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Not in My Library: *Eldred v. Ashcroft* and the Demise of the Public Domain

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The right of the public to free access to intellectual ideology and information has long been a resounding force behind the copyright laws of the United States, but one that has receded in recent years to a force of word rather than deed. Congressional lip service has been paid to the importance of works in the public domain; Congress’s pretense is clearly identifiable in any historical reading of the laws governing copyright ownership in the United States. The compelling societal benefit of works which fall into the public domain, and of a balanced system by which they do so while protecting the rights of authors and creators, have been ignored to the continued detriment of society. Now, the concerns of the Framers all but forgotten and the United States Constitution itself tread upon, the copyright laws engender resentment rather than progress, and their protectorate is not the author but generations—corporate generations—down the line.

This Article recounts the journey of the public domain, from the significance granted it by the Founding Fathers, the Framers of the United States Constitution, through the consistent undermining of its value in the various incarnations of American copyright law, lately and most notably in The Sonny Bono Copyright Term Extension Act of 1998 (CTEA).

Part I of this Article discusses the history of the law in terms of the public domain, from early English law through the hotly contested, and recently upheld, CTEA. Part II examines the considerable setbacks to the public domain and its stature posed by *Eldred v. Ashcroft*, the United States Supreme Court’s 7-2 decision upholding the constitutionality of the CTEA. Finally, in Part III, a number of practical examples of the law’s effect are addressed and suggestions for the necessary revamping of copyright laws are fielded.

I. WORKS IN THE PUBLIC DOMAIN: THE IMPROVEMENT OF THE HUMAN CONDITION¹

A. *Lessons from England*

The recognition that the feeding of works into the public domain is necessary and proper for the improvement of society has been long embedded in the psyche of the American common law, stemming from the laws of England. Nearly three hundred years ago, the English Parliament provided for a limit of the term of ownership on works that should be used for the betterment of the public.² This was codified in its Statute of Anne, which became law in 1710.³ The Statute of Anne set the term of copyright at twenty-one years.⁴ The Statute also provided for works composed prior to its passing; such works were given a shorter term of copyright of fourteen years.⁵

The Statute of Anne was a result of intensive lobbying to the English Parliament by a leading contingency of London-based printers and booksellers called the Stationer's Company (Stationer's).⁶ Stationer's had been a political favorite of the monarchy who granted Stationer's a monopoly on publishing.⁷ In return for this financial boon the Company performed according to the wishes of the Crown.⁸ When, in 1695, official licensing to publish in England expired, the Stationer's Company turned to Parliament to seek protection anew.⁹

Interestingly, the response of Parliament to the Stationer's Company did not confer upon Stationer's the same monopoly that it had enjoyed under the Crown.¹⁰ In fact, the provisions set forth by the Statute of Anne encompassed all authors and creators of works, and was well tuned to the

1. In a letter to Isaac McPherson in 1813, Thomas Jefferson described the free exchange of ideas as necessary for man, for the "improvement of his condition." See Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), available at <http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jef/220.htm> (last updated Mar. 6, 2003) (on file with the United States Library of Congress) [hereinafter 1813 Jefferson-McPherson Letter].

2. See, e.g., Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 30 (2002), available at <http://www.law.asu.edu/HomePages/Karjala/opposingCopyrightExtension/constitutionality/achoaSJcs-TermExtArt.pdf> (citing sources); see also <http://www.patent.gov.uk/copy/history/>.

3. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

4. See *id.*

5. See *id.*

6. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 1.2, at 3-4 (2d ed. 1995).

7. See *id.* at 4.

8. See *id.*

9. See *id.*

10. See *id.*

fact that the public should benefit from the protected creations.¹¹ Parliament, in passing the Statute, had “shifted the emphasis from the Stationer’s Company to authors in general.”¹²

The language of the Statute is instructive with respect to this “shifting of emphasis.” First, it is noteworthy that the Statute of Anne billed itself an “act for the encouragement of learning.”¹³ Such language indicates the Statute’s creators were not interested in merely lining the pockets of its beneficiaries, but were determined to establish another purpose behind the law. Second, while the Statute did permit monopolies on works, it was nevertheless mindful of the necessary limits of copyright. Specifically, it provided for the investiture of rights under it only “during the times therein mentioned.”¹⁴

The Statute of Anne became a significant precursor to American copyright law.¹⁵ In fact, as Thomas Jefferson later noted, England was the only nation of which he knew that had placed a barrier to the free exchange of ideas.¹⁶ But when viewed in light of the apparent intent of the Parliament, the purpose of the Statute becomes not erecting a barrier but creating a give and take in society: In exchange for nourishing society and its learning, authors would be permitted a limited monopoly to gain financial benefit from its service. This key relationship that developed in the Statute of Anne became instructive for the creators of American copyright law.

B. Early History of American Copyright Law

The concept of the expression of ideas, inventions and literature as property was debated at length among the Founding Fathers. Because, as noted above, Thomas Jefferson was incredulous at the notion that, as he viewed it, the “free exchange of ideas” could be controlled or limited, it is not surprising to learn that he found the concept of works of expression categorized as and deemed “property” rather unseemly. As late as 1813, in a letter to Isaac McPherson that is now widely quoted and often referred to as the letter advising “No Patents on Ideas,”¹⁷ Jefferson

11. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

12. See LEAFFER, *supra* note 6, § 1.2, at 4.

13. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

14. *Id.*

15. See LEAFFER, *supra* note 6, § 1.2, at 5.

16. 1813 Jefferson-McPherson Letter, *supra* note 1. Jefferson, as discussed herein, was resolutely opposed to such a rein in terms of the law; he was of the opinion that ideas and the works that stemmed from them were for, and should be freely divested to, the public. See *id.*

17. A number of resources allude to the 1813 Jefferson-McPherson letter as Jefferson’s exposition for the premise of “No Patents on Ideas.” See *id.*

cited ideas as being “incapable of confinement or exclusive appropriation,” not suitable for becoming a “subject of property.”¹⁸ Jefferson reveled in nature’s provision of “ideas . . . freely spread from one to another over the globe, for the moral and mutual instruction of man.”¹⁹

Jefferson’s view stemmed from the arrant differences between real property and intellectual property.²⁰ Jefferson recognized that real property, that which is tangible, available to be cordoned off, and privately held, was not meant for public consumption.²¹ However, he did not attribute those characteristics to that which is the subject of “intellectual” property, such as literature, works of art, and the like.²² Such material, he believed, was by its very nature meant for the public and its enrichment.²³ Thus, its classification as “property” for ownership was tenuous for Jefferson.²⁴

Given the history surrounding the enactment of the Statute of Anne and the monopoly held for so long by publishers in England,²⁵ it is not of much surprise that there arose in the Framers a *bona fide* concern about the effect that granting rights in author’s works would have on society.²⁶ The potential for abuse, as the past had illustrated, was ripe.²⁷

18. *Id.*

19. *Id.* Modern American copyright law explicitly prohibits the protection of “ideas” under copyright law. See 17 U.S.C. § 102 (2000). Rather, it protects the “expression” of ideas. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (noting idea/expression dichotomy). Thus, taken literally, at least, Jefferson’s concern that ideas could not be protected was heeded. It is the expression of those ideas, in the form of works protected by copyright, which is subject to the copyright laws. In this Article, the terms “idea” and “expression” are used interchangeably in terms of discussion of Jefferson’s opinions, due to the fact that it appears that no such distinction was made in Jefferson’s time.

