irreconcilable with controlling precedent. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985); United Video v. F.C.C., 890 F.2d 1173, 1191 (D.C. Cir. 1989). As both Harper and United Video make clear, "the familiar idea/ expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression." Id.

In response, plaintiffs argue that the Court should ignore these decisions, which directly address the relationship between the First Amendment and the copyright laws, and instead, focus on First Amendment decisions pertaining to areas wholly unrelated to copyright. Specifically, plaintiffs urge the Court to apply the standards governing intermediate First Amendment scrutiny of content-neutral restrictions on speech which were first enunciated in United States v. O'Brien, 391 U.S. 367, 377 (1968). Under the O'Brien standard, "[a] content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech

assignment of a copyright by an author does not affect the constitutionality of the copyright laws, so too the constitutionality of the CTEA does not turn upon the existence or scope of an author's right to terminate that assignment. Plaintiffs' arguments to the contrary (Pl. Mem. at 34-35) are simply unfounded.

and does not burden substantially more speech than necessary to further those interests." Turner Broadcasting System v. F.C.C., 520 U.S. 180, 189 (1997). Plaintiffs then devote considerable energy to attempting to establish that the CTEA fails to satisfy the O'Brien standards.

However, plaintiffs' suggestion that the O'Brien standards should be applied to test the validity of restrictions on the use of copyrighted materials has already been considered and expressly rejected by the D.C. Circuit. In United Video v. Federal Communications Commission, 890 F.2d 1173 (1989), a group of cable television companies challenged federal regulations that restricted the retransmission of copyrighted television broadcasts as violative of the First Amendment. Like plaintiffs here, the petitioners in United Video sought to establish that the regulations failed to satisfy the standards for intermediate scrutiny set out in O'Brien. The Court concluded, however, that "the rules are not subject to such scrutiny." Id. at 1190. The Court's explanation for this conclusion disposes of plaintiff's claim under O'Brien:

The petitioners are therefore in the position of claiming that they have a first amendment right to express themselves using the copyrighted materials of others.

* * * Cases in which a first amendment defense is raised to a copyright claim do not utilize an O'Brien analysis. The Constitution grants Congress the power to secure for limited times to authors the exclusive rights to their works, and this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work. In Harper & Row v. Nation Enterprises, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), for instance, the Supreme Court considered whether a magazine's excerpts from former

President Ford's memoirs infringed their copyright even though the defendant claimed a first amendment right to quote them. The Court did not ask, as it would have, if it applied *O'Brien*, whether copyright protection furthered an important governmental interest unrelated to the suppression of free expression, and whether the incidental restriction on expression was no greater than was necessary to further that interest. The furthest the Court was willing to go was to consider whether the public importance of the excerpts might have some bearing as to whether they would be considered a "fair use" of the copyrighted work - and even this claim was rejected. *Id.* at 555-60, 105 S.Ct. at 2227-30.

In the present case, the petitioners desire to make commercial use of the copyrighted work of others. There is no first amendment right to do so. Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.

Id. at 1190-1191.

Plaintiffs' attempts to circumvent the direct holding of United Video (Pl. Mem. at 49-54) are wholly unpersuasive. First, plaintiffs' suggestion that the reasoning of the Court applies solely to copyright infringement actions (Pl. Mem. at 50-51) is frivolous since United Video itself was not a copyright infringement action, but instead a challenge to regulations promulgated by the Federal Communications Commission.

Plaintiffs alternatively argue that the holding in United Video applies solely to cases in which the "substantive scope of copyright's reach is challenged," and not to cases that challenge the duration of copyright restrictions (Pl. Mem. at 52-53). However, the courts' decisions in Harper & Row and United Video do not rest on the limited duration of copyrights but instead on the conclusion that the copyright laws, because they preserve the

unfettered exchange of ideas, adequately accommodate the First Amendment. That would remain the case, regardless of a copyright's duration.

Although plaintiffs acknowledge that, so long as the idea/expression dichotomy remains a part of the Copyright Act, "there is no need for courts to add an additional layer of First Amendment protection," (Pl. Mem. at 51-52), that is precisely what they seek to do in this case. Under plaintiffs' theory, the analysis of United Video would apply solely to the first day of copyright protection; the courts would then have to look to O'Brien to determine whether such restrictions continue to be necessary on day two. Adoption of such a theory would emasculate the holding in United Video since, in every case, courts would have to apply the standards enunciated in O'Brien to determine whether copyright restrictions remain necessary, a result which is irreconcilable with the Court's decision.⁵

⁵ Even if O'Brien were applicable in this case, the CTEA fully satisfies its standards. The interests advanced by the copyright laws are unquestionably "important governmental interests unrelated to suppression of speech" - - indeed, so important that they are expressly included in the powers conferred upon Congress by the Constitution. As defendant established in Point I above, the CTEA clearly advances those interests notwithstanding plaintiffs' arguments to the contrary. Similarly, as the decisions in Harper & Row and United Video reflect, the idea/ expression dichotomy ensures that the CTEA does not burden substantially more speech than necessary to further those interests.

Plaintiffs argue that the CTEA's extended period of copyright protection fails to provide any incentive to creativity because the present economic value of such protection for newly created works is "tiny." Pl. Mem. at 48. However, as the legislative history reflects, the CTEA was motivated by reasons unaffected by plaintiffs' "present economic value" analysis, including Congress'

III. THE PUBLIC TRUST DOCTRINE DOES NOT RESTRICT THE SCOPE OF CONGRESS'S CONSTITUTIONAL AUTHORITY UNDER THE COPYRIGHT CLAUSE

Although the public trust doctrine is a judicially developed doctrine derived from the common law which pertains to states' ownership of soils under navigable waters, plaintiffs contend, once again without citation of supporting authority, that the public trust doctrine is "best understood as a principle of constitutional law, constraining federal law." Pl. Mem. at 66. However, as defendants previously demonstrated, the Supreme Court

desire to harmonize our copyright laws with those of the European Union, to provide incentives for the preservation and dissemination of existing works, and to provide additional resources for the creation of new works. Moreover, the incentives provided to authors by the Copyright laws have never been tied to some particular dollar amount of compensation to authors which was thought to be reasonable. Instead, the incentive which Congress has chosen to provide to authors is a promise of a stream of income for the author and his or her descendants. As the Senate Judiciary Committee explained:

Based on the numerous viewpoints presented to the Committee as it has considered these issues, the Committee concludes that the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation. The Committee believes that this general anticipation of familial benefit is consistent with both the role of copyrights in promoting creativity and the constitutionally based constraint that such rights be conferred for limited times.

S. Rep. No. 104-315, 104th Cong. 2d Sess. 10. Thus, the incentive to authors adopted by Congress is not a particular level of monetary compensation, but instead a "general anticipation of familial benefit" from the copyright which is appropriately tied to the life expectancy of the author and his or her descendants. Given the nature of that incentive, plaintiffs' present value computations are irrelevant.

has repeatedly ruled to the contrary.

In that regard, the Court has consistently held that whatever interests the states may have by virtue of the public trust doctrine are subordinate to and "can never be used so as to effect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution." Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845); Shively v. Bowlby, 152 U.S. 1, 48 (1894) (public trust doctrine does not restrict Congress's power to perform international obligations, to regulate foreign or interstate commerce, or to "carry out other public purposes appropriate to the objects for which the United States hold the territory"); accord, Phillips Petroleum Company v. Mississippi, 484 U.S. 469, 473-474 (1988) (state's interests in public trust lands are "subject to the rights surrendered by the Constitution of the United States"); see District of Columbia v. Air Florida, 750 F.2d 1077, 1085 (D.C. Cir. 1984) (questioning "whether Congress has preempted some or all of the field which a *federal* common law public trust doctrine would occupy"). In view of the fact that the public trust doctrine derives not from the Constitution, but instead from the common law, the doctrine does not and cannot operate as a restriction on the scope of Congress's authority under the Copyright Clause. Plaintiffs' claims to the contrary

are simply without foundation.⁶

CONCLUSION

For the foregoing reasons, defendant's motion for judgment on the pleadings should be granted, plaintiffs' cross-motion should be denied, and judgment should be entered in favor of defendant in this action.

Respectfully submitted,

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⁶ The Supreme Court's decision in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) provides no support for plaintiffs' claim that the public trust doctrine operates as some sort of overarching limitation that supersedes Congress's constitutional authority over copyrights. In Illinois Central, the Court held that the State of Illinois could not irrevocably abdicate its control over submerged lands in the harbor of the City of Chicago, reasoning that, to do so, was akin to abdicating its police powers to a private corporation. Id. at 453-456. Here, plaintiffs seek to use the same doctrine not to prevent Congress from surrendering its authority over copyrights, but instead to prevent Congress from exercising that authority.

CERTIFICATE OF SERVICE

I certify that, on August 23, 1999, I caused a copy of the foregoing 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, to be served by first-class mail, postage prepaid, upon plaintiff's counsel at the following addresses:

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