

PANEL II: Mickey Mice? Potential Ramifications of *Eldred v.* *Ashcroft*

Moderator: Hugh C. Hansen^{*}

Panelists: David O. Carson[†]

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Charles Sims^{||}

MR. PERRY-CAMPF:[#] Welcome back everyone and welcome to those of you who were not here this morning. My name is David Perry-Campf. I am the managing editor for the *Journal*. I would like to welcome you to the panel on *Eldred: Mickey Mice? Potential Ramifications of Eldred v. Ashcroft*.

The moderator of the panel will be Hugh Hansen. Professor Hansen has been at the Law School since 1978 and teaches various areas of intellectual property law. Is that right?

PROFESSOR HANSEN: That's fine.

MR. PERRY-CAMPF: He is one of the reasons why the *Fordham Intellectual Property, Media & Entertainment Law Journal (IPLJ)* is so successful. I would like to thank him again

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for being here and for moderating the panel. Without further ado, because he doesn't want any more ado, Professor Hugh Hansen.

PROFESSOR HANSEN: Thank you very much. First, I would just like to get a view of the audience. How many people are familiar with the *Eldred* case and how many are not.¹

[After shows of hands.]

So we have quite a few who are not and some that are. Okay. We will keep that in mind when we are speaking.

For those who are not familiar with *Eldred*, take a look at a short piece that I did on the case before it was argued that appeared in the *Preview of Supreme Court Cases*.² The journal was originally aimed to bring Supreme Court newspaper reporters up to speed to understand the oral argument and to write about the decision when it came down.

We certainly have a distinguished panel that is fairly evenly balanced on the merits.

The catalyst for this lawsuit was an extension of the term of copyright in 1998, the Copyright Term Extension Act (hereinafter

¹ *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). The petitioners, individuals, and companies who excavate the public domain for works with expired copyright, challenged the constitutionality of the Copyright Term Extension Act of 1998 [CTEA], Pub. L. No. 105-298, tit. 1, 112 Stat. 2827-28 (codified as amended in scattered sections of 17 U.S.C. (Supp. V 2000)). *Id.* The law increased the term of copyright by twenty years so that most works are protected for the life of the author plus seventy years. *See* 17 U.S.C. § 302(a) (2000). The petitioners claimed the law was unconstitutional under the Copyright Clause's "limited Times" restriction and under the First Amendment's free speech guarantee. *Eldred*, 123 S. Ct. at 775. *See also* U.S. CONST. art. I, § 8, cl. 8; U.S. CONST. amend. I. The Court of Appeals for the District of Columbia Circuit, affirming a district court ruling, found the law constitutional. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd*, 123 S. Ct. 769 (2003). The Supreme Court granted certiorari and heard oral arguments on Oct. 9, 2002. *See* Transcript of Oral Argument, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-618.pdf. On January 15, 2003, the Court affirmed the lower court rulings and upheld the law's constitutionality. *Eldred*, 123 S. Ct. at 790. In a 7-2 decision, the Court stated that the CTEA complied with the Copyright Clause's "limited Times" prescription and did not create a perpetual copyright, was a rational exercise of the legislative power conferred by the Clause, and did not violate the First Amendment. *Id.* at 781, 782-83, 789-90.

² Hugh C. Hansen, *What Are the Constitutional Limits on Congressional Extensions of the Term of Copyright Protection?*, 2001-02 PREVIEW U.S. SUP. CT. CASES 38.

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the “Act”),³ which members of Congress fondly called the Sonny Bono Copyright Term Extension Act. People against term extension unfailingly also refer to it as such because it reflects their contempt for both Sonny Bono and the Act.⁴

The original purpose of this Act was not based upon a copyright policy view that authors needed life plus seventy years of protection, the new term under the Act. Rather, it was responding to the European Union Term of Protection Directive, which pushed copyright from life plus fifty to life plus seventy.⁵ The reason for the directive also had nothing to do with copyright policy. It was based upon the need for free movement of goods within the Community. Germany's term of protection for copyright was life plus seventy, Spain had life plus sixty, and the rest of the member states had life plus fifty.⁶ This meant that it was impossible to circulate some goods completely freely throughout the European Union because in two countries they might have been protected by copyright whereas in the others they were in the public domain. The answer was to increase protection in all Member States to life plus seventy.⁷

³ See 17 U.S.C. § 302(a).

⁴ See, e.g., <http://eldred.cc/eldredvashcroft.html> (last visited Apr. 6, 2003). The website, which is maintained by CTEA opponents, repeatedly refers to the law as the “Sonny Bono Act.” *Id.*

⁵ Council Directive 93/98/EEC, art. I, 1993 O.J. (L 290) 9 [hereinafter Directive 93/98], reprinted in PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 564 (2001). This directive harmonized the term of copyright among the member states of the European Union to life plus seventy years. *Id.*

⁶ See Fred Koenigsberg & Joan T. Pinaire, *Impact of International Copyright Developments in U.S. Practice*, in IMPACT OF INTERNATIONAL COPYRIGHT DEVELOPMENTS IN U.S. PRACTICE, at 540 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course, Handbook Series No. G4-3932, 1994) (“Copyright terms had previously varied throughout the EU. Most member countries had adopted the minimum term required by the Berne Convention: the life of the author plus 50 years. But others had longer terms: for example, life plus 60 years (Spain) or life plus 70 years (Germany and, for musical works, France).”). See generally Justine Antill & Peter Coles, *Copyright Duration: The European Community Adopts “Three Score Years and Ten”*, 18 EUR. INTELL. PROP. REV. 379 (1996).

⁷ See Koenigsberg & Pinaire, *supra* note 6, at 540–41 (“Given the concept of a single internal economic market, it made no sense—indeed, it was counterproductive—to have varying terms of copyright in the EU.”).

Of course, the Community had a choice of bringing Germany and Spain down to life plus fifty. This would have raised constitutional issues, however. The German Constitutional Court, their Supreme Court for constitutional issues, had already made noises that it might find European Union actions that exceeded its authority under the Treaty not binding in Germany. This risked a constitutional crisis within the European Union.⁸ Moreover, there was the general view that it was wrong to take twenty years off the term of those copyright owners who had an expectation based upon law of protection of their works for life plus seventy.⁹

Differences of opinion among countries about intellectual property may result from whether a country is a net exporter or net importer of intellectual property products.¹⁰ Countries that are net exporters of IP products, as you might expect, are pro intellectual property. Net importing countries, which are concerned with costs of all imported products, have more reservations. The Netherlands, a net importer of IP products, is perhaps the most vocal of countries in this category.¹¹ The Netherlands and three

⁸ See the *Bundesverfassungsgericht's* [German Federal Constitutional Court] Maastricht decision, BVerfGE 89, 155 [hereinafter Maastricht], translated in 33 I.L.M. 395 (1994). The decision, which upheld the constitutionality of the Treaty of Maastricht, was key to Germany's participation in the future of an integrated Europe. See Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"*, 43 AM. J. COMP. L. 177, 177 (1995). The decision warned that "the Federal Constitutional Court will examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them." *Id.* The court added that legal acts of the Union that exceed the competences outlined in the treaty, as interpreted by the German court, will not be legally binding. *Id.*

⁹ See Directive 93/98, *supra* note 5, recital 9 ("[A] harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by right holders in the Community."); Antill & Coles, *supra* note 6, at 380 ("[It] was deemed contrary to one of the general principles of Community law (regard for established rights) to reduce the term of protection already granted to rights owners in certain Member states.").

¹⁰ See, e.g., J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 U. DAYTON L. REV. 809 (1995); Hamish McRae, *The Business World: So, How Much Did Harry Potter Make for the Rest of Us?*, INDEPENDENT (London), Feb. 7, 2001, at 2 (discussing a recent International Monetary Fund report stating which countries are the biggest importers and exporters of intellectual property).

¹¹ See Hilary Clarke, *EC Governments Agree on New Copyright Accord; Terms May Mean Protection for 100-Plus Years*, HOLLYWOOD REP., Nov. 9, 1993 ("In a strongly worded statement . . . the Dutch government said the new rules 'don't just give

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other net-importing countries were against the Directive.¹² It just passed under the qualified majority voting scheme for directives.¹³

One reservation about the increase of the term of copyright was that it would benefit the United States the most.¹⁴ About the only thing that unites the world today is its anti-Americanism. It is unlikely that the Term Directive would have been adopted if U.S. works received the benefit of the twenty year term extension.¹⁵

So they did what they were allowed to under the Berne Convention, which was the rule of the shorter term, saying that unless your country also protects the same amount we protect, nationals of your country will not received the higher term of protection.¹⁶ I am convinced that the EU was hopeful that the United States would not adopt life plus seventy years. This is because the amount of revenue leaving Europe would not be matched by the amount of term extension revenue leaving the U.S. for Europe, as there really are not that many European works that

preference to the interests of the author over those of the consumer' but 'also complicate relations with third countries.'").

¹² See *Approval for 70-Year Copyright Protection*, EUR. REP., Oct. 30, 1993 ("[T]he Luxembourg, Dutch and Portuguese delegations were opposed [to the resolution] and the Irish abstained. France, Germany and Italy explained that they had approved the Directive because it guarantees free movement of copyrighted works while eliminating distortions of competition, because it will encourage literary and artistic creation and because it respects national peculiarities in copyright protection."), available at 1993 WL 2490038.

¹³ See *id.*

¹⁴ See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 79 & n.10 (2000) (noting that American industries that are heavily dependent on copyright habitually report considerable losses to the domestic economy as a result of copyright infringement abroad and arguing that the increase in international harmonization of intellectual property rules may promise heightened global enforcement of rights, which should in theory significantly benefit the United States). This is also true because American music and movies might predominate in those for whom protection for life plus 70 would produce monetary reward.

¹⁵ See McRae, *supra* note 10, at 2 (noting that the United States is the largest net exporter of intellectual property).

¹⁶ Directive 93/98, *supra* note 5, art. 7, § 1. See also Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention] (establishing a basic term of life of the author plus fifty years), available at <http://www.law.cornell.edu/treaties/berne/overview.html>.

would get the advantage of the life plus seventy over here,¹⁷ and there are a lot of American works that would get the advantage and, therefore, take revenue out of Europe.¹⁸

But Congress did pass life plus seventy.¹⁹ There were academics and some user groups in opposition.²⁰ I think Congress basically saw it as a trade bill creating more jobs, tax revenues, et cetera. The copyright policy arguments that were presented by some law professors in opposition to a term extension thus had little effect and Congress passed it.²¹

Larry Lessig, a well-known academic, came up with a constitutional attack on the Act. I thought it was doomed to lose. Most people in the copyright field thought likewise. He lost in the district court;²² he lost in the court of appeals.²³ I do not know

¹⁷ See McRae, *supra* note 10, at 2 (“America may have an enormous appetite for foreign goods—German cars, Japanese TVs and so on—but it has no appetite for foreign intellect.”).

¹⁸ See *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 73 (1995) [hereinafter *Hearings on S. 483*] (statement of Sen. Orrin Hatch) (suggesting that the loss of twenty years’ copyright protection would hurt U.S. trade: “In a world economy where copyrighted works flow through a fiber optic global information infrastructure, American competitiveness demands that we adapt our laws—and adapt them quickly—to provide the maximum advantage for our creators.”).

¹⁹ See 17 U.S.C. § 302 (2000).

²⁰ See Jenny L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. & ENT. L.J. 945, 973 (1996) (“Opposition to the proposed extension comes primarily from the academic community.”); Letter from Mary Burgan, General Secretary of the American Association of University Professors, to Representative Henry J. Hyde, Chair, House Judiciary Committee (Oct. 8, 1997) (opposing copyright extension legislation), <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/letters/aaup-01.html>.

²¹ See, e.g., 144 CONG. REC. S11672 (daily ed. Oct. 7, 1998) (statement of Sen. Leahy) (“The 1998 Report on Copyright Industries in the U.S. Economy issued by the International Intellectual Property Alliance indicates just how important the U.S. copyright industries are today to American jobs and the economy and, therefore, how important it is for the U.S. to give its copyright industries at least the level of protection that is enjoyed by European Union industries.”); 144 CONG. REC. H9950 (daily ed. Oct. 7, 1998) (statement of Rep. Coble) (“[The bill] will give the United States economy 20 more years of foreign sales revenue from movies, books, records and software products sold abroad. . . . This bill is also good for consumers. . . . When works are protected by copyright, they attract investors who can exploit the work for profit. That in turn brings the work to the consumer. . . .”).

