

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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,

Plaintiffs,

v.

JANET RENO, in her official capacity
as Attorney General of the
United States,

Defendant.

Case No. 1:99CV00065 JLG

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

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Plaintiffs 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 submit this memorandum (1) in support of their motion for judgment on the pleadings or, in the alternative, for summary judgment and (2) in opposition to the government's motion for judgment on the pleadings. For the reasons set forth below, plaintiffs submit that judgment should be entered against defendant Janet Reno.

INTRODUCTION

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.

Congresswoman Mary Bono¹

Two views of copyright are alive within our culture. On one, copyright is a kind of natural entitlement backed by law. It gives a legal protection to authors that in turn should be as strong as the law can provide. The job of Congress, on this view, is to “strengthen ... copyright laws in all the ways available.” It is to protect an author's control over “Black Beauty” as much as it is to protect a farmer's control over “Blackacre.”²

On the other view, copyright is a bargain, struck between an author and society. In exchange for their original work, authors are granted an “exclusive right” for a limited time, after which their work falls into the public domain. The public domain becomes a resource for others to draw upon.³ The aim of copyright, on this view, is to

¹ 144 Cong. Rec. H9946, 9951-2 (October 7, 1998).

² See this discussion in Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180, 1193 (1970).

³ As Professor Jessica Litman has described it,

[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects and sculptors all engage in the process of adapting, transforming, and recombining what is already 'out there' in some other form. This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.

provide a sufficient incentive for authors to create, and in turn, to enrich the public domain. The law strikes a balance between rights granted an author, and access guaranteed the public.

Our framers chose between these two views. As the Supreme Court has repeatedly recognized, the framers intended our Constitution to offer authors a bargain, not a perpetual right.⁴ They meant Congress to create incentives, through a temporary and limited monopoly, not an entitlement that gets perpetually renewed. Their aim was balance.⁵ As Justice Joseph Story described the power:

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

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S.Ct. 2199, 1999 U.S. Lexis 4376, *38 (1999) (Stevens, J., dissenting) (quoting J. Story, Commentaries on the Constitution of the United States § 502, p. 402 (R. Rotunda & J. Nowak eds. 1987))(emphasis added).

Jessica Litman, The Public Domain, 39 Emory L.J. 965, 966-67 (1990) (footnotes omitted; emphasis added).

⁴ See Graham v. John Deere Co., 383 U.S. 1, 9 (1966) (“The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.”); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (monopoly granted by Copyright Act “is intended to motivate the creative activity of authors and inventors ... and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (“The 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 the authors.”)(citations omitted). For a balanced consideration of the two traditions, see Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tulane L. Rev. 991 (1990).

⁵ See, e.g., Stewart v. Abend, 495 U.S. 207, 224-28 (1990) (aim of Copyright Act is to balance between public right and private monopoly to promote certain creative activity); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 167 (1989) (noting “careful balance between public right and private monopoly to promote certain creative activity”) (discussing patents).

This case is about whether Congress must respect the framers' choice. For while the framers intended copyright as an incentive to produce, Congress has increasingly used copyright to reward. Over the past few decades, and most significantly in the 1998 "Sonny Bono Copyright Term Extension Act" [CTEA], Congress has ignored the mandate that copyright create incentives for the production of creative work, and it has instead used the power to grant benefits where no incentive to produce exists.

No doubt this modern trend has its supporters. It is plainly the view of many in Europe, and strongly supported within our own political system. But a constitution is not to be amended simply because a different view becomes popular—or well-funded. If present political majorities believe a different foundation for the law governing copyright should trump the framers', then Article V of the Constitution is the procedure for amendment. Until then, it is the duty of this Court, within the appropriate bounds of institutional competence, to hold our laws to the framers' constitution.

Fidelity to our framers' conception is especially important now. As the Internet transforms ordinary citizens into "publishers," the value and importance of the public domain only increases. The ability to create and publish on the net depends crucially upon a space where ideas can "freely spread from one to another over the globe," VI Writings of Thomas Jefferson, at 180–181 (Washington ed.), quoted in Graham v. John Deere Co., 383 U.S. 1, 9 n.2 (1966), and where there is only as much control as is necessary to induce others to create, leaving the rest free.

Yet the trend in Congress has been in the other way. While the first Congress protected copyrights for 14 years, renewable only if the author survived, copyrights now extend for the life of the author plus 70 years—conceivably 10 times the framers' initial term. While the first Congress extended protection to printed "map[s], chart[s], and ... books," copyrights now extend to any original work "fixed in any tangible

medium of expression” 17 U.S.C. § 102(a). And while the first Congress gave authors “the sole right and liberty of printing, reprinting, publishing and vending,” copyright now gives the author those rights, plus the rights to translate, or perform, or produce derivative works. See 17 U.S.C. § 106. Copyright has thus grown, both in scope and duration. But the importance of the public domain has grown as well.

Plaintiffs have no wish to question this general trend. We describe it to put the most recent change into perspective. No doubt on the whole, this growth has helped create markets in speech where there otherwise would have been none. No doubt it has served as the “engine of free expression.” Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985). To the extent it has, it is justified under the mandate that speech restrictions pursuant to the Copyright Clause be for the purpose of creating incentives.

But the most recent change of the CTEA is different. Neither in its prospective aspect (applying to works not yet made) nor its retrospective aspect (applying to existing works) does the CTEA advance the constitutional end of creating more incentives to produce. Instead, it is a simple transfer of initially public resources to private actors, with none of the constitutional justifications to support it.

The government can identify no limit on Congress’s power. Though the Constitution speaks of exclusive rights for “limited Times,” the government interprets that language to have no limiting effect on Congress at all. In the government’s view, nothing prohibits Congress from extending subsisting copyrights perpetually. Nor does any principle forbid Congress from reclaiming from the public domain copyrights that have lapsed. Under the government’s reading of the constitutional text, Congress is free, in the words of Professor Peter Jaszi, to grant authors a perpetual term “on the installment plan.” The Copyright Term Extension Act of 1995: Hearings on S. 483 Before

the Senate Judiciary Comm., 104th Cong. 73 (1995) (statement of Prof. Peter A. Jaszi, American University, Washington College of Law).

This was not the framers' plan. Nor is it a fair reading of the constitutional text. In this cross motion for summary judgment, and in response to the government's motion for judgment on the pleadings, we offer a simple and judicially administrable way to enforce the framers' vision of a limited copyright term. We ask this Court to enforce it.

Plaintiffs' argument has three parts. We first argue that the retrospective portion of the CTEA violates the plain language of the Copyright Clause. We then argue that both the retrospective and prospective aspects of the CTEA violate the First Amendment. And finally, we argue that the retrospective aspect violates the Public Trust Doctrine. If this Court finds for plaintiffs on any ground, then the CTEA as a whole must be struck.

FACTS

This action is brought by a group of plaintiffs, each of whom depend upon the public domain for their livelihood. Plaintiffs challenge Congress's most recent restriction of the public domain, the Sonny Bono Copyright Term Extension Act of 1998. The significance of this most recent change can only be seen against the background of our constitutional tradition.

A. The Science And Useful Arts Clause

Article I, § 8, cl. 8, of the United States Constitution confers upon Congress the authority:

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.

The Science and useful Arts Clause includes several limitations on the power of Congress. In addition to limiting the duration of the copyright that Congress may authorize, the Constitution requires that copyright be made available only to “authors,” only for their “writings,” and only where the grant “promote[s] the Progress of Science and useful Arts.” Compl. ¶ 17.

Except for “limited Times,” these terms have been judicially construed as they apply to copyright law. The concept of a “writing” has been interpreted broadly. See Trade-Mark Cases, 100 U.S. 82 (1880); see also 17 U.S.C. § 102(a). “Authors” include any person, or persons, in the case of joint-authorship, “to whom anything owes its origin.” Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). The two together have been held to mean that works must be “original” (in the narrow sense of not having been simply copied) to receive copyright protection. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). Protection extends only to the author’s particular “expression” (e.g., the specific words, lines, colors or musical notes used by the author), and not to underlying ideas.⁶

The exclusive rights conferred by copyright include the right to reproduce, distribute, perform, or display the copyrighted work or derivative works. 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

⁶ Under the statute, employers are recognized as the authors of so-called “works for hire” — works created at the direction of the employer. See 17 U.S.C. § 201(b). In some types of copyrightable works, originality is manifested by changes to a preexisting work. For example, a translator, anthologist, or film-maker who changes another author’s work may be entitled to his or her own copyright. In the case of the anthologist, the copyright is in the “compilation.” See 17 U.S.C. §§ 101, 103(b) (1994). The translator or film-maker’s work are examples of a “derivative work.” See 17 U.S.C. § 101 (1994).

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, a 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. Compl. ¶ 20.

B. Regulations Pursuant To The “Copyright Clause”

Pursuant to the authority granted under Article I, §8, cl. 8, Congress has enacted numerous laws since 1790 providing for copyrights upon a variety of literary and artistic works. Those statutes are codified at 17 U.S.C. § 101 et seq.

These statutes were initially quite limited. The 1790 Act regulated the “printing” of “map[s], chart[s] and ... book[s]” for an initial term of 14 years. Act of May 31, 1790, §1, 1 Stat. 124. Except for this narrow range of restrictive regulation, authors and citizens were generally free to draw upon aspects of our common culture in other writings, and publications. Copyright covered a tiny part of cultural life. Most early copyrights were for scientific or instructional texts. The primary activist for a national copyright power, Noah Webster, sought protection for his dictionary.

In this early period, most writing was not even eligible for copyright protection. And because the requirements of registration were relatively severe, most work was simply in the public domain. Like a story one hears on a street corner, citizens were free to repeat and elaborate on most of the writing within that culture.

This was expressly true of foreign works. Until 1891, United States law explicitly exempted from protection foreign publications. Americans were free to copy English works without the permission of English authors; they were free to translate foreign

works without the permission of foreign copyright holders. Speech within the realm of publication was generally uncontrolled.

Over the 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.

While the scope of copyright increased, only once in the 19th century did Congress extend copyright's duration. In 1831, Congress extended the initial term for copyrights from 14 to 28 years, while the renewal term remained at 14 years. Act of February 2, 1831, §§ 1-2, 4 Stat. 36. For the first 119 years of our republic, the maximum term of copyright was just 42 years. Compl. ¶ 61.

During this period, the public domain thrived. While increased copyright protection no doubt spurred much greater authorship and publication, a key feature of the original copyright protection was the device of renewal. If a copyright holder did not renew his or her right after the initial copyright term, that work would fall into the public domain. The vast majority of copyrighted works fell into the public domain after their initial term. The effective term of exclusive protection, then, was much shorter than the statutory maximum.

In 1909, Congress effected a major change in the copyright act. The statute codified and extended copyright's scope, purporting to reach "all the writings of an author." Act of March 4, 1909, §4, 35 Stat. 1075, 1076. The statute also increased copyright's duration, by extending the renewal term by 14 years. Id. §§ 23-24. The maximum term under the 1909 statute then was 56 years, though again, the statute preserved the basic structure of renewal. Id. Holders of copyrights had to file an application for renewal within one year of the expiration of the initial term. Id. Failure

to renew would mean that the originally copyrighted work would fall into the public domain. Id.

The 1909 Act controlled copyright for most of this century. While it extended the duration of the copyright term the act facilitated continued growth of the public domain, by preserving the structure of renewal. The Copyright Office estimates 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). This means that the effective term under the 1909 Act would have been 32.2 years.

A vast amount of extraordinary work was created under the terms of the 1909 statute. That work, if properly renewed, would have begun to come into the public domain in 1965. Beginning in 1962, however, Congress began to extend the terms of subsisting copyrights, keeping them from falling out the control of the initial copyright holders.⁷

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. That statute affected copyright issued in 1906, 1907, and 1908. Congress’s second extension of subsisting rights extended the term of subsisting rights to December 31, 1967. That statute benefited copyright holders whose initial rights were granted in 1906, 1907, 1908, 1909, and 1910. In 1967, Congress extended the term again for one year, adding the class of 1911 to the bandwagon of

⁷ These laws were: Pub. L. No. 87-668, September 19, 1962, 76 Stat. 555; Pub. L. No. 89-142, August 28, 1965, 79 Stat. 581; Pub. L. No. 90-141, November 16, 1967, 81 Stat. 464; Pub. L. No. 90-416, July 23, 1968, 82 Stat. 397; Pub. L. No. 91-147, December 16, 1969, 83 Stat. 360; Pub. L. No. 91-555, December 17, 1970, 84 Stat. 1441; Pub. L. No. 92-170, November 24, 1971, 85 Stat. 490; Pub. L. No. 92-566, October 25, 1972, 86 Stat. 1181; Pub. L. No. 93-573, title I, § 104, December 31, 1974, 88 Stat. 1873.

copyright holders who were benefiting from this retroactive extension of their initial term. This pattern continued until in 1974, there were 14 years of copyright classes dependent upon the extension of the copyright term.

In 1976, Congress made a significant change in the structure of the Copyright Act. While the 1976 Act codified certain important First Amendment values that courts had recognized—such as a protection for “fair use” and an express limitation of the scope of copyright to “expression” rather than “ideas”—the act also changed dramatically the nature of the copyright term. Rather than a fixed term that might be renewed, the statute established a single term for all copyrights issued after January 1, 1978, of life plus 50. (For “works made for hire” the term was fixed at 75 years.) Congress thus eliminated the need to renew a copyright in order to get the benefit of the maximum term. And in 1992, Congress eliminated the need to renew copyrights originating under the 1909 Act, but still in their term. After 1992, all copyright holders would automatically get the benefit of the maximum copyright term.

The effect of this change on the growth of the public domain was extraordinary. Congress effectively cut off the flow of work into the public domain before the expiration of the maximum term. And because, beginning in 1962, Congress continually extended the length of the maximum term, the flow of material into the public domain was essentially choked off. Except for a lapse caused by the failure of Congress to pass the CTEA initially in 1995, 1961 was the last time copyrighted work that had been renewed fell into the public domain. That work had been originally authored in 1905.

C. 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 years to the term of most copyrights. See Pub. L. No. 105-298, §

102(b). The term extension provided by the CTEA was made retroactive; that is, twenty years was added to the copyright term of works that had already been created as well as works which might be created after the CTEA became law. See id. § 102 (b) & (d). Compl. ¶21.

Thus, prior to enactment of the CTEA, a work that was 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. The CTEA, however, extended the copyright term of such a work to 95 years, meaning that it will not enter the public domain until December 31, 2018. Compl. ¶22.

D. The No Electronic Theft Act

The No Electronic Theft Act of 1997 (the “NET Act”) criminalizes certain forms of copyright infringement. Compl. ¶¶ 23-24.