20. 1813 Jefferson-McPherson Letter, *supra* note 1.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See* LEAFFER, *supra* note 6, § 1.2, at 3-4. The monopoly arose nearly six decades after William Caxton’s 1476 invention of the printing press, when England’s monarchy decreed that publishing would be permissible only for those who had a license to do so and after the approval of the “official censors.” *See id.* § 1.2, at 4. It was at this time that the Stationer’s Company was granted its monopoly in exchange for its acting at the behest of the Crown. *See id.*

26. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *available at* <http://www.teachingamericanhistory.org/library/index.asp?documentprint=107> [hereinafter 1788 Madison-Jefferson Letter].

27. In his dissenting opinion in *Eldred*, Justice Stevens, recounting the history of the copyright laws in the United States, also discussed the Statute of Anne and a contentious debate that surrounded a proposal for its amendment in 1735 to extend the terms of existing copyrights for another twenty-one years. *See Eldred v. Ashcroft*, 123 S. Ct. 769, 796 (2003) (Stevens, J., dissenting). That amendment was defeated due to fears that the extension would create a “perpetual Monopoly” that would in effect merely line the pockets of the booksellers. *See id.* As

Yet, James Madison, unlike Jefferson, favored the creation of intellectual property “monopolies.” Madison’s support was based on the hope that they would encourage productivity and creativity.²⁸

Madison also justified the granting of rights in certain works based on the fact that America would be a country powered by a government of the people, and would therefore be less prone to abuse of the system: “Where the power, as with us, is in the many, not in the few, the danger cannot be very great that the few will be thus favored.”²⁹ For Madison, then, the fear that the rights granted in creative works would be exploited was tempered by his faith in the system of government being established.

C. *Constitutional Recognition*

It is apparent that the debate that preceded the establishment of copyright law concerned the encouragement of ideas and the benefit and exposure of the public thereto. With the development of the Copyright Clause of the Constitution, copyright law began to incorporate these general concepts. Unfortunately, it appears that the actual establishment of a Copyright Clause in the Constitution was held behind closed doors.³⁰ The Clause was ratified in September 1787 without fanfare.³¹

Nevertheless, from the catalogued letters of the Framers, it is clear that their ideas were maintained through the ratification of the Clause. In its final form, the Copyright Clause, Article I, Section 8 of the United States Constitution, granted Congress the power “[t]o 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.”³²

Like so much of the Constitution, framed to govern generations, this language is inherently ambiguous. What exactly is to be promoted? What constitutes a “useful Art”? And of course, what exactly is a *limited* time? These are questions that necessarily arise as progressions never envisioned by the Framers are developed, as media works such as film

Justice Stevens noted, “[t]he authors of the federal statute that used the Statute of Anne as a model” were familiar with the history of the argument over the booksellers’ influence and the debate over the monopoly they had enjoyed for so long. *Id.*

28. See 1788 Madison-Jefferson Letter, *supra* note 26.

29. See *id.*

30. See LEAFFER, *supra* note 6, § 1.3, at 5.

31. See *id.*

32. U.S. CONST. art. 1, § 8, cl. 8.

and television programming are created, and even as the political machine that drives the American government beleaguers the Congress.³³

Despite the questions it provokes, however, it is clear, both from its terminology and the history predating it, that the constitutional provision for copyright sought, in theory, a proper balance between the good of the public and the benefit of the inventor. But this auspicious foundation for United States copyright law has failed to survive the subsequent incarnations taken by the law. In a seemingly constant shift of priorities, the nation's legislature has persistently narrowed the power of and protection to the public with respect to copyrighted material. As a result, the balance sought by the Constitution and its Framers has been all but lost.

II. INITIAL CODIFICATION OF A "LIMITED TIME"

A. *The Copyright Act of 1790*

Motivated perhaps by the ratifying of the Copyright Clause and a desire to limit the terms set forth in any subsequent law, Thomas Jefferson, in 1789, suggested that any monopoly granted to "persons for their own productions in literature and their own inventions in the arts"³⁴ be limited to a term of nineteen years. In this way, the effect of any monopoly would be limited, and the benefit to the public domain would be realized sooner rather than later. Jefferson's proposal may have been one means of trying to curtail any damage stemming from the monopoly sanctioned by the Constitution's Copyright Clause, because Jefferson

33. Times have changed, but it is dubious that this last point would constitute an acceptable excuse given that, as demonstrated by English history, lobbyists and special interest groups have been in existence as long as government has existed to be lobbied. Early Congresses were not immune, either. As discussed by Justice Stevens in his dissenting opinion in the *Eldred* case, an inventor named Oliver Evans lobbied Congress for an extension of time for his rights in his patent, the third patent granted by the U.S. government. *See Eldred v. Ashcroft*, 123 S. Ct. 769, 796-97 (2003) (Stevens, J., dissenting). Evans' patent had expired; in fact, it had been in the public domain for four years. *Id.* He sought another term of ownership because, he maintained, he had not had ample time, in the fourteen years of ownership he had enjoyed, to gain enough income from his invention. *See id.* After lobbying every year for four years, Evans was finally granted his own private legislation: an extension of his patent for another full term, fourteen years. *See id.* Interestingly, respondent in *Eldred* had used this scenario as an example of Congress's "historical" tendency to extend patent and copyright terms, and the majority seized upon this example and others as evidence of Congress's historical exercise of power in this arena. *See id.* at 797. As Justice Stevens noted, however, consistently unconstitutional activity is not made constitutional merely because it is consistent. *See id.*

34. *See* Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), available at [http://memory.loc.gov/cgi-bin/query/r?ammcm/mtj:@field/DOCID+@lit\(tj050135\)](http://memory.loc.gov/cgi-bin/query/r?ammcm/mtj:@field/DOCID+@lit(tj050135)).

maintained his disinclination to the prospect of ownership of one's ideas even decades after making the proposal.³⁵

The first major legislation concerning copyright law in the United States was enacted the following year, in 1790.³⁶ It was this Act that was based on the Statute of Anne.³⁷ Being so early in time, this first Copyright Act is instructive for its close adherence to the beliefs and intentions of the Framers; it was the codification of their Constitutional provision.³⁸ Like Jefferson's proposal, it did limit the term for copyright considerably, to fourteen years.³⁹ Unlike Jefferson's plan, it provided for a term of renewal for another fourteen years.⁴⁰ This renewal was only applicable in the event the author or creator was still alive, however.⁴¹

B. *A Century of Development*

From the time of the 1790 Act, through the next overhaul of United States copyright law, a number of amendments to the act and developments in the common law by way of judicial opinion occurred. In 1834, the Supreme Court decided *Wheaton v. Peters*,⁴² a dispute between the Court's official reporter at the time of the decision, Richard Peters, and its former reporter, Henry Wheaton.⁴³ The Court ruled against Wheaton, who argued that Peters' publication of reports of cases decided during Wheaton's tenure violated Wheaton's "perpetual" right in his work.⁴⁴ In so ruling, the Court not only cited the Statute of Anne as instructive historically, but also adhered to the language of the Constitution, implementing the "limited Times" phrase of the Copyright Clause.⁴⁵

Another significant case surfaced in 1853 when Harriet Beecher Stowe sued the publisher of a German periodical who had published *Uncle Tom's Cabin* in the German language, without Ms. Stowe's

35. This was demonstrated in part by the 1813 Jefferson-McPherson Letter. See 1813 Jefferson-McPherson Letter, *supra* note 1.

36. See Act of May 31, 1790, ch. 15, 1 Stat. 124.

37. See Amy Masciola, *Timeline: A History of Copyright Law in the United States*, at <http://arl.cni.org/info/frn/copy/timeline.html> (last modified Nov. 22, 2002).

