

3-2004

As Congress Giveth, So Congress Taketh Away: The Supreme Court Assures Congressional Authority to Retroactively Extend Copyright Terms in *Eldred v. Ashcroft*

Darcy L. Jones

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Jones, Darcy L. (2004) "As Congress Giveth, So Congress Taketh Away: The Supreme Court Assures Congressional Authority to Retroactively Extend Copyright Terms in *Eldred v. Ashcroft*," *Mercer Law Review*: Vol. 55 : No. 2 , Article 7.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol55/iss2/7

This Casenote is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Casenote

As Congress Giveth, So Congress Taketh Away: The Supreme Court Assures Congressional Authority to Retroactively Extend Copyright Terms in *Eldred v. Ashcroft**

In *Eldred v. Ashcroft* (“*Eldred*”),¹ the “so-called ‘Mickey Mouse case,’”² the United States Supreme Court held that the Copyright Term Extension Act³ (“CTEA”) did not violate the First Amendment and that

*. I would like to thank Professors David Oedel and David Hricik for their insightful editorial comments and suggestions to improve earlier drafts of this Casenote. I would also like to thank David Tallman, not only for his valuable editorial comments on this Casenote, but also for his undying support and encouragement.

1. 537 U.S. 186 (2003).

2. Robert J. Bernstein & Robert W. Clarida, *Supreme Court Upholds Term Extension*, N.Y.L.J., Mar. 20, 2003, at 3 [hereinafter *Supreme Court Upholds Term Extension*]. Disney was one of the companies that lobbied aggressively for passage of the Copyright Term Extension Act (“CTEA”), which when enacted insured that the copyrights to the first animation of Mickey Mouse, set to expire in 2004, would be extended for another twenty years.

3. CTEA, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302).

Congress did not exceed its power under the Copyright Clause⁴ when it enacted CTEA provisions enlarging terms for both future and previously published works with existing copyrights by twenty years.⁵ Thus the Court announced that it would defer to Congress in matters related to copyright legislation.⁶ While the case is a narrow, cautious decision that plows little new Constitutional ground, the Court clearly indicated it would find congressional acts under the Copyright Clause invalid.

I. FACTUAL BACKGROUND

In the spring of 1995, Eric Eldred, a father and technical analyst for a computer magazine, dismayed by his daughters' lack of appreciation for classic literature, decided to create a web site to inspire his daughters to read more. After scanning and posting a few classic works of literature, Eldred decided to expand his site to include rare and hard-to-find books. Eldred named his growing site Eldritchpress.org. He added several more works whose copyrights had expired, and Eldritchpress.org eventually became an electronic library of works primarily available in the public domain. The site won numerous awards and was recognized in 1997 by the National Endowment for the Humanities as one of the twenty best humanities sites on the Internet.⁷

In 1998 Congress passed the CTEA, which extended copyright protection an additional twenty years, not only for future published works, but also for all works copyrighted after January 1, 1923.⁸ Eric Eldred, who hoped to post a number of works copyrighted in 1923 with terms that expired in 1999 on his Internet site, saw his efforts thwarted by the CTEA, which extended the copyright terms for all works copyrighted in 1923 to the year 2019.⁹

In *Eldred v. Reno*,¹⁰ Eldred and other individuals, associations, and organizations that utilized and distributed copyrighted works in the public domain, both commercially and non-commercially, challenged the constitutionality of the CTEA. Plaintiffs alleged that they prepared to use works in the public domain created before 1923 that "but for the CTEA . . . could have legally [been] copied, distributed, or performed."¹¹

4. U.S. CONST. art. I, § 8, cl. 8.

5. *Eldred*, 537 U.S. at 222.

6. *Id.*

7. Daren Fonda, *Copyright Crusader*, BOSTON GLOBE MAG., Aug. 29, 1999, at 12, 14.

8. CTEA, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 27 U.S.C. § 302).

9. Supreme Court Upholds Term Extension, *supra* note 2, at 3.

10. 74 F. Supp. 2d 1 (D.D.C. 1999) [hereinafter *Eldred I*].

11. *Id.* at 2.