As its name suggests, the Act was enacted to criminalize the violation of copyrights through the posting of copyrighted materials on the Internet.⁸ The No Electronic Theft Act does not, however, merely criminalize the posting of copyrighted materials on the Internet. The statute criminalizes any “reproduction or distribution . . . 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.” 17 U.S.C. § 506(a). Therefore, anyone who uses, reproduces, or distributes a copyrighted work without permission is subject to the NET Act’s stiff fines and prison terms. Compl. ¶ 25.

⁸ The Internet is a network of computers that are linked to one another by phone lines, modems, and other networking technologies in order to share resources. The Internet has over 100 million users worldwide. The posting of a work on the Internet makes it easy to access, read, and copy that work. Because of the popularity of the Internet, moreover, any single copy of a work that is posted on the Internet can be read and copied many times over each month.

E. The Relevance Of The Internet

Though the 1976 Act extended copyright's scope to any original work "fixed in any tangible medium of expression . . ." 17 U.S.C. § 102(a), the scope of copyright's coverage, as well as the duration, was not significant for most citizens until the birth of the Internet. While the clogging of the flow of material into the public domain certainly had an effect on the ability of other authors and creators to make derivative works based upon the copyrighted work, most citizens are not authors, and most rarely engaged in publishing.

The Internet has changed all this. By dramatically lowering the costs of publication, the Internet has made it possible for millions to in effect become publishers. Anyone with a computer attached to the Internet can become a publisher of original or derivative works. As the Supreme Court recognized in Reno v. ACLU, millions have. 521 U.S. 844, 850 (1997). The Internet has dramatically changed the creative potential of ordinary citizens, as it has moved the control of publication from large organizations to small.

Plaintiff Eric Eldred is a perfect example of this shift. Eldred is a computer programmer, who in 1995 began Eldritch Press. Eldritch Press produces derivative versions of public domain books. Eldred essentially converts a public domain book into a format that can be easily navigated on the World Wide Web. Eldred thus became a part-time publisher, making classic texts available for free to millions across the world. Compl. ¶¶ 1, 2, 27-30.

Every original writing Eldred produces is currently automatically copyrighted. Its term will extend for the life of Eldred plus seventy years. This means every exchange Eldred has on the Internet - every email he may write, every web page he authors - all becomes subject to the law of copyright.

The same is true for the “writings” of everyone on the Internet. The law essentially protects every act of original creation produced on the Internet for a period of at least a century.

This protection may well be said to benefit authors—which now includes all of us. But at the same time, the extension in the scope and duration of copyright means that there is far less available in the public domain to draw upon. This decline in the supply of material flowing into the public domain is at the center of this case.

F. The Significance Of The Public Domain To The Plaintiffs

The significance of this public domain to our culture, and the creative process, is the ultimate issue at stake in this case. All of the plaintiffs, in addition to Eric Eldred, draw upon the public domain for an important aspect of their livelihood. Compl. ¶31.

Higginson Book Company. Plaintiff Higginson Book Company, for example, reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars. It focuses on books originally printed in small editions that are no longer in print and therefore difficult to obtain from any other sources. The extension of the copyright term effectively reduces the domain of works Higginson Books can draw upon in meeting the demand that might exist for the early, limited edition works. Compl. ¶¶3, 33-35.

The burden on Higginson Books caused by the extension of the copyright term is not just the costs of royalties that Higginson Books might pay. The real cost is the difficulty in locating copyright holders of works that are so old. Thus the extension of the copyright term for works originally copyrighted in 1923 effectively eliminates the ability of Higginson Books to publish works from that period.

Jill A. Crandall. Plaintiff Jill Crandall is a choir director at a church in Athens, Georgia. She selects the music that her church choir will perform. Limited church

resources require Crandall to draw primarily upon works that are in the public domain. But for the extension of the CTEA, Crandall would have been able to draw upon works by Ralph Vaughan Williams, Gustav Holst, and Edward Elgar for her choir performances. Compl. ¶¶4, 36-38.

Tri-Horn International. Plaintiff Tri-Horn International produces derivative works based on the history and tradition of golf. Some of these products use images of famous golfers or golf scenes. Because the 1920s were an important period in the history of golf, many of the products that Tri-Horn intended to produce were drawn from images affected by the CTEA. Like Higginson Books, the burden of the CTEA for Tri-Horn is primarily the impossibility of locating copyright holders of the images Tri-Horn wants to use. The costs of negotiating the rights to use the images are much greater than any benefit. Compl. ¶¶5, 39-41.

Luck's Music Library. Plaintiff 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. The cost of such music to Luck's customers is significantly lower than copyrighted work. The CTEA has effectively increased the costs Luck's Music would otherwise have faced, for music from an important part of the American musical tradition. Compl. ¶¶6, 42-44.

Edwin F. Kalmus & Co. Plaintiff Edwin F. Kalmus & Co. also sells public domain music for orchestras. Kalmus's Fall 1998 catalog contained an extensive list of music that would have been within the public domain as of January 1, 1999. Because of the CTEA, Kalmus & Co. was forced to withdraw its catalog, and is effectively stopped from adding to its listings until 2019. Compl. ¶¶7, 45-47.

American Film Heritage Association and Moviecraft, Inc. Plaintiff American Film Heritage Association and Moviecraft, Inc. both preserve and restore old films. Many of

these films are “orphaned,” meaning the physical film is deteriorating, yet the original copyright holder either cannot be located, or is not acting to preserve the film. Both AFHA and Moviestore are significantly affected by the CTEA, as are the films they would otherwise restore. Because much of this film is decaying, by the time the CTEA’s extension expires, much of the film will be lost. Compl. ¶¶8-9, 48-50.

Dover Publications. Plaintiff Dover Publications is a well-known publisher of paperback books. Dover sells approximately 15,000,000 books each year, and has an inventory of over 10,000,000 books. Approximately one-third of its books are reprints from public domain sources, many of which would otherwise be completely out-of-print. Dover had intended to publish a significant range of works drawn from the 1920’s and 1930’s. The CTEA has made much of that publication impossible. Compl. ¶¶10, 51-53.

These plaintiffs represent a diverse collection of interests because the public domain affects a wide range of interests. But however diverse, they are but a small portion of the real interests affected by the erosion of a public domain. We come from a time when our common culture was held in common—where it could be drawn upon by others to copy, or build upon, as people wished. As the declaration of Professor Dennis Karjala shows, a significant portion of the stories that constitute the most important part of our common culture are stories that arose from this public domain.⁹

The shift that the recent extensions in copyright represents means that an increasingly large part of our common culture is privatized. Copyright no longer feeds the public domain; works that would have fallen into the public domain don’t; and the

⁹ See accompanying Declaration of Dennis S. Karjala, ¶¶ 2-4 (“Karjala Decl.”), attached hereto as Exhibit A. This motion also is based upon the accompanying affidavit of Hal Varian (“Varian Aff.”), attached hereto as Exhibit B.

development of derivative works from the early 1920s onward will be subject to the control of either copyright holding corporations, or the distant relatives of long dead authors. Plaintiffs submit that this change is inconsistent with the vision of a commons constitutionalized by our framers.

Each plaintiff is harmed by the increase in copyright's term. The free speech costs that they incur are both obvious and non-obvious. Simply ascertaining whether a work is in fact still copyrighted is no easy matter. That determination requires an investigation into whether the work had complied with the various formal requirements of the previous versions of the statute, most notably the 1909 Act. See 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 7.02[C](1) (“as to all works published anywhere in the world prior to January 1, 1978, protection is gauged initially under the strictures of the 1909 Act”).

Assuming the status of a copyright can be ascertained, works which remain under copyrights which would have otherwise expired but for the CTEA cannot, of course, be freely distributed by the plaintiffs or used as the basis of a plaintiff's own derivative work. To be sure, the plaintiffs can attempt to obtain the authorization of the copyright owner. With older works, however, it is frequently difficult or impossible to ascertain the copyright owner to obtain a license, assuming one would be offered on acceptable terms.¹⁰

¹⁰ This problem particularly affects cinematic works. Older films, such as those from the 1920's are constantly deteriorating and in need of restoration. The Library of Congress has defined many of these films as “Orphan Works” because they are not being exploited by anyone, and the owners of their copyrights cannot be determined. Thus, while the films may be under copyright, the companies that produced them are no longer in existence or they have abandoned these films because of their age or ephemeral nature. “Orphan Works” such as these make up a significant portion of the body of silent films. Because the CTEA extends the copyrights on many of these films for 20 more years, they may be lost forever. Compl. ¶¶ 49-50.

As a result of the passage of the CTEA, the plaintiffs are precluded from distributing works which would otherwise have fallen into the public domain; because of the difficulty of ascertaining copyright status, they are inhibited from distributing works which may in fact be in the public domain; and certain works will not be distributed at all (and may be lost) because it is impossible to identify and locate the owner of the copyright.

SUMMARY OF ARGUMENT

A. The issue before this Court is whether the Sonny Bono Copyright Term Extension Act is authorized by the Copyright Clause, and consistent with the First Amendment. The CTEA is a regulation of speech. The statute exposes authors and publishers to civil and criminal liability based upon the words they utter—not just words that might be an identical copy of copyrighted texts, but words that are derivative of copyrighted works, or translations, or not quite “fair use” of a copyrighted text. As with any statute targeted at speech, the CTEA can be justified only if the government satisfies its burden under a form of heightened review. The issue in this case is therefore not whether the CTEA has any rational basis. The issue is whether the CTEA can survive heightened review.

B. The government sidesteps this argument by asking that “the notion that copyright restrictions violate the First Amendment has specifically been considered and rejected by both the Supreme Court and the D.C. Circuit.” Gov. Mem. at 27. But plaintiffs obviously do not contend that all “copyright restrictions violate the First Amendment.” A properly crafted Copyright Act is fully consistent with the First Amendment.

But it does not follow that any amendment to the Copyright Act is also consistent with the First Amendment, or that changes to the Copyright Act need only pass

rational-basis review. Nothing exempts copyright legislation from the ordinary review of the First Amendment, nor does anything guarantee that every copyright law would satisfy the restrictions of the First Amendment.

C. Contrary to the arguments of amici, there is nothing radical or “revolutionary” in this view. It is instead fully consistent with Supreme Court and lower court practice. The Court has consistently acknowledged the important Free Speech interests at stake when Congress regulates speech. It has consistently interpreted the language of the Copyright and Patent Clauses in a way that respects the explicit and implicit limitations of those clauses. There is no way to understand the Supreme Court’s interpretation of the copyright power except as an exercise of heightened review—whether grounded ultimately in the First Amendment, or in the Copyright Clause.

Thus the only revolution that plaintiffs have noticed is the recent shift by Congress away from this balance. It is only recently, in the face of pressure by large corporations holding expiring copyrights, that Congress has forgotten the public’s part in the framers’ bargain.

D. Plaintiffs’ argument has three parts. We distinguish between the prospective aspect of the CTEA (extending the copyright term by 20 years, see Pub. L. No. 105-298, § 102(b)), and the retrospective aspect of the CTEA (extending the term of subsisting copyrights by twenty years, see Pub. L. No. 105-298, § 102(b) & (d)).

1. Our first claim is under the Copyright Clause. We submit that the retrospective aspect of the CTEA violates the plain terms of the Copyright Clause. Our argument is textualist: The express limitations in the Copyright Clause, against the

background of the expressly stated purposes for that clause, render the retrospective aspect of the CTEA unconstitutional.

2. We then address the First Amendment argument. The CTEA is a regulation of speech. Like all regulations of speech, it can be justified only if it survives heightened review. Applying intermediate scrutiny to the speech restrictions of the CTEA, plaintiffs submit that both the retrospective and prospective aspects of the CTEA are unconstitutional.

3. Our third argument is grounded in the Public Trust Doctrine. The CTEA effects a transfer of resources that were to become the public's. It is a transfer of those public resources to private parties. Under the principles of the Public Trust Doctrine, such a transfer is permitted only if it is supported by a legitimate public purpose. In light of the purpose specified by the Copyright Clause, the transfer of the CTEA is invalid.

4. Finally, we address the remaining justifications offered by the government in support of its motion for judgment on the pleadings. None satisfies either the plain language of the Copyright Clause, nor the burden of heightened scrutiny imposed by the First Amendment.

E. If this Court finds for the plaintiffs on any ground, thereby invalidating either the prospective or retrospective aspect of the CTEA, then plaintiffs submit the whole of the CTEA must be struck. As we argue in our final section, one part is not permissibly severable from the other.

ARGUMENT

I. The Retrospective Aspect Of The CTEA Is Beyond Congress’s Enumerated Power Under Article I, §8, cl. 8.

A. The Copyright Clause

The Copyright Clause grants Congress 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;

U.S. Const. Art. I, §8, cl. 8.

This clause is unique among the Constitution’s enumerated powers. It is the only enumerated power that specifies both the purpose of the power and the means by which that purpose is to be achieved. By its plain terms, the aim of Congress’s copyright legislation must be “to promote the Progress of Science and useful Arts,” by means of an “exclusive right” that may be granted only for “limited Times” to “Authors.”

Each of these terms had a very specific meaning in the context of the early American Republic. The framers were deeply skeptical of monopolies, especially monopolies over the right to speak. The stationers’ copyright and the printers’ patent in England had been the tools of both censorship and of an extraordinary corruption of the Crown. Powerful publishers petitioned the Crown for perpetual rights to publish. The Crown would grant these rights, but only in exchange for cash or cooperation. The printing industry thus became an arm of the state, relying upon the Crown’s favors, and thus cooperating with its wishes. As the Supreme Court said of the Patent and Copyright Clause, “[I]t was written against the backdrop of the practices ... of the Crown in granting monopolies to court favorites in goods or businesses....” Graham v. John Deere Co., 383 U.S. 1, 5 (1966). See also Irah Donner, The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?, 36 Am. J. Legal Hist. 361, 365-68 (1992); Paul E. Schaafsma, An Economic Overview of Patents,

79 J. Pat. & Trademark Off. Soc’y 241, 245-46 (1997); Thomas M. Meshbesh, The Role of History in Comparative Patent Law, 78 J. Pat. & Trademark Off. Soc’y 594, 602-03 (1996); Henry H. Perritt, Jr., Electronic Freedom of Information, 50 Admin. L. Rev. 391, 410 n.131 (1998).