38. See LEAFFER, *supra* note 6, § 51-3, at 5-6.

39. See Act of May 31, 1790.

40. See *id.*

41. See *id.*

42. 33 U.S. 591 (1834).

43. See Masciola, *supra* note 37.

44. See *id.*

45. See *id.* ("The decision struck a decisive blow against the notion of copyright as a perpetual natural right, and the utilitarian view of copyright embodied in the U.S. Constitution prevailed . . .").

permission.⁴⁶ The Pennsylvania circuit court ruled, however, that the translation could not constitute a copy of the work.⁴⁷

Finally, in 1884, the Supreme Court upheld Congress's granting of statutory protection to photographs and agreed that they could be copyrighted.⁴⁸ In *Burrow-Giles Lithographic Co. v. Sarony*, the Court noted that if a photograph could be determined to be the "original intellectual conception" of its alleged creator, then it was entitled to protection.⁴⁹ In *Sarony*, the plaintiff-appellee, a photographer, claimed rights in a picture he had taken of Oscar Wilde, the writer.⁵⁰ The decision was significant not only for the Court's recognition of photographs as works of art, but also for its holding that copyright notice was sufficiently given by Sarony's inclusion of the following insignia on each copy of the Wilde photograph: "Copyright, 1882, by N. Sarony."⁵¹

In addition to these judicial developments, a number of statutory provisions were enacted after the 1790 Copyright Act, including the extension of the copyright term from fourteen to twenty-eight years.⁵² The first major overhaul to the copyright laws came with the 1909 Act.

C. Broadening the Scope of Protection: The 1909 Act

The 1909 Copyright Act was a product of four years of debate.⁵³ The process began in 1905, spurred by then-President Theodore Roosevelt, who sought a revision of the law concerning copyrights due to related developments in society.⁵⁴

The 1909 Act constituted a major expansion of protected subject matter. For example, it extended protection to "all writings" of an

46. See *id.*; see also *Copyright in America*, at <http://www.pbs.org/now/politics/copyright.html> (last visited Mar. 22, 2003).

47. *Stowe v. Thomas*, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853).

48. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

49. *Id.*

50. *Id.* at 54.

51. See *id.* at 55-56.

52. See Ochoa, *supra* note 2, at 30. The 1831 Act lengthened the duration of copyright to twenty-eight years, with a fourteen-year extension. See *id.* Significantly, the extension did not apply to works already in the public domain by virtue of the previous term. See *id.* at 31. Apparently, the reasoning behind the extension was to bring the United States in line with its European counterparts. See *id.* The 1831 Act also extended protection to musical compositions. See *id.* at 30.

53. See LEAFFER, *supra* note 6, § 1.4[A], at 6.

54. See *id.* § 1.4[A], at 6-7. The expansion of intellectual property rights through the late 1920s was built on doctrines such as Roosevelt's. See William W. Fisher, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* 10-12, available at <http://cyber.law.harvard.edu/people/ffisher/iphistory.pdf> (last visited Mar. 26, 2002). Fisher observed that the law had appeared to "evolve[]" so as to serve the changing 'needs' of the American economy." *Id.* at 12.

author.⁵⁵ The Act also extended the provision for the copyright term, maintaining an initial copyright term of twenty-eight years and making the renewal period just as long.⁵⁶

The implementation of the 1909 Act was influenced by concerns about the public domain. As reported in Congressional papers, in considering the expansion of protection to musical works Congress noted:

[I]t has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer⁵⁷

Although Congress resisted implementing sweeping extensions in the 1909 Act, it was not long before the laws that portended the current provisions were enacted.

III. CONTEMPORARY COPYRIGHT LAW: CONGRESS THREATENS THE PUBLIC DOMAIN

A. *The Copyright Act of 1976*

The Copyright Act of 1976 took five times as long as the 1909 Act to become a reality.⁵⁸ As early as 1955, it was officially recognized that the copyright laws in the United States left much to be desired in terms of reconciliation with international copyright laws⁵⁹ and synchronization with the changing realm of copyrightable works.⁶⁰ Obviously, however, that recognition did not bear fruit until much later.

55. See LEAFFER, *supra* note 6, § 1.4[A], at 6.

56. See Masciola, *supra* note 37.

57. H.R. REP. NO. 2222, 60th Cong., 2d Sess., at 7 (1909).

58. See LEAFFER, *supra* note 6, § 1.4[C], at 7-8.

59. See *id.* § 1.4[C], at 8. The Berne Convention, first passed in 1886, was home to many signatories and presented a somewhat unified front for copyright ownership. See *id.* § 1.4[C], at 7. The Convention, however, differed extensively from the United States copyright law. See *id.* Although there was encouragement to make the United States laws compatible with the Convention at even the time of the 1909 Act, a number of safeguards in the U.S. law, such as the notice requirement for copyrighted work, made that option impractical. See *id.* As discussed *infra*, in fact, it would be nearly 100 years before the United States reworked its copyright laws to correspond to those of Berne. Because those laws are so generous to owners, however, there is some question whether the United States' reliance on them in shaping its own laws was wise or, in fact, if it was in line with the United States Constitution.

60. See *id.* § 1.4[C], at 7-8.

The 1976 Act brought the United States much closer to the Berne Convention, to which a number of European states are signatories.⁶¹ Most significantly, the Act inflated the term of copyright from a *possible* fifty-six years as dictated in the 1909 Act to the life of the author plus fifty years.⁶² The Act precluded full American synchronization with the Berne Convention, however, because it maintained a number of formal requirements that were not compulsory under the Berne Act.⁶³ For example, United States law continued to require notification of copyright on works.⁶⁴ In addition, a copyright owner could not seek judicial redress against an infringer without having first registered the copyright and/or recording any applicable transfers of ownership.⁶⁵

Another significant addition to the 1976 Act was the abolition of the dual copyright system that had been maintained under the 1909 law.⁶⁶ The 1976 Act saw the preemption of all common law copyright, thereby streamlining the system.⁶⁷ In so doing, the Act granted federal protection to unpublished works, rather than relegating them to state or common law protection as they had been previously.⁶⁸

The 1976 Act also enumerated several broad categories of works eligible for protection. The categories of works included:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.⁶⁹

Two of the most significant provisions of the 1976 Act were §§ 106 and 107. Section 106 delineated five exclusive rights of copyright

61. *See id.* § 1.4[C], at 9-10.

62. *See* 17 U.S.C. § 302(a) (1976). Interestingly, the suggestion to extend the copyright term to the author's life plus fifty years was presented to Congress by Samuel Clemens, *a.k.a.* Mark Twain, in 1906. *See Mark Twain on Copyright*, available at <http://www.bpmlegal.com/cotwain.html> (last updated Apr. 12, 2000). Mr. Twain noted that because he had raised his daughters as "young ladies who don't know anything and can't do anything," the copyright term should be extended so as to allow them to be cared for. *See id.* Mr. Twain noted, however, that the grandchildren could "take care of themselves." *See id.*

63. *See* LEAFFER, *supra* note 6, § 1.5[A], at 9-10.

64. *See id.*; *see also* 17 U.S.C. §§ 401(a), 405 (1976).

65. *See* LEAFFER, *supra* note 6, § 1-5[A], at 8.