²² See *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999), *aff’d sub nom. Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

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anyone on either side of the debate who thought that certiorari would be granted.²⁴

When the Court granted certiorari, people were dumbstruck. I had confidently predicted that certiorari would be denied. People started thinking of reasons why the Court did grant certiorari. Of course, Larry Lessig had been a clerk of Scalia.²⁵ I do not know if that had any effect. It probably did not hurt, but I am sure that certiorari was not granted just because of that factor. But it was a puzzlement. Ultimately, the petitioners primarily objected to the so-called retroactive protection: protection for works already in existence.²⁶

There are various arguments that can be made against this. The Preamble to the Copyright Clause states, “To promote the Progress of Science and the useful Arts”—“Science” meaning learning and “useful Arts” meaning the patent-type inventions—Congress shall have the power to grant for “limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries.”²⁷ The argument goes that this clause somehow creates an obligation upon Congress only to enact copyright provisions whose purpose is to provide incentives for creation of new works. Protection for existing works, by definition, could not create incentives for their creation.²⁸ The extension for existing

²³ See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

²⁴ See Linda Greenhouse, *Justices to Review Copyright Extension*, N.Y. TIMES, Feb. 20, 2002, at C1 (“The court’s action took the world of copyright holders and users by surprise.”).

²⁵ Lessig clerked for Scalia during the Supreme Court’s 1990–91 term. Stanford Law School, *Lawrence Lessig: Curriculum Vitae*, Stanford Center for Internet and Society, at <http://cyberlaw.stanford.edu/lessig/bio/cv/> (last visited Mar. 10, 2003).

²⁶ See generally Brief for Petitioners, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618) (attacking the retroactive extension of the copyright terms and arguing that the CTEA’s prospective and retroactive extensions of copyright terms are unseverable), <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/opening-brief.pdf>.

²⁷ U.S. CONST. art. I, § 8, cl. 8.

²⁸ See Brief for Petitioners at 40–41, *Eldred* (No. 01-618) (“[W]indfall benefits for the economic well-being of authors and their heirs *independent of any claimed incentive to create* cannot constitute a legitimate, much less an important or substantial, governmental interest sufficient to justify a restriction of speech.”).

works is just a windfall at the expense of the public.²⁹ There is dispute as to whether that requirement of providing incentives for creation necessarily flows from the preamble or not.³⁰ Justice Souter, for instance, in the Supreme Court in oral argument indicated that it went beyond that; Congress had more discretion on how to promote science than to just provide incentives for new creative activity.³¹

In any case, that argument coupled with a limited times argument meant that this extension was unconstitutional.³² There was also a First Amendment angle which was not completely independent of the other arguments. This argument was not particularly clear but it seemed to be that copyright is a restriction of free expression and as such needs First Amendment scrutiny of some kind. At the least, there should be the time, place, manner analysis used for content neutral state actions³³ The thrust was that if you applied either the constitutional power analysis based upon of article 1, section 8, clause 8, or even low level First Amendment analysis, at least the application of term extension to existing works (so-called retroactive application) would be unconstitutional.³⁴

²⁹ See Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 95–96 (2002) (“The question is how to balance the moral rights of the producer of expression with the interests of the general public in the widest possible dissemination of speech. Copyright law does this when applied prospectively by giving authors and artists notice as to the protections that they will have. Retroactive extension is a windfall, benefiting one group—the copyright holders, who may or likely may not be the producers, at the expense of another group—those who want wider dissemination of the speech.”).

³⁰ See Brief for the Respondent at 44, *Eldred* (No. 01-618) (arguing that rather than granting windfall benefits, the CTEA “allows copyright holders an opportunity to profit from their creative property *to the extent* that they succeed in making the works publicly available”), <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/government-brief.pdf>.

³¹ See Transcript of Oral Argument at 6–7, *Eldred* (No. 01-618).

³² See Brief for Petitioners at 17–23, *Eldred* (No. 01-618). Specifically, the petitioners argued that copyright terms under the CTEA were no longer “limited,” did not promote the progress of science, and were not compatible with the quid pro quo requirement of the Copyright Clause. The petitioners further argued that history confirms that the law exceeded Congress’s power. *Id.* at 23–30.

³³ See *id.* at 34–47.

³⁴ See *id.* at 17–33 (noting the unconstitutionality of the retroactive provision under Copyright Clause).

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We are fortunate to have speakers who will cover all sides of the argument, so that is enough background.

We have among the panelists at least two who are squarely against the Act and its constitutionality. One may not be for the Act on policy grounds but certainly thinks it is constitutional. David Carson is with the Copyright Office and we'll see what are his public views. I am the moderator, but—

PROFESSOR MOGLEN: But not moderate.

PROFESSOR HANSEN: Some people say I am going to *immoderate* the panel today, which may be true. But I do have a position on this.

We will start out with Professor Moglen, who is at Columbia University. He started out his professional career, after going to Swarthmore, on the technical side. He was a Programmer/Analyst in the Programming Language Research and Development Department of IBM. Then he went to law school at Yale. At the same time he was going to law school, he was also getting a Masters and Ph.D. in History. He was with Cravath Swaine & Moore for a year. Then he clerked for Judge Weinfeld in the Southern District. He probably did not even see daylight for long times in the winter as Judge Weinfeld worked his clerks very hard. He was a wonderful judge, probably the best district court judge in the country. Then Professor Moglen went to clerk for Thurgood Marshall. From there he started teaching at Columbia. Eben teaches an English Legal History course, and the other one is Internet and Constitutional Law.

Every speaker has twelve minutes, which leaves us plenty of time for discussion.

Eben, please take it away.

PROFESSOR MOGLEN: Thank you. I am very pleased to be here. I appreciate very much the invitation from the *IPLJ* to talk to you today about this fascinating, but actually rather unimportant, little case.

I do want to say a couple of things in response to Hugh's immoderate introduction, which I very much appreciate as clearing the ground.

The reason that we call the statute the Sony Bono Copyright Term Extension Act is that is what Congress called it,³⁵ and they called it that because they needed the fact that this moron skied into a tree as an excuse for the perpetration of a particular crime against the public interest of the United States.

Hugh is utterly factually incorrect. The statute had nothing whatsoever to do with term extension in the European Union.

The lawsuit, which began before the statute, was planned first in conversations that Larry³⁶ and Charlie Nesson³⁷ and I had at Harvard in 1994. We knew that there would be the statute and we knew that there would be the lawsuit against the statute at a time when the European Term Extension Directive had not even issued.

The reason that we knew all that was Mickey Mouse. That is to say, we knew that, beginning in 2004, expiration of copyrights would begin. It has nothing to do with individual authors, folks. Life plus seventy is total nonsense. It has to do with the term of corporate ownership of copyrights. We knew that the beginning of the mass media copyright expiration period would begin in 2004. *Steamboat Willie*, which is the moment at which the thugs take over culture in the United States, is 1928.³⁸

³⁵ See 17 U.S.C. § 101 (2000) (“This title may be referred to as the ‘Sonny Bono Copyright Term Extension Act.’”).

³⁶ Lawrence Lessig represented Eric Eldred in *Eldred v. Ashcroft*, challenging the 1998 Sonny Bono Copyright Term Extension Act. He is currently a Professor of Law at Stanford Law School. Professor Lessig was the Berkman Professor of Law at Harvard Law School. He is the author of *The Future of Ideas* and *Codes and Other Laws of Cyberspace*. He teaches and writes in the areas of constitutional law, contracts, comparative constitutional law, and the law of cyberspace. See <http://cyberlaw.stanford.edu/lessig/bio/short/> (last visited Mar. 15, 2003).

³⁷ Charles Nesson is the William F. Weld Professor of Law at Harvard Law School and co-director of the Berkman Center for Internet & Society. See The Berkman Center for Internet & Society at Harvard Law School, *Charles Nesson Harvard Law School Biography*, at <http://cyber.law.harvard.edu/nesson.html> (last visited Mar. 10, 2003).

³⁸ See Disney Archives, *Steamboat Willie*, at <http://disney.go.com/disneyatoz/archives/movies/steamboat/steamboat.html> (last visited Mar. 10, 2003). *Steamboat Willie* was the first Mickey Mouse cartoon released, on November 18, 1928. Prior to the passing of the CTEA, the original drawings of Mickey Mouse in *Steamboat Willie* would have expired in 2003. See Pub. L. No. 95-553, 90 Stat. 2541, 2572–76 (codified as amended at 17 U.S.C. §§ 301–304 (2000)) (extending the term of protection to the life of the author plus fifty and extending the term of protection for works for hire to seventy-five years).

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And so we knew that there would be special-interest legislation purchased from a hired Congress to extend indefinitely the corporate control of American culture, and we knew that it would be necessary to attack it.

The revolution against intellectual property, which I represent in my work, thinks ten years ahead, which is why we are already in the post-Microsoft era, though you are not, and why we are already worried not about what will happen in *Eldred* but what will happen after the end of the recording industry, which, despite the fact that they are still paying Chuck's bills, we are certain to bring about within the next fifteen years.³⁹

Eldred is in that sense a tiny, little sideshow in the fundamental activity, which is the deliberate and intentional destruction of the intellectual property system by people who recognize that in the twenty-first century, when all works of knowledge, learning, art, culture, music, useful information, and technical understanding have zero marginal cost, and can be given to everybody in the world for the same price that the same person receives them, it is immoral to exclude people from knowledge and from culture.⁴⁰

The system of private property and ideas is a system that befit the bourgeois capitalism of the twentieth century. It is inappropriate to the conditions of the twenty-first century, as broadcasting and the private ownership or licensing of spectrum

³⁹ See, e.g., Eben Moglen, *Liberation Musicology*, NATION, Mar. 12, 2001, at 5 (predicting the end of the recording industry due to OpenNap software that enables every computer to engage in music sharing without a centralized registry such as Napster); Eben Moglen, *The Public's Business*, LINUXUSER, May 2001, at 66 (predicting that government contracts based on competitive bidding will go to firms that employ free software, which will result in a reduced dependence on Microsoft and free software holding the world's largest market for computer software), available at http://www.linuxuser.co.uk/articles/issue10/lu10-Free_Speech-The_publics_business.pdf. See generally Eben Moglen, Columbia Law School, at <http://emoglen.law.columbia.edu> (last visited Mar. 10, 2003) (containing Eben Moglen's curriculum vitae, research agenda, selected publications, and links to related sites).

⁴⁰ Cf. LAWRENCE LESSIG, THE FUTURE OF IDEAS 94-95 (2001) (quoting Thomas Jefferson and explaining why information should be free).

are inappropriate to the technical conditions of the twenty-first century.⁴¹

A corps of people around the world—tens in the beginning, now hundreds of thousands, soon to be millions—are engaged in various collaborative enterprises to destroy that unjust system. One tiny piece of that activity is the elimination of those pieces of the copyright system that establish the control of culture on the parts of organizations utterly uncontrolled by the bought politics of the United States and the European Union.⁴²

Eldred is a tiny test of the relationship between the principles of the freedom of speech and the principles of the ownership of culture and ideas.⁴³ It shocks the copyright lawyers that the Supreme Court grants certiorari because it shocks the copyright lawyers that there is the First Amendment at all. It shocked even Melville Nimmer, who before his death did manage to point out that the ownership of *Blackacre* in perpetuity is acceptable where the ownership of *Black Beauty* in perpetuity is not, as Nimmer said, because of the First Amendment.⁴⁴ What *Eldred* tests is the willingness of the Justices of the Supreme Court to recognize that fact now, at the opening of the twenty-first century.

⁴¹ See MARJORIE HEINS, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM, A PUBLIC POLICY REPORT (2002), <http://www.fepproject.org/policyreports/copyright.html>.

⁴² See Brief of Amici Curiae of the Free Software Foundation at 12, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618), <http://moglen.law.columbia.edu/publications/eldred-amicus.html>; Daren Fonda, *Copyright Crusade Eric Eldred Says the Latest Copyright Goes Too Far*, BOSTON GLOBE MAG., Aug. 29, 1999, at 12.

⁴³ See *Eldred*, 123 S. Ct. at 769. Petitioners challenged the constitutionality of the CTEA under the First Amendment and the Copyright Clause. *Id.* at 775. Petitioners argued that Congress’s power under the Copyright Clause is contingent upon an exchange involving the author’s exclusive right for a limited time and a dedication to the public thereafter. *Id.* Petitioners claimed “the CTEA is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations.” *Id.*

⁴⁴ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. REV. 1180, 1193 (1970) (“Some may question why literary property should be treated differently from other forms of property? If I may own *Blackacre* in perpetuity, why not also *Black Beauty*? The answer lies in the [F]irst [A]mendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright.”).