Against that background, each term of the Copyright Clause has an important and specific meaning. The power was to be exercised only to “promote the Progress of Science and useful Arts” —not to benefit favored publishers. The power was only to grant rights “to Authors”— not to the publishers or printers who had benefited from the Stationers’ copyright or Printers’ patents. Authors are more numerous. They were-- and still are--less likely to engage in the intrigue that had corrupted the Crown. The monopoly of an “exclusive right” in the Copyright Clause was designed to enable them to create where the market otherwise would not, not to enable publishers to extract monopoly profits. And finally, the power was only to grant exclusive rights for “limited Times.” By releasing copyrighted works to the public domain after “limited Times,” the Copyright Clause would promote the spread of ideas and common culture. By requiring that the terms be fixed ex ante, the Copyright Clause would avoid the embarrassment of copyright holders perpetually petitioning Congress for the extensions of their subsisting rights.

The Supreme Court has recognized the importance of the limitations—both express and implied—built within the Copyright Clause. Again, as the Court said in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984):

The [copyright] 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.

(emphasis added). See also Graham v. John Deere Co., 383 U.S. 1, 5 (1966) (“The clause is both a grant of power and a limitation.”).

Eight years ago, the Court demonstrated the significance of these limitations. In Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 352-61 (1991), despite a long-standing practice affirmed in the lower courts, the Supreme Court unanimously struck the “sweat-of-the-brow” doctrine that had justified copyright for unoriginal compilations of facts. Implied in the terms “Authors” and “Writings,” the Supreme Court held, was a requirement of “originality.” Only work that “was independently created by the author” could be protected under the Copyright Clause. Id. at 345. Facts are not “independently created by” an “Author.” Thus compilations of facts without a minimum of originality cannot be protected under the Copyright Clause. Id. at 348.

Feist sets a very high standard for the interpretation of Congress’s power under the Copyright Clause. First, the limitations that the Court articulated are by no means plain from the text of the Constitution. The Court (rightly, in plaintiffs’ view) derived the implicit requirement of “originality” from the “Writings” and “Authors” language, against the background of the twin purposes of the clause—that it be to authors, and that it foster “the public domain.” Id. This is a highly restrictive reading of the constitutional text, manifesting, plaintiffs submit, a distinctive interpretive requirement for legislation pursuant to the Copyright Clause.

Second, Feist makes it clear that Congress is not given the power to suppress the speech of some just so that others can make monopoly profits, or so that any form of publication can be produced free of competitive pressures. Rather, the purpose of the clause is to induce creativity, which is, so the Constitution tells us, uniquely valuable to

Progress. Those who create can get the benefit of a state-sponsored monopoly; those whose work lacks a minimum of creativity are left to compete in the market.

This is so even if the consequence is that work that would be created by “the sweat of the brow” will not be produced because the threat of copying is too great. In other words, Feist means that the Copyright Clause is not a general solution to the problem of incentives that the publishing industry may face. It does not empower Congress to regulate speech whenever it might make a certain publication possible. Feist means that the only justification for suppressing speech through “an exclusive right” is when that suppression serves the ends of creativity. It is “Progress,” not profit, that is the touchstone of the “Science and useful Arts Clause.”¹¹

Finally, Feist imposes these restrictions despite the expansive reach of Congress’s commerce power, and Congress’s power under the Necessary and Proper Clause. Thus, contrary to the suggestion by amici, Amici Br. at 35, these grants of power are not ways to evade express or implied limitations within an enumerated power. See Railway Labor Executives’ Assn. v. Gibbons, 455 U.S. 457 (1981). If amici were correct, Feist would not be law.

Against this historical background, and in line with the method of interpretation adopted by the Supreme Court in Feist, plaintiffs submit that this is a straightforward case. The retrospective aspect of the CTEA plainly violates the “limited Times” term of the Copyright Clause; it also violates the requirement that the grant of exclusive rights be vested in “Authors,” since more than “Authors” benefit from the grant. Neither the

¹¹ As Edward Walterscheid, noted scholar of the early history of the patent and copyright power, it is misleading to refer to this clause as the Patent and Copyright Clause, as those terms were not used. Nor was the term “intellectual property” known in the 18th century. Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1 n.1 (1994).

government nor amici offer an interpretation of the Copyright Clause that makes sense of its language against the background of the framers' purpose, or against the background of the Supreme Court's method of reading legislation pursuant to the Copyright Clause as evinced in Feist.

The Court of Appeals for the D.C. Circuit has said as much, though in dicta, in a case that struck an earlier copyright term extension act on Establishment Clause grounds. As the Court noted, quoting Senator Burdick,

Most copyrights are granted in order to give their owners a temporary monopoly over a specific expression of an idea to permit persons to obtain a reasonable monetary profit from artistic or literary effort. In cases where that is the rationale for granting copyright there is no justification for continuing copyright beyond its normal term....

United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152, 1164 (D.C. Cir. 1987) (emphasis added). Plaintiffs agree that there “is no justification for” extending a subsisting copyright term. But we believe the point goes even further: even if there is a rational basis for extending a copyright term, the plain language of the Copyright Clause forbids it.

B. In Light Of Its Express Purpose, The Retrospective Aspect Of The CTEA Violates The “Limited Times” Term Of The Copyright Clause.

The language of the Copyright Clause specifies the purpose that any grant of exclusive rights is to serve. That purpose is “the Progress of Science and useful Arts.” The Supreme Court has interpreted this purpose. Congress is empowered, the Court has held, to suppress speech in order to produce an incentive to engage in creative activities. The “primary objective” of this power, the Court explained in Feist, “is not to reward the labor of authors.” 499 U.S. at 349. Its objective is “progress,” see id., through a mechanism that supports the establishment of a rich public domain. As the Supreme

Court said of the patent system, “the ultimate goal ... is to bring new designs and technologies into the public domain through disclosure.” Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 151 (1989). The aim of the Copyright Clause is no different. Speaking of the Patent and Copyright Clause, the Supreme Court wrote, “[i]t is intended to motivate the creative activity of authors and inventors ... and to allow the public access to the products of their genius.” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

Any interpretation of “limited Times” must make sense of this express purpose. It should also be consistent with the objective of advancing the public domain, and combat the evil that the framers were legislating against.

The government’s interpretation of “limited Times” satisfies none of these conditions. By ratifying the retrospective aspect of the CTEA, the government’s reading makes no sense of the express purpose of the Copyright Clause. Nor does it respect the public domain. And rather than combat the original evil that the framers wrote against, the government’s reading recreates precisely the incentives that originally corrupted the patents system in England.

On the government’s reading, “limited Times” means any fixed term. A term is limited if it is not perpetual. So, for example, in 1909, Congress offered authors a “limited” term of 28 years, renewable to a maximum of 56 years. In 1962, Congress retroactively changed that “limited Time” by extending it by three years. See Pub. L. No. 87-668. In 1965, it changed that “limited Time” again, extending it by 2 years. See Pub. L. No. 89-142. Congress did it again in 1967 (one year), 1968 (one year), 1969 (one year), 1970 (one year), 1971 (one year), 1972 (two years), and 1974 (two years). In 1976 Congress passed a 19 year extension while reforming the basic act. And in 1998, the CTEA extended the term yet again. Thus between 1962 and 1998, Congress thus

changed the “limited Time” for some copyrights granted under the 1909 statute 11 times.¹² Compl. ¶62 & table.

Each time, of course, the resulting term that Congress granted was in a sense “limited.” But to say that this practice respects the constitution’s “limited Times” term is to make that term meaningless. Like the child who is told to take “just one piece of cake,” and after being scolded for taking his fourth piece insists that each time he took just one, the government’s reading is so literal that it makes no sense of the obvious purpose of the clause. Compl. ¶ 63.

First, the reading makes no sense of the objective to promote progress. By granting copyrights for works that already exist, the retrospective aspect of the CTEA does not create any incentive for authors to produce. As Dean Hal Varian’s affidavit makes plain, a retrospective extension of a copyright term creates no additional incentives to produce, since by its terms, the copyright holder gets this extension whether or not he or she produces anything more. Varian Aff., ¶¶ 4-12 . By extending subsisting copyrights initially granted in 1923, the CTEA can enhance incentives only if it can enhance the incentives of authors in 1923. But there is no way to incent backwards. Even the United States Congress cannot now magically expand the incentives that authors faced in 1923. Compl. ¶ 64.

Second, this reading makes no sense of the framers’ purpose to protect and advance the public domain. The CTEA removes work that, but for the CTEA, would have passed into the public domain. It suppresses the public’s right to use what would have been in a commons, in exchange for no promise of future creativity by anyone.

¹² See Pub. L. No. 87-668 (1962); Pub. L. No. 89-142 (1965); Pub. L. No. 90-141 (1967); Pub. L. No. 90-416 (1968); Pub. L. No. 91-147 (1969); Pub. L. No. 91-555 (1970); Pub. L. No. 92-170 (1971); Pub. L. No. 92-566 (1972); Pub. L. No. 93-573 (1974); Pub. L. No. 94-553 (1976); Pub. L. No. 105-298 (1998).

The statute effects a simple transfer of assets, from the commons to copyright holders, without any benefit to the public.

Third, this reading recreates the very evil that the framers were legislating against. By interpreting “limited Times” to permit endless extensions of an initial term, the government creates a perpetual incentive for copyright holders to petition Congress to extend their state-backed monopoly rights. Under the government’s reading, the Constitution would permit the pattern of extensions over the last thirty years to continue indefinitely. And, at the end of each of these cycles, copyright holders could be expected to line-up in Congress demanding an extension of their state privilege, while the general public, and public domain, suffers.

The government argues that this is simply the democratic process as applied to economic legislation. Gov. Mem. at 11-21. Plaintiffs acknowledge that this is the ordinary rule. But where the framers have expressly limited Congress’s ordinary power, there is no reason not to read those limitations as written. Especially where there is no Copyright Clause reason, as understood by Feist, for interpreting “limited Times” as the government has, plaintiffs submit this Court should look beyond the otiose reading the government offers.

There is a better reading of “limited Times” that does not render the term meaningless. Unlike the government’s reading, this interpretation makes sense of the express purpose of the clause, and of the implicit objectives that courts and commentators have recognized. This reading provides a limitation on Congress’s Copyright Clause power, while remaining faithful to the plain meaning of the constitutional text.

On this reading, a term is “limited” if it is for a specified time that cannot be extended. Under this reading, Congress violates the “limited Times” clause when it

retrospectively extends the term of an otherwise limited copyright. Its subsequent extension makes the earlier “limited Time” no longer “limited.”

This alternative, and equally plain, reading of the clause makes sense of the express purpose of the clause. It also accords fully with the implicit purpose the framers had in mind when enacting the copyright clause, and that the Supreme Court has ratified. It gives Congress the power to grant authors an exclusive right that is not perpetual, that guarantees that work will fall into the public domain, and that does not create an ongoing incentive for subsisting copyright holders to petition Congress for extensions. It thus avoids precisely the evil that the framers identified with England’s system of copyright before the Statute of Anne and the Statute of Monopolies. See Ira H Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?*, 36 Am. J. Legal Hist. 361, 365-68 (1992). By interpreting the “limited Times” term to require that any change of the copyright term be prospective only, this Court would remove the continued incentive of copyright holders to press for an increasing copyright term.

Where there are two plain readings of a constitutional text, one according with the intent of the framers of that text, and one undermining the intent of the framers of that text, a court should adopt that reading that best advances the purpose of the framers. The reading that the government advances would defeat the obvious purpose of this constitutional provision. The government has given no account of the framers’ purpose that would make sense of their reading. This Court should therefore reject this toothless reading of the “limited Times” term, and adopt a reading that disables Congress from generally extending a “limited” term.

C. The Retrospective Extension Of The CTEA Does Not Grant Rights To “Authors” Within The Meaning Of The Copyright Clause

The Copyright Clause requires that “exclusive rights” be vested in “Authors.” The CTEA creates rights which otherwise would not exist. The constitutional question is in whom Congress vests these rights. The government argues that because the Copyright Act initially vests a copyright in an “author,” and because the CTEA does not repeal that provision of the Copyright Act, the CTEA’s extension of copyright does not violate the constitutional requirement that the exclusive right vest in “Authors.”

The government has lost sight of the Copyright Clause’s original purpose. For in both its interpretation of “Authors” and in its elaboration of reasons supporting the CTEA, the government has failed to distinguish between a power to create a speech-suppressing monopoly that benefits publishers, and the power to create a speech-suppressing monopoly that benefits authors. By giving Congress the power to grant exclusive rights to “Authors,” the framers chose a regime that diffused the monopoly rights that the Copyright Clause authorized. Congresses throughout our history have understood this objective, and respected it by guaranteeing that its grants work directly to the benefit of Authors. See William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 Notre Dame L. Rev. 907, 908 (1997).

But the CTEA does not properly respect that requirement. The government knows well that, historically, when Congress extended the copyright term, it has either given authors (or their heirs) the non-assignable right to terminate the extended renewal term (this, for example, was the rule in the 1976 Act), or it has made the renewal term revert to the author or heirs.¹³ See id. at 908. This right of termination or

¹³ Roughly put, this right means that the author or his or her heirs have the right to reclaim the copyright, even if the copyright had been assigned.

renewal expresses a constitutional presumption that any grant of rights under the Copyright Act be to the direct benefit of authors.

The CTEA is unprecedented in its deviation from this presumption. Indeed, it expressly denies the termination right to authors (or their heirs) who exercised the termination right under the 1976 Act, Pub. L. No. 105-298, § 102(d)(1)(D), even though the justifications for termination are as compelling now as they were in 1976. Thus while the government is correct in noting that Congress has granted termination rights under the CTEA in some cases, it ignores Congress's failure to grant termination rights in other contexts. This deviation from the presumption that benefits would inure to authors directly is inconsistent with the historical understanding of the "to Authors" term, and renders the CTEA unconstitutional.

In sum, the framers' drafted carefully to avoid the familiar dangers of giving government the power to establish monopoly rights over speech. They narrowed the grant of that power to a single purpose—to promote progress. They specified the means—through an exclusive right to Authors for limited Times. Congress remains free in other ways to subsidize publishers if it wants. It can grant tax breaks to publishers, or spend money to subsidize their productions. But the plain language of the Constitution limits Congress's power when it comes to limiting the right to speak. If Congress wants to grant exclusive rights to speak, it can only do so consistent with the limited purpose and restricted means of the Copyright Clause. The retrospective aspect of the CTEA exceeds those limits.

II. Both The Prospective And Retrospective Aspects Of The CTEA Violate The Free Speech And Press Clauses Of The First Amendment.

The First Amendment states:

Congress shall make no law ... abridging the freedom of speech, or of the press....

Plaintiffs assert that both the prospective and retrospective aspect of the CTEA violate the Free Speech and Press Clause of the First Amendment. Unlike the Copyright Clause argument, this count requires that the Court evaluate the reasons that Congress had for extending the regulation of speech effected through the Copyright Act. Plaintiffs submit that Congress did not properly weigh the speech interests at stake when enacting the CTEA. The government therefore cannot meet its burden under heightened review.