66. *See id.*

67. *See id.*

68. *See id.*

69. *See* 17 U.S.C. § 102(a) (1976). This section was amended in 1990 to include architectural works. *See id.* (2000).

owners, including the right to reproduce the work, the right to adapt it, the right to distribute it, and the rights to display and perform it to the public.⁷⁰ Section 107, and the sections that followed it, set out to dampen those rights somewhat. Section 107, specifically, was unprecedented: It attempted to codify the “fair use” privilege and to give examples of the ways in which the public would be able to use a copyrighted work freely.⁷¹

Thus, although the 1976 Act granted such a considerable extension of time in copyright, its progenitors nevertheless maintained at least a semblance of concern for the public domain. This was evident in their attempt to codify the “fair use” doctrine. Another example is that of Robert Kastenmeier, former ranking majority member of the House Committee on the Judiciary and the Chairman of Courts, Intellectual Property, and the Administration of Justice Subcommittee, who headed the movement toward the creation of the 1976 Act.⁷² Approximately twelve years after the passing of the 1976 Act, on the eve of reforms in the copyright law that ultimately brought the United States in further harmony with the provisions of the Berne Convention,⁷³ Kastenmeier observed the tenuous relationship between the public interest and the needs of the copyright owner. He noted:

Determining the scope of a law which deeply affects how all of us may enjoy books, films, television programming, computer software, information products and services, music, and the visual arts requires great caution, particularly in a rapidly changing society such as ours that seeks both the free flow of information and the free marketplace.⁷⁴

Despite this recognition, as the copyright laws have developed in the United States, the benefits to a few have largely outweighed the concern for the many in the public domain.

70. *See id.* § 106 (1976).

71. *See id.* § 107; *see also* LEAFFER, *supra* note 6, § 1.5[A], at 9.

72. *See* Press Release, National Film Preservation Foundation, Michael Heyman and Robert Kastenmeier Join National Film Preservation Foundation Board of Directors (Jan. 19, 2000), *available at* http://www.filmpreservation.org/news_heyman_kastenmeier.html (documenting Kastenmeier’s role in shaping copyright law).

73. The Berne Convention Implementation Act entered into law March 1, 1988. *See* 17 U.S.C. § 101 (2000).

74. 133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (statement of Rep. Kastenmeier). Despite the apparent intent to maintain the “free flow of information,” the Berne-related amendments were the ones that were least considerate of the public domain, thereby posing a considerable amount of confinement and restraint on that “flow.” *See id.*

B. The Digital Millennium Copyright Act

In yet another setback to the concerns of the public, indeed, of every individual, with respect to works protected by copyright, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA is comprised of five titles, including one implementing treaties of the World Intellectual Property Organization (WIPO) and providing measures preventing the circumvention of technological protections designed to prohibit copying of digital media and another dealing with online copyright infringement liability.⁷⁵ The former are designed to prohibit copying from such digital media as DVDs; the latter, to govern the liability of Internet Service Providers.⁷⁶

Although placed under the umbrella of the WIPO treaties, the circumvention provisions of the DMCA sweep with a much broader brush than required by those treaties.⁷⁷ The circumvention provisions handcuff consumers from using digital material in a manner that, under previous copyright provisions, would have been protected as fair use. For example, the provisions prevent DVD viewers from forwarding through commercials presented prior to a movie.⁷⁸ Moreover, the provisions outlaw the *tools* that could be used for circumvention purposes.⁷⁹ These basic curbs on the rights of the public set a dangerous precedent.⁸⁰

75. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C., 28 U.S.C., and 35 U.S.C.).

76. *See id.* Although Title II of the DMCA professes “liability limitation,” the fact is that one significant, and unfortunate, result of corporate desperation to hold onto copyrighted material in the age of Internet technology has been the attempt by those entities to seek out individual users of programs such as file-sharing programs, and using Internet Service Providers to do so. *See, e.g., In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003).

77. *See Unintended Consequences: Three Years Under the DMCA* 1 (May 3, 2002), available at http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf [hereinafter *Unintended Consequences*] (noting that the DMCA circumvention provisions were not merely a result of U.S. treaty obligations but also in response to piracy concerns of copyright owners facing a digitized world).

78. *See id.*

79. *See* 17 U.S.C. § 1201(a)(2), (b) (1998).

80. In addition to the use of the DMCA to single out individual users of available technology described *supra* note 77, the Electronic Frontier Foundation (EFF) has observed that the circumvention provisions have been used to the further detriment of the public good with a number of challenges to scientists and others instrumental to technological advancement. *See Unintended Consequences, supra* note 77, at 2-4. The situation is so dire that foreign scientists have become “increasingly uneasy about traveling to the United States out of fear of possible DMCA liability.” *Id.* at 2. Another, rather astonishing abuse that has surfaced is the use of the DMCA by certain companies against their competitors. The EFF cites Sony Corporation’s attempt to undermine companies who make gaming devices competitive with Sony’s Playstation as one such example. *See id.* at 1.

C. *Man v. (Mickey) Mouse: The Copyright Term Extension Act*

It is, of course, the current law that is the most troubling in its utter disregard for the public domain and the checks installed in the Constitution by the Framers. It was the constitutionality of this law, the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, which was upheld by *Eldred*.⁸¹

The bill that became the CTEA was sponsored by Senator Orrin Hatch and co-sponsored by a bipartisan group of his peers.⁸² The bill passed through the Senate, with a similar version in the House.⁸³ It appears that little debate focused on the twenty-year term extension for duration of copyright; rather, the majority of the debate centered on the provisions of the latter portion of the Act.⁸⁴

The CTEA as enacted extended copyright protection by an additional twenty years, bringing the term for copyright to life plus seventy years.⁸⁵ The language is simple, merely adding twenty years to each durational provision.⁸⁶

While the extension is troubling in its refusal to require anything of its beneficiaries in return, even more troubling is the Act's retroactive effect. Previously legislated to last for the excessive period of seventy-five years, the copyright for works already protected and works for hire, i.e., works commissioned to be completed by employees but owned by corporate entities, now extends, by virtue of the Act, for fully ninety-five years from the date of publication *or* 120 years from the date of creation, whichever is less in time.⁸⁷ Finally, works that were created but not published or copyrighted prior to January 1, 1978, works such as letters, memoirs, or other works not made for public distribution⁸⁸ now expire not in 2027, but in 2047.⁸⁹

81. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 790 (2003).

82. See *Bill Summary & Status for 105th Cong.*, S.505, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SN00505:@@P|TOM:/bss/d105query.html>.

83. See Cong. Rec. H9949 (Oct. 7, 1998) (statement of Rep. Sensenbrenner that S. 505 is "substantially identical" to his sponsored bill, H.R. 4712, entitled "Fairness in Music Licensing Act," introduced with Rep. McCollum).

84. See Cong. Rec. H9946-9952 (Oct. 7, 1998) (record of debate over Fairness in Music Licensing Act provisions of Sonny Bono Copyright Term Extension Act).

85. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

86. See *id.*

87. See *id.*

88. See LEAFFER, *supra* note 6, § 6.3[G], at 177.

89. To put this length of time in perspective, a child born on December 31, 1977, would graduate from high school in 1995, turn thirty in 2007, and still have forty years to go before an unpublished work created, but not published or copyrighted, on the date of his birth would lose its copyright protection. Put another way, *The Thorn Birds*, the best-selling novel by Colleen

It was this latter problem—the needless and unjustified extension of the copyright term for works that had already been protected for decades—that led petitioner Eric Eldred to contest the CTEA.⁹⁰ Eldred runs a nonprofit Web site called the Eldritch Press,⁹¹ an Internet-based operation that utilizes the works of many earlier authors, works that have fallen into the public domain.⁹² The fact is that the CTEA puts Eldred and the other petitioners at a severe disadvantage—for the next twenty years.