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Now, I will say, in all candor, that in 1994 and thereafter, I was against bringing this lawsuit now. My own personal preference was for a negotiated disposition, rather like that of the Sonny Bono Term Extension Act, that is to say, a comparatively short renewal of Michael Eisner's ownership of everything. My reasoning was, that as the logic of the needs of the widows and orphans (who are of course the exclusive possessors of Mr. Eisner's stock) compels Mr. Eisner to strangle culture yet further by making everything a pay-per-view/pay-per-read subscription proposition for everybody on earth, the Congress and the judges will become increasingly aware of the fatal flaw in the extension of terms, a flaw which, despite Professor Hansen's absolute commitment to this immoral and disgraceful system, he too recognizes and told you about. He told you that the limitation of terms in existence—had the European Union, for example, chosen to shorten the term of subsisting copyrights⁴⁵—would have raised a taking-of-property problem even in their weak, lukewarm, and ludicrous European system of constitutional protection, let alone here.

Yet, the brief of the United States Government in *Eldred* argues that Congress has plenary power to set the terms of copyrights—subsisting ones as well as copyrights to be issued—be those terms what they may.⁴⁶ And although the Solicitor General, himself personally arguing this case, was not asked by the Court the question, had he been asked whether Congress has the power to shorten the terms of subsisting copyrights, the logic of his brief would have required him to say yes.⁴⁷

⁴⁵ See Directive 93/98, *supra* note 5.

⁴⁶ Brief for the Respondent at 7, *Eldred* (No. 01-618).

⁴⁷ See Brief of Amici Curiae of the Free Software Foundation, *Eldred* (No. 01-618). Authored by Moglen, the brief argues that under the logic of the Solicitor General's apparent argument, Congress could pass a statute shortening the term of existing copyrights. *Id.* at 13. "If the statute simply provided that the term of copyright be reduced to fourteen years, according to the Court of Appeals, that would satisfy the requirement of 'limited Times,' and there would be no occasion for the Courts to inquire into whether such a change promoted the progress of science and the useful arts, though copyright holders could well be expected to contend that such an alteration of the duration of existing copyrights deprived them of the benefit that the 'copyright bargain' supposedly 'secures' them." *Id.*

Of course, had Congress chosen not to lengthen the term of copyright but to shorten it, they would have faced immediately, from Chuck and all the other hirelings of the thugs in Hollywood, an avalanche of arguments concerning takings of property rights, as Professor Hansen acknowledges.

It is the fact that the public domain, the reversionary interest of copyrights, the constitutional limitation on the terms, can no more be adjusted without a taking of the rights of people than the term itself.⁴⁸ In precisely the same way that the Supreme Court recognizes that you may take the interest of the reversioner of a lease in order to give the fee simple to the property owner as a matter of land reform only if you compensate.⁴⁹ Facing squarely the question now presented, in all justice the Supreme Court would be compelled to agree that you cannot take the reversioner's interest in the public domain without payment.⁵⁰

It is this fundamental unfairness of the legislation, which ought to vitiate the arguments by the copyright theorists who would themselves be agitated by a shortening of subsisting terms. They ought to be on our side. But, unfortunately, the bread of the copyright lawyers has always been buttered by the copyright industries, and remains so now.

So what we have, in other words, is a purchased Congress, a piece of corrupt hireling legislation, a bought bar, and a co-opted academic circle of commentators, but also a vivid and unstoppable ongoing revolution.

Now, they will tell you, I suppose, that *Eldred* is a lost case for my dear friend Professor Lessig, who is today in Japan, else I am sure he would want to be here. They will predict, I have no doubt, some number of votes amounting as close to nine as they can fantasize, though on the transcript of the argument they will have

⁴⁸ See *id.* at 5, 9.

⁴⁹ See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). In *Midkiff*, the Court upheld a land distribution scheme implemented by the Hawaiian legislature. The Court stated that the state could take property as long as it was for a public purpose even if the property ended up in private ownership. That the government compensated landowners for the taking was dispositive on the issue of constitutionality even though the adequacy of compensation was not addressed by the Court. *Id.*

⁵⁰ See Brief of Amici Curiae Free Software Foundation at 11, *Eldred* (No. 01-618).

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some difficulty counting past seven, no matter what they do. And they will conveniently ignore for you that it takes four votes to grant certiorari in the Supreme Court and not a single one of those votes was a vote to affirm. For the very reason that Professor Hansen himself suggested, everybody who thought they knew the answer in the case was for leaving it alone. We had four votes, folks, on the morning of the argument. On the Friday morning thereafter, when the case was decided, it is my belief that we had six. If we have not even five, *tant pis* [pity], the revolution goes on.

The end of the movie industry is twenty-five years off, no matter what, thanks to the sharing of video by everybody on planet Earth who wants to share it. The end of the recording industry is ten years off for the same reason, and a good thing too. The end of the software monopoly has already happened; you just do not know it yet.

So from my point of view, *Eldred* represents a minor test of the willingness of the existing regime to modernize, to become the *ancien regime* peacefully, slowly, gradually, more in an English way than in a French one.

But we do not care. Our goal is justice. We will take it either way. Freedom now.

Thank you very much.

PROFESSOR HANSEN: I am just wondering when will we get to the argument on the merits. Assuming that someone does not share your hatred for capitalism, corporations, the middle class, and everything that this country stands for, is there anything else that might support your position? It was very interesting, though. A sort of "Das Disney." It is a good thing they don't have guillotines anymore, because Eisner would be in trouble, wouldn't he?

PROFESSOR MOGLEN: He's in trouble already, is he not?

PROFESSOR HANSEN: Maybe you will just improvise.

Our next speaker is Charles Sims. What do you think of Chuck? The person on your left?

PROFESSOR MOGLEN: Were you asking me?

PROFESSOR HANSEN: Yes.

PROFESSOR MOGLEN: I think he is a superb lawyer. He beat my brains out in the Second Circuit in the DVD cases, for reasons that still mystify me.⁵¹

PROFESSOR HANSEN: All right.

Chuck went to Amherst, then Yale, then clerked in the District Court of Rhode Island, and then for eight or ten years was with the ACLU, First Amendment practice, where he supervised Supreme Court practice and argued in the Supreme Court, Second Circuit, and other courts. Now he is at Proskauer Rose LLP, where he is litigating copyright, First Amendment and defamation cases. Most of Chuck's clients in copyright litigation, I think, have been copyright owners, but I am not sure.

MR. SIMS: And against Eben and his friends.

PROFESSOR HANSEN: So welcome Chuck. You have twelve minutes.

MR. SIMS: Eben spoke spectacularly. I had the pleasure of going to college in the late 1960s and early 1970s, I got out in 1971, and that was like being in an old Students for Democratic Society (SDS) meeting. That was just great.

PROFESSOR MOGLEN: He admits to being there, you notice.

MR. SIMS: And I know what side I was on, too.

As I have watched the copyright wars over the last few years, one of the things that I have remarked to people, and I have never gotten confirmation such as this, is that the spirit on the other side is very much the spirit of the late 1960s. It is very much the spirit of bring down the corporation, let it all fall down. Eben has in great prose given us the *locus classicus*, I guess, of that position.

Eldred was not an unimportant, little case until the day of its argument. This was the case that Larry Lessig and Yochai Benkler, and I dare say Eben, although I didn't hear him talk about it, thought was the single most important copyright case of a generation. I think it is being repositioned as unimportant because, in fact, it will be lost, and it should be lost.

⁵¹ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

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The arguments that were made here, the arguments that were made in the Supreme Court in the briefs by the petitioners and by their allies, are precisely the same arguments that were made to Congress.⁵² I do think it is fair to say that the law was passed a year or two early for them, in the sense that I think that there has gotten to be a movement of users, led by a group of academics—copyright professors they style themselves, although I think of them as the anti-copyright professors. There is no other area of the academic professoriate that I am aware of, no other area, in which there is all of this passion on one side and very few people on the other. Aside from the deans of the old copyright law professors, Bob Gorman, Paul Goldstein, and Jane Ginsberg, there is this group of forty-two of them or so who testified in Congress,⁵³ who filed briefs in case after case. They have lost most of them. They feel very passionately, as Eben has just indicated to you.

The question in this case is a constitutional question, or two constitutional questions.⁵⁴ It is not whether the law was a good idea or not.

It is whether Congress had the power to enact the law.⁵⁵ As to that question, which Eben did not talk about very much, I think the answer can only be what the two lower courts held and what the Supreme Court, I dare say, will hold, which is that whether or not this is as good law. Whether or not the *Washington Post* or the *New York Times*⁵⁶ have editorialized against it on policy grounds, the fact is that Congress had the power because the framers of the Constitution gave Congress the power to secure copyright for

⁵² See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

⁵³ See *Hearings on S. 483*, *supra* note 18.

⁵⁴ Brief for Respondent at I, *Eldred*, 123 S. Ct. 769 (2003) (No. 01-618).

⁵⁵ See Brief for the Petitioners at 28, *Eldred*, 123 S. Ct. 769 (2003) (No. 01-618).

⁵⁶ See, e.g., *Copyrights and Wrongs*, WASH. POST, Oct. 16, 2002, at A24 (“There is no question that the plaintiffs in the current litigation—a group of publishers and individuals who deal in public domain materials—have a righteous gripe against Congress’s move in 1998 to offer an additional 20 years of protection.”); *The Supreme Court Docket: The Coming of Copyright Perpetuity*, N.Y. TIMES, Jan. 16, 2003, at A28 (“This decision almost certainly prepares the way for more bad copyright extension laws in the future.”).

limited times, and in the case of corporations, ninety-five years is clearly a limited time.⁵⁷

Now, one of the most amazing things about this argument—and I think the moment at which it was securely lost was when the petitioners gave up on the proposition of trying to argue to the Court that ninety-five years was too long, or life plus seventy was too long. They did not really make that argument. They, in fact, conceded that for prospective works it was not too long.⁵⁸ It is impossible analytically to figure out how a period of time that is limited for works written in the future can violate the requirement that it be a limited time for other works. There is no principled basis on which to bring a lawsuit complaining about the works from the 1920s and 1930s that are not going to get into the public domain for another twenty years and to not worry about what is going to happen eighty or ninety or 120, whatever it is, years from now about the last twenty years when nothing will go into public domain because of this law.

So, having abandoned the proposition that it was possible to argue that this time is not limited, which is really the only issue that the Constitution and the enabling clause⁵⁹ presents, they made a very curious argument. Their argument was essentially this: It is very difficult to tell you, Supreme Court, what is too long. We are not prepared to tell you that ninety-five years is too long. But we think you should make a structural gambit instead. If you simply hold, as a matter of policy really, that Congress does not have the power to extend the term for works already written, then the problem solves itself. Then there will not be the enormous pressure from the Walt Disney companies of the world to do what is done, and Congress, without these pressures from existing copyright owners, will be able to do its job and function as an ideal legislature of Thomas Jefferson and come to a just result.⁶⁰

⁵⁷ See *Eldred*, 239 F.3d at 380.

⁵⁸ See Brief for the Petitioners at 48–49, *Eldred* (No. 01-618).

⁵⁹ See U.S. CONST. art. I, § 8, cl. 8.

⁶⁰ See Brief for the Petitioners at 11, *Eldred* (No. 01-618).

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It is a curious argument. It sounds like a political science professor's argument. It sounds like a Yale Law School argument. It does not sound like a legal argument.

I think that by the time Larry was up arguing the case, the whole enterprise had the smell of the lamp about it. It seemed like a clever idea that a bunch of very smart people had concocted and they had ridden this horse as far as it would go, and by the end of the day it just didn't really stand up to analysis.

The historical claims that were made were proven, I think, by the briefs, entirely false.⁶¹ The fact is that extending copyright term for existing works is not something that Michael Eisner cooked up. It is not something that paid shills for the movie industry concocted. The very first Congress did it in 1790,⁶² and it had been done in 1831,⁶³ in 1909,⁶⁴ and in the consolidated period of time from the 1960s to 1976 in which Congress decided essentially to extend copyright to life plus fifty.⁶⁵ So, with an unbroken history from 1790 forward, and with enormous reliance inferences, Justice Breyer pointed out, since 1976 there have been enormous numbers of people—creators, companies, creative companies, companies in the content businesses—who have relied on the extensions from 1976, bought and sold companies, bought and sold catalogues.⁶⁶

The arguments made in this case have equal application to what happened in 1976. If the 1998 law was struck down, so too would have to be the 1976 law, with staggering consequences that it is hard to imagine the Court contemplating.⁶⁷

⁶¹ See *id.* at 23–27; Brief for the Respondent at 11–18, *Eldred* (No. 01-618).

⁶² Act of May 31, 1790, 1 Stat. 124 (repealed 1802).

⁶³ Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436.

⁶⁴ Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

⁶⁵ Pub. L. No. 95-553, 90 Stat. 2541, 2572–76 (codified as amended at 17 U.S.C. §§ 301–304 (2000)).

⁶⁶ See Transcript of Oral Argument at 8, *Eldred* (No. 01-618).

⁶⁷ See Brief of Amici Curiae Association of American Publishers et al. at 25–31, *Eldred* (No. 01-618) (“Petitioners’ theory would unsettle, for tens of thousands of copyright owners, rights established by the 1976 Act and the extensions leading up to it. Countless transactions would risk being undone, and countless investment-backed expectations denied.”), <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/opp-amici/aap.pdf>.