A. The CTEA Is A Regulation Of Speech

The CTEA is a regulation of speech. By extending the copyright term for subsisting and future copyrights, it is a direct regulation of who can say what—not just who can reproduce the particular expression of someone else, but also who may translate or make derivative works, and who may make public distributions, performances, and displays. See 17 U.S.C. § 106.

The CTEA regulates this speech by removing from the public the rights to use work that but for the passage of the CTEA, would have entered the public domain in 1999. The CTEA has stopped that transfer, and has thereby disabled plaintiffs from using such work to develop derivative works free of the restrictions of descendants of the original authors, and in forms that descendants of the original authors may not plan.

Plaintiff Eric Eldred, for example, would have published a free, derivative electronic version of “New Hampshire,” by Robert Frost on the World Wide Web in January, 1999, but for the restrictions of the CTEA. That version would have permitted users to search the work, or print sections from it; in conjunction with other

technologies, it would have enabled users on the World Wide Web to comment upon and criticize the works Eldred posted.

The CTEA disables these efforts at creation, by reducing the number of works available to speakers such as plaintiffs. For producers of derivative works, the public domain is their channel of production. Just as the “must carry” provisions of the Cable Act “reduce[d] the number of channels over which cable operators exercise unfettered control, and ... render[ed] it more difficult for cable programmers to compete,” and therefore raised a free speech interest, so too has the CTEA reduced the number of writings over which plaintiffs would have unfettered control, and rendered it more difficult for plaintiffs to compete. Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 637 (1994) [“Turner I”]. The effect in the two cases is the same. The need for the government to justify that effect is also the same.

As with any regulation of speech, the government’s burden is to justify the CTEA under a form of heightened scrutiny. As the Court held in Turner I, distinguishing the Cable Act from the antitrust laws, or contract law,

while ... a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment ... laws that single out the press, or certain elements thereof ... are always subject to at least some degree of heightened First Amendment scrutiny.

Id. at 640-41 (emphasis added; citations omitted). Copyright law is inherently about “the press.” Historically, it was only “the press” that could fall afoul of copyright’s primary restrictions. Increasingly, as the Internet spreads, everyone has become the press. A law regulating the ability of ordinary citizens to publish is a law regulating speech, and the press. If campaign finance reform, see, e.g., Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n, 518 U.S. 604 (1996); Federal

Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985); Buckley v. Valeo, 424 U.S. 1 (1976), cable regulation, see, e.g., Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996); Turner I, 512 U.S. at 641; and commercial speech generally, see Edenfield v. Fane, 507 U.S. 761, 767 (1993); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976), must withstand First Amendment review, then so too must Congress's efforts to control who may say what through the copyright law.

What form of heightened scrutiny is required, however, depends upon the character of the regulation at issue. As the Supreme Court has explained, "because not every interference with speech triggers the same degree of scrutiny under the First Amendment," this Court must decide "the level of scrutiny applicable" to a law increasing the copyright term. Turner I, 512 U.S., at 637.

B. At A Minimum, the CTEA Is A Content-Neutral Regulation Of Speech

A law regulating speech can be content-based or content-neutral. It is content-based ordinarily if it is "based on hostility—or favoritism—towards the underlying message expressed," R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992), or if "by [its] terms [the law] distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," Turner I, 512 U.S. at 643. It is content-neutral if it "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed." Turner I, 512 U.S. at 643.

If the CTEA is content-based, then it is subject to strict First Amendment scrutiny. The law can be sustained only if the government can show that "its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). If the CTEA is

content-neutral, then the government's burden is less. As the Supreme Court outlined in Turner I, a content-neutral regulation of speech need only survive intermediate scrutiny. See Turner I, 512 U.S. at 642.

While some commentators have argued that copyright law should be treated as content-based,¹⁴ this Court need not ultimately resolve which standard should apply. For even if copyright law is content-neutral, the regulations of the CTEA violate the First Amendment. Plaintiffs submit that the government cannot meet its burden even under intermediate scrutiny, and that summary judgment in plaintiffs favor is therefore appropriate.

Turner Broadcasting is the Supreme Court's most recent application of intermediate scrutiny in the context of a statute targeted at a general speech market. There the Court reviewed the "must carry" provisions of Congress's 1992 Cable Television Consumer Protection Act. These rules required cable carriers to set aside a certain number channels for the retransmission of broadcast television. Because the law was targeted at the speech of cable operators, the Court applied the intermediate standard of review of United States v. O'Brien, 391 U.S. 367 (1968).

For purposes of this motion, plaintiffs take Turner Broadcasting to represent the Court's current view about the burden the government must bear to justify a content-neutral regulation of speech.

¹⁴ See Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147, 186 (1998). Like the regulation in Burson v. Freeman, 504 U.S. 191 (1991), copyright law gives the state the power to silence certain speech, even if that power is not viewpoint based. Similarly with Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105 (1991). Others have argued that copyright law is best viewed as content-neutral regulation. See Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 NYU L. Rev. 354, 413, 446 (1999). Like the regulation in Turner, the CTEA is not motivated by hostility to any particular viewpoint, or kind of speech.

1. *The Requirements Of Intermediate Scrutiny (I)*

Turner Broadcasting requires that a content-neutral regulation of speech 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) [hereinafter Turner II]. In the context of copyright legislation, the Supreme Court has repeatedly identified the “important governmental interest” that copyright law is to advance: incentives to create. As the Court said in Feist, “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 349 (1991). Copyright law “promotes” that “Progress” by creating incentives in authors to produce. To survive the first prong of intermediate scrutiny, the government must demonstrate that a change in the Copyright Act that reduces the public’s access to works nonetheless increases the incentives to produce.

In general, copyright law does this. An exclusive right is needed to provide an incentive because of the special nature of expression and creativity. Expression can be easily copied. If copyright law did not give authors the power to control who could copy their expression, then it would be too risky for publishers to produce an author’s original work. If the publisher must pay the author for the author’s work, but the author cannot control who may copy his or her work, then a second publisher could simply copy the work of the first publisher, but pay the author nothing. The first publisher would be at a disadvantage relative to the second, and that disadvantage would in turn disadvantage the author, and eventually the public. Publishers would not ordinarily be willing to pay for an author’s work without copyright if the publisher

were not protected from illicit copying.¹⁵ Fewer authors could then afford to work as authors; and fewer works would be produced that “promot[ed] the Progress of Science and useful Arts.” Copyright thus induces creativity by assuring authors that they can capture at least some of the value that they create.

Thus while copyright restricts speech (here the speech of the second publisher), this restriction in turn enables speech. By limiting the rights of some to speak, the law creates an incentive for others to produce. The law functions, then, as the Supreme Court has characterized it, as an “engine of free expression.” Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985). Without the restrictions of copyright law, less speech would be produced. With the restrictions of (a properly balanced) copyright law, more speech is produced.

It is for this reason that “copyright restrictions” do not inherently “violate the First Amendment.” Gov. Mem. at 27. The First Amendment forbids any law that “abridge[s]” the freedom of speech. Whether speech is “abridged” however depends on the baseline. Copyright does not “abridge” speech if it engenders original speech that otherwise would not exist. So long as the law functions to create an incentive for the creation of original speech—so long as it functions as an “engine” and not a brake on free expression—it is consistent with the commands of the First Amendment. Read in light of these First Amendment values, then, the “important governmental interest” justifying copyright law is to provide incentives to create more speech.

But not every addition to the exclusive rights of authors will advance this important governmental interest. Not every addition will translate into an increased

¹⁵ These generalizations have been effectively questioned by (now Justice) Stephen Breyer. See Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970).

incentive to produce. Some additions would benefit authors without increasing the incentive for them to produce. These additions—to the extent they restrict speech—would fail to advance the government’s “important” interest. They therefore could not be justified by the “engine of free speech” rationale.

The term of copyright is a perfect example. Increasing the term of copyright adds to the bundle of exclusive rights held by an author. But this increase does not necessarily increase the incentive of the author to produce. As the affidavit of Dean Hal Varian makes plain, at some point, extending the duration of a copyright term has no meaningful effect on an author’s present incentive. Varian Aff. ¶¶ 3, 5-11. Any prospective increase in a term many years in the future must be discounted to the present to determine its present effect on incentives. When the term is as long as it presently is, adding more does not add any significant increase in incentives.

This is not a new point. As Thomas Babington Macaulay said over 150 years ago:

the evil effects of the monopoly are proportioned to the length of its duration. But the good effects for the sake of which we bear with the evil effects are by no means proportioned to the length of its duration.... [I]t is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible.... [A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn ... is really no motive at all to action.

T. B. Macaulay, Works 199 (Trevelyan ed. 1879), quoted in Robert A. Gorman & Jane C. Ginsburg, Copyright For the Nineties: Cases and Materials 307 (4th ed. 1993) (emphasis supplied).

Macaulay’s point is even stronger with respect to a retrospective increase in a copyright’s term. Giving a longer term today for works created in the past (as the CTEA

effectively does) cannot increase the incentive to create works in the past. Term extension will of course benefit authors from the past (or more likely their descendants), but it will not—it cannot—induce them to produce anything more in the past. Incentives work forward. Retrospective term extensions look backward. They are an increase in the author’s bundle of rights, but is an increase that cannot increase any relevant incentive to produce.

If not every increase in an author’s bundle of exclusive rights can be said to increase the incentive to produce, then Congress must distinguish between increases in authors’ rights that increase the incentive to produce and increases in authors’ rights that do not. Only the former advance “an important governmental interest.” Only they can justify restrictions on speech under the rationale of intermediate scrutiny.

The government bears the burden of demonstrating that Congress in fact did distinguish between increases in rights that produce more incentives and increases in rights that do not. It must demonstrate that Congress made a “reasonable inference” Turner I, 512 U.S. at 666, that the particular increase in authors’ rights facilitated by the CTEA “in fact,” id. at 664, advances “important governmental interests.” It must therefore show that the increase in the copyright term effected by the CTEA—both in its prospective and retrospective aspect—can reasonably have been expected by Congress to increase the incentives to produce in the future.

The government cannot meet this burden. Whatever purposes Congress had, it cannot reasonably have believed that it was producing an increase in incentives to produce. Nothing in the legislative history, nor in the government’s rationalizations, see infra Section IV(A), would sustain the government’s burden under Turner.

2. *Intermediate Scrutiny (II).*

The second part of the Turner test requires a form of narrow tailoring. Even if an increase in authors' rights can be said to advance important governmental interests, the government can only sustain its burden under Turner if it can show that the increase "does not burden substantially more speech than necessary to further those interests." Turner II, 520 U.S. at 189. Congress must focus its incentive-producing efforts. It cannot be unreasonably overbroad in its extension of exclusive rights to authors. Thus, for example, even if the prospective aspect of a term extension act did create some marginal increase in future incentives, that would not sustain the retrospective aspect of term extension as well. The incentive-producing part would have to stand on its own.

The burden is on the government to demonstrate that Congress engaged in some form of narrow tailoring. This burden is not overly strict. As the Court explained in Turner I, "a regulation need not be the least speech-restrictive means of advancing the Government's interests," 512 U.S. at 662. But there is some requirement of narrow tailoring that is required to assure that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. (citations omitted).

C. The Government Cannot Show That The Changes In Term Effected By The CTEA Would Advance "Important Governmental Interests" Without Burdening "Substantially More Speech Than Is Necessary."

To meet its burden under Turner, the government must "do more than simply posit the existence of the disease sought to be cured. It must demonstrate ... the regulation will in fact alleviate these harms in a direct and material way." Turner I, 512 U.S. at 664 (citations omitted). In the context of copyright law, the only "harm" is the potential loss in creativity or progress due to the inadequacy of the existing copyright incentive. It is the government's burden to demonstrate that Congress reasonably

concluded that the regulation of the CTEA will “in fact alleviate these harms in a direct and material way.” Id.

Congress must in the first instance make this judgment about the relationship between the benefits of term extension and its free speech costs. But it is this Court’s duty to assure that Congress has in fact made that judgment. As the Supreme Court has instructed,

in First Amendment cases . . . the deference afforded to legislative findings does not foreclose . . . independent judgment of the facts bearing on an issue of constitutional law. . . . This obligation to exercise independent judgment . . . is not a license to reweigh the evidence. . . . Rather it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.

Turner I, 512 U.S. at 666 (citations omitted).

The government cannot meet its burden under Turner either with respect to the prospective or retrospective aspect of the CTEA. Both aspects must therefore be stricken.

1. *The Retrospective Aspect Of The CTEA*

The CTEA increases the term of subsisting copyrights by 20 years. These copyrights are for works created in the past—the earliest in 1923. As plaintiffs argued with respect to the Copyright Clause claim, the CTEA therefore grants exclusive rights in a way that cannot — so long as time travel remains impossible — increase the incentive to produce. As the Court of Appeals for the D.C. Circuit said in Christian Scientists, “a grant of copyright protection after the author’s death . . . provides scant incentive for future creative endeavors,” 829 F.2d 1152, 1169 n.84 (D.C. Cir. 1987). It therefore, as the court went on to say, provides “no justification” for extending a copyright term.

Rather than creating incentives to produce, the retrospective aspect of the CTEA removes incentives to produce. It adds nothing, but takes from the public domain a significant portion of our cultural past. It thereby disables other authors who would use that material to produce derivative works, or who would distribute that original work in other media. By extending the term during which copyright holders can use state power to control access to the writings of long-deceased writers, the CTEA bottles up resources for creative, academic and scholarly work, with no compensating gain in creativity. It functions then not as an engine of free expression, but rather as a brake.

There is no way that the government can meet its burden of demonstrating that the retrospective portion of the CTEA advances “an important governmental interest.” It is a cost with no benefit. As copyright scholar Melville Nimmer put it,

Neither of the reasons previously posited justifying first amendment subordination to copyright can justify this 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.

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17 UCLA L. Rev. 1180, 1195 (1970). Accord: Robert L. Bard & Lewis Kurlantzick,

Copyright Duration 181-84 (1999); Yochai Benkler, Free as the Air to Common Use: First

Amendment Constraints on Enclosure of the Public Domain, 74 NYU L. Rev. 354, 387

(1999).

2. *The Prospective Aspect Of The CTEA*

The CTEA also extends the terms of copyrights issued after 1978 by 20 years, from a term of life plus 50, to life plus 70. Pub. L. No. 105-298, § 102(b). The term under the CTEA thus protects copyright not just for the life of the author, nor for the life of the author and his or her children, nor even for the life of the author and children and

grandchildren. The CTEA could conceivably grant an exclusive right for the life of the author, and his or her children, grandchildren, and great-grand children.