The severity of the CTEA is perhaps best observed by using an example given by Dennis S. Karjala, a professor of law at Arizona State University. On his Web site, “Opposing Copyright Extension,”⁹³ Professor Karjala notes that, had the CTEA been the law of the land during the past century, the United States government would have had to pay the relatives of Thomas Nast, creator of “Uncle Sam,” royalties every time the government used that image.⁹⁴ Mr. Nast’s descendants would also have benefited greatly from royalties stemming from use of Santa Claus.⁹⁵ In fact, Father Christmas would have been protected by copyright until 1973.⁹⁶

Why such an extension, and why now? In discussing the growth of intellectual property laws, Harvard Law Professor William Fisher has pointed to the ongoing love affair of Congress with the “romantic conception of authorship.”⁹⁷ This view, notes Fisher, coupled with a long standing adherence to the notion that one who contributes to the wealth of ideas is entitled to a reward for such contribution,⁹⁸ has helped further the privileges of copyright owners.⁹⁹

McCullough that became a 1983 television miniseries starring Richard Chamberlain, was written in 1977. Had *The Thorn Birds* not been published or copyrighted as of 1978, it would still be entitled to copyright protection and will be until 2047, when Richard Chamberlain would be 112 years old.

90. See Brief for Petitioners, at 3, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618).

91. Eldred’s Web site is at <http://www.eldritch-press.org>.

92. See Brief for Petitioners, *supra* note 90, at 5.

93. See Opposing Copyright Extension, at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension.default.htm>.

94. See Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, S. 505 “The Copyright Term Extension Act,” (Jan. 28, 1998), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtensin/legmats/1998Statement.html>.

95. See *id.*

96. See *id.*

97. See Fisher, *supra* note 54, at 15 (internal quotations and citations omitted).

98. See *id.* at 12 (referring to the “durable and widespread” commitment to this theory, labeled a “labor-desert theory of property”).

99. See *id.* at 15-16.

But any romanticism of authorship on the part of Congress cannot fully explain the decision to enact the far-reaching CTEA, which has almost nothing to do with the artists and authors who create copyrightable works and nearly everything to do with their heirs, or more significantly, the corporations to which the author's rights have been assigned. In fact, the corporate interest appears to be what drove Congress to enact the CTEA in the first place. Thus, the answer to the question of why this extension was passed seems to lie in the persuading power of lobbyists in the political system.

In the late 1990s, the costly specter of copyright loss loomed for the Walt Disney Corporation.¹⁰⁰ The company faced the expiration of the first few of its many Mickey Mouse copyrights.¹⁰¹ Works such as the famed silent movie featuring Mickey Mouse, *Steamboat Willie*, were set to fall into the public domain in 2003.¹⁰² Moreover, Disney was set to lose its rights in its Pluto character in 2005, Goofy in 2007, and Donald Duck in 2009.¹⁰³

Disney decided to take matters into its own hands. Faced with the prospect of losing untold royalty and licensing fees from the copyrights, the company began an aggressive lobbying campaign for the extension of copyright term.¹⁰⁴ Perhaps most ironic in this is the fact that the famous *Steamboat Willie* film was in fact borrowed from works in the public domain: The short was a parody of Buster Keaton's *Steamboat Bill, Jr.*¹⁰⁵ Nevertheless, Disney's efforts were rewarded with the passing of the CTEA in 1998.

100. See *Web Site Fights Copyrights, Royalties*, CNN.com, Oct. 7, 2002, available at <http://www.cnn.com/2002/TECH/biztech/10/07/copyrightchallenge.ap>.

101. See *id.*

102. See *id.*; see also David McQuire, *High Court Opens Sessions with Busy Agenda: Technology Cases Drawing Attention*, *washingtonpost.com* (Oct. 7, 2002), available at <http://www.washingtonpost.com/ac2/wp-dyn/A50881-2002Oct6?language=printer>.

103. See Phillis Schafly, *Why Disney Has Clout with the Republican Congress* (Nov. 25, 1998), available at <http://www.eagleforum.org/column/1998/nov98/98-11-25.html>.

104. See *id.*; see also *Web Site Fights Copyrights, Royalties*, *supra* note 100.

105. See Jesse Walker, *Mickey Mouse Clubbed*, *reason.com* (Jan. 17, 2003), a telling and humorous mock interview with the Mouse himself, available at <http://www.reason.com/links/links011703.shtml>. Thus, the outrage of Disney's sycophantic lobbying is heightened by the company's own, not insignificant "borrowing" from the public domain. In addition to the *Steamboat Willie* take, Disney cartoons, such as *The Hunchback of Notre Dame*, would never have been possible had the laws now in effect passed in Victor Hugo's time (or, for that matter, in the time of his grandchildren). See *id.* And the famous *Snow White* was also taken from the public domain by Disney. See Dan Gillmor, *Copyright Dictators Are Winning Out*, *MERCURY NEWS*, Feb. 19, 2002, available at <http://www.siliconvalley.com/mld/siliconvalley/2705666.htm>. Disney's use of works in the public domain is an example of the very give-and-take which, as observed by the Founding Fathers, is necessary in copyright law.

D. Précis: Public Domain and the Development of U.S. Copyright Law

As Jefferson maintained, the quality of ideas, inventions and creative works is such that, on a certain level, it is difficult to believe that they could or should be contained by proprietorship. There is an argument to be made that intellectual property is neither tangible in the same way as real property, nor is it, necessarily, meant for ownership by a person or persons in the same sense as real property. Rather, the argument goes, it is of the imagination, even when reduced to the tangible or observable form of a book, for example, or a film: the means of expression. Moreover, the expression of ideas and inventions, the substance of intellectual property, are meant by their very nature to be shared with society, for society's benefit.

But to reward that substance with a limited period of ownership is valuable, as Madison believed. The prospect of ownership is encouraging to potential writers, composers and inventors. Their encouragement leads to the creation of more works, which, once in the public domain, serve to benefit society in the manner envisioned by Madison. Thus, even if the concept of intellectual property as something to be possessed is somewhat problematic, the practice of maintaining a balanced, controlled system of ownership has a practical result, one that resounds with the intentions of the Framers.

As demonstrated by the timeline reconstructed above, however, legislative developments in copyright law—especially in the last several years, from the time of the 1976 Act—have discounted the well-reasoned intentions of the Founding Fathers (and the constitutional safeguards that developed therefrom). Thus, Congress's decision to cater to the Disney contingency is an unfortunate example of exactly the type of situation Madison had feared but had decided to overlook due to his faith in the system of governance he was aiding to establish. Passage of the CTEA was an example of the power of the people lying in the hands of a few.

Whether guided by the prospect of political gain and financial backing, the inability to come to grips with advances in technology, or merely a desire to push the constitutional envelope in its exercise of power, Congress has regardless created a poor platform for the future of the public domain. That the Supreme Court endorsed Congress's activities with respect to (at the least) the CTEA is a regrettable signal of the ostensible developments to come in copyright law.

IV. *ELDRED V. ASHCROFT*: A SHIFTING OF PRIORITIES

The Supreme Court's 7-2 decision in *Eldred v. Ashcroft* is significant both for what it says and for the issues on which it is silent. The Court took a very literal reading of the Constitution on the one hand, but refused to address the intentions of the Framers on the other: The Court rationalized the twenty-year extension of the copyright term by saying that it was still a "limited Time" as prescribed by the Constitution.¹⁰⁶

A. *History of the Case*

The CTEA severely limits the opportunities available to those persons who, and entities which, rely on the information available in the public domain for their livelihoods. For this reason, the petitioners in the *Eldred* case, all of whom were affected by the twenty-year extension of copyright that so completely curtailed the influx of new works into the public domain, brought suit to contest the Act.¹⁰⁷ The lawsuit was dismissed by both the district and appellate courts in Washington D.C.¹⁰⁸ The Supreme Court granted certiorari to address two questions. First, did the United States Court of Appeals for the District of Columbia "err in holding that Congress has the power under the copyright clause to extend retrospectively the term of existing copyrights?"¹⁰⁹ Second, "[i]s a law that extends the term of existing and future copyrights categorically immune from challenge under the First Amendment?"¹¹⁰

The crux of petitioners' argument was twofold. First, petitioners argued that Congress had failed to adhere to the restrictions proscribed by the Copyright Clause, by disregarding the "limited Time" provision of the Clause.¹¹¹ Petitioners argued that by continuing to expand and enlarge the length of time of the copyright term, Congress was exceeding the limits posed by the Constitution.¹¹² Admitting that striking the CTEA as unconstitutional could theoretically mean rendering the 1976 Act unconstitutional as well, petitioners nevertheless maintained that the advent of the Internet and the effect of the extension on the public

106. *Eldred v. Ashcroft*, 123 S. Ct. 769, 781 (2003).

107. *Id.* at 771 ("Petitioners[] products or services build on copyrighted works that have gone into the public domain.").

108. *See Electronic Commerce & Law Report*, Vol. 7 BNA No. 40, at 1027 (Oct. 16, 2002).

109. *Id.*

110. *Id.*

111. *See* Brief for Petitioners, *supra* note 90, at 2.

112. *See id.*

domain meant that the CTEA affected much more than merely the regulation of commercial interests and that it was therefore open to challenge.¹¹³ Petitioners also observed that serious disruption could occur in response to the repeal of the 1976 Act, a consideration that may outweigh a finding of unconstitutionality for that Act.¹¹⁴

Petitioners urged the Court to construe Congress's actions in prolonging the copyright term in light of the purpose stated in the Copyright Clause, namely, for the "Progress of Science and useful Arts."¹¹⁵ They contended that the continued extension of the copyright term did nothing to promote that "Progress."¹¹⁶

The second major prong of petitioners' argument concerned the First Amendment.¹¹⁷ Alleging that issues concerning freedom of speech were also at stake, petitioners contested the CTEA on those grounds.¹¹⁸ Specifically, petitioners contended that the CTEA constituted content-neutral speech regulation, burdening speech when unnecessary and without any overriding governmental interest.¹¹⁹ Such a burden, they argued, required scrutiny under the heightened standard appropriate to this regulation.¹²⁰

B. *The Majority's Opinion*

The Supreme Court, of course, did not accept petitioners' view. In fact, with respect to the question of whether Congress overstepped its bounds, the seven-person majority seemed to summarily dismiss petitioners' argument, finding that because there was no perceived intent by Congress to circumvent its obligation under the Copyright Clause, the CTEA was not in violation of the "limited Time" directive.¹²¹ Moreover, the Court found, because the term of copyright was limited *at all* by the CTEA, Congress had not overstepped its bounds.¹²²

113. See *Electronic Commerce & Law Report*, *supra* note 108, at 1027.

114. See *id.*

115. U.S. CONST. art. 1, § 8, cl. 8; see also Brief for Petitioners, *supra* note 90, at 20.

116. *Eldred v. Ashcroft*, 123 S. Ct. 769, 784 (2003).

117. See Brief for Petitioners, *supra* note 90, at 11.

118. *Id.* at 34.

119. *Id.* at 37-39.

120. *Id.*

121. See *Eldred*, 123 S. Ct. at 785.

122. *Id.* at 781. This extremely literal reading of the Constitution failed, conveniently, to take into account the heavily documented intent of the Framers.

The majority found comfort in two key facts: one, that retroactive extensions had been approved by Congress in the past¹²³ and two, that the extensions brought the U.S. laws in line with those of Europe.¹²⁴ Neither is compelling. For one, as petitioners pointed out in oral argument, the CTEA pushes the limits of the Constitution such that the public domain is severely harmed.¹²⁵ Thus, past Acts of Congress extending the duration of copyright, whether or not proper at the time, do not, in and of themselves, constitute justification for the CTEA.

Secondly, the fact that the European Community passes a law does not mean the United States must follow suit. As lead counsel for petitioners, Professor Lawrence Lessig, noted during oral argument, if France passed a law prohibiting hate speech, the United States could not do so because it would violate the Constitution.¹²⁶ The same holds for violations of the Copyright Clause.

Interestingly, the Court relied on *McClurg v. Kingsland*, an 1843 patent case in which a patent owner was granted retroactive rights upon a change in the law, as the “pathsetting precedent” in its determination that the legislative retroactive extension of the copyright term was constitutional.¹²⁷ The majority viewed *McClurg* as permitting patent rights after a change in the law permitted rights to issue despite the use of the invention by the inventor’s employer prior to the granting of the patent.¹²⁸ Justice Stevens’ dissent noted, however, that the employer was a former employer, and in fact an infringer who continued to use the invention after the term of employment was over, and that the Court’s decision was not about extending the rights of the patentee but about protecting the infringer’s right to continue to use the invention after the issuance of the patent.¹²⁹ The extension discussed by the majority, wrote Stevens, was actually a finding by the Court that the employer’s prior use was not a public use that would invalidate the patent, even if it may have been prior to the 1836 amendment of the law.¹³⁰

123. *See id.* at 778. The Court noted, “History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.” *Id.*

124. *See id.* at 776.

125. *See Electronic Commerce & Law Report*, *supra* note 108, at 1027.

126. *See id.* at 1028.

127. 42 U.S. 202, 206-07 (1843).

128. *Eldred*, 123 S. Ct. at 780 & n.9.

129. *Id.* at 799 (Stevens, J., dissenting).

130. *Id.*

Nevertheless, the majority was not inclined to question Congress with respect to the CTEA, and choosing to rely in part on *McClurg*, it upheld the extension.

The majority's First Amendment analysis was no less cursory. Finding simply that the statute did not rise to the level necessary for heightened scrutiny, the Court declined to apply that level of First Amendment scrutiny to the CTEA.¹³¹ Rather, the Court found that the Copyright Clause has inherent "speech-protective purposes and safeguards" and, therefore, was not to be subjected to heightened scrutiny.¹³² Specifically, the Court viewed the fact that the Copyright Clause and First Amendment were drafted close in time as evidence that the Framers did not view the two as incompatible.¹³³ The Court opined that the Copyright Clause was not limiting free speech, but merely prevented the uncontrolled exploitation of authors' works, a restriction that, in the Court's view, did not rise to the level of government-proscribed First Amendment limitations.¹³⁴

C. *The Dissent*

In the end, only Justices Stevens and Breyer dissented. Each of their arguments focused at least in part on the failure of the majority to recognize the fallacies of its historical analysis of copyright law in the United States and its resulting refusal to recognize Congress's over-exercise of power.

Justice Stevens' dissent provided a detailed account of the early development of the patent and copyright laws in the United States. Stevens emphasized that the constitutional requirement that the grants to authors of exclusive rights in their works was in order to reach the penultimate goal of promoting the progress of "Science and useful Arts," and that this would be achieved "by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires."¹³⁵ Citing the Court's 1888 decision in *Wisconsin v. Pelican Insurance Co.*,¹³⁶ Stevens noted that the presumption that "historic practice illuminates the constitutionality of congressional practice" is at its strongest when the early practices are considered.¹³⁷ Thus, by 1831,

131. *Id.* at 788-90.

132. *Id.* at 789.

133. *Id.*

134. *Id.* at 790.

135. *Id.* at 791.

136. 127 U.S. 265, 297 (1888) (arguing that the Constitution's "true meaning" is revealed when those in the Congress and those who fathered the Constitution are one and the same).

137. *Eldred*, 123 S. Ct. at 798 (Stevens, J., dissenting).

the year of the first major extension to the copyright duration, no contemporaneity existed between the members of Congress and the framing convention of 1787, and the act of Congress at that time is therefore not protected by the presumption of historical accuracy.¹³⁸

Justice Stevens expressed the manifest unfairness of the retroactive nature of the CTEA, posing the necessary issue of quid pro quo: Just as Congress could not, in all fairness, limit the term of a patent (after having issued said patent) or copyright in order to shorten the time before the invention or work fell into the public domain, it cannot take from the public domain in order to make the exclusive monopoly held by the inventor or author.¹³⁹ Such *ex post facto* laws are prohibited by the Constitution and the necessary considerations of fairness that underlie the relevant constitutional provisions.¹⁴⁰ Moreover, the extension “do[es] not even arguably serve either of the purposes of the Copyright/Patent Clause.”¹⁴¹ Thus, Congress overstepped its authority in legislating the CTEA.

Justice Breyer presented a reasoned, practical evaluation of the unconstitutionality of the CTEA. Justice Breyer explained that the Act would be deemed unconstitutional if its primary benefits were private, not public; if it undermined the values embodied by Article I, Section 8; and if it could not be rationalized by the provisions of that Clause.¹⁴² Noting that it had been established quite early on that the Copyright Clause was to inure to the benefit of the public, not of the private author,¹⁴³ Breyer found fault with the CTEA’s retroactive nature and the fact of the statute’s purpose to benefit primarily those persons already holding copyrights.¹⁴⁴

With respect to the values of the Copyright Clause, Justice Breyer found that because the monetary benefit contemplated by the statute would inure not to original authors but to their “distant heirs, or shareholders in a successive corporation,” the “progress” of the arts was

138. *See id.* at 798-99.

139. *See id.*

140. *See id.* at 793.

141. *Id.*

142. *Id.* at 801 (Breyer, J., dissenting).

143. *Id.* at 803 (citing congressional records stating that the copyright protection was designed principally for the public benefit).

144. *Id.* at 804 (offering an insightful accounting of the significant royalties to be earned by those copyright owners because of the CTEA). Later in his dissent, Justice Breyer acknowledged the significant concessions made to the entertainment industry by passage of the bill, citing portions of the legislative history that mentioned companies such as Disney and Sony by name. *Id.* at 811.

not a foreseeable result of the statute.¹⁴⁵ Moreover, the perceived uniformity between United States and European copyright laws was not only inaccurate, noted Breyer, but also failed to serve as a reasonable justification for the extension legislated by the CTEA.¹⁴⁶ Furthermore, the “serious harm” feared by the majority if American laws failed to mirror European laws was unlikely to materialize, and the copyright laws of Europe and America had coexisted for some time without difficulty and in spite of key differences between the laws and their goals.¹⁴⁷

Justice Breyer’s dissent recognized the difficulties posed to libraries by the CTEA. He criticized the provisions of the statute that require that permission be sought by anyone seeking to use any copyrighted material, including libraries.¹⁴⁸ Such provisions, Justice Breyer noted, would actually discourage use of such works because of the required effort to seek permission.¹⁴⁹ Moreover, it was estimated that in order to create an electronic archive and to get permission to do so, a library would have to devote twelve hours of effort *per work*.¹⁵⁰ In addition, Justice Breyer discussed the library exemption, *infra*, condemning its strict conditions and the impracticality of its implementation.¹⁵¹

V. THE EFFECT OF THE DECISION ON THE PUBLIC DOMAIN

As brought to light by the petitioners in *Eldred*, one significant effect of the CTEA is its curtailing of opportunities for those whose livelihood relies, in whole or in part, on works that have come into the public domain. The *Eldred* decision upholding the Act had no regard for that fact. Rather, the decision focused on the fact that in the past, extensions of the copyright term had included some retroactive effect; the majority reasoned that, in effect, what was acceptable in the past was acceptable in the present.¹⁵² This “goose and gander”-type justification failed to take into account a number of important points.

145. *Id.* at 807 (“The extension will not act as an economic spur encouraging authors to create new works.”).

146. *Id.* at 809-10.

147. *Id.*

148. *Id.* at 804.

149. *Id.* at 805.

150. *See id.*

151. *Id.* at 806.

152. *Id.* at 772.

A. “No Free Lunch”

As any law school student can attest, it is a fundamental concept in American common law that one cannot get something for nothing. In contract law, this concept is called “consideration”: The party in the position to profit must provide the other party adequate remuneration in return.¹⁵³

A contractual type of relationship exists between the owners of copyrights and the public.¹⁵⁴ Upon creation of a work, the author or creator is entitled to benefit from the work’s creation. This benefit comes in the form of ownership of the work, the ability to sell and license it, and recognition for its creation.

In return, the public waits until the term of ownership is completed, and then has the right to use the work freely for its own progress and advancement. While waiting for this privilege, in the meantime, the public pays for use of the work.

This careful balance is undone and the “contract” is broken when one side benefits more than the other. For example, if Congress were to decide tomorrow that copyright ownership should last six years, then the public domain would be flooded with recent, valuable works (in addition to works with less available sale or licensing value). The public domain would benefit greatly, of course, but the creators of the works would suffer, obviously unable to reap much of a reward for their work. The public domain in this situation would need to give up something to make up for its windfall, such as a hefty price during the ownership phase, perhaps. In other words, to maintain the “contract” between the public domain and copyright owners, the public must pay its due consideration.

With the extension bestowed upon them by the CTEA (via *Eldred*), however, the owners of already copyrighted works are being granted a reward without reason. In short, prior owners pay no “consideration” for the prolonged twenty-year extension granted them by Congress. And the result is that the public domain loses valuable works, decades of time, and the very reason for its existence: that intangible body of knowledge that promotes the progress of society. Thus, the copyright owners benefit, but the public domain is disadvantaged, without amends.

153. BLACK’S LAW DICTIONARY (SC) 300-01 (7th ed. 1999).

154. This idea is not new. In 1824, then Attorney General Wirt argued in *Gibbons v. Ogden*, 22 U.S. 1, 175 (1824), that the relationship between a patentee and the U.S. public was “virtually a contract . . . by which the time of exclusive and secure enjoyment is limited, and then the benefit of the discovery results to the public.” Moreover, petitioner Eldred proffered the argument that there exists between copyright owners and the public, if not a contractual relationship, at least a quid pro quo. See Brief for Petitioners, *supra* note 90, at 23.

B. Principles of the Framers, Betrayed

The failure of Congress to deny the call of copyright holders who lobbied for the significant term extension that was legislated and became the CTEA is chiefly a failure to benefit the public, in direct contravention of the intent of the Founding Fathers. Congress's disregard for their intent is so evident that there is no question that the majority in *Eldred* recognized it and yet chose to ignore it. In so doing, the majority in fact chose to disregard Congress overstepping its bounds. This, too, was in contravention of the Framers' intent. It was also surprising from a Court which has as its responsibility the enforcement of the system of checks and balances in United States government, and which has heeded that call to great extent in its history.¹⁵⁵

The Court did not concern itself with the havoc its decision would wreak on the public domain. It is obvious that the majority deemed the public domain insignificant, but their failure to discuss it makes it difficult to ascertain the reasons behind the Court's disregard for the societal benefit that has been a necessary part of the bargain between owner and consuming public for over three hundred years. The departure of the Court in this manner is a downfall for the public, insured by the Framers to bear the fruit of artistic and scientific progress.