Lessig answered that sometimes when future consequences look really bleak, you play a little with retroactivity and just have a constructive decision going on.⁶⁸ Nobody on the Court, I thought, seemed persuaded by that. A few of the people on the Court really made mock of it, pointing out that in the First Amendment area, for example, the Court had never either been presented with, much less adopted, any kind of argument like that, and it would be antithetical to most of the Court's First Amendment jurisprudence.⁶⁹

I think, as I say, the question really is not whether the law is a good idea or not. I am not sure I would have voted for the law. But I do think that we have a legislature. There is good reason for Congress to be making these decisions. It can consider widely all sorts of considerations.

One of the considerations it had in mind, and which I think it is plain the European Community had in mind too, is that, although it seems like a long time, from the point of view of the functional purpose of copyright, which is to enable authors, creators, men and women, to care for their spouses and children, the whole next generation, the amount of time involved is now really equivalent to what it used to be.⁷⁰ That is, people are living longer. There was testimony—this is not just Michael Eisner going up on the Hill and testifying. Quincy Jones testified.⁷¹ There were comments about Saul Bellow and various other creators who had children very late in life, and copyright has for more than a hundred years, I think, aimed to take care of their children for the whole balance of their lives as part of the incentivizing mechanisms that we have.⁷²

So the notion that it was an aim of the people who brought this lawsuit to bring down the motion picture industry, I think that is worth really thinking about. There are motion pictures of great

⁶⁸ See Transcript of Oral Argument at 8, *Eldred* (No. 01-618).

⁶⁹ See *id.* at 13, 16–18.

⁷⁰ See S. REP. 104-315, at 10–11 (1996), available at <ftp://ftp.loc.gov/pub/thomas/cp104/sr315.txt>.

⁷¹ See *Hearings on S. 483*, *supra* note 18.

⁷² See S. REP. 104-315, at 10–11.

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power made all over the world. I happen to be a Satyajit Ray⁷³ aficionado. I watch his Indian movies a lot. He, like most filmmakers, needs money to make films and needs copyright protection in order to do it. The whole financing of motion pictures, whether they are meretricious movies by people who do one set of things, or wonderful art movies that others of us might prefer—but the whole enterprise is really based on foreseeable revenues that come from at its base copyright law.⁷⁴ The notion that a bunch of law school professors can blithely decide that this is a bad system, so let's tear this down is not, I think, an attractive picture and I do not think it is going to be successful.

PROFESSOR HANSEN: Thank you.

Wendy Seltzer went to Harvard College and Harvard Law School. She is a Fellow with the Berkman Center for Internet & Society at Harvard Law School, a research center devoted to the active study of law in cyberspace, where she leads the Openlaw project's public discussion of *Eldred* and has assisted with the case since its inception. She practiced litigation in intellectual property law as an associate with Kramer Levin Naftalis & Frankel LLP, and she teaches Internet Law as an Adjunct Professor at St. John's University School of Law.

Wendy.

MS. SELTZER: I have been working on this case since its beginnings, leading the Berkman Center's Openlaw forum for public discussion of the case.⁷⁵ The time that its importance really came home to me was going down to Washington on the morning of October 9, 2002 and seeing a crowd lined up around the block outside the Supreme Court, many of whom had arrived there the night before, in order to hear a copyright case.⁷⁶ These were members of the public lining up to hear lawyers arguing about copyright, in challenge to enact the Sonny Bono Copyright Term

⁷³ Satyajit Ray is an Indian filmmaker. See <http://www.satyajitray.org> (last visited Apr. 6, 2003).

⁷⁴ See Brief of Amici Curiae Association of American Publishers et al. at 25, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618).

⁷⁵ See <http://eldred.openlaw.org>.

⁷⁶ See Linda Greenhouse, *Justices Hear Arguments in Challenge to Copyrights*, N.Y. TIMES, Oct. 9, 2002, at C1.

Extension Act, that had passed on a voice vote and unanimous consent in the Congress, without a single vote of opposition.

So what I see as an immediate ramification of the *Eldred* case is that that will not happen again. Now we have a public watching what is happening in the copyright arena, the public concerned about the expansion of copyright and the trend toward copyright as property and as control, and a public that will be fighting these battles beyond *Eldred*. Because *Eldred* is not just a fight about twenty years of copyright or about reclaiming Mickey Mouse for the public domain, but a fight to restore balance to the copyright law—the balance that the Constitution prescribes.

The Copyright Clause tells us that Congress has 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.”⁷⁷ So to promote progress, the publication and dissemination of new works, Congress can grant limited monopolies in those works, and the clause is both the grant and the limitation on that congressional power.⁷⁸ And the First Amendment constrains the exercise of congressional power because, after all, copyright is a restriction on speech.⁷⁹

The petitioners in *Eldred* argued that Congress has forgotten that balance, that Congress has abandoned the public side to the copyright grant by continually reaching into the past and extending the terms of copyrights long after they have promoted whatever creation they were going to promote—at the time the work was created. By reaching in and continually lengthening those terms, Congress is taking from the public an interest that the public rightfully expected to get. The public rightfully expected to gain free access to those works, to use them in new and creative and innovative ways from the public domain.⁸⁰

⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

⁷⁸ See *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

⁷⁹ See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10(A), at 1-66.57 (2002) (“Congress is granted authority to legislate in a given field, it does not follow that such a grant immunizes Congress from the limitations of the Bill of Rights, including the First Amendment.”).

⁸⁰ See Brief for the Petitioners at 9–11, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618).

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Eric Eldred, the lead plaintiff, publishes public domain works with annotations and links to their historical context on his website, making them available to people who might not have had access to the works or their context.⁸¹ Other plaintiffs and amici restored old films that would otherwise have disintegrated denied to the public; still others reprinted out-of-print music and books and compilations of historical material.⁸² All of these groups, waiting, preparing to use works when they entered the public domain, instead had them snatched away for another twenty years because corporations such as Disney had the stronger lobbyists in Congress and wanted that extra revenue from exploiting Mickey Mouse and similar properties.⁸³

The argument about international harmonization proves too much, because there are plenty of places where the CTEA created more dissonance than harmony with Europe and other regions of the world.⁸⁴ As a sovereign nation we are accustomed to promoting different goals through our unique copyright policy.

Instead, what we are really looking at is Congresswoman Mary Bono's statement, "Actually Sonny wanted copyright to last forever. I am informed by staff that such a change would violate the Constitution. . . . [T]here is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next congress."⁸⁵ Or, as Peter Jaszi testified, Congress gave Sonny the next-best thing, "a perpetual copyright on the installment plan."⁸⁶

The original Copyright Act was far more limited in scope than what we have now. It granted fourteen-year monopolies on the

⁸¹ See <http://www.eldritchpress.org> (last visited Mar. 10, 2003).

⁸² See Brief of Amici Curiae the Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation at 3–5, *Eldred* (No. 01-618), <http://eol.law.harvard.edu/openlaw/eldredvashcroft/supt/amici/internet-archive.html>.

⁸³ See HEINS, *supra* note 41, at 8–9.

⁸⁴ See Dennis S. Karjala, *Harmonization Chart Between U.S. and E.U. After Adoption of the Sonny Bono Copyright Term Extension Act* (May 15 2002), <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/HarmonizationChartDS.html>.

⁸⁵ 144 CONG. REC. H9951 (daily ed. Oct. 7, 1998) (statement of Rep. Bono).

⁸⁶ *Hearings on S. 483*, *supra* note 18 (testimony of Professor Peter Jaszi, American University Law School).

right to publish, republish and vend books, charts, and maps.⁸⁷ Now, 200 years later, copyright grants the author of any work—literary, musical, dramatic, visual, sound recordings—exclusive rights of reproduction, distribution, preparation of derivative works, public performance and displays, even digital transmissions of sound recordings, and all of this lasts for life of the author plus seventy years (or ninety-five years for works for hire), a far cry from the original fourteen-year monopoly that the original framers saw implemented.⁸⁸

But copyright is not meant to be absolute. While it is limited in other ways than by term—limited by fair use, by idea-expression distinctions, and by the first-sale doctrine—those do not go all the way.⁸⁹ They do not give us the freedom we need to make the widest range of other creative uses of works. The reason those limits are enough to satisfy the First Amendment is, in part, because after a limited time, the copyright expires and the work enters the public domain. Because after its copyright term ends, the work is freely available to be built upon in variations on a theme, to be put into derivative forms or annotated editions; to be made a part of common culture, and celebrated and criticized in that culture.⁹⁰

Instead, the extensions that Congress has continually enacted eleven times in the last forty years,⁹¹ reaching in and drawing out the copyright term yet further, have denied us that essential limit

⁸⁷ Act of May 31, 1790, ch. 15, §1, 1 Stat. 124 (repealed 1802).

⁸⁸ See *id.*; HEINS, *supra* note 41, at 3–5 (discussing the purposes behind copyright law, its extensions, and resulting problems).

⁸⁹ See 17 U.S.C. §§ 107, 109(a) (2000); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

⁹⁰ See generally Brief of Amici Curiae Free Software Foundation at 5, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618) (“In the sphere of copyright, the limited time requirement protects the public domain, by providing for its constant enrichment.”).

⁹¹ See Pub. L. No. 105-298, 112 Stat. 2827 (1998); Pub. L. No. 94-553 § 304, 90 Stat. 2572 (1976); Pub. L. No. 93-573 tit. I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566 § 1, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).

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on copyright that lets it serve its purpose of enriching the public for whose benefit it has served as an incentive to create in the first place.

Art and literature are not created in vacuums. Musicians from classical composers through folk, jazz, and rap have built upon the themes developed by their predecessors; because artists draw upon the work that comes before them; because literature reuses plots and characters—Disney himself took Snow White and Cinderella, and his company has taken Victor Hugo and the Little Mermaid, and made his own creations from them, yet it now wants to stop us from doing the same thing to Disney works.⁹²

So the *Eldred* case is an important case for all of the works and characters that it will restore to the public; for the chance that it will give us to use not just those famous works like the Mickey Mouse, but the tens of thousands of other works that are lying fallow because no copyright owner has seen fit to exploit them. The technology gives all of the public a chance to read, see and hear those works and to make new creations from them.⁹³

But even more, the *Eldred* case is important because it has helped to catalyze a movement, a movement that builds upon work that Eben has done with the Free Software Foundation,⁹⁴ and builds on the ideas of James Boyle and environmentalism for the

⁹² See SNOW WHITE AND THE SEVEN DWARFS (Disney 1938) (adapted from the fairy tale); CINDERELLA (Disney 1950); THE HUNCHBACK OF NOTRE DAME (Disney 1996) (adapted from VICTOR HUGO, THE HUNCHBACK OF NOTRE DAME (1831)); THE LITTLE MERMAID (Disney 1992) (adapted from Hans Christian Andersen, *The Little Mermaid* (1836), in THE COMPLETE HANS CHRISTIAN ANDERSEN FAIRY TALES (Lily Owens ed. 1981)).

⁹³ See Brief for the Petitioners at 5, *Eldred* (No. 01-618) (“By using the technology of the Internet, [Eldred] is able to build texts that are available freely around the world. By integrating search technologies and links, his texts enable students and scholars to study these works in ways that would be impossible with printed books.”).

⁹⁴ See Free Software Movement, *About Free Software*, Philosophy of the GNU Project, at <http://www.fsf.org/philosophy/philosophy.html#TOCAboutFreeSoftware> (last visited Apr. 6, 2003) (“Free Software is a matter of freedom: people should be free to use software in all the ways that are socially useful. Software differs from material objects—such as chairs, sandwiches, and gasoline—in that it can be copied and changed much more easily. These possibilities make software as useful as it is; we believe software users should be able to make use of them.”).

Net.⁹⁵ It is a movement to recognize once again the importance of the free flow of information against this propertization and privatization of cultural expression. It has built a movement that camped out on the Supreme Court steps on the principle that so-called intellectual property should not limit free discussion.⁹⁶

PROFESSOR HANSEN: Thank you, Wendy. Our final speaker is David Carson. David obtained a Bachelor of Arts degree and then a Master of Arts degree from Stanford. He then went to Harvard Law School. David first practiced with the Beverly Hills entertainment law firm of Cooper Epstein & Hurewitz. He moved to New York and to Schwab Goldberg Price & Dannay, a very well-known, outstanding copyright firm, where he was a partner.

From there he moved to become the General Counsel of the U.S. Copyright Office. The General Counsel is the principal legal officer with responsibility for the Office's regulatory activities, litigation, administration of the copyright law, and providing liaison on legal matters between the Office and Congress, Department of Justice, and other agencies of government. While in practice, he wrote briefs and argued many cases in the copyright area.