This change in the copyright term, too, cannot be said to “advance an important governmental interest.” The increase will affect present incentives only if it will increase the economic value of a copyrighted work created today. But as common sense suggests, and simple economics confirms, this future benefit will have no meaningful economic effect on the present value of a copyright.

As the affidavit of Dean Varian demonstrates, even assuming the strongest case—assuming that an author finishes a work, immediately passes away, and that the work is an immediate and perpetual best seller—the increase in term from 50 to 70 years, once discounted to its present economic value, is tiny. Varian Aff. ¶¶ 5-11. That’s the best case. In most cases, the increase is even more attenuated. For an author who is forty, and who lives until she is 75, the increase in the copyright term would be from 85 to 105 years. The present effect of that increase is even less than Dean Varian describes.

It is simply factually not credible to believe that this change in duration would have any substantial effect on present incentives. There is no evidence that any business forecasts 100 years into the future before deciding whether to launch a business venture.¹⁶ Nor, plaintiffs submit, is there any person. The CTEA has not induced any change in the creative energies of authors. No one seriously believes it could. The extension of copyright term this far in advance cannot reasonably be said to increase present incentives.

¹⁶ 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, 104th Cong. 299 (1995) (statement of Dennis S. Karjala, Professor of Law, Ariz. State Univ.) (“no one in these industries makes financial decisions based on even 50-year, let alone 70-year, projections”).

The government's burden is to demonstrate that Congress made a "reasonable inference" from substantial evidence about the effect of this increase on present incentives, and weighed that probability against the free speech costs imposed. Turner I, 512 U.S. at 666. It must therefore demonstrate that despite these facts about incentives, Congress reasonably concluded that an increase in term at least 50 years from now would increase present incentives. Plaintiffs submit that the government cannot meet this burden.

D. The Application Of Intermediate Scrutiny To Changes In Copyright's Duration Is Plainly Consistent With The Supreme Court's Case Law.

Plaintiffs raise a facial challenge to the CTEA under the First Amendment. The government and amici contend that the First Amendment has no relevance to this case, because the "the notion that copyright restrictions violate the First Amendment has specifically been considered and rejected by both the Supreme Court and the D.C. Circuit." Gov. Mem. at 27. This argument is incorrect.

The Supreme Court and lower courts have considered a number of as-applied First Amendment challenges to the Copyright Act. In all of these cases, the question was whether the First Amendment might be defense to a copyright infringement action. In only two cases has any court ever held that the First Amendment would be a defense to a copyright infringement action. See Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 881-84 (S.D. Fla. 1978), aff'd on other grounds, 626 F.2d 1171 (5th Cir. 1980); Holliday v. Cable News Network, N.Y.L.J., Jan. 21, 1994, at 5 (C.D. Cal. June 11, 1993). In every other case, courts have rejected First Amendment defenses. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985) (rejecting First Amendment defense to copyright infringement); Los Angeles

News Service v. Tullo, 973 F.2d 791, 795-96 (9th Cir. 1992) (same); United Video, Inc. v. F.C.C., 890 F.2d 1173, 1190-92 (D.C.Cir. 1989) (same).

The government and amici infer from these cases that copyright legislation is free from First Amendment heightened scrutiny. But no such inference can be drawn, and the government has no authority to support such an extravagant claim. The First Amendment says “Congress shall make no law,” not “Except for copyright, Congress shall make no law.” It was enacted after the Copyright Clause, partly in response, according to the records of at least one ratifying convention, to concerns that Congress’s power under the Copyright Clause was too broad. As a delegate to the Pennsylvania ratifying convention argued, in support of a First Amendment,

Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect, they will have it They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.

2 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Pennsylvania, 454 (Merrill Jensen ed. 1976).¹⁷ The First Amendment plainly applies. The only question is how.

In arguing to the contrary, the government is confusing two different ideas. One is the idea that the First Amendment does not constrain Congress in enacting copyright legislation. The other is that courts should not apply intermediate First Amendment scrutiny in a defense to a copyright infringement action. The second idea is true; the first is not. What the courts have effectively said is that where Congress has built Free Speech protections in the scope of the Copyright Act, courts should not add a second

¹⁷ For other historical sources, see Stephen Fraser, The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet, 16 *Cardozo Arts & Ent. L. J.* 1, 20 n.126 (1998); Edward C.

level of protection on top. Courts should therefore not apply intermediate scrutiny in a copyright infringement action because Congress has already provided tools that adequately limit copyright's substantive scope.

There is nothing remarkable in this claim. The Supreme Court and lower courts have long acknowledged the First Amendment values reflected in the Copyright Act. In light of these values, Congress has codified two distinct tools designed to limit the substantive reach of copyright's protection. Specifically, Congress has extended copyright only to expression, and not to ideas, and it has guaranteed a space for "fair use." See 17 U.S.C. §§ 102(b), 107 (idea/expression, fair use). These limitations on copyright's scope have been understood by Congress to reflect First Amendment values. See H. Rep. 2222, 60th Cong., 2d Sess. 7 (1909). They have been understood by courts in the very same way. See Harper & Row, 471 U.S. at 560 (idea/expression distinction and "fair use" doctrine are "First Amendment protections ... embodied in the Copyright Act[.]")¹⁸ So long as they remain part of the Copyright Act, there is no need for courts to add an additional layer of First Amendment protection.¹⁹ They set the

Walterscheid, To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1, 56 (1994).

¹⁸ See also Los Angeles News Service v. Tullo, 973 F.2d 791, 795-96 (9th Cir. 1992) (rejecting First Amendment infringement defense on the grounds that "[c]opyright law incorporates First Amendment goals" by way of the idea-expression distinction and the fair use doctrine); Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1100 (2d Cir. 1982) (rejecting First Amendment infringement defense, citing "the general rule that '[c]onflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine'" (quoting Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977))); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (rejecting First Amendment infringement defense, given that "the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the First Amendment").

¹⁹ But see Lee v. Runge, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting from denial of cert.) ("Serious First Amendment questions would be raised in Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas.").

First Amendment test for copyright’s scope, and plaintiffs are not arguing that this Court should replace those tests with the intermediate scrutiny of Turner.

Thus in United Video, this Circuit wrote that “[c]ases in which a first amendment defense is raised to a copyright claim do not utilize [intermediate scrutiny].” 890 F.2d at 1190. Plaintiffs agree with this statement—in cases where the substantive scope of copyright’s reach is challenged, the tools that Congress has provided should resolve the question rather than a direct application of the First Amendment. Its holding however has no relevance to this case because we do not raise a First Amendment challenge to the scope of the Copyright Act.

Likewise, in Harper & Row, when The Nation magazine claimed a “First Amendment defense” to a copyright infringement action, the Court acknowledged that significant First Amendment values were at stake, but found that since Congress had taken those First Amendment values into account when codifying the “fair use” defense to a copyright infringement action, there was no need for the Court to add a second layer of First Amendment review. Where Congress has provided a device for reckoning First Amendment interests raised by copyright’s scope,²⁰ there is nothing remarkable

²⁰ Plaintiffs do not contend that the First Amendment would never be a defense in a copyright infringement action. A number of courts have suggested contexts where in fact it might. See Triangle Publications, 626 F.2d at 1184 (Tate, J., concurring) (arguing that “under limited circumstances, a First Amendment privilege may, and should exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts or expressions”; emphasis added); Sid & Marty Krofft, 562 F.2d at 1171 (“There may be certain rare instances when first amendment considerations will operate to limit copyright protection for graphic expressions of newsworthy events.”); Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977) (“Some day, [certain cases] may require courts to distinguish between the doctrine of fair use and ‘an emerging constitutional limitation on copyright contained in the first amendment.’”, (quoting Melville B. Nimmer, Does Copyright Abridge The First Amendment Guarantees Of Free Speech And Press? 17 U.C.L.A. L. Rev. 1180, 1200 (1970))); see also Schnapper v. Foley, 667 F.2d 102, 114 (D.C.Cir. 1981) (expressing confidence that if in some future case the idea-expression distinction and fair use doctrine fail to vindicate a person’s free speech interests, “the courts of the United States would . . . consider afresh the First Amendment interests implicated thereby.”).

about the Court using that device, once convinced it in fact advances First Amendment interests.

But the question of copyright's scope is distinct from the question of its duration. As the Supreme Court said in Twentieth Century Music Corp. v. Aiken, distinguishing the two constraints,

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.

422 U.S. 151, 156 (1975) (emphasis added; footnotes omitted).

The issues are separate. Whether copyright properly respects First Amendment values depends both on its scope and its duration. A copyright law with a generous fair use doctrine would still be unconstitutional were its duration so long as to prevent works from ever entering the public domain. Likewise, a copyright law granting protection for a duration of only a few years would still be unconstitutional if it granted copyright monopolies over ideas as well as expression. The issues are distinct, and one cannot resolve the other.

The reason is straightforward. The First Amendment question is whether copyright functions as an "engine of free expression." Harper & Row, 471 U.S. at 558. That principle requires that increases in copyright's duration produce an increase in incentives. Whether an increased term of copyright creates an increase in incentives depends upon the length of the term. It does not depend upon whether "fair use" is protected, or whether only expression is covered. While prospective increases within some range can reasonably be expected to increase incentives, at some point, an increase in the copyright term will have no meaningful effect on incentives. The

difference depends upon a simple fact about mathematics and human behavior: that changes far in the future will have little or no effect on rational behavior in the present.

The point is made clear in the affidavit of Dean Hal Varian. Different durations will create different incentives; some increases in duration will produce no meaningful change in incentives. Varian Aff. ¶¶ 5-11. The Court thus needs a test for distinguishing between changes in terms that “advance important governmental interests,” and changes in terms that do not. The “idea/expression” distinction, or “fair use” analysis cannot do that. To rely upon them alone to calibrate First Amendment interests is like using a thermometer to measure barometric pressure.

Ordinary First Amendment analysis, however, can test the issue of duration. The intermediate scrutiny of Turner Broadcasting provides this Court with a method for distinguishing changes in terms that Congress could “reasonably” believe would create incentives from changes in terms that Congress could not “reasonably” believe would create changes in incentives. Placing the burden on the government to demonstrate that Congress “in fact” made such a judgment is a perfectly adequate way to protect the speech interests at stake.

E. Against The Background Of An Expanding Scope And Duration For Copyright, The Internet Has Increased The Need For This Court To Test Congress’s Copyright Legislation Against The Restrictions Of The First Amendment.

As Judge Benjamin Kaplan noted thirty years ago, there has been a significant expansion in the scope of the “exclusive rights” protected by copyright law. Benjamin Kaplan, An Unhurried View of Copyright 36 (1967) (describing the “gradual broadening” of the “conception” of copyright). While the framing generation enacted a copyright law that protected authors against direct copies of copyrighted texts, Congress over the past two centuries has added substantially more to the substance and

reach of the copyright’s “exclusive right.” Unlike the copyright granted in 1790—which covered the copying and sale of “map[s], chart[s] and ... books” for an initial term of 14 years, renewable if the author survived—copyright holders today enjoy an exclusive right over literal copying, translation, derivative works, and public performances of “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works,” see 17 U.S.C. § 106, for what could well be more than 120 years. These modern rights were not within the scope of the right initially contemplated by the framers of the copyright clause.

Even more surprising to the framers may be the nature of what copyright today protects. The framers did not imagine the scope of “writings” that would gain the benefit of a clause that gave Congress the power to promote the progress “of Science and useful Arts.” The “Science and useful Arts” that the framers had in mind were not novels, or entertainment. Indeed, many in the framing generation were generally opposed to production of “novels.” And early records from the Copyright Office indicate that while a large number of educational and scientific texts were granted Copyrights, only a small proportion of initial copyrights were for novels and plays, and none were for music.²¹

Plaintiffs have no desire to question Congress’s decision to expand protections beyond the narrow reach that the framers had in mind. Neither do we seek to question the Supreme Court’s willingness to permit that extension. Nor do we question the scope

²¹ See Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tulane L. Rev. 991, 1002-03 (1990) (citing statistics, “540 newspapers (157 newspapers for 1790-92, 383 for 1798-99), 441 titles in Political Science (207 for 1790-92, 234 for 1798-99), 302 titles in History (117 for 1790-92, 185 for 1798-99), 270 titles in Social Science (125 for 1790-92, 145 for 1798-99), and 61 Fourth of July orations for 1798-99 ... the publication of novels appears fairly modest: 43 titles for 1790-92 and 119 for 1798-99,” and quoting Jefferson: “A great obstacle to good education is the inordinate passion prevalent for novels, and the time lost in that reading which should be instructively employed.”); Federal Copyright Records 1790-1800 xxii-xxiii (James Gilreath ed. 1987).

of the “exclusive rights” protected by the modern Copyright Act. Both the term “writings” and the term “exclusive right” are sufficiently flexible to permit congressional expansion of copyright coverage to meet technological changes permitting modes of expression that could not have been foreseen by the drafters of the Constitution.

The term “limited Times,” however, does not have the same flexibility, and more importantly, none of the technological changes justifying an expanded copyright scope undercut the basic constitutional policy behind the “limited Times” restriction.

Thus, the government and amici are incorrect to suggest that there is nothing in the nature of copyright law today requiring the Court to weigh the Free Speech/Copyright balance. There can be no doubt but that the Copyright Act grants monopolies over a much wider scope of speech than the framers envisioned, and no doubt for radically longer period of time. The Court has a duty to test further expansions, especially of term, against basic constitutional principles.

In particular, this accretion increases the need for courts to test changes in the copyright act against free speech principles because changes in technology have increased the relevance of such regulation. The Internet today turns ordinary citizens into publishers. It throws ordinary “creative” activity into the domain of copyright’s restriction. In the world of 1790, very little of the communicative activity of ordinary citizens was subject to the restrictions of copyright, since ordinary citizens were not “publishers.” Today, on the Internet, practically every on-line exchange between citizens on the Internet is subject to the restrictions of copyright. As the Supreme Court described in Reno v. ACLU, 521 U.S. 844 (1997), the Internet has become an extraordinary source for speech and publication, as it has given to ordinary citizens the power of publication.

This change in the relationship of ordinary citizens to the copyright law has simultaneously increased the importance of the public domain. The great growth of the Internet, and its extraordinary diversity, has come from its open and unrestricted character. Congress's increase in the scope of copyright could endanger this feature of the Internet. As circumstances have thus made copyright more relevant to ordinary free speech concerns, it has increased the need for this Court to assure adequate room for free speech interests as well.

III. The CTEA's Retroactive Extension Of Copyright Protection Violates The Public Trust Doctrine.

Plaintiffs believe that the CTEA is unconstitutional both prospectively and retrospectively under the First Amendment, and unconstitutional retrospectively under the Copyright Clause. We argue further that the retrospective aspect of the CTEA is also inconsistent with a traditional doctrine of public and constitutional law, the Public Trust Doctrine. This doctrine, properly understood, constrains the scope of government's power to give public assets to private parties. While the Public Trust Doctrine arose historically in disputes about navigable waterways, there is nothing in the doctrine that limits its application to only one kind of public property. Instead, plaintiffs submit, the doctrine has natural application to intellectual property, and so applied it regulates Congress's power to give away assets of the public domain.

A. The Copyright Laws Vest A Present Exclusive Right In Copyright Holders, And A Future Remainder Interest In The Public.

Every congressional exercise of the power to issue copyrights by definition gives rise to two distinct proprietary interests. On the one hand, by granting authors "the exclusive Right to their . . . Writings," copyright laws vest a present exclusive right to a copyrighted work in the author's estate. U.S. Const. art. I, § 8, cl. 8. On the other hand, because copyrights may only be "secur[ed] for limited Times," the copyright laws

simultaneously vest in the public a future remainder interest in the right to use the copyrighted work. Id.; see also Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearings Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary, 105th Cong. 90 (1997) (statement of Prof. Jerome H. Reichman, Vanderbilt School of Law) (describing the “Constitutional requirement” that the public be made “the remainderman under all copyright laws”). The issuance of a copyright thus creates a dual entitlement: it entitles the author to exclude others from using the copyrighted work during the duration of the copyright; but at the same time it entitles the public to free access to the work once the copyright expires. Compl. ¶ 69.

This view of copyright is reflected in the case law. In addition to recognizing works with valid copyrights to be the exclusive property of authors, the courts commonly ascribe the label of “public property” to works whose copyrights have expired or been deemed invalid. See, e.g., Mifflin v Dutton, 190 U.S. 265, 266 (1903) (holding that writings in question “became public property” once they were published without a copyright first being obtained); Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 883 F.2d 1429, 1440 (9th Cir. 1989) (stating that, if material is found to have an invalid copyright, the “material becomes public property”; citations omitted); Read v. Turner, 48 Cal.Rptr. 919, 926 (Cal. App. 1966) (stating in reference to a copyrighted work that, upon “termination of the copyright, . . . the subject thereof became public property”); see also Champion Map Corp. v. Twin Printing Co., 350 F.Supp. 1332, 1336 (E.D.N.C. 1971) (describing uncopyrighted work as “public property”).²² Thus, as a

²² In its argument that copyrighted works are not public property subject to the Public Trust Doctrine, (Gov. Mem. at 24 – 25), the government cites Fox Film Corp. v. Doyal, 286 U.S. 123 (1932); but the citation is off point. Fox Film concerned the question whether states could tax royalties received from the sale of

default, authored works are the property of the public. Copyrights are granted to authors against this backdrop. Consequently, the limit on a copyright's duration marks not only the termination of the author's property interest in his work; it also marks the time at which the work will revert to the public. See Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 Am. Literary Hist. 21, 22 (1997) (concluding that historical evidence shows that American copyright protection was originally conceived as “the temporary alienation of public property”).

Indeed, the granting of a copyright is motivated in large part by the guarantee that the copyrighted work will eventually be transferred back to the public domain. As the Supreme Court has stated:

[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors. A copyright . . . is . . . the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals. . . .

Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (internal quotation marks omitted).

licenses to use copyrighted works. Fox argued that the states could not impose such taxes, reasoning that copyrights are instrumentalities of the United States. In rejecting Fox's argument, the court held that copyrighted material “is the property of the author and not of the United States In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use.” Id. at 127.

However, as the context makes clear, the government's citation to Fox Film is simply irrelevant to this case. Fox Film concerned the status of ownership in copyrighted material during the life of the copyright. Of course it is true that, during the life of a copyright, the author has exclusive ownership over the copyrighted material. By granting copyright protection to the author, the federal government does not become a partner or shareholder in the author's enterprise, and thus does not become an owner of the copyrighted work in this sense. Consequently, in exercising his or her copyrights, the author cannot claim to be carrying out a governmental function exempt from taxation. But none of these conclusions concern the status of ownership in the copyrighted work after the copyright expires. It is this future remainder interest in the copyrighted work that is at stake in this case, not the present interest held by the author through the duration of the copyright. The government cannot disprove public ownership of the former merely by disproving such ownership of the latter.

The public's future remainder interest in the right to use a copyrighted work is one of the "general benefits" the public expects to receive in exchange for the granting of the copyright. That interest is bought and paid for—and thus vests—at the time the copyright issues. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 Mich. L. Rev. 462, 504 n.155 (1998) (putting forth the argument "that it is the public that is the property owner [of a copyright], since the public stands in the relation of remainderman to the copyright 'owner's' life (plus 50) tenancy, and since it is the public's remaindered interest that justified the creation of the life tenancy in the first place").

The CTEA takes away from the public a portion of this future remainder interest and conveys it to authors, in the form of a retroactive extension of their copyrights. By its terms, then, the CTEA effects a transfer of public property to private hands. Compl. ¶ 70.

B. The Public Trust Doctrine Forbids The Transfer Of Public Property To Private Hands Unless The Transfer Is Made Primarily For A Public Purpose.

The Supreme Court has long recognized the Public Trust Doctrine as a constraint on the sovereign's power to convey public property to private parties. The classic statement of the Public Trust Doctrine appears in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), where the Supreme Court effectively invalidated an Illinois statute conveying lands under Lake Michigan to the Illinois Central Railroad. Key to the Court's holding was its finding that navigable waters such as those at stake in the case must be considered public property, "held in trust for the people of the State that they

To the extent that the government's citation to *Fox Film* is intended merely to draw attention to the fact that no formalities of title accompany the vesting of the public's interest in copyrighted works, this concern is addressed below. See *infra* n.23 and accompanying text.

may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” Id. at 452. Because the ownership of navigable waters is “a subject of public concern to the whole people of the State,” the Court reasoned, “[t]he trust with which they are held . . . is governmental and cannot be alienated, except . . . when parcels can be disposed of without detriment to the public interest” 146 U.S. at 455 – 56.

A more recent formulation of the Public Trust Doctrine distills three “basic principles” from the body of law built upon Illinois Central, two of which are directly relevant to this case. Lake Michigan Fed’n v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D.Ill. 1990). The first principle calls for heightened scrutiny of transfers of public trust property, holding that “courts should be critical of attempts by the state to surrender valuable public resources to a private entity.” Id. While courts should consider a legislature’s declaration that the disputed transfer is being made for a public purpose, “the self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose.” Id. at 446 (internal quotation marks omitted). Rather, a more searching scrutiny of the state’s action is required. For “[t]he very purpose of the Public Trust Doctrine is to police the legislature’s disposition of public lands. If courts were to rubber stamp legislative decisions, . . . the doctrine would have no teeth.” Id.

The second principle distilled from the case law describes the main thrust of the doctrine: “the public trust is violated when the primary purpose of a legislative grant [of a public resource] is to benefit a private interest.” Id. at 445; see also United States v. Beebe, 127 U.S. 338, 342 (1888) (stating that the “public domain is held by the government as part of its trust” and “[t]he government is charged with the duty . . . to protect it from trespass and unlawful appropriation”). It is not enough for the grant to

have “some aspects which are beneficial to the public.” Lake Michigan Fed’n, 742 F. Supp. at 445. So long as its primary purpose is to benefit private interests, the grant is improper, and it “is not made any more palatable by attaching cosmetic conditions to the conveyance which permit restricted public access to the [conveyed] property.” Id. at 447.

Although the Public Trust Doctrine historically has been applied almost exclusively in the context of navigable waters, there is nothing inherent in the doctrine that prevents its application in other contexts – including the context of a copyright case. Indeed, attention to the language used by the Illinois Central Court, as well as common sense, suggest that the Public Trust Doctrine ought to turn not on whether a piece of property is aqueous or navigable, but on whether the property is especially suited and has in fact been set aside for unrestricted public use. As the Illinois Central Court put it: “[That the government cannot alienate the navigable waters in question] follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.” 146 U.S. at 456. Put again: “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers” Id. at 453 (emphasis added). Navigable waters should be understood, then, as an illustrative, and not exclusive, application of the Public Trust Doctrine; for the doctrine by its nature is general in scope. See Richard A. Epstein, The Public Trust Doctrine, 7 Cato J. 411, 419 (1987) (arguing that the Public Trust Doctrine should regulate the transfer of public property to private parties generally and prohibit such a transfer where there is no “reason to believe that the private owner of the asset can make better use of it than the public owner”); see also District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (describing how courts and

commentators recently have found the Public Trust Doctrine to be a “flexible” principle, “enough to meet diverse modern needs,” such as the protection of recreational areas and environmental resources).

Like navigable water, intellectual property possesses an essentially “public character”: especially in this Information Age, the whole people have a vital interest in the free flow of informational and creative works. Moreover, as discussed above, a future remainder interest in every such work is in fact set aside for the public when the works are copyrighted. Theoretically, then, the Public Trust Doctrine should protect this future remainder interest just as much as any comparable public asset. Compare Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. Davis L. Rev. 185, 186 – 89 (1980) (arguing that the Public Trust Doctrine should protect public expectations against destabilizing changes).²³

Moreover, there is a strong argument that the Public Trust Doctrine makes more sense in the context of intellectual property than in the context of real property. Real property is exhaustible; uses compete. And one might well argue that the state has a valid and legitimate interest in privatizing real assets to assure that they are best managed to avoid the “tragedy of the commons.”

Intellectual property is fundamentally different. Uses do not technically compete. One person’s use of an intangible work does not preclude the use by another. Hence there is not the same economic justification for “privatizing” intellectual property as there is for privatizing real property.

²³ By the same token, contrary to the suggestion of the government, (Gov. Mem. at 24–25), the applicability of the Public Trust Doctrine should not depend on whether the government formally holds “title” in the public property at issue. Indeed, the “central idea of the public trust” is to protect proprietary “expectations held in common but without formal recognition such as title.” Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. Davis L. Rev. 185, 188 (1980).

Admittedly, the courts have given no clear indication whether and how the Public Trust Doctrine applies to federal statutes such as the copyright laws. The doctrine has traditionally been applied to the states; but in recent decades, several courts have recognized the doctrine to constrain the federal government as well. See United States v. 1.58 Acres of Land, 523 F.Supp. 120 (D.Mass. 1981) (holding that the Public Trust Doctrine equally restricts the state and federal governments in their power to alienate public trust lands to private individuals); In re Steuart Transportation Co., 495 F. Supp. 38, 40 (E.D.Va. 1980) (holding that the State of Virginia and the United States are both bound by the Public Trust Doctrine in their management of natural wildlife resources). Upon surveying these cases, as well as the ongoing expansion of the Public Trust Doctrine as it pertains to state law, the D.C. Circuit has officially left open the question whether the doctrine applies to federal law. See Air Florida, 750 F.2d at 1084.

Plaintiffs contend that the Public Trust Doctrine is best understood as a principle of constitutional law, constraining federal law. To date, no court has considered the question whether the Public Trust Doctrine constrains federal law through the Constitution. But there are strong theoretical reasons to believe that the doctrine does rise to the level of constitutional principle. As Professor Richard Epstein has argued:

The public trust doctrine is the mirror image of the eminent domain clause. Both are designed to place limitations upon the power of [the] legislature to divert property, whether held privately or in common Both doctrines derive from a strong sense of equity that condemns these uncompensated transfers as a genteel form of theft, regardless of whether the original holdings are public or private. . . . In principle the public trust doctrine should operate at the constitutional level, as a parallel to the eminent domain clause.

Epstein, supra, at 426.

Indeed, a simple extension of precedent is all that is required in order to locate the Public Trust Doctrine in the Due Process Clause of the Fifth Amendment. The Supreme Court held long ago that the Due Process Clause of the Fourteenth Amendment prohibits the taking of private property without just compensation. See Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) (applying this prohibition against the states). Presumably, the Due Process Clause of the Fifth Amendment contains the same prohibition (though it is rendered moot by the Takings Clause). If this is true, then it would seem that the Due Process Clause also must provide some similar restriction on the transfer of public property. For, on its face, the Due Process Clause does not discriminate between private and public property; it provides simply that no person shall be deprived of ‘property’ without due process. Thus, just as it prohibits the deprivation of private property without just compensation, so it ought to prohibit the similar deprivation of public property. Cf. Epstein, supra, at 427 (“[T]he due process clause seems to apply [to transfers of public trust property] because the ‘property’ to which it refers includes not only private property, but also the fractional share that each person holds in the trust property.”). Put another way, as the Court stated in Chicago, Burlington & Quincy Railroad:

Due protection of the rights of property has been regarded as a vital principle of republican institutions. . . . The requirement that [private] property shall not be taken for public use without just compensation is but an affirmation of a great doctrine established by the common law for the protection of private property.

166 U.S. at 235–36 (internal quotation marks omitted). The Public Trust Doctrine, having been held in similar regard by republican institutions and possessing a similar common law pedigree, see, e.g., 1.58 Acres of Land, 523 F.Supp. at 122–23, ought as well to be affirmed as a requirement of due process.

C. The CTEA's Retroactive Extension Of Copyright Protection Benefits Private Interests, With No Legitimate Benefit To The Public, And Thus Violates The Public Trust Doctrine.

As has been discussed above in the context of the First Amendment and the Copyright Clause, the CTEA's retroactive extension of copyright protection by definition fails to provide an incentive for the creation of new works. As a result, the extension effectively gives away the public's future remainder interest in copyrighted works without producing any significant public benefit in return. Such a transfer of public property is barred by the Public Trust Doctrine.²⁴

The government claims that the CTEA serves certain public purposes. But these purposes are dwarfed by the benefits the CTEA will bestow on large private interests and the concomitant costs it will impose on a public forced to continue paying monopoly prices for works it would otherwise be entitled to enjoy for free. "What we

²⁴ Courts have essentially recognized this principle in a slightly different context, in holding that, once a work is injected into the public domain, it cannot be taken out again. See Bridge Publications, Inc. v. F.A.C.T.Net, Inc., 183 F.R.D. 254, 262 (D.Colo. 1998) ("Once a work enters the public domain, it remains there irrevocably."); Dow Jones & Co. v. Bd. of Trade of City of Chicago, 546 F.Supp. 113, 116 n.5 (S.D.N.Y. 1982) ("When a work has been injected into the public domain, all of its copyright protection is lost permanently."); Jacobs v. Robitaille, 406 F.Supp. 1145, 1149 (D.N.H. 1976) ("Once a work has been injected into the public domain, all of its copyright protection 'is lost permanently and cannot be restored or reclaimed.'" (quoting Ringer & Gitlin, "Copyrights," at 15 (Practicing Law Institute 1965))); Ross Products, Inc. v. New York Merchandise Co., 233 F.Supp. 260, 261 (S.D.N.Y. 1964) ("It is well established that once a work has been put in the public domain there can be no valid copyright subsequent to that publication.").