By retroactively extending copyright protection, plaintiffs argued, Congress exceeded its enumerated power under the Copyright Clause, which only allowed Congress to extend copyright for “limited [t]imes.”¹² Plaintiffs also asserted that the CTEA violated the First Amendment as a regulation of speech, which is subject to heightened judicial scrutiny.¹³

On cross-motions for judgment on the pleadings, the district court granted defendant’s motion and denied plaintiffs’ motion, concluding that plaintiffs had “no First Amendment rights to use the copyrighted works of others” and that Congress acted within its authority under the Copyright Clause to enact retrospective copyright laws.¹⁴ On appeal the United States Court of Appeals for the District of Columbia affirmed the district court’s ruling, reasoning that there was “nothing in text or in history that suggests that a term of years for a copyright is not a ‘limited Time’ if it may later be extended for another ‘limited Time.’”¹⁵ The court concluded that the CTEA was a “‘necessary and proper’ measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual.”¹⁶ The court also declared that, because “the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment” by protecting only an author’s expression and not underlying facts, copyrights were “categorically immune from challenges under the First Amendment.”¹⁷

The Supreme Court granted certiorari in February 2002 to determine whether Congress had the power under the Copyright Clause to retroactively extend the term of existing copyrights and whether the CTEA violated the First Amendment’s free speech guarantee.¹⁸ In a 7-2 decision, the Court backed away from the appellate court’s declaration that all copyrights were “categorically immune” from First Amendment challenges,¹⁹ instead holding that First Amendment scrutiny was not necessary because Congress did not alter traditional copyright protection under the CTEA.²⁰ Reasoning that Congress acts within its authority when it enacts legislation that furthers the goals of the Copyright Clause and that these goals may be rationally related to Congress’s decision to

12. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

13. *Id.*

14. *Id.* at 3.

15. 239 F.3d 372, 379 (2001) [hereinafter *Eldred II*].

16. *Id.*

17. *Id.* at 375.

18. *See* 534 U.S. 1126 (2002); 534 U.S. 1160 (2002).

19. *Eldred II*, 239 F.3d at 379.

20. *Eldred*, 537 U.S. at 221.

extend the limited terms of copyright protection for future as well as existing works, the Court upheld the constitutionality of the CTEA.²¹

II. LEGAL BACKGROUND

A. A Brief History of U.S. Copyright Legislation

Article I, section 8, of the United States Constitution provides that "Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²² Congress passed the first copyright act shortly after the new Constitution was ratified, in 1790.²³ The Copyright Act of 1790 granted copyright protection for existing works previously protected by state copyright laws and future copyrightable works for fourteen years.²⁴ This initial term could be renewed for an additional fourteen years, provided the author was still alive when the initial term expired, for a possible total term of twenty-eight years.²⁵

Congress passed copyright protection laws on several more occasions, often to bring United States copyright law in line with international copyright protections. These acts expanded copyright terms for both existing and future copyrighted works.²⁶ In 1831, for instance, partially in response to concerns that foreign authors received greater copyright protections than American authors,²⁷ Congress lengthened the initial term of copyright protection for existing and future works to twenty-eight years, renewable for an additional fourteen years, for a possible total term of forty-two years.²⁸ In 1909 despite arguments by authors such as Samuel Clemens that copyright protection should last for a term of life of the author plus fifty years²⁹ (the length of protection granted

21. *Id.* at 223.

22. U.S. CONST. art. I, § 8, cl. 1, 8.

23. See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790).

24. *Id.*

25. *Id.*

26. Several early Congresses also extended terms for patents. See, e.g., Act of Jan. 7, 1808, ch. 6, 6 Stat. 70; Act of Mar. 3, 1809, ch. 35, 6 Stat. 80; Act of Feb. 7, 1815, ch. 36, 6 Stat. 147.

27. See 7 REG. DEB. 119-20 (1830).

28. Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436. Notably, an existing work had to be in its initial copyright term *at the time this Act became effective*, and could not have fallen into the public domain, to qualify for this extension. *Id.* at §§ 1, 16.