Let us see what his position is. David?

MR. CARSON: One of my purposes today is not to tell you what my position is, but we will see if I can manage that.

I should start with a couple of disclaimers. I am not here to speak on behalf of the United States Government. Certainly, while this case is pending in the Supreme Court, there is only one person who is authorized to speak on behalf of the United States Government, the Solicitor General. He did so eloquently a month ago, and I cannot add anything to that, and if I tried, I would get in trouble with the Solicitor General's Office.

⁹⁵ See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997).

⁹⁶ See, e.g., Brief for the Petitioners at 41, *Eldred* (No. 01-618) ("By retroactively extending copyright terms, Congress is directly re-allocating the right to speak. It is choosing favored speakers . . . and disfavoring other speakers who would, but for this regulation, be permitted to develop derivative works, or perform free of the restrictions of copyright.").

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I am not here to speak in defense of the Sonny Bono Copyright Term Extension Act. Actually, I am disappointed; I thought Chuck was going to do that, so I thought he would take some pressure off me. But maybe no one here wants to defend it. I certainly never have, and I doubt that I ever will.

But I have no problem at all defending the constitutionality of the Sonny Bono Copyright Term Extension Act. And if you accept for a moment the policy propositions urged by the people on my left and my right, to say the least, I think reasonable minds can differ on those policy propositions.

If you take seriously the arguments made in the briefs as to why copyright term extension was a horrible idea, at the end of the day my response is that as a matter of constitutional law, Congress has the power to get it wrong. So if Congress got it wrong, so be it. There is nothing in the Copyright Clause and there is nothing in the First Amendment that tells Congress it cannot get it wrong.⁹⁷ And basically, I think most of the arguments—and certainly the best arguments, I have seen—are policy arguments, not constitutional arguments.⁹⁸

I would commend to you a couple of articles that I reread on the way up here by a couple of distinguished members of the New York legal academic scene.

One was by Jane Ginsburg at a symposium at Cardozo about two years ago.⁹⁹ I don't mean to slight the other participants—Bill Patry, Wendy Gordon, and Arthur Miller—all of whom had very insightful comments, but Professor Ginsburg's really struck a chord with me. What she said essentially was that copyright term extension was a lousy idea but that it was not unconstitutional. Congress had the power to do that.¹⁰⁰

The other thing she said—and I am putting this in my own words now, certainly not her words, and it is something that

⁹⁷ See U.S. CONST. art. I, § 8, cl. 8; U.S. CONST. amend. I.

⁹⁸ See Brief for the Petitioners at 5, *Eldred* (No. 01-618).

⁹⁹ Jane C. Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 *CARDOZO ARTS & ENT. L.J.* 651, 695–704 (2000).

¹⁰⁰ See *id.* at 697–704 (discussing policy concerns about the CTEA but also discussing why it could survive constitutional scrutiny).

concerns me greatly—is that she thought copyright term extension was probably a mistake.¹⁰¹ Why was it a mistake? Well, look to my left and look to my right and you will see why it was a mistake.

What the Copyright Term Extension Act turned into was, in my words, a poster child for everything that is wrong with copyright law. It became basically a banner behind which opponents of copyright law could rally. And it certainly has been very effective in doing that. I think that were it not for copyright term extension—something that is simple for people to understand and people to take a position on—the folks who are opposing all sorts of legislation and just in general have qualms about the level of copyright protection we find in our society today—and I think that describes the people to my left [Professor Eben Moglen] and my right [Wendy Seltzer], but not my far left [Charles Sims]—those people would have a much harder time getting any traction. So the Sonny Bono Copyright Term Extension Act in many respects was a gift to them.

I am not sure in the long run whether it is going to make any difference. I wouldn't expect it to make a difference in the Court, but we will see. I am not going to offer any predictions there. I predicted a year ago that there was not a chance that the Court would take the case because there were no serious constitutional issues. I have retired from the business of predicting what the Court is going to do.

Observe, however, that two years ago, the Court granted certiorari in *New York Times Co. v. Tasini*, and yet we had, I think, a 7-2 vote to affirm.¹⁰² So the fact that the Court takes a case does not necessarily mean the Court is ready to reverse. Our most recent experience with a copyright case gives those folks who would like to see the Court affirm some reason to hope.

Anyway, I would commend to you Jane Ginsburg's remarks, which you can find in the *Cardozo Arts & Entertainment Law Review*.¹⁰³

¹⁰¹ See *id.* at 698–701.

¹⁰² See *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

¹⁰³ See Ginsburg et al., *supra* note 99.

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Another piece that I would commend to you is something that was published in FindLaw on October 24, 2002 by Professor Marci Hamilton of Cardozo.¹⁰⁴ Her arguments were in some respects the same as Professor Ginsburg's, that copyright term extension is bad policy—that's her first heading—but she just doesn't see the constitutional argument, and in many respects says the same kinds of things I think we heard Chuck say already.¹⁰⁵

She did make one observation that had not occurred to me yet, and I cannot say it is the be-all and end-all or that it really resolves the issue for me, but it was one that, as I said, had not occurred to me yet and one that I think is worth thinking about. If there is one thing that is probably the primary item on the U.S. Government's agenda with respect to international copyright, and it is one thing that most people I think can understand, it is our efforts to stamp out piracy worldwide¹⁰⁶—and piracy not necessarily, and not even primarily at this point, on the Internet, although that is becoming a very large part of the problem¹⁰⁷—but piracy just in terms of physical media. You go to certain parts of the world and you cannot find a legitimate DVD or CD of music or of a motion picture because the pirated stuff has just flooded the market, and it is so cheap and the quality is good enough that the legitimate copyright owners simply cannot make a go of it.¹⁰⁸

Well, one thing that Professor Hamilton points out is that as a consequence of a reversal of the D.C. Circuit's decision in the

¹⁰⁴ Marci Hamilton, *Mickey Mouse Versus Wired Magazine: The Supreme Court Considers Whether a Law Extending the Copyright Term Is Constitutional*, FindLaw's Writ: Legal Commentary, at <http://writ.findlaw.com/hamilton/20021024.html> (Oct. 24, 2002).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* (arguing that interference with the CTEA's policy of copyright harmonization would allow many works still copyrighted in Europe to enter the public domain in the United States—"a recipe for piracy, and resulting international tension").

¹⁰⁷ See Michael J. Muerer, *Focus on Cyberlaw, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 881 (1997) ("It is easy to see that the Internet raises the threat of piracy. . .").

¹⁰⁸ See Christian John Pantages, Comment, *Avast Ye, Hollywood! Digital Motion Piracy Comes of Age*, 15 TRANSNAT'L L. 155, 178 (2002) ("Even for a powerful organization like the [Motion Picture Association of America], enforcing the intellectual property rights of its members outside the United States is difficult or nearly impossible."); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1 (1998).

Eldred case would be that our copyright term here would revert to a shorter term than the term in Europe.¹⁰⁹ “So what?” you might say.

Well, one response to that is we may find ourselves becoming a piracy haven, at least *vis-à-vis* Europe, which is the most important market for the United States and with whom we generally try to have good relations.¹¹⁰ The notion behind that is that European works are protected in their own territory for life plus seventy.¹¹¹

And by the way, just as a footnote, an aside, I think Professor Moglen has his history wrong. The European Union Directive on Copyright Term Extension was issued in 1993.¹¹² It did not come out of the blue. It was in the making for quite some time.¹¹³

I think you can accept Professor Moglen’s characterization of the motives of the people in the private sector who asked Congress to enact the Copyright Term Extension Act. I do not think there is anything unusual about private parties who have an economic interest in legislation pushing for that legislation. But I do not think it is fair to say that the rationale that Congress adopted, or the rationale that was urged to Congress in adopting this, was simply to help Michael Eisner. The rationale was, and the motivating force, and I suppose from Professor Moglen’s point of view perhaps, the excuse for enacting the law, was that Europe had in fact gone to life plus seventy and this was the trend. This was the direction in which things were going. We were going to get there sooner or later and because we are a leader in trying to have modern and appropriate levels of intellectual property protection worldwide, we should get on that train as well.¹¹⁴

Let me return to the point that Professor Hamilton was making. If suddenly, and particularly with the Internet, all of these works

¹⁰⁹ See Hamilton, *supra* note 104.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Directive 93/98, *supra* note 5.

¹¹³ Tim Dabin, *EC Must Unify Copyright Laws*, BILLBOARD, October 16, 1993, at 8 (The “European Commission has been masticating the directive that would produce [copyright harmonization] for years now.”).

¹¹⁴ Brief for the Respondent at 25–26, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618).

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that are still under copyright in Europe are suddenly freely available in the United States and freely available from websites in the United States, we are going to have problems with our friends in Europe.¹¹⁵

Now, is that a reason to extend copyright, in and of itself? I would not pretend that it is. But it was an original thought that I think was one that would certainly give those folks in the United States responsible for our international copyright relations some pause.

I meant to bring a letter that the Register of Copyrights received earlier this year, and I discovered I forgot to slip it in to my briefcase, but I called and had someone dictate it to me.

I should note that the Copyright Office in 1995, before my time, at the time that this legislation was first pending, did come out in favor of term extension, and the Register of Copyrights gave some very lengthy testimony in which, I think it is fair to say, she ultimately said as a matter of policy it is a close call, but on balance we think it makes sense.¹¹⁶

This year she got a letter. I will read it to you:

Dear Ms. Peters: I have been spending a great deal of time reviewing testimony on the Sonny Bono Copyright Term Extension Act, for obvious reasons. I was struck in reading your testimony by how extraordinarily balanced and conscientious you were, to emphasize the costs of term extension while also adding your views about the benefits. This was more than completeness. It reflected an integrity that was too rare in contexts like that. Thank you.

¹¹⁵ See Hamilton, *supra* note 104 (“Striking down a law that strikes an international balance is not something any court could or should feel very comfortable doing, especially on the slender reed of the argument that ‘70 plus life’ is, in effect, no longer ‘limited.’”).

¹¹⁶ *Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 1–22 (1995) [hereinafter *Hearings on H.R. 989*] (testimony of Marybeth Peters, Register of Copyright and Associate Librarian for Copyrights Services).

With warm regards,

Lawrence Lessig¹¹⁷

We should not pretend that copyright term extension was without costs. Of course it was, and we have heard people tell us what those costs were.¹¹⁸ On balance, Congress made the policy judgment, which I think Congress had absolute power to do, that term extension was appropriate. It was within Congress's power to do that. And while I am not going to predict what the Court will do, I guess I am not terribly worried.

A final word: Professor Moglen said this is not a very important case. I think the answer is that it depends. If the Court affirms, then I would agree, I think this is not a very important case; it is just one of those little historical footnotes. If the Court reverses—and, of course, it depends on the ways in which the Court reverses—then this is an incredibly important case, because to do that, I think, the Court is going to have to challenge the conceptions we have had about copyright—and that will not come as a great shock or disappointment to some of the people sitting up there—conceptions we have had for a couple of centuries.

It is hard for me to imagine how the Court can reverse without seriously tying Congress's hands in the future to amend copyright law—and not just with respect to term, but with respect to all sorts of other things, such as scope of copyright—in ways that I think many of us would live to regret if that is the way it turns out.

Thank you.

¹¹⁷ Letter from Lawrence Lessig, Professor of Law, Stanford School of Law, to Marybeth Peters, Registrar of Copyrights, U.S. Copyright Office (Mar. 19, 2002) (on file with David O. Carson).

¹¹⁸ *Id.* at 64–65.

There are some costs to term extension, however, and they must be weighed against the benefits. While it does appear likely that as a result of term extension, some items may become more expensive, the impact on individual consumers should be minimal. . . . When it comes to choosing whether to protect authors or slightly decrease costs associated with making materials available, the balance should be in favor of authors.

Id.

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PROFESSOR HANSEN: First, let me just say everyone at this table seems to think that Sonny Bono, one of my heroes, and his act—

PROFESSOR MOGLEN: He was a very nice man.

PROFESSOR HANSEN: I do not know. He could have been a jerk. But I certainly — you know, I am not saying—

MR. SIMS: Do not speak ill of the dead.

PROFESSOR HANSEN: The point seems to be that most, if not all, of the speakers think that a twenty year extension is bad law and bad policy. Implicit, in this is an acceptance of the public domain as an unqualified good. Moreover, some seem to think that those who want protection are bad or even evil and should die by hitting a tree. Some critics of copyright are really talking about the capitalist system.

But back to the attack upon copyright. It is not an evil monopoly. It is not even a monopoly. Copyright protection does not give the power to control prices or exclude competitors. Copyright is just a bundle of rights with regard to some intangible res or thing. In this sense it is no different from forms of tangible property. A copyright is ownership and ownership is not the same as a monopoly. It is important to keep in mind that copyright protection only prevents copying. A third party can completely independently create the exact same work.¹¹⁹

Now, they used to say, “Those who can do, do, and those who cannot do teach.” Well, those who can create, create, and those who can’t, do the public domain. It is somewhat sad that reproducing works that are out of copyright is somehow viewed as equally or even more meritorious than creating those works in the first place.