A closely related and equally compelling principle is that, once a work has been scheduled to enter the public domain at a certain time, its entry therein may not be delayed. For, from the perspective of the Public Trust Doctrine, there is no significant difference between delaying the entry of works into the public domain and removing them from the public domain once there. Both are commensurate violations of the public trust, in that both force the public to give additional benefits to the copyright holder without any public benefits being produced in return.

The idea can be put in contractual terms. The original duration of a copyright represents a sort of going price paid by the public for the copyrighted work at the time the copyright was issued. The public agreed to give up free access to the work for a specified time, as the price it had to pay for, among other things, free access to the work after this specified time. The CTEA effectively raises this purchase price after the deal between author and the public has already been struck. Therein lies the violation of the public trust. It should not matter whether the purchase price is raised after the work is transferred from seller to purchaser (i.e., after the work has already entered the public domain) or before (as with the CTEA); the same waste of public assets is effected either way.

have here is a transparent giveaway of public property to . . . private entit[ies].” Lake Michigan Fed’n, 742 F.Supp. at 447. While the public justifications offered for the CTEA extension may have made the extension “more palatable” to members of Congress, “the inescapable truth” is that the extension will sacrifice the public’s proprietary interest in copyrighted works in order to provide a windfall to private copyright holders. Id. at 445.

IV. The Government’s Justifications For The CTEA Do Not Meet Its Burden Under Intermediate Scrutiny, Nor Do They Sustain The Government’s Argument For A Less Restrictive Understanding Of The Copyright Clause

A. The Government’s Justifications For The CTEA Do Not Meet Its Burden Under Intermediate First Amendment Review.

The government offers three justifications in support of the CTEA. None is plausibly related to the only historical purpose the Court has recognized for the “To promote the Progress of Science and useful Arts” Clause—to provide incentives for the creation of new works. None are applicable to plaintiffs’ argument that the CTEA violates the “limited Times” term of the Copyright Clause. As applied to the First Amendment analysis, the government must show that Congress adequately considered the free speech interests at stake.

The three justifications are weak. In particular, the economics of the government’s second and third justifications is extremely implausible. This implausibility should place a special burden on the government. Just as in the context of antitrust law, a party advancing an implausible economic account bears a heavier burden to sustain that account, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), so too should a party resisting a First Amendment challenge bear a special burden when the economics underlying its defense is so extremely implausible.

1. *Need For Harmonization*

The government argues first that the CTEA advances the purpose of harmonization with the European Union’s Directive on Copyright. Gov. Mem. at 13-15. That directive requires that members of the European Union grant a copyright term of life plus 70 years. It also requires that members of the European Union apply the “rule of the shorter term,” meaning that a country within the European Union may grant copyright protection for a term no longer than that recognized by the home country’s law. In the case of the United States, for works after 1977, that means that but for the CTEA, a copyright granted by the United States would get only life plus 50 years of protection, even though an equivalent copyright granted by a member of the European Union would enjoy protection for life plus 70.

It is important to note what this argument is not: The government is not arguing that we are under a treaty obligation to extend the term of copyright, or that we are enabling ourselves to enter a treaty as we were, for example, when Congress changed the basic form of protection in the 1976 Act from a fixed term to life plus 50. The United States is in compliance with the Berne Convention on copyright, and with TRIPS. See J.H. Reichman, The Duration of Copyright and the Limits of Cultural Policy, 14 *Cardozo Arts & Ent. L. J.* 625, 628-31 (1996). It is under no obligation to follow the policy choices of Europe. Instead, the government is arguing that there is a policy interest in harmonizing our laws with the laws of the European Union—even though, of course, the United States is not a member of the European Union.

But the government has not established that harmonization is an “important government interest” under intermediate scrutiny. Indeed, beyond the aesthetic advantage of “harmony,” it is not even clear what the interest in harmonization is.

Conceivably the interest is in efficiency: if all terms were identical, then the costs of calculating a copyright's term would be less. But this certainly is a negligible benefit. First, not all, or even the most important, copyright systems have adopted the EU directive. Second, under a life+x term, one always determine anyway when an author has died to know when a work is protected. Given the need to make that determination, it is hard to understand why it is more difficult to then add 50 rather than 70.

Alternatively, the interest might be that no particular nation allow a work to fall into the public domain (and thereby advantage its own) before any other nation. But if this is the objective, then it is neither the case that the CTEA comes close to achieving it (as major nations remain exceptions, such as Japan, as harmonizing with some nations means falling out of harmony with others, such as Japan, and as dissonance was added by the CTEA, as we describe below) nor is it clear why the baseline should be Europe's rather than the United States. The United States can achieve harmonization if it likes by getting Europe to agree to our standard of protection.

Second, and contrary to the government's representation, the CTEA in fact does not harmonize United States and European copyright law. In at least one case, in fact, the law makes the dissonance worse. The CTEA extends the copyright period for corporate "authors" to 95 years (or 120 years if the work is unpublished), while the European Union now offers corporate authors 70 years of protection—less even than the 75 that we provided before the CTEA was passed. The CTEA thus exacerbates the non-harmonized aspect of European and United States copyright law. If Congress's aim were really harmonization, dissonance would not have been its means.

Nor is work-for-hire the only example of dissonance between the American and European regimes. As Professor Neil Netanel has written,

[T]he United States provides longer terms than required by the Berne Convention, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), [and] the European Union for photographers, creators of applied art, broadcasters, sound recording and film producers, [as well as] corporate authors.

Neil Weinstock Netanel, Copyright and Democratic Civil Society, 106 *Yale L.J.* 283, 367 (1996). If harmonization were the aim, there was plenty Congress could have done to assure that United States law harmonized with Europe before it extended the term of copyright by 20 years.

Nor does the law actually harmonize particular works. As Professor Dennis Karjala testified before Congress, under existing law, the works of George Gershwin, for example, were about as “harmonized” as they could be. He 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 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) (“Karjala Stmt.”). Thus for at least 11 years, Europeans—for the rule of the shorter term applies—will have the benefit of free access to Gershwin’s work while Americans will not. This can hardly be described as “harmonization.”

Congress was told, repeatedly, that the CTEA would not “harmonize” EU and American law.²⁵ There was nothing in the record contradicting the evidence presented.

²⁵ 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, 104th Cong. 282 (1995) (statement of Prof. John Belton, Rutgers Univ.) (noting lack of

In light of this, the government cannot “in fact,” Turner I, 512 U.S., 664, show that the speech restriction of the CTEA advances the interests of “harmonization.”

Third, even if harmonization would have a beneficial effect on present incentives, there is no need under the “rule of the shorter term” to harmonize both retrospectively and prospectively. Even if the government were able to sustain its burden in demonstrating that harmonization increased the incentive of present authors to produce, there is no need to harmonize retrospectively to get the benefit of that rule.

Article 7 of the E.U. Directive states that:

Where the country of origin of a work ... is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work ...

EU Directive on Term, art 7.

The directive is based on “the work.” Thus current authors could get the benefit of a harmonized life+70 term whether or not the law extended subsisting copyrights as well. The CTEA is therefore more restrictive “than necessary” under intermediate scrutiny.

Indeed, if harmonization were an “important governmental interest” it would justify the CTEA only to the extent that the CTEA extended the terms for individual

harmonization prospectively); Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary, 104th Cong. 305-06 (1995) (statement of Prof. Dennis S. Karjala, Ariz. State Univ.) (“There are many other features of copyright law [besides work-for-hire rules] that are not ‘harmonized’ even within Europe, let alone between Europe and the United States, including moral rights and the important United States concept of fair use. ‘Harmonization’ is therefore not in itself a valid ground for extending any of our current copyright protection terms.”); Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary, 104th Cong. 313 (1995) (statement of Prof. William F. Patry, Benjamin N. Cardozo College of Law) (CTEA will perpetuate the disparity between US and Europe in the rights granted authors to terminate contracts with assignee corporations); Id., at 349 (pointing out that harmonizing with Europe would bring the United States out of harmony with other nations, including Japan).

authors. It would not justify the extension of works made for hire—for again, while the E.U. Directive mandates a 70-year term where a Member State recognizes corporate authorship, most Member State national laws have no separate category for works made for hire. Thus under the second part of the Turner test, the extension of works made for hire would be more restrictive than necessary to achieve the important governmental interest. Corporate copyrights can get no support under the harmonization rationale of the CTEA.

Rather than satisfying its burden under Turner Broadcasting, the harmonization argument simply comes to this: That because Europe gives a longer protection for European copyright, both Americans and Europeans must pay for longer American terms under American copyrights. This transfer from Americans and Europeans to copyright holders will certainly benefit these copyright holders. But again, as the Supreme Court has repeatedly held, “[t]he primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts.” Feist, 499 U.S., at 349. Restrictions are permitted only when the public gets creativity in return. Harmonization is not creativity.

2. *Providing Increased Resources To Stimulate Creation Of New Works*

The government next argues that the retrospective aspect of the CTEA will stimulate the creation of new works by providing increased resources to past creators of copyrighted work. But this claim too is neither plausible, nor supported by any evidence in the record.

In simple terms, the argument comes to this: that by giving the grandchildren of past authors more money today, while removing creative resources from other writers and readers, we are likely to create in them more incentives to produce than they otherwise would.

The argument is absurd as a matter of common sense and economics. Why would one expect that the heirs of an author are likely authors? Or why would one expect that by subsidizing them, society will increase the incentive for them to produce writings rather than simply go on vacation? There is no reason to expect that the increased royalties from already produced works will yield any increase in production of new works. The government's argument does nothing to suggest why it would.

The same is true a fortiori for works made for hire. A corporation's decision whether to invest in the production of new work turns solely upon the return from that work. Money that it received regardless of its production of new work cannot provide incentives for the production of new work. If it make sense to invest that money in new work, then, all things being equal, the company will invest in producing that work whether the retrospective grant is given or not; if it does not make sense to invest money in producing new work, then, all things being equal, the company will not invest in producing that new work, whether the retrospective grant is given or not.

We make this point not to sustain the pedestrian economics that underlie it. Plaintiffs argue instead that it is implausible to believe that Congress was in any way motivated by the belief that retrospective grants will induce prospective work. Whatever motivated Congress, it is not reasonable to believe that "in fact" these changes will increase incentives to produce. Nothing in the record would support the government's claim to the contrary. The only evidence in the record is that retrospective extensions of the copyright term would yield an extraordinary present return to some copyright holders, regardless of what they do with the windfall of this reward.

The only real effect of giving distant descendants an extended copyright is that it will allow them to engage in precisely the kind of private censorship that the First Amendment abhors. Professor Dennis Karjala testified to a number of these effects in

his 1998 statement to Congress. Karjala Stmt. p. 14. Jane Austen’s distant relatives, for example, have complained about the harm to the literary legacy of Jane Austen caused by the movie “Clueless.” The Disney Corporation was criticized by descendants of Victor Hugo because of its movie “Hunchback.” Congress heard testimony about refusals by the estate of Lorenz Hart for permission to use Hart’s lyrics unless the biographer promised not to mention Hart’s homosexuality. Id. at n.22. The same point was made much earlier by Professor Zechariah Chafee. See Zechariah Chafee, Jr., Reflections on the Law of Copyright: II, 45 Colum. L. Rev. 718 (1945). The CTEA adds to the power of distant relatives to control how the stories from the past might be adapted in the future, by granting them an extended veto right over the use of these aspects of common culture.

Jane Austen’s relatives have an absolute right to criticize the movie “Clueless.” The descendants of Victor Hugo have a right to criticize Disney. But in the American tradition, what they do not have is a perpetual “moral right” to control how the stories their ancestors started will continue: once the initial bargain with the author is over, the stories that author creates become part of the public domain. Just as Santa Claus evolved from a thin and moralistic scrooge to a jovial and generous character once freed to the public domain, so too does the American tradition require that other stories, and characters, and ideas become free to develop once an initial, and limited, exclusive right expires. Karjala Stmt. at 13.

It is the free market that should determine which ideas will flourish, and which will change—not decedents of authors with outdated ideas of the appropriate. The Copyright Clause was never intended to empower distant relatives as the “culture police.” The very idea is anathema to our constitutional tradition.

The D.C. Circuit's opinion in Christian Scientists is instructive on this point. There the Court struck down a private law of Congress that recaptured and extended the term of copyright for certain works of the Christian Science faith. The sole purpose of this extension was to give a particular sect of the Church control over who could use these publications. While the Court rejected the government's argument that a retroactive extension of a copyright term might induce greater creativity, 829 F.2d 1152, 1169 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"), it rested its decision ultimately upon a conflict with the Establishment Clause.

But in this, the principles of the Establishment Clause resonate with the ideals of the Free Speech and Press Clauses of the First Amendment. The legitimate interest that the Supreme Court has identified for giving authors an exclusive right is not that authors (or more importantly, their descendants) might exercise a veto right over the use and criticism of their work. The interest is incentives. But with the expansion of copyright's scope, a veto right is in effect is what an extension gives.

3. *Preservation Of Existing Works*

Finally, the government argues that granting retrospective extensions of the copyright term will provide the incentive for holders of some copyrighted material to preserve that material by converting that material into new forms. This argument, even if true, is inadequate for at least two reasons.

First, the argument is insufficient because the CTEA is not narrowly tailored to achieve this goal. The CTEA unconditionally expands copyright protection for all copyrighted works. It may be that there are particular works (film, perhaps) that face a special need for conversion into new media. If Congress were to draft a narrow statute

targeted precisely to the kinds of works that have this need for “restoration,” then it is possible that Congress might find the market for restoration would be best served by extending the exclusive right of copyright for those works, rather than by leaving the works to the public domain, where film collectors, archivists, scholars, librarians, and art lovers have an opportunity to restore them.²⁶ That indeed is precisely the business of plaintiffs American Film Heritage Association and Moviecraft. Plaintiffs believe that if Congress were fairly to make that judgment, it would decide that the public domain is a better environment for restoration. But in any event, Congress has no power—consistent with the requirement of narrow tailoring—to provide incentives for restoration by extending the terms of all copyrights.

Second, and more fundamentally, extending copyright protection on this ground advances no interest recognized as legitimate by the Copyright Clause. The copyright laws, as the framers conceived them, (1) provide incentives to authors (2) for the creation of original works. The CTEA, as the government defends it, does neither. The point of the statute, under this portion of the government’s vision, is not to benefit

²⁶ Congress heard testimony that it was in fact untrue, offered by the same expert the government relies upon to support the claim that “authors” benefit under the CTEA. As Professor Peter Jaszi put it,

It could be argued . . . that term extension for existing works may provide significant public benefits by encouraging dissemination of those works by publishers and other information distributors. The fallacy of this suggestion, however, is readily apparent. No rational economic actor will cease distributing a still-popular work when it ceases to be protected by copyright, merely because it may now face competition in the marketplace; if anything, such a firm is more likely to respond by improving the version of the work it offers in order to compete more effectively—and to be able to claim a derivative work copyright. By the same token, no firm motivated by a desire for profit will begin distributing a still-unpopular work merely because it retains copyright protection. And where a formerly unpopular work is deemed ripe for commercial revival, the absence of copyright protection (associated with lower production costs for the reissue) actually may operate as an incentive to a firm interested in bringing it to market.

authors at all; it is to benefit whatever publisher currently holds the rights in the work. Yet the purpose of the clause was not to benefit publishers. The framers followed the Statute of Anne, not the practice of granting stationers' copyright, or printing patents. See Irah Donner, The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?, 36 *Am. J. Legal Hist.* 361, 365-68 (1992). The principle behind the Statute of Anne, echoed in the text of the constitution, is that the copyright monopoly supports creation, not production. The purpose of the clause was correct for a market failure that would make authorship difficult. Publishers should rise or fall based on competition in the market; authors, without copyright, could not.

Similarly, the government understands the CTEA to grant copyright protection to encourage the creation of “new works” without regard to whether those works are original.²⁷ Yet if the new versions of the works are not original, they cannot be granted copyright protection at all. Copyright, as the Court held in Feist, can only protect original authorship. Whatever interest the government is advancing here, therefore, it is one foreign to the Copyright Clause. And just as the arguments of the telephone book producers in Feist—that a copyright was necessary to give the incentives to producers necessary to produce a phone book—were insufficient to overcome the limitations of the Copyright Clause, so too should they be insufficient here.

* * *

Copyright Term Extension Act of 1995: Hearing on S.483 Before the Senate Comm. On the Judiciary, 104th Cong. 75 (1995) (statement of Peter A. Jaszi, Professor, American University, Washington College of Law).

²⁷ If they are original, then there is no need for retrospective protection. The original work would be a derivative work, which would, under the Copyright Act, get its own copyright. See 17 U.S.C. §103 (1994). See also Copyright Term Extension Act of 1995: Hearing on S.483 Before the Senate Comm. On the Judiciary, 104th Cong. 127 (1995) (statement of Peter Jaszi, Professor, American University) (explaining that, in most cases, digital preservations of existing works would meet the Feist originality standard and qualify for copyright protection as derivative works).

As plaintiffs have argued, to meet its burden under Turner, the government must “do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” Turner I, 512 U.S. at 664 (citations omitted). Plaintiffs submit that none of the justifications could sustain the government’s burden under intermediate scrutiny. (The second justification would even fail rational basis scrutiny).

Plaintiffs are not asking this Court to reweigh the evidence that Congress was to have reckoned. We are not asking that this Court make the judgment of whether the palpable restrictions on speech that the CTEA imposes are outweighed by a probable increase in creative incentives. We rehearse these justifications simply to suggest that it is not plausible to believe that these were the considerations that Congress had in mind. They are ex post rationalizations, and weak rationalizations at that. Their very weakness demonstrates that the government cannot meet its burden under Turner Broadcasting.

B. The Precedent The Government And Amici Rely Upon Do Not Contradict Plaintiff’s Reading Of The Copyright Clause.

The government suggests that the Supreme Court’s interpretation of the Patent Clause undermines this reading of “limited Times.” Gov. Mem. at 19-21. It also argues that the history of copyright legislation demonstrates a different original understanding of the clause. Neither claim is correct.

1. *Retrospective Extensions In The Context Of The Patent Clause.*

On a number of occasions during the 19th century. Congress has granted specific patent holders extensions in the terms of their patents. On a few occasions, Congress granted extensions to classes of patents. In general, these extensions were granted in

light of specific failings that made it unlikely that the inventor would have a sufficient incentive to develop and deploy a specific invention. Some extensions are due to failures by the patent office properly to execute a patent; some are due to unforeseen complications in the exploitation of a patent. As a Senate Report characterized these extensions, “the common factor has been that the inequity to the inventor was due to Government action.” Private Patent Extensions, S. Rep. No. 103-64, at 3 (1993).

Early in the 19th Century, the Supreme Court considered a number of challenges to these extensions. In a handful of cases, the Supreme Court upheld these extensions.²⁸

The government suggests that these cases stand for a general proposition that Congress has the power retrospectively to extend the term of patents and copyrights. Gov. Mem. at 19–20. But, as commentators have long argued, no such implication can be drawn.

First, while the text of Patent and Copyright Clause is identical for patents and copyrights, the Court has developed very different constitutional requirements for each. While Feist imposes an “originality” requirement drawn from the “authors” and “writings” language of the Copyright Clause, there is a much stricter originality requirement for patents. See Graham v. John Deere Co., 383 U.S. 1, 6-7 (1966). This difference is due to the different interests at stake between patents and copyrights. Standards from one domain cannot directly be applied to another.

²⁸ The case that the government cites, McClurg v. Kingsland, 42 U.S. 202, 1 How. 202 (1843) is not precisely on point. That case deals with the application of changed patent statutes. To the extent the government relies on this case for the proposition that Congress’ patent and copyright clause power is “plenary” and without “restraints,” later Supreme Court decisions have clearly overruled that. See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991). For better authority supporting the government’s position, see the opinion of Justice Story discussing early Supreme Court cases, Blanchard v. Sprague, 3 F. Cas. 648 (C.C.D. Mass. 1839).

For example, one critical difference between patents and copyrights is that while patents could conceivably affect free speech interests, copyrights always do. This difference has lead Melville Nimmer to discount this precedent:

[A] vital distinction nevertheless remains as between patent and copyright, found in the first amendment. It is only in the copyright sphere, not in that of patents, that the interest in free expression must be balanced against the interest in the “progress of science and useful arts.”

Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180, 1196 (1970) (footnote omitted).

Second, in none of these cases has the Court approved a general extension of a patent term. In each case, the extension was granted for a specific patent. Plaintiffs submit that a narrow, and equitable, extension by Congress in light of intervening events that may have disabled the progress of a particular patent cannot ground a general power by Congress to extend the term of copyrights, with no similar showing.

These differences between the nature of the interest protected by copyright and patent make it impossible to infer a general rule from one to another. Another difference, too, suggests the limited value of inferring a rule in one domain from a practice in another. While the Supreme Court may not have vigorously policed the extensions of patents, plaintiffs note that patents have not in fact been substantially changed since 1790. Congress originally granted patent holders at term of 14. Today the ordinary term is 20—roughly equivalent. 35 U.S.C. §154. Copyright, however, is a different story. While the initial term in 1790 was 14 years, renewable if the author survived to 28, the current term under the CTEA can extend up to 150 years.

2. *Legislative Practice*

Nor does the legislative practice of Congress over the past two centuries establish a different original understanding of the Copyright Clause. Rather than our

argument marking a “radical” break with the past, it is the recent behavior by Congress that marks the radical change from historical understanding.

The government and amici argue that Congress has always granted retrospective copyright terms, and that therefore the recent retrospective extensions are nothing new. This is a wild exaggeration of a much more complicated history. The key element missing in the government’s analysis is the important role played historically by copyright’s registration requirements in a context where information about published works would be hard to obtain. Registration, and the accompanying deposit and recordation requirements, were themselves important aspects of Congress’s system for promoting the “progress of Science and useful Arts.” Registration facilitated catalogs of works, and the easy distribution and location of copyrighted texts. And in all but one instance, Congress historically has tied the benefits of copyright protection granted retrospectively to copyright holders who comply with registration requirements. Except for this one case, only those who register could get the benefits of extension.

Thus, the act of 1790 conditioned “the benefit of” the Copyright Act upon the “deposit [of] a printed copy of the title of” the copyrighted work in a district court clerk’s office, paying the clerk 60 cents per recordation, and then publishing a notice in “one or more of the newspapers printed in the United States, for the space of four weeks.” Act of May 31, 1790, §3, 1 Stat. 124, 125. “Proprietor[s]” of copyrights were also required to deliver a copy of the work to the Secretary of State within 6 months of publication. *Id.* at §4. And while it is true that the Act extended its protection to works “already printed and published,” obviously one purpose of the initial act was to preempt state laws to the contrary. This is a necessity of any first act, and has no necessary relationship to the meaning of “limited Times.”

The 1831 Act functioned similarly. Authors could not receive “the benefit of” the 1831 Act unless they “deposit[ed] a printed copy of the title of” the work in the clerk’s office. Act of February 3, 1831, §4, 4 Stat. 436, 437. The clerk was required to record that title, and collect a fee of fifty cents. *Id.* The clerk was also instructed to keep lists of works and to transmit that list to the Secretary of State at least once a year.

The 1909 Act worked slightly differently. Copyright holders were required to deposit a work with the Register of Copyrights. Act of March 4, 1909, §12, 35 Stat. 1075, 1078. But failure to deposit a work did not entail the loss of protection. Instead, the Register had the right to fine the copyright holder for failure its failure to deposit the works. Reregistration required the payment of a fee, and the filing of an “application for such renewal and extensions” as was granted retrospectively by the 1909 Act. *Id.* §24, 35 Stat. 1075, 1081. Thus again, the renewal was a quid pro quo for compliance with registration and deposit requirements.

The one exception to this practice of registration quid pro quo was one aspect of the 1831 Act, which extended the term for subsisting copyrights in their initial term from the original 14 years to 28. Plaintiffs concede that this single case would be inconsistent with the understanding of the Copyright Clause that we advance in this motion. But a single statute enacted forty years after the framing cannot be presumed to speak for the framers.

Rather than “revolution,” plaintiffs simply ask this Court to restore an original understanding that monopoly rights over speech are not given out for no reason. No court has ever upheld the contrary practice. And no court, consistent with the original meaning of the Copyright Clause, could.

3. *The D.C. Circuit's Decision In Schnapper Is Fully Consistent With Plaintiffs Argument*

Finally, amici contend (Amici Br. at 34-35) that the D.C. Circuit had held, contrary to the United States Supreme Court, see *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (“[t]he clause is both a grant of power and a limitation”), that the Copyright Clause has no internal limits that might restrain Congress’s power to grant copyrights. The D.C. Circuit has held no such thing.

The issue in *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), was the unremarkable question of whether Congress had the power to create a copyright in governmentally sponsored works. The Court held that it could. Congress could have judged that such a copyright would have spurred creativity. That was sufficient, the Court held, to find it consistent with Congress’s copyright power. See *id.* at 112.

In the course of its decision, the D.C. Circuit stated that Congress need not “require that each copyrighted work be shown to promote the useful arts.” *Id.* (emphasis added; citations omitted). Obviously plaintiffs do not maintain that “each” work must be shown to advance “the useful Arts.” Our claim is that Congress must reasonably believe that a regime of copyright protection promote the useful Arts. That may well be true (as the D.C. Circuit said it was for government sponsored copyrights) even if a particular work advances no “useful Art” or “Science.”

In sum, there is no clear judicial precedent that supports Congress’s ignoring of the “limited Times,” clause of the Copyright Clause; nor is there any clear early practice by Congress that would justify the conclusion that the framers intended “limited Times” to mean nothing. Instead, there is simply a constitutional text whose plain meaning requires that once Congress grants a term, it not extend it. That reading removes the continued incentive of existing copyright holders to seek to extend the

copyright term. And it would therefore also remove the incentive that Congress has recently had to further skew copyright's balance.

V. The Retrospective Aspect Of The CTEA Cannot Be Severed From The Prospective Aspect, And Therefore The CTEA As A Whole Must Be Struck.

If this Court concludes that the retrospective aspect of the CTEA violates the Constitution, its prospective aspect must be struck down as well. The two aspects of the statute are inseverable. As the Supreme Court made clear in I.N.S. v. Chadha, 462 U.S. 919 (1983), a provision may not be severed from a larger statute if it was an essential part of the “legislative bargain” Congress struck in passing the statute. See id. at 931–32. The legislative history of the CTEA shows that the retroactive aspect of the statute was central to its enactment. Indeed, the primary impetus for the statute was the issuance of the E.U. Directive, which directed European nations to grant its own authors life plus 70 years of copyright protection, while only granting American authors that amount of protection extended to them by U.S. law – which then was life plus 50 years. The directive, Congress feared, would deprive authors of existing works or their heirs, and thus the nation as a whole, of potential trade revenue – unless U.S. copyright law was changed, and changed retroactively. See, e.g., H.R. Rep. No. 104-315, at 7 (1996) (reporting the CTEA favorably out of committee on the belief that “the current U.S. copyright term of protection is no longer sufficient to protect adequately our Nation’s economic interests in copyrighted works, and more importantly, the interests of American authors and their families”); 144 Cong. Rec. H1463 (daily ed. Mar. 25, 1998) (statement of Rep. Delahunt) (finding the positive effect that the extension of the copyright term would have on the nation’s trade balance to be the “most important[]” feature of the CTEA); 144 Cong. Rec. S11672 (daily ed. Oct. 7, 1998) (statement of Sen. Leahy) (quoting American songwriter Carlos Santana: “I find it unacceptable that I am

accorded inferior copyright protection in the world marketplace.”); 141 Cong. Rec. S3392 (daily ed. Mar. 2, 1995) (urging passage of the CTEA in order to benefit authors of existing works and their heirs).

Congress thus placed great importance on the notion that the CTEA’s retroactive extension of copyright protection would generate a large windfall to American authors and the national economy. Had the act not included this retroactive aspect, Congress might very well have judged the act’s costs and benefits to be negative on balance. Accordingly, the retroactive aspect of the statute may not be struck down without striking down the entire statute. See Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C.Cir. 1985) (holding that a statutory provision may not be severed if Congress would have preferred no statute at all).²⁹

²⁹ Moreover, severing the retrospective aspect of the CTEA would be constitutionally troublesome from a purely textual standpoint. For part of the statute’s retrospective aspect appears in section 102(b) of the CTEA, which extends by 20 years the copyright duration of any works created “On or After January 1, 1978.” This language is at once retrospective and prospective in application. Hence, in order to sever the retrospective aspect of the CTEA from its prospective aspect, this Court would not only have to eliminate “On or” and “1978” from the statute, but also add “1998” in its stead. This change would represent an affirmative amendment to the statute, rather than a mere deletion, and thus would stretch the bounds of judicial competence.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for judgment on the pleadings, or, in the alternative, for summary judgment, should be granted, and judgment should be granted in favor of plaintiffs.

Dated: July 23, 1999

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