29. See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 918-19 (1997).

by other foreign countries under the Berne Convention),³⁰ Congress only expanded the length of the renewal term for existing and future works to twenty-eight years, making copyright protection available for a total of fifty-six years.³¹

Congress did not make significant changes to copyright terms until 1976,³² when it passed sweeping legislation changing the copyright term to a single term of life of the author plus fifty years,³³ aligning the copyright term to the international copyright term in effect under the Berne Convention.³⁴ This new term did not apply to pre-existing works, although the renewal term for works already in existence was extended to forty-seven years, for a total possible term of seventy-five years.³⁵

B. Case Law Interpreting Congressional Power Under the Copyright Clause

The Supreme Court has historically shown great deference to Congress under the Copyright Clause in the realms of both patent and copyright. In an expansive interpretation of congressional authority under the Copyright Clause in *McClurg v. Kingsland*,³⁶ in 1843, the Court held that there were “no restraints” on congressional power to legislate on the subject of patents and there was “no limitation of their right to modify [patents] at their pleasure.”³⁷ In 1884 the Court in *Burrow-Giles Lithographic Co. v. Sarony*³⁸ held that congressional authority under the Copyright Clause should be given “very great” and “almost conclusive” weight.³⁹

30. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised, Paris, July 24, 1971, 25 U.S.T. 1341.

31. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075.

32. Between 1962 and 1974, Congress enacted a series of one-year copyright term extensions while they investigated possible new provisions for the 1976 Act. See Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, 88 Stat. 1873 (1974).

33. See Copyright Act of 1976, Pub. L. No. 94-553, §§ 302-305, 90 Stat. 2541, 2572-76 (1976).

34. See Berne Convention, *supra* note 30; H.R. REP. No. 94-1476, 135 (1976).

35. Copyright Act of 1976, § 304.

36. 42 U.S. (1 How.) 202 (1843).

37. *Id.* at 206.

38. 111 U.S. 53 (1884).

39. *Id.* at 57.

In more modern times, the Court has been equally deferential. In 1966 the Court in *Graham v. John Deere Co.*⁴⁰ stated that Congress may "implement the stated purpose of the Framers by selecting the policy, which in its judgment best effectuates the constitutional aim" of its patent power.⁴¹ Interpreting the meaning of "limited [t]imes" in the preamble of the Copyright Clause, the Court in 1981 denied certiorari to review an appellate court decision rejecting the argument "that the introductory language . . . constitutes a limit on congressional power."⁴² In 1984 the Court determined that "[a]s the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors."⁴³ The Court in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*⁴⁴ stated that "[i]t is for Congress to determine if the present system" appropriately effectuates the goals of the Copyright Clause.⁴⁵ And in perhaps its strongest declaration of deference to congressional authority regarding copyright power, the Court in 1990 announced, "it is not our role to alter the delicate balance Congress has labored to achieve" through its copyright legislation.⁴⁶

C. Copyright Law and the First Amendment

Both Congress and the Court have addressed the interplay of the First Amendment⁴⁷ and principles of free speech with copyright law, with the Court declaring in 1985 that "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."⁴⁸ Although copyright protection limits freedom of expression, Congress made a distinction between the protection of ideas and expression in the Copyright Act of 1976, which provides that copyright protection does not extend to ideas.⁴⁹ Discussing this distinction, the Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*⁵⁰ declared that this "idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the

40. 383 U.S. 1 (1966).

41. *Id.* at 6.

42. *Schnapper v. Foley*, 667 F.2d 102, 112 (D.D.C. 1981).

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

44. 489 U.S. 141 (1989).

45. *Id.* at 168.

46. *Stewart v. Abend*, 495 U.S. 207, 230 (1990).

47. U.S. CONST. amend. I.

48. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

49. See Copyright Act of 1976, § 102(b).

50. 471 U.S. 539 (1985).

Copyright Act by permitting free communication of facts while still protecting the author's expression."⁵¹ Congress went even further in the Copyright Act of 1976 to square free speech guarantees of the First Amendment with the goals of copyright protection by enacting the Fair Use Doctrine ("Fair Use"),⁵² which even allows protected expression to be used in certain circumstances, such as scholarship, news reporting, and teaching.⁵³

D. Current Copyright Legislation

The most recent copyright legislation passed by Congress was the CTEA,⁵⁴ enacted in 1998. One of the principal reasons for adopting this legislation included the need to harmonize the U.S. copyright term with the term adopted by the European Union in 1993.⁵⁵ Congress feared that without passage of the Act, American authors would be discriminated against in European countries because "American creators [would] have twenty years less protection than their European counterparts."⁵⁶ Other reasons for passage of the Act included providing longer terms of protection in response to advances in healthcare that allow authors to live longer⁵⁷ and technological advances that prolong the commercial longevity of works⁵⁸ and to provide a greater incentive for authors to create and disseminate their work in the United States.⁵⁹

The CTEA amends the Copyright Act of 1976 by extending the protected copyright term for most existing copyrights protected in either their original or renewal terms. For instance, section 102(b) extends the copyright term for all works created on or after January 1, 1978, by twenty years, to life of the author plus seventy years.⁶⁰ The copyright

51. *Id.* at 556 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

52. Copyright Act of 1976, § 107.

53. *Id.*

54. CTEA, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

55. Council Directive 93/98, 1993 O.J. (L 290). This European Union directive provides a copyright protection term of life of the author plus seventy years for all members of the European Union. The copyright term granted to authors from non-European Union countries is dependent on the "date of expiry of the protection granted in the country of origin." *Id.*

56. 141 CONG. REC. E379 (daily ed. Feb. 16, 1995) (statement of Rep. Moorhead).

57. See Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 332 (1996).

58. *Copyright Term Extension Act: Hearings on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. 18 (1995) (statement of Marybeth Peters, Register of Copyrights).

59. Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 734 (1998).

60. CTEA § 102(b)(1).

term was also extended an additional twenty years for all existing copyrighted works created before 1978 that were still protected by copyright, for a total term of ninety-five years.⁶¹ It was this extension of existing copyright terms that led Eric Eldred to challenge the constitutionality of the CTEA in *Eldred v. Reno*.⁶²

III. RATIONALE OF THE COURT

A. *The Majority Opinion*

In rejecting petitioners' broad arguments challenging the constitutionality of the CTEA, the Court in *Eldred* provided a multi-faceted opinion that ultimately led the Court to declare its deference to Congress in matters pertaining to copyright.⁶³ Supported by the weight of legislation historically extending terms for future and existing copyrights, as well as precedent demonstrating a reluctance by the Court to second-guess congressional decisions regarding copyright, the Court affirmed the judgment of the court of appeals and held that the CTEA met petitioners' constitutional challenges.⁶⁴

Writing for the majority, Justice Ginsburg began by evaluating the constitutionality of "the CTEA against the backdrop of Congress'[s] previous exercises of its authority under the Copyright Clause."⁶⁵ The Court determined that the provisions of the CTEA extending copyright terms to both future and existing copyrights were consistent with the Copyright Acts of 1831, 1909, and 1976.⁶⁶ Citing to numerous previous Congressional Patent Acts extending the duration of patent terms, as well as the Court's early decision in *McClurg*,⁶⁷ holding that there is "no constitutional barrier to the legislative expansion of existing patents," the Court concluded that Congress had the authority to extend the term of copyright protection to cover existing copyrights as well.⁶⁸ Therefore, CTEA provisions extending copyrights for twenty years on existing copyrighted materials were not in violation of the "limited [t]imes" prescription of the Copyright Clause.⁶⁹

61. *Id.* § 102(d)(1)(A)(i)(I).

62. *Eldred I*, 74 F. Supp. 2d 1 (D.D.C. 1999).

63. 537 U.S. at 222.

64. *Id.*

65. *Id.* at 194.

66. *Id.* at 200-01.

67. 42 U.S. (1 How.) 202 (1843).

68. *Eldred*, 537 U.S. at 202.

69. *Id.* at 204.

In determining whether the CTEA was a rational exercise of congressional authority under the Copyright Clause, the Court turned to the underlying rationale behind the CTEA.⁷⁰ Citing to factors such as the need to protect American authors by extending their copyright terms to match those of their European counterparts and the need to provide incentives for copyright holders to restore and distribute their works, the Court concluded that the CTEA simply reflected the kinds of judgments that Congress typically makes, and therefore, was a rational exercise of its authority.⁷¹

Next, the Court addressed petitioners' arguments relying on what it characterized as "novel readings"⁷² of the Copyright Clause and summarily dismissed each one in turn.⁷³ In response to petitioners' argument that the CTEA's term extension allowed Congress to evade the "limited [t]imes" constraint of the Copyright Clause by effectively creating perpetual copyrights through repeated extensions, the Court noted that Congress had repeatedly extended the term under previous Copyright Acts.⁷⁴ Holding that these Acts did not create perpetual copyrights and that there was no showing that the CTEA crossed a "constitutionally significant threshold" beyond the "limited [t]imes" created by previous Copyright extensions, the Court dismissed this argument.⁷⁵

The Court then examined whether Congress could extend existing copyright terms without new consideration from the author.⁷⁶ Because a work must be original before it can be protected by copyright, according to the decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁷⁷ petitioners argued that a work was no longer original once it was already published, and therefore, copyright extensions were not permitted.⁷⁸ Rejecting this argument, the Court responded that *Feist* did not address the length of time a work could be protected and was therefore irrelevant in determining whether a copyright extension was in violation of the originality requirement.⁷⁹

70. *Id.* at 204-08.

71. *Id.*

72. *Id.* at 208.

73. *Id.* at 209-18.

74. *Id.* at 209-10.

75. *Id.* at 210.

76. *Id.*

77. 499 U.S. 340, 359 (1991).

78. *Eldred*, 537 U.S. at 211.

79. *Id.*

The Court also rejected the argument that extending existing copyright terms did not "promote the Progress of Science,"⁸⁰ as required by the preamble to the Copyright Clause.⁸¹ While conceding that the Copyright Clause is "both a grant of power and a limitation"⁸² on congressional authority to define the rights granted to copyright holders, the Court deferred to Congress to determine whether granting certain rights to copyright holders promoted the progress of science, stressing that it was "for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."⁸³ Because Congress consistently extended existing copyright terms over the past two hundred years without constitutional objections, the Court held that this practice was entitled to "very great weight,"⁸⁴ overwhelming the argument that granting extensions did not promote the progress of science.⁸⁵

Next, the Court rejected the argument that the Copyright Clause required a quid pro quo from authors and held that additional consideration from the copyright holder was not required in exchange for extending an existing copyright term.⁸⁶ First, because previous copyright term extensions placed existing copyright holders in parity with future holders, the Court concluded that an author would reasonably expect that a grant of a copyright term would also include any future extensions that might be granted by Congress during the copyright's original term without additional consideration.⁸⁷ Second, the court distinguished quid pro quo requirements in the areas of copyrights and patents, stating that they "do not entail the same exchange, and . . . our references to a *quid pro quo* typically appear in the patent context."⁸⁸ Unlike patent ownership, owning a copyright "gives the holder no monopoly on any knowledge . . . [allowing] a reader of an author's writing . . . [to] make full use of any fact or idea she acquires from her reading."⁸⁹ Owning a patent, however, "does prevent full use by others of the inventor's knowledge," and therefore it requires a more strict quid pro quo standard.⁹⁰ However, even if the Court were to apply the more exacting patent quid pro quo requirements to

80. U.S. CONST. art. I, § 8.

81. *Eldred*, 537 U.S. at 214.

82. *Id.* at 212 (quoting *Graham*, 383 U.S. at 5).

83. *Id.*

84. *Id.* at 213 (quoting *Burrow-Giles Lithographic Co.*, 111 U.S. at 57).

85. *Id.* at 213-14.

86. *Id.* at 217.

87. *Id.* at 214-15.

88. *Id.* at 216.

89. *Id.* at 217.

90. *Id.*

copyrights, these extensions would be permitted without violating the “limited [t]imes” prescription in the Copyright Clause because Congress previously created several extensions for existing patents without objection.⁹¹

Finally, the Court refused to impose heightened scrutiny on the CTEA as a content-neutral regulation of free speech.⁹² According to the Court, “copyright law contains built-in First Amendment accommodations,” by only protecting expression and not ideas.⁹³ Therefore, copyright law should not be subject to heightened First Amendment scrutiny because it already creates “a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”⁹⁴ Furthermore, the Court asserted, copyright law traditionally protects First Amendment safeguards by allowing “fair use” of copyrighted works, permitting the public to use both the expression and the ideas in a copyrighted work in certain circumstances, such as for news reporting and teaching.⁹⁵ The CTEA also applied these same First Amendment safeguards.⁹⁶ Although it retreated from the court of appeals holding that copyrights were “categorically immune from challenges under the First Amendment,”⁹⁷ the Court ultimately held that First Amendment scrutiny was simply not necessary in this case because Congress did not alter the “traditional contours of copyright protection” when it enacted the CTEA.⁹⁸

B. Justice Stevens’s Dissent

In his dissent, Justice Stevens took a more extreme position than the one argued by petitioners and declared the CTEA and all previous copyright term extension acts unconstitutional.⁹⁹ Justice Stevens primarily disagreed with the majority’s “mistaken premise” that the judiciary had “virtually no role” in reviewing copyright legislation.¹⁰⁰ Citing the Court’s decision in *Sears, Roebuck & Co. v. Stiffel Co.*,¹⁰¹ which held that states could not extend a patent term beyond its

91. *Id.*

92. *Id.* at 218-19.

93. *Id.* at 219.

94. *Id.* (quoting *Harper & Row*, 471 U.S. at 556).

95. *Id.* at 219-20.

96. *Id.* at 220.

97. *Id.* at 221 (quoting *Eldred II*, 239 F.3d at 375).

98. *Id.*

99. *Id.* at 241-42 (Stevens, J., dissenting).

100. *Id.* at 223 (Stevens, J., dissenting).

101. 376 U.S. 225 (1964).

expiration date,¹⁰² he argued that Congress was similarly constrained from extending an existing copyright term, and the CTEA should therefore be held unconstitutional.¹⁰³

Looking at copyright and patent law in tandem, Justice Stevens argued that retroactive extensions did not serve the dual purposes for copyright and patent protection, namely to encourage new works and to promote progress by making these works available to the public.¹⁰⁴ Instead, he argued, these extensions fail to motivate an author to create new works and severely limit the public's access to these works after the original terms have expired.¹⁰⁵

Justice Stevens rejected the majority's opinion that the long history of legislation providing copyright term extensions to expired copyrights should be given controlling authority.¹⁰⁶ Rather he argued that "the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case."¹⁰⁷ First, he argued, the 1790 Act did not extend copyright terms, but instead created new federal rights that replaced previously existing state rights.¹⁰⁸ Furthermore, he asserted that the 1831 Copyright Act was based on the grounds that copyright was a legal provision to protect a natural right and that an author had an exclusive and perpetual right to his works.¹⁰⁹ Because these grounds were later rejected by the Court in *Wheaton v. Peters*,¹¹⁰ Justice Stevens asserted, the 1831 Act should also not be relied on as precedent for declaring copyright extensions for existing copyrights constitutional.¹¹¹ Additionally, he argued that the majority relied on several legislative patent extension cases in its opinion that were later overruled by the Court in *Graham*,¹¹² nullifying the majority's holding that the long history of patent term extensions provided support to uphold the constitutionality of the CTEA.¹¹³ Finally, Justice Stevens concluded that the majority's

102. *Id.* at 231.

103. *Eldred*, 537 U.S. at 226-27 (Stevens, J., dissenting).

104. *Id.* at 225-26 (Stevens, J., dissenting).

105. *Id.* at 226 (Stevens, J., dissenting).

106. *Id.* at 239 (Stevens, J., dissenting).

107. *Id.* at 235 (Stevens, J., dissenting).

108. *Id.* at 231 (Stevens, J., dissenting).

109. *Id.* at 236 (Stevens, J., dissenting) (citing 7 REG. DEB. 120 (1831)).

110. 33 U.S. 591 (1834).

111. *Eldred*, 537 U.S. at 236 (Stevens, J., dissenting).

112. *Graham*, 383 U.S. at 7.

113. *Eldred*, 537 U.S. at 238 (Stevens, J., dissenting).

reliance on *McClurg* was misplaced.¹¹⁴ The Court in *McClurg* “said nothing about the power of Congress to extend the life of an issued patent,” but instead it concluded that Congress had “plenary power to legislate on the subject of patents provided ‘that they do not take away the rights in existing patents.’”¹¹⁵ This outcome, Justice Stevens concluded, was “fully consistent with the view that [Congress] cannot enlarge the patent monopoly to the detriment of the public after a patent has issued.”¹¹⁶

Finally, Justice Stevens was not persuaded that it was necessary to extend terms for all existing copyrights based on an author’s expectation that existing copyrights would be extended if Congress enacted future copyright extensions.¹¹⁷ Again turning to the dual purposes of the Copyright Clause, he declared that extending terms for existing copyrights neither induced an author to create new works, nor did it support the public’s interest in accessing works in the public domain once a copyright term ended.¹¹⁸

C. Justice Breyer’s Dissent

In an equally forceful dissent, Justice Breyer argued that upholding the CTEA resulted in creating a “virtually perpetual” copyright term that had the practical effect of inhibiting, rather than promoting, progress.¹¹⁹ Justice Breyer did not go so far as to say that all previous copyright extensions were unconstitutional, instead positing that striking the CTEA would not “automatically doom the 1976 Act” or any other previous copyright acts.¹²⁰ Instead, he argued that because Congress had no rational support for extending copyright terms and because the CTEA fell outside the limits granted to Congress in the Copyright Clause, the CTEA alone should be held unconstitutional.¹²¹

Justice Breyer noted that the intended primary beneficiaries of the Copyright Clause are the public, and copyright terms are limited to allow the public to have access to them after the author’s term of exclusive control has expired.¹²² Justice Breyer concluded that the CTEA primarily benefits the holders of existing copyrights, to the

114. *Id.* (Stevens, J., dissenting).

115. *Id.* at 239 (Stevens, J., dissenting) (quoting *McClurg*, 42 U.S. (1 How.) at 206).

116. *Id.* at 239 (Stevens, J., dissenting).

117. *Id.* at 240 (Stevens, J., dissenting).

118. *Id.* at 240-41 (Stevens, J., dissenting).

119. *Id.* at 243 (Breyer, J., dissenting).

120. *Id.* at 264 (Breyer, J., dissenting).

121. *Id.* at 243 (Breyer, J., dissenting).

122. *Id.* at 245-48 (Breyer, J., dissenting).

detriment of the public who must pay copyright holders royalties in order to use these works.¹²³

Furthermore, he asserted that copyright extensions impose expanded "permissions" requirements on potential users of copyright, including historians, scholars, teachers, and writers.¹²⁴ These permissions requirements inhibit and often prevent the use of older works, due to the difficulty and expense of contacting and obtaining permission from copyright holders.¹²⁵ These costs far outweigh the small benefits provided for authors by extending copyright terms, and Congress could therefore not rationally justify extending copyright terms.¹²⁶ Because "only [two percent] of all copyrights retain commercial value" after fifty-five to seventy-five years, extending the terms past seventy-five years does little to encourage authors to create new works.¹²⁷ According to Justice Breyer, even the lucky two percent are not encouraged by copyright extensions because it will be the heirs, or perhaps the shareholders in a successor corporation, instead of the authors, who actually receive the royalties.¹²⁸

Finally, Justice Breyer argued, the justification that the CTEA was enacted to create uniformity with international copyright laws was "surprisingly weak."¹²⁹ The CTEA only created uniformity with respect to new, post-1977 works attributed to natural persons, not the "lion's share of the economically significant works," i.e., those works made "for hire," and existing works created before 1978.¹³⁰ Therefore, the concerns with uniformity did not justify copyright term extensions for older works, as the CTEA created no international uniformity with respect to these works at all.¹³¹

IV. IMPLICATIONS

The decision in *Eldred* is "ultimately a very measured, cautious, deferential decision that breaks little doctrinal ground, answers no extraneous questions and changes nothing fundamental about the way copyright law will be applied during the extended term."¹³² However,

123. *Id.* at 248 (Breyer, J., dissenting).

124. *Id.* at 249-50 (Breyer, J., dissenting).

125. *Id.* at 250 (Breyer, J., dissenting).

126. *Id.* at 253-54 (Breyer, J., dissenting).

127. *Id.* at 254 (Breyer, J., dissenting) (citing Edward Rappaport, *CRS Report for Congress, Copyright Term Extension: Estimating the Economic Values*, at 7 (1998)).

128. *Id.* at 257 (Breyer, J., dissenting).

129. *Id.* (Breyer, J., dissenting).

130. *Id.* (Breyer, J., dissenting).

131. *Id.* at 260 (Breyer, J., dissenting).

132. Supreme Court Upholds Term Extension, *supra* note 2, at 3.

in a term generally marked by the Court's willingness to create greater harmony with the other political branches, the decision did highlight the deference the judiciary will give Congress in copyright matters.¹³³ This theme of deference is in sharp contrast with the limits the Court has previously been willing to enforce in other areas, such as its limits on congressional commerce power.¹³⁴

It is important to remember that utilization of the Internet to disseminate public domain works was the issue that first brought Eric Eldred to challenge the CTEA, and it will be users such as Eldred who will be the most dramatically affected by the result in *Eldred*. As Justice Breyer noted in his dissent, "in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope."¹³⁵ As electronic databases become more prevalent, the costs to the creators of these databases will multiply. And as users become more dependent on utilizing these databases as their primary means of research, they will likely not realize that online providers have chosen not to include certain copyrighted works in the databases because of the prohibitive cost, "thereby condemning that which is not so accessible . . . [such as] the cultural content of early twentieth-century history, to a kind of intellectual purgatory from which it will not easily emerge."¹³⁶

Public domain advocates and electronic database providers have begun turning their efforts to Congress rather than the judiciary, seeking specific legislative exemptions to the CTEA. For example, Representative Zoe Lofgren (D-Cal.) recently introduced House Bill 2601, entitled "The Public Domain Enhancement Act," to allow abandoned works to enter the public domain before their terms expire.¹³⁷ Under this bill, copyright holders would be required to pay one dollar and submit a form to the Copyright Office for any works they want protected after the initial fifty-year term, and every ten years thereafter until the end of the copyright term.¹³⁸ Failure to submit the form and pay the registration fee would result in expiration of the copyright term.¹³⁹ Bill sponsors assert that requiring copyright holders to give notice of their intent to

133. Marcia Coyle, *Follow the People: In Rulings on Gay Rights and Affirmative Action, the Court Caught Up With Social Trends*, NAT'L L. J., Aug. 4, 2003, at S1.

134. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

135. *Eldred*, 537 U.S. at 250 (Breyer, J., dissenting).

136. *Id.* at 252 (Breyer, J., dissenting).

137. Public Domain Enhancement Act, H.R. 2601, 108th Cong. (1st Sess. 2003).

138. *Id.*

139. *Id.*

retain copyright would provide users contact information when they seek permission from copyright holders, while allowing abandoned works to enter the public domain more quickly.¹⁴⁰ Another similar measure to reform copyright terms was recently created by the Public Library of Science, a nonprofit organization of scientists and physicians who are launching a campaign to make scientific research available on the Internet for free.¹⁴¹ This campaign has since received additional support from Representative Sabo of Minnesota, who is drafting legislation that would put publications describing research funded by taxpayer dollars into the public domain.¹⁴²

These measures notwithstanding, it is unlikely there will be many viable efforts to reform copyright terms in the near future. Instead, the Internet and new technologies will bring other challenges to those who wish to protect their copyrights, and they will turn to both the courts and Congress to resolve copyright law and its intended benefits to the public and to authors. Public domain advocates and Internet file-sharing proponents will likely ask the courts to enlarge the definition of non-infringing fair use protections to include access to works made available through file-sharing technology and online databases, especially in regard to the ninety-eight percent of copyrights that do not retain commercial value. Enlarging fair use protections for these uses is not an unthinkable result when compared to the Court's reaction in cases such as *Sony*, which defined fair use exceptions broadly.¹⁴³ Indeed, it is likely that *Eldred* and its focus on the constitutionality of copyright term extensions will simply be a skirmish along the way on the upcoming battlefield of fair use.

Whatever may be the cause for creating and interpreting copyright law in the future, there is no doubt that new technologies will continue to shape the law. These technologies will force both Congress and the

140. *Id.*

141. Rick Weiss, *A Fight for Free Access to Medical Research*, WASH. POST, Aug. 5, 2003, at A1.

142. See <http://eldred.cc> (last visited Sept. 28, 2003).

143. *Sony*, 464 U.S. at 429. In response to the advent of new home video recording technology, the Court held that there was a significant likelihood that substantial numbers of copyright holders who licensed their works for broadcast on free television would not object to having their broadcasts "time shifted" by private viewers who recorded programs for later viewing. *Id.* at 456. Additionally, the Court held that owners of copyrights to television programs failed to demonstrate that "time shifting" would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. *Id.* Therefore, because home videotape recording was capable of substantial noninfringing uses, manufacturers' sale of such equipment to the general public did not constitute contributory infringement of copyrights. *Id.*

courts to strike a new balance between traditional notions of copyright law and fostering progress and innovation in an ever-changing modern society.

DARCY L. JONES