¹¹⁹ See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 n.16 (2d Cir. 1951). Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another. If it could be shown that two precisely similar works were in fact produced wholly independently of one another, the author of the work that was published first would have no right to restrain the publication by the other author of that author’s independent and original work.
Id. (quoting W. COPINGER, *THE LAW OF COPYRIGHT* 2 (7th ed. 1936)).

In fact, getting twenty years more copyright protection for works will have little effect. For most works that old, no one will want to use them. For those works that will be used, probably no one will be around to care about the copyright and for those who are around and care, most will be happy to give a royalty-free licenses. And if someone wants to be paid, fine—pass on the costs to the consumer.

And how many people who be using these very old works on the Web or elsewhere will care about licenses and clearing rights? I mean, most of the stuff you get on these websites treat all works, current and old, as if they are in the public.

MR. CARSON: Is there a moderator in the room?

PROFESSOR HANSEN: No. We have a bunch of people saying this extension is horrible, just horrible. Twenty more years of deprivation. Like Chicken Little, they think the sky is falling but it is not. In fact, the Act will lead to increased revenue from Europe to United States which means more jobs and more tax, revenue. Many more people will be benefited indirectly from the increased revenue than will be deprived of access to works by the twenty year extension. Moreover, the some of the increased revenue may lead to the funding of new creative projects.

Some say this is all about Steamboat Willie? Do you think anyone in the public cares about Steamboat Willie? He does look like the Mickey we know and love today and he is not alike in character. But Steamboat Willie is not Mickey Mouse and his going into the public domain would not have threatened the commercial viability of the Mickey Mouse character of today.

So what are the effects when a work goes into the public domain? Are they all good? Let's say a play goes into the public domain. A producer puts it on. Is the ticket cheaper? All the public domain accomplishes is that the producer is able to put on the play without obtaining a license or paying the creator.¹²⁰ Is

¹²⁰ See *Hearings on S. 483*, *supra* note 18, at 15–16 (1995). Irwin Karp states, “[T]he advantage of the ‘public domain’ as a device for making works more available to the public is highly overrated; especially if availability is equated to ‘low cost’ to the public.” Jack Valenti states that public domain works do not circulate more widely or cheaply under actual marketplace conditions. *Id.* at 41–42.

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that good? It might mean that producer will be drawn to revivals of works in the public domain rather than take risks with new works. Do we want a lot of works that were created 100 years ago repackaged and performed or distributed, or do we want that money and energy going into new works and to new creators?

We are told that the public domain is great for consumers. As we have just seen, if they want new works it is not. And if they want old works they will not pay less for them even if they are in the public domain.¹²¹ In short, I am just saying there is something to be said for protection and there are downsides to the public domain.

You are going to have your chance to comment. But just before we forget the thought, let's have some predictions on what the Supreme Court will do. It will be interesting to see later on whether our predictions are right.

Chuck, do you have a prediction?

MR. SIMS: Oh, yes. I think the D.C. Circuit's decision will be affirmed 8-1.

PROFESSOR HANSEN: Stevens is the dissent?

MR. SIMS: I actually think it will be Breyer.

PROFESSOR HANSEN: Okay.

PROFESSOR MOGLEN: The majority opinion is by John Paul Stevens for five or six. The primary dissent is written by Justice Ginsberg and is joined by the Chief Justice, Justice Thomas, and possibly Justice Kennedy. The rest of the votes are ours.

PROFESSOR HANSEN: I didn't hear all of that.

¹²¹ See generally *Hearings on H.R. 989, supra* note 116, at 238–39 (statement of Quincy Jones) (“The alternative to copyright protection is, of course, that works will fall into the public domain. While the term ‘public domain’ implies that the ultimate public, the consumer, will have free and easy access to creative works, this is really not the case. The price of a quality compact disc recording of Beethoven is no less expensive than the price of a Pearl Jam CD. The record company that manufactures the CD does not have to pay royalties to the Beethoven estate and these cost savings are not passed on to the consumer.”).

PROFESSOR MOGLEN: I said the majority opinion is written by John Paul Stevens.

PROFESSOR HANSEN: I heard that.

PROFESSOR MOGLEN: The primary dissent is written by Justice Ginsberg. She is joined by the Chief Justice, who assigned it to her, Justice Thomas, and possibly Justice Kennedy. The rest are ours.

PROFESSOR HANSEN: Okay. Do you have doubts about anything, Eben?

PROFESSOR MOGLEN: Many things, one is which if you have ever been in any contact with the Internet.

PROFESSOR HANSEN: You mean your thought is I haven't yet been infected?

PROFESSOR MOGLEN: My thought is you haven't even been impinged upon.

PROFESSOR HANSEN: I haven't even been what?

PROFESSOR MOGLEN: Noticed. Since I don't quite comprehend why it is that you think that people pay for public domain literature, which they do not.

MR. SIMS: Of course they do. I mean, in any bookstore—

PROFESSOR MOGLEN: They do if they buy their books in bookstores. But since public domain literature has zero marginal cost, they do not have to pay for it at all if they do not want to. They voluntarily pay publishers for the convenience of emitting public literature conveniently-sized and bound paper, which is also what they will do in order to get such Satyajit Ray movies that they love or Mick Jagger music that they want.

We are not talking about whether works will get created. We are talking about whether exclusion from those works will be decreed for those who cannot pay. The real subject of the conversation is not wheat. The real subject of the conversation is something that everybody can get for nothing if anybody has it and, therefore, whether it is fair to exclude people.

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PROFESSOR HANSEN: Is this the majority or the dissent, Eben? Which opinion is this? All I asked you for was the vote. You can come back and give your—

PROFESSOR MOGLEN: I gave you the vote. You asked me further questions, and then you asked me whether I—

PROFESSOR HANSEN: All right. Then it goes on to David. Pass the baton, all right.

MR. CARSON: I am going to drop the baton. I don't think I can make any predictions.

PROFESSOR HANSEN: Okay.

Wendy, do you have a vote?

MS. SELTZER: Well, I don't have the details worked out the way Eben has. I would say *Eldred* by six or seven.

PROFESSOR HANSEN: Well, I don't like to go out on a limb, but I think definitely Eldred is going to lose. I think Stevens will be in dissent. I think Breyer might be in dissent. I have trouble seeing any of the others clearly in dissent. I think clearly in the majority are the hard core of O'Connor, Ginsberg, and Souter. And I think you probably have the Chief Justice in there. You are probably also going to have Scalia—or maybe not Scalia, but you will have Thomas.

So I have real trouble seeing any clear dissenters, other than Stevens. Justice Stevens, as I see it, is a 1950s antitrust lawyer, and as William Wordsworth said, the child is father of the man.¹²² Translated to lawyers means: how you grew up professionally and what influenced your views at an early stage—and I'm really concerned about how you grew up, Eben—affect you and your views throughout your legal or judicial career. Stevens in practice was imbued with the 1950s antitrust view of intellectual property, and he has been consistent ever since, voting against the intellectual property owner in almost every case.¹²³

¹²² See William Wordsworth, *My Heart Leaps Up* (1802), available at <http://www.bartleby.com/145/ww194.html>.

¹²³ See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In this case, Justice Stevens delivered the 5-4 majority opinion that the sale of videotape

Breyer, of course, had his piece, *The Uneasy Case for Copyright*,¹²⁴ but other than that, I have trouble finding other justices in dissent. But time will tell, and I absolutely agree it is difficult to predict.

Now we will go through one more time for people's rebuttals, comments, or whatever.

Eben, why don't you continue with yours?

PROFESSOR MOGLEN: No, I pass.

PROFESSOR HANSEN: Are you in a snit now, Eben, or what?

PROFESSOR MOGLEN: Certainly not.

PROFESSOR HANSEN: Okay, good.

Wendy, why don't you?

MS. SELTZER: Well, I was anxious to jump in on the value of revivals of works in the public domain. I think plays are the perfect example of where we see a wider range of performances once a work has come out of the exclusive control of its copyright holder. Suddenly, we can see *Porgy and Bess* with a cast re-imagined, not only the all-black cast that the Gershwin estate mandates;¹²⁵ we can see women in *Waiting for Godot*. We can see characters in different contexts and critical studies with interpretations that might not have the approval of the author or his estate.¹²⁶ So its not only a matter of how much the performance costs—if we're paying the actors as much, great for the actors—we

recovered to the general public does not constitute contributory infringement of copyrights. *Id.* at 428–56.

¹²⁴ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹²⁵ Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at B7 (“Marc G. Gershwin, a nephew of George and Ira Gershwin and a co-trustee of the Gershwin Family Trust, said: ‘ . . . [W]e’ve always licensed “Porgy and Bess” for stage performance only with a black cast and chorus. That could be debased. Or someone could turn “Porgy and Bess” into rap music.’”).

¹²⁶ See, e.g., *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (allowing publication and distribution of ALICE RANDALL, *THE WIND DONE GONE: A NOVEL* (2001), a parody of MARGARET MITCHELL, *GONE WITH THE WIND* (Scribner 1996) (1936)).

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are getting a very different experience once the work has emerged from copyright's control.

Returning to the point about trade balance, literary works are not wheat. When we have art and literature that can be given to everyone and not diminish in their value, our goal should be to get those out to as many people as possible and not to create an artificial scarcity so that a few can make money off them.¹²⁷ We should be celebrating the chance that technology gives us to disseminate these intellectual products more widely.

PROFESSOR HANSEN: David, do you have anything to say?

MR. CARSON: Well, there were a few comments I heard that I guess I would like to respond to.

First of all, it does not shock copyright lawyers that there is a First Amendment at all. I think Chuck is a pretty good example of the marriage of copyright and the First Amendment. I have done my share of First Amendment work, and many, many copyright lawyers I know have. That should not be surprising, because a good deal of First Amendment work is done by lawyers representing the media. Media does happen to own copyrights. There is nothing inconsistent between the notion of copyright and the First Amendment.¹²⁸ In fact, it is a pretty nice marriage that works pretty well.

I would argue, and I am certainly not the first—certainly the court in the District of Columbia Circuit agreed—that copyright is an engine of First Amendment expression and that the doctrines within copyright, such as fair use,¹²⁹ such as the idea/expression dichotomy,¹³⁰ such as the merger doctrine,¹³¹ very, very easily

¹²⁷ See generally LESSIG, *supra* note 40 (arguing that the increased power wielded over the Internet by large corporate interests threatens to close off important avenues of thought and free expression).

¹²⁸ See generally Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571 (1987) (discussing how courts and legislatures have attempted to reconcile the tensions between the Copyright Clause and the First Amendment).

¹²⁹ See 17 U.S.C. § 107 (2000); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 669 (1994).

¹³⁰ See 17 U.S.C. § 102(b).

¹³¹ See *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 36 (1st Cir. 2001) (explaining that the merger doctrine applies when “[t]here is essentially only one way to

accommodate all the First Amendment interests that are necessary to accommodate.

We heard *Steamboat Willie* mentioned a couple of times. We have heard about how Walt Disney just raided the public domain and then created his own copyrighted works out of it. Okay, fair point. I don't know whether this is true, but I have been told that *Steamboat Willie* was in fact a parody of Buster Keaton's motion picture *Steamboat Bill*.¹³² I do not know whether that is true, but that is what I am told. Certainly at the time *Steamboat Willie* was made, *Steamboat Bill* was protected by copyright. I am not aware of any reports of Buster Keaton, or whatever studio produced *Steamboat Bill*, filing suit against Walt Disney for copyright infringement. Why? Probably because of the fair use doctrine, which very comfortably accommodates parodies.¹³³ Look at the *Wind Done Gone* case, if you have any doubts about that.¹³⁴

So the notion that there is this opposition between copyright and the First Amendment is just fundamentally false. I think many of us who practice copyright law would find some other job if we were persuaded that copyright was somehow inconsistent with the First Amendment.

Wendy mentioned something that appears throughout the briefs, and has appeared throughout the briefs in this case since it was filed in the district court—she should know better and Larry Lessig should know better—this thing about Congress extending copyright term eleven times in forty years. It is a recurring theme, and it is there for a reason. It is there because the larger theme that they are trying to argue is that Congress cannot help itself; every time you look at it, it turns around and extends copyright term. This is—I think she quoted Peter Jaszi—“a perpetual copyright on the installment plan.”¹³⁵

express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression.”).

¹³² See Lawrence Lessig, Keynote Address at the Open Source Convention (Aug. 15, 2002), available at <http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html>.

¹³³ See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

¹³⁴ *Id.*

¹³⁵ *Hearings on S. 483*, *supra* note 18.