C. The Monopoly Problem

Another difficulty posed by the Supreme Court's decision is that it sanctions the excessive longevity of monopolies to copyright owners. This presents precisely the problem that the Framers had feared but had reconciled based on their beliefs in the system of government they were working to implement.

The CTEA's provisions may be rightly characterized as creating monopolies well beyond the scope of what the Framers had imagined. This is due in part to the fact that the provisions do nothing to advance the *raison d'être* of the Copyright Clause: the progress of the arts and the encouragement of authors of valuable works. Rather, the provisions bring substantial royalties to the grandchildren or other descendants of the authors, which is in no way connected to the Copyright Clause or the Framers' intent.¹⁵⁶

155. See, e.g., *INS v. Chadha*, 462 U.S. 919, 921 (1983) (legislative veto, as a legislative activity, must be within strictures of Constitution); *United States v. Lopez*, 514 U.S. 549 (1995) (Congress exceeded authority under Commerce Clause by regulating use of firearms in local school districts).

156. See Schafly, *supra* note 103 (stating that the extension of copyright protection "is worth billions of dollars to the Disney Co.").

The realization of these monopolies evidences a drawback in the system in which the Framers had such faith. Supreme Court-sanctioned kowtowing by Congress does not leave the power with the populace, as it were; rather, it emphasizes an unfortunate imbalance in the dissemination of “power” in the United States and the apparently high suggestibility of the country’s governance. The failure of Congress to avoid creating what can only be characterized as a monopoly, and the Court’s failure to recognize, or end, the congressional fault in extending the law, indicates a fissure in the system created by the Founding Fathers.

VI. REPERCUSSIONS OF THE EXTENSION

The setbacks faced by the public domain are not necessarily merely abstract. As demonstrated by the petitioners themselves, there are numerous businesses and organizations that utilize works in the public domain for that which brings them livelihood.

Likewise, corporations, artists, and authors borrow freely from the public domain and use the material therein to expand, create and, ultimately, profit. To deprive them of an ever growing, enriched public domain is, in fact, to deprive them of some of the incentive to create. As part of the “bargain” with the public domain, authors and artists have the right to own their work. But the authors and artists are also beneficiaries of the public domain, and they, too, are at a disadvantage when the public domain loses.

VII. NOT IN MY LIBRARY

It is evident that the lack of support for the public domain demonstrated by Congress and approved by the Supreme Court is detrimental to everyone, even those who would extend the copyright laws seemingly indefinitely.

One example of this to which most can relate easily is the effect of the law on libraries. Section 104 of the CTEA, which revised 17 U.S.C. § 108, provides:

For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a

reasonable investigation, that none of the conditions set forth in subparagraphs [below] apply.¹⁵⁷

The caveats include the following: that the work is not the subject of “normal commercial exploitation”;¹⁵⁸ that a copy of the work cannot be procured at a reasonable price;¹⁵⁹ the copyright owner has not provided notice that the work is the subject of “normal commercial exploitation,” or may be obtained for a reasonable price.¹⁶⁰

The library provision in the CTEA is yet another indication of the congressional lack of adherence to the principles of the Copyright Clause and the intent of the Framers. Closing libraries off of copyrighted works until the last twenty years of the copyright is a telling rebuke to the public domain. There is no detriment to copyright owners in permitting libraries to utilize and display their works, especially those that have been dormant and without significant commercial use for decades. Yet this very idea was the subject of heated debate, and the libraries’ “victory” was hard-fought.¹⁶¹

The implications of this provision are severe. Libraries, the purpose of which are to encourage and educate the public, now have no means to do so, even decades after a work has been published and copyrighted. Their collections could become older or much less valuable, thereby making the libraries themselves outmoded.

Libraries are, and have been historically, the purveyors of ideas and expression. The effect of the CTEA on this valuable public resource may turn libraries into “licensees of commerce.”¹⁶² Libraries are especially essential now, when under the CTEA, no new work will enter the public domain until 2019.¹⁶³

157. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

158. *See id.* (amending 17 U.S.C. § 108(2)(A) (1994)).

159. *See id.* (amending 17 U.S.C. § 108(2)(B)).

160. *See id.* (amending 17 U.S.C. § 108(2)(A)-(C)).

161. Arnold P. Lutzker, *Primer on the Digital Millennium: What the Digital Millennium Copyright Act and the Copyright Term Extension Act Mean for the Library Community*, available at <http://www.ala.org/washoff/primer.html> (last modified Mar. 8, 1999).

162. *See id.*

163. *See* Lawrence Lessig Blog (Jan. 20, 2003, posted at 12:05 pm), available at cyberlaw.stanford.edu/lessig/blog.

VIII. SOLUTIONS: “BUILDING, NOT SUING”¹⁶⁴

It is clear that copyright law in the United States has run on a deleterious course for some time. There is a pressing need to right the balance that has been disrupted by the recent transgressions of Congress and the courts.

A number of solutions have been proposed to correct the injustice that has resulted to the public domain. Lead counsel for petitioners has proposed a fee system, similar to that used in patent law, for copyright owners. Owners who neglect to pay the fee after three years would lose their works to the public domain.¹⁶⁵ This solution would align the copyright system with those used in other areas of intellectual property protection and enforcement, i.e., those for trademark and patent protection. It would also benefit libraries to a great extent, because they could use “dormant” works much sooner.

Another, more revolutionary approach was fielded in *The Economist*. That approach was to make a sweeping change, namely, the lessening of the copyright term to fourteen years.¹⁶⁶ Explaining that the revision would be a return to the original purpose of copyright, the author criticized the consistent extensions of copyright duration over the past half-century, stating that the extensions served to inhibit progress by preventing the “circulation of ideas” present in the “thousands of old movies, records and books languishing behind a legal barrier.”¹⁶⁷

The extreme revision proposed by *The Economist* could be reasonable in light of the prevalence of the Internet and the potential for information dissemination posed by the Internet and other technological advancements. Moreover, such a change would be a true return to the visions of the Founding Fathers in this area of law.¹⁶⁸

Regardless of what reforms are made, a number of factors are to be considered in the debate. First, the language and intent of the Constitution’s Copyright Clause, its implicit and explicit meaning, is

164. Professor Lawrence Lessig, the lead attorney for petitioners in *Eldred*, is heading a charge for legal reform of the copyright laws. The phrase coined for this effort is “Building, Not Suing.”

165. See Lawrence Lessig, *Protecting Mickey Mouse at Art’s Expense*, N.Y. TIMES, Jan. 18, 2003, at A17.

166. *A Radical Rethink: The Best Way to Foster Creativity in the Digital Age Is to Overhaul Current Copyright Laws*, ECONOMIST, Jan. 23, 2003, available at http://www.economist.com/opinion/PrinterFriendly.cfm?story_ID=1547223 [hereinafter *A Radical Rethink*].

167. *Id.*

168. See Copyright Act of 1790. The *Economist* article makes a similar claim, alleging that copyright was “originally the grant of a temporary government-supported monopoly on copying a work, not a property right.” See *A Radical Rethink*, *supra* note 166.

significant, as are the beliefs and intentions of the Founding Fathers that surrounded its creation.

Second, international concerns and the protection of American works abroad should be contemplated, but within reason. As discussed by Justice Breyer, the necessary differences in the laws between America and its European counterparts have not hindered the coexistence of the laws.¹⁶⁹

Finally, consideration of the necessity of the public domain, its role in the contract with copyright owners, and the debt it is owed is necessary. Any revisions must benefit the public, the intended primary beneficiary of copyright directives.

169. Thus, blind adherence to the stifling terms of the European laws, which have no provision for “limited Times,” are not in order.