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There is so little truth to that that it is laughable, and it is demonstrably wrong. Of those eleven times in the last forty years, I think nine were interim extensions which were based upon Congress's recognition that it had already determined in the context of a very, very lengthy—years and years and years—process of omnibus revision of the copyright law to move from our two-term process, where we had two terms of twenty-eight years each, to the Berne standard of life plus fifty.¹³⁶ Once that decision was made, and prior to ironing out all the other wrinkles that had to be taken care of in order to enact an omnibus copyright revision, which finally came in 1976,¹³⁷ Congress decided, starting in 1961, that we were moving to life plus fifty and therefore preserved the copyrights of works about to fall into the public domain because it had already decided they were entitled to life plus fifty, and because it had already decided they were entitled to life plus fifty.”¹³⁸

So for several years, Congress had one- or two-year extensions.¹³⁹ To say that these are each an independent extension and an example of Congress's profligate extension of copyright term is just a lie. It is nothing short of a lie.

It was simply Congress's placeholder in order to memorialize something that had already been decided. Congress extended copyright in 1976, fair enough.¹⁴⁰ It extended it in 1998, fair enough.¹⁴¹

The notion that this is perpetual copyright on the installment plan again is demonstrably false. If it was an attempt to do that, at least, Congress failed miserably. Works passed into the public domain shortly after the 1976 Copyright Act went into effect, notwithstanding Congress's extension of copyright term, and they

¹³⁶ See Ginsburg, *supra* note 99 at 693.

¹³⁷ See Copyright Act of 1976, 17 U.S.C. §§ 101–914 (1976).

¹³⁸ See *id.* § 303.

¹³⁹ See Pub. L. No. 92-566 § 1, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).

¹⁴⁰ 17 U.S.C. §§ 101–914.

¹⁴¹ CTEA, Pub. L. No. 105-298 tit. 1, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C. (Supp. V 2000)).

continued to go into the public domain every year until the Sonny Bono Copyright Term Extension Act was enacted in 1998.¹⁴²

And yes (with one exception), works will not go into the public domain due to expiration of copyright term until that twenty-year period has occurred, and you can determine for yourself whether that is regrettable or not. But it is hardly perpetual copyright on the installment plan.

I, for one, would be shocked if Congress in our lifetimes ever extended copyright term again, and I see no evidence for anyone to believe that that is on anyone's agenda.

I will mention that, come January 1 of next year, a vast number of works will enter the public domain due to the expiration of copyright term.¹⁴³ Section 303 of the Copyright Act provides that any work created before 1978 that is unpublished, and which therefore on January 1, 1978, was converted from a perpetual common law copyright to a statutory copyright, to a statutory copyright will go into the public domain starting on January 1 of next year if the standard term of life plus seventy has already passed and if the work has not been published prior to the end of this year.¹⁴⁴ An uncountable number of works will pass into the public domain by virtue of that.

There was one provision, by the way, that in the original version of the Copyright Term Extension Act would have postponed that date for another ten years.¹⁴⁵ In part because of the Copyright Office, and in part because Congress, and in part because Congress just saw the justice of it, the decision was made not to do that and to keep this date as it is. So works will continue to go into the public domain.

I could say more, but I think I have probably taken up more than my allotted time for the moment.

¹⁴² *See id.*

¹⁴³ Press Release, U.S. Copyright Office, Certain Unpublished, Unregistered Works Enter Public Domain (Jan. 13, 2003), <http://www.copyright.gov/pr/pdomain.html>. Any work that was neither published nor registered for copyright as of Jan. 1, 1978, and whose author died before 1933 entered the public domain on Jan. 1, 2003, unless it was published on or before Dec. 31, 2002. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See* S. 483, 104th Cong. § 2(c)(1) (1995), S. REP. NO 104-315, at 3 (1995).

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PROFESSOR HANSEN: Okay.

Chuck?

MR. SIMS: Yes. I want to make some comments about some of the points David made, because they were really the points that I think are fundamental here too.

I am trained as a First Amendment lawyer. At the ACLU, actually while I was still there, the *Harper & Row* case about Gerald Ford came up.¹⁴⁶ There was a huge struggle within the ACLU at the time. I didn't know that I was going to be eventually getting some revenues from the motion picture studios or any other content providers. I was making an ACLU public interest salary. But there was a huge battle within the organization about which side of that case to be on or whether to do it at all.

Eventually, the organization did decide to support *The Nation's* fair use claim.

I happen to have felt at the time that the other argument was right, because I think the notion which Wendy kept repeating, that there is something fundamentally inconsistent between the First Amendment and copyright law, that the copyright law is somehow infringing First Amendment rights which we can only allow on sufferance for the exact moment in time at which we must, is fundamentally wrong.

She kept talking about—this is the phrase she used repeatedly—“propertization and privatization of ideas.” There is nothing about either the Copyright Term Extension Act or copyright law generally that does that.

It is true that for people who think that because it can be done it must be done, that there is something that feels binding about copyright law. The silliest amicus brief I have ever seen in my life actually was a brief filed by Charles Nesson, who I like quite a lot, but this is a brief that I think is indicative of the fundamental error on that side of the table.¹⁴⁷

¹⁴⁶ See *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539 (1985).

¹⁴⁷ Brief of Professor Charles R. Nesson as Amicus Curiae, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (No. 00-CV-277), <http://eon.law.harvard.edu/openlaw/DVD/filings/NY/0510-amicus.html>.

His brief was filed in the DVD case, which involved encryption of DVDs, was essentially as follows: I teach trial practice at Harvard Law School. In trial practice I find it really important to show my students the key courtroom movie scenes, the scenes from *Twelve Angry Men*,¹⁴⁸ Paul Newman's scenes from *The Verdict*,¹⁴⁹ other things like that. This law violates my First Amendment rights because I cannot burn these scenes and put them on a CD and conveniently show them.¹⁵⁰

Well, the ideas of Gershwin's works or of Virginia Woolf's works, which are now going to be under copyright for some more years, or Robert Frost's poetry—I am just looking down at a list of works covered by the Sonny Bono Act which we included as an appendix to our brief¹⁵¹—William Faulkner's novels, Hemingway's novels—those of you who think that somehow your First Amendment rights are being violated by the fact that those works are in copyright, or your interests and free expression are somehow hampered, I don't understand that argument.

Anybody can go buy Hemingway, anybody can go buy Faulkner. I do not think that the interest in having other people do Faulkner in black-face instead of white-face, or do "Porgy and Bess" with a South African white cast, or whatever it might be, makes any sense at all.

The arguments, the ideas, in all of these works can be written about, can be talked about, can be taught. But there is no meaningful infringement on freedom of speech or on any principle of freedom of speech that I understand by the existence of copyright or by its term.

If the fact that *To the Lighthouse* is under copyright today is not a violation of the First Amendment, I do not know why keeping it for another twenty years under copyright is.

¹⁴⁸ TWELVE ANGRY MEN (MGM 1957).

¹⁴⁹ THE VERDICT (20th Century Fox 1982).

¹⁵⁰ Brief of Professor Charles R. Nesson as Amicus Curiae, *Universal City Studios* (No. 00-CV-277).

¹⁵¹ See Brief of Amici Curiae Association of American Publishers et al. app. at 1ap-2ap, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618).

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I dare say that the argument that the motion picture studios made, which is that there will be more money invested in film preservation and dissemination of preserved films, more of that available, as a matter of economic theory, certainly as a matter of the framers' preconception, if we have exclusive rights than if we do not, makes a lot of sense to me.¹⁵² It is certainly the assumption that the framers had.¹⁵³

The other point I think I want to make is a point that both Eben and Wendy made that I also think is really fundamental here. There is always a reference in these discussions to the grab for control, the grab for control so that there will be a pay-for-use world. I guess that if you think that is what is going on, if you think that is what is underlying, the secret levers that are underlying these debates, have to do with Jack Valenti's or Michael Eisner's mania for more and more power, you will end up where they end up.

I suggest that there is another model that bears a lot more relationship to reality in thinking about this, which is that what is happening in Congress and in these debates does not reflect a grab for more power; it reflects the insecurity of those whose ability to extract the revenues that copyright law offers is more and more threatened and is leakier and leakier by the day.

And so what is from one point of view this mania for a pay-per-use world is from the other side, watching what has happened with Napster, the motion picture industry or the book industry worrying about being Napsterized, and efforts, whether technologically or through new kinds of legislation like the DMCA or maybe extension of term, to try to preserve a portion of the revenues that they were promised, that they counted on, and that are leaking away by teen-age hackers who because it can be done think that they have a right to do it.

PROFESSOR HANSEN: Okay. We are going to open it up now to questions.

¹⁵² See Brief for the Respondent at 34, *Eldred* (No. 01-618) ("Applying the CTEA's copyright term to subsisting copyrights also enhances the incentive for copyright holders 'to restore older works and further disseminate them to the public.'").

¹⁵³ See Brief for the Respondent at 31-32, *Eldred* (No. 01-618).

Let me just say one thing. I agree with Wendy that one advantage of works going into the public domain is you can then have different versions or derivative works that allow people with different views to make statements that may be impossible to make by simply creating a new work. The problem is that I do not think as a practical matter this happens very often. All right. Why don't we go out to questions from the audience. State your name and if you have an affiliation.

QUESTIONER: My name is Ting Kwok. I go to Law School here.

I just wanted, first, to disabuse the moderator's notion of saying that eliminating copyrights and putting them in the public domain would not lower the price of tickets because if the charge for the use of the copyright were a per-use charge, that would either shift up or down the marginal cost curve. If there are any economists around here, that would mean that the price would go down with a lower or no fee.

But there is something else. There is a benefit of being able to restrict use, in that if you were a consumer of this type of material, a scholarly consumer that needed to look at the footnotes and stuff like that, if the work itself was not something like Plato, which was very well-recognized—there would be only one version, so it would be much easier to look things up. That is a very minor benefit. But I am not saying that it is going to be either—it depends on who the consumer is as to whether or not I think it would be beneficial to have stronger or weaker copyright protection.

But my question is: Have you noticed the absence of *Schnapper* from the petitioner's brief, and whether or not you think that means that Lessig has just given up on an argument? If you look at the appeals court opinion, there seems to be a little bit of a hissy fit about whether or not *Schnapper* applies. Sentelle says one thing and Ginsburg says something else.¹⁵⁴ So if you could comment on *Schnapper*.

¹⁵⁴ See *Eldred v. Reno*, 239 F.3d 372, 383 (D.C. Cir. 2001) (Sentelle, J., dissenting) (arguing that the holding of *Schnapper* [*v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981),] was that “[C]ongress need not ‘require that each copyrighted work be shown to promote

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MR. SIMS: Well, at the Supreme Court nobody cares about D.C. Circuit precedent, so in the D.C. Circuit it was a big deal, but once it got to the Supreme Court, they couldn't care less.

There are a bunch of studies on book pricing, and all of them show that book prices for works out of copyright—books by Hawthorne, whatever—do not differ markedly or meaningfully at all from works that are in copyright.¹⁵⁵ I think that was the basis of Hugh's suggestion. I would assume that whether or not there is a copyright expiration, the fact is that consumers do not get the benefit of a lowered price reflecting some sort of copyright interest. It sounds logical. I'm sure economists think that it ought to happen, but it does not in the real world.

PROFESSOR MOGLEN: Assuming no change in the means of distribution, which is of course the whole point. The change in the mode of distribution is revolutionary in its nature. It is a shift of the kind that economists treat as long-run change due to technological adjustment. What it does is to eliminate all of those inflexibilities in distribution, like bookstores and publishers, the result of which is that the price of the public domain literature goes to marginal cost.

If you want it as bits on a screen, the marginal cost is zero. If you want it on paper, the marginal cost is what it costs for print-on-demand services, to which the publishers, knowing that book

the useful arts,” and “[i]nsofar as [the introductory language of the Copyright Clause] is taken to be anything more than the determination concerning that limited analysis, it is not a holding but simply *dicta* (perhaps *obiter dicta*) and not binding on future panels”) (quoting *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979)), *aff'd sub nom. Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). See also *id.* at 378 (stating that the holding of *Schnapper* “rejected the argument ‘that the introductory language of the Copyright Clause constitutes a limit on congressional power’”) (quoting *Schnapper*, 667 F.2d at 112).

¹⁵⁵ *Editor's Note*: Although we have not been able to locate the studies referred to by Mr. Sims, the following examples may be instructive. Modern Library Classics sells Hawthorne's *Mosses from the Old Manse* for \$13.95. A free version of this title is available at <http://www.eldritchpress.org/nh/mosses.html>. Similarly, Vintage Books has recently published a paperback edition of *The Buffalo Soldier* (a work still protected by copyright) by contemporary author Chris Bohjalian. It too retails for \$13.95. See <http://www.randomhouse.com/catalog/display.pperl?0375725466>.

publishing is within a generation of conclusion, are now shifting their business.¹⁵⁶

In the end, there is a bitstream. Either you will be excluded if you cannot pay, or the rules will have changed and you will choose whether to take the bitstream in a form which allows you to read at no cost, or there is a “McDonald’s of text” on the corner—call it Kinko’s—which manufacturers books for you if books are a thing you want. Most of us probably will not because the methods of reading free are superior to the methods of reading on dead trees and within a generation we shift.

There are forty or fifty novels in my book bag at any time. They are in my laptop. I read them typeset the way I want them, on a display whose background texture and color is set the way I want it at the moment, given the reading conditions. I am not better off going down to the corner bookstore and buying a copy of Hawthorne at the existing price, which is largely determined by the inflexibilities of the distribution system.

I entirely agree with Chuck. There is either a grab for control on the side of his clients or on the side of my clients. This is known as class conflict. It results in what is known as the appropriation of the means of production by one side or the other. At present, there are five companies that control more than ninety percent of the world’s popular music.¹⁵⁷ They behave like an oligopoly. They reduce output and raise price. CDs cost \$17.00 and most musicians do not live from music.

After the end of their mode of distribution—which is being undertaken not just by the twelve-year olds, but also by the artists who see that there is little value for most of them in the existing distribution system—there will be many more musicians in the world and music will be more freely available to everyone who wants it. That is an unalloyed good.

¹⁵⁶ See JASON EPSTEIN, *BOOK BUSINESS: PUBLISHING PAST, PRESENT AND FUTURE* 177–92 (2002).

¹⁵⁷ Moglen, *supra* note 39, at 2.

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There are seven companies in the world that control more than ninety percent of the Western movie market,¹⁵⁸ and they also exclude output and raise price. When they are gone, and both screen exhibition and, more importantly, personal viewing of video is no longer subject to their control, more people will make video art and people will not have to pay for it, so they will be able voluntarily to support what they love.

This model currently makes the best broadcast electronic news in the United States at NPR.¹⁵⁹ It currently makes the best software in the world, which is the product of my Free Software Movement. It currently produces a whole range of cultural institutions. And, more importantly, before the law of copyright, it was the model that produced and distributed all of human culture.

It is not a speculative proposition to suggest that the decay of the proprietarian capitalist mode for the production and distribution of culture would result in more culture, available to more people, more easily, more freely.

The primary threat to freedom of speech is not the freedom of speech that is involved in being able to publish Kahlil Gibran, about which of course I agree with you—it is utterly unimportant. The primary threat to freedom of speech is the ancillary harm to the freedom of technical communication being done by your clients through your extraordinarily skillful means.¹⁶⁰

I now have clients who are enjoined all over the world from explaining how DVDs work, a thing that they have an absolute right to do under my conception of the First Amendment.¹⁶¹

MR. SIMS: Eben, you know that is not true.

PROFESSOR MOGLEN: No. It is factually accurate. Which part of it are you challenging?

¹⁵⁸ Universal City Studios, Inc.; Paramount Pictures Corporation; Metro-Goldwyn-Mayer Studios, Inc.; Sony Pictures, Inc; Warner Brothers; Disney Enterprises, Inc.; and Twentieth Century Fox Film Corporation. See MPAA, at <http://www.mpa.org/about/index.htm> (last visited Apr. 14, 2003).

¹⁵⁹ See Nat'l Pub. Radio Found., *About NPR*, at <http://zeus.npr.org/about/about.jhtml> (last visited Mar. 10, 2003).

¹⁶⁰ See Eben Moglen, *Free Software Matters: Exploring the Frontiers of Unfreedom*, NATION, May 10, 2002, at 2.

¹⁶¹ See *Universal City Studios*, 273 F.3d at 429.

MR. SIMS: The injunction, as you know, did not cover explaining anything. It covered the provision of the utility.¹⁶²

PROFESSOR MOGLEN: You assume that the best way of explaining how DVDs work is not an executable computer code, and that is false. It is the case that that injunction covers limericks written by witnesses in my lawsuit.

MR. SIMS: We are not going to argue about this.

PROFESSOR MOGLEN: All right, fine.

MR. SIMS: Anybody here who thinks that reading Thomas Wolfe before it was edited by Maxwell Perkins working for a large publishing company is preferable to reading Thomas Wolfe ought to do it. Anybody who thinks that the next Saul Bellow who is now eighteen or twenty years old will find his market, will find his voice, and will be able to create what he otherwise would have by self-publishing on the Internet instead of by going to a publisher which has costs and copyrights and paper, is free to spend all the time you want looking through the Internet and trying to find which one of the billion people self-publishing is that one.

But the model that Eben is talking about, which has a lot in connection with information-wants-to-be-free nonsense we heard ten years ago, that model is not one I suggest that is going to lead to the glories of American culture.

PROFESSOR HANSEN: Okay. This is an interesting debate.

If there are problems with concentration in a particular copyright-related market, you have antitrust laws to deal with oligopolies and concentration as with all other types of markets. It is not a failing attributable to copyright protection. In fact, if there are any places in our economy where there is less fear about oligopoly, it is the copyright-driven industries. Moreover, more creators now can become their own publishers and producers because of this great new technology. So there is no reason to destroy the old, we can have the old and Eben's new world side by side. Those who don't want to exercise copyright rights do not have to do so. Those who want to, can.

¹⁶² *Id.* at 441.

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So if you are right, Eben, that your vision is the one everyone will accept, then there should be no fear of copyright. The reason you fear copyright and want it abolished is that you know deep down inside that your view is not a view shared by most creators and distributors—people who want to be remunerated and to make a living. If your view were right, you would not have to destroy copyright because people are always free to provide royalty-free licenses, as some have done in the software industry.

Ultimately I think you are afraid of the marketplace. You have to control it because you don't have faith in your vision as being one that most people will choose.

It is strange that I am a moderator, I must say.

Let's go to another question. There must be another question out there.

QUESTIONER: Professor Hansen, I have to say that I am really disappointed at the unprofessional way you are handling this panel. I think if you really wanted to take a voice on this panel, you should have put yourself on the panel and gotten yourself a moderate moderator. I think you have interfered in the exchange by being such a person who's got a point of view that has to be made. I'm surprised that this happened.

That is all I have to say.

PROFESSOR HANSEN: Then you obviously haven't seen me before.

QUESTIONER: No. I have seen you before.

PROFESSOR HANSEN: So basically this is it. I am what you see and this is what you get, and if you don't like it—well it is just like everything else—you are entitled to your opinion. You do not like what I am doing. I like what I am doing. And I happen to be up here and you happen to be down there, and that is just the way it is. Maybe the next time you will be up here.

QUESTIONER: If I am, I hope I will have a different attitude.

PROFESSOR HANSEN: Do you actually have anything further or is that it?

QUESTIONER: I was going to ask—you talked about pushing away the idea of the term of copyright. Now, I have a client who

reproduces wonderful old technical books that are in the public domain. He brings to light to an intellectual audience all over the world books that have lain fallow for years because it is free to reproduce. That is the thing that separates him from the ability to make it. If he had to pay fees, that area of his production would not take place. So I think we are oversimplifying this whole business.

Secondly, I am a photographer. I teach artists' rights. I am a photographer. I have never seen a more aggressive user of copyright than the Disney World, who actually tells me you can't even photograph their buildings at Disney World and make any use of it.

So I would be very happy when their copyright runs out so I would not have that arrogance in front of me.

Thank you.

PROFESSOR HANSEN: Another question?

QUESTIONER: I feel like I'm back in college twenty years ago.

I also want to say to Professor Hansen I wish I were still at Fordham so I could take one of your classes. I missed that when I was here.

I was curious as to a response from the other panelists as to Mr. Carson's comment that he believes or suspects that the Sonny Bono Act signified the end of this process whereby the copyright protection has been expanded. Do the other panelists believe that we are not going to see within our lifetime, or within a reasonable period of time, additional extensions proactively or retroactively?

PROFESSOR MOGLEN: Well, if it is true, it is because we get our work done within the next twenty years and there is no subject for further discussion. If I do not have them down within twenty years, of course they will be back. They have no more intention of giving away Mickey Mouse or Donald Duck or any of the rest of the franchise in 2024 than they had of giving it away in 2004.

The proposition that Chuck offers about their fear is absolutely correct.

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One of the things that was happening in October of last year, after the various events downtown, is that I was spending a fair amount of time on the Hill trying to keep Disney from succeeding in getting Senator Hollings's bill that would have crawled inside every computer and piece of software on earth and made it protect copyright their way from being enacted.¹⁶³

So I would be going in to Hollings' staff, and out would be coming Preston Padden, the chief Washington representative of Disney, former President of ABC News. Preston and his friends were the only people in all of Washington last October who weren't wearing an American flag pin in their lapel. They had Donald Duck. I can tell you, the feeling of that was really quite extraordinary. It was "Our empire is our empire. Don't mess with us."

I entirely agree with Chuck, that it is actually fear masquerading as bravado. They have billions of dollars available and they have enormous leverage over American politics because they make image. But they are frightened. They are right to be frightened.

Far from being unconfident, I know what is going to happen to them. They will be back in twenty years to buy more legislation, if we allow bought legislation in the United States in twenty years and if they exist.

You all, if you do not believe my point of view, might at least want to have campaign finance reform so that they cannot do it. And if you believe me, you might want to join up and make sure that they are not around in twenty years to try again.

PROFESSOR HANSEN: I was just told some people didn't identify themselves for the record. Did you identify yourself for the record?

PARTICIPANT: My name is Len Spire. I am a professor at FIT.

¹⁶³ See Security Systems Standards and Certification Act at <http://cryptome.org/sscca.htm>. See also Eben Moglan, *Free Software Matters: More Menace from the Mouse*, NATION, Mar. 19, 2002, at 1.

PROFESSOR HANSEN: I just wanted that for the purposes of my lawyer.

The gentleman back there?

PARTICIPANT: Steve Vicker. I am an attorney in New York.

PROFESSOR HANSEN: Okay.

I don't think there ever is going to be a further extension of term of copyright protection.. I think this was a one-off based on reaction to the Term Directive in Europe. I do not see it happening again. It certainly will never happen in Europe; it is not going to happen in the rest of the world, and it is not going to happen here, in my view.

Another one? Someone else?

QUESTIONER: My name is Ed Cramer. I am an attorney in Manhattan.

Without judging the merits or commenting on that, Professor, is it the logical extension of your position that copyright—not extension, but all copyright—should be abolished?

PROFESSOR MOGLEN: In the long run, the answer to that question is most certainly yes.

QUESTIONER: Thank you.

PROFESSOR MOGLEN: The proper way of doing it, I think, is transitionally, through the kind of mixed economy that Professor Hansen was talking about. It is correct that there ought to be no reason for the absence of a lengthy period of coexistence between the free production and distribution worlds and the proprietary production and distribution worlds. In that Professor Hansen is correct.

I believe that what prevents that process of coexistence is precisely the defensive measures of the owners that Chuck was talking about. I think their concern for desertion is correct. I do not think it is primarily that they are afraid the audience will desert. I think it is primarily that they are afraid the creators will desert, because creators get a very bad deal from the systems of proprietary distribution. It is possible, I think likely, that at least in music, and ultimately in video production as well, you see the producers deserting the media of distribution that currently exists.

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The result, defensively on the part of those industries, is to attempt to make our modes of behavior illegal. The justification for doing so is that if we create the free distribution system, it will be used for piracy, and so it ought to be prohibited from occurring because it will abet piracy if it exists at all. This is the VCR argument again, as you remember.¹⁶⁴ A technology should be eliminated because it is seen as contributing to copyright infringement.

From my point of view, the fact that it contributes to copyright infringement is either neutral or good but not important. In any event, it is not a reason for preventing the evolution of the system of coexistence that Professor Hansen was talking about.

After a generation or so of coexistence between free development and proprietary development, my forthcoming book argues, it is safe to do away with the property protection for ideas altogether.

MR. SIMS: There were amici—creative amici,¹⁶⁵ not just copy amici—who filed briefs in *Eldred*, and the symphonic composers, for example, people like John Corigliano, Libby Larsen, Stephen Paulus—all sorts of symphonic conductors filed a brief supporting term extension.¹⁶⁶ They certainly do not think that their careers can be made, their families can be fed, and that they can keep creating, on the basis of a free distribution system.¹⁶⁷ I think quite to the contrary.

One of the interesting points they made is that, unlike popular music, serious music, academic symphonic music, tends not to find its audience for many, many years—may never find it, but if it does find it, it is often twenty-thirty years down the pike, so that for them term extension was particularly important.¹⁶⁸

¹⁶⁴ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁶⁵ See, e.g., Brief of Amici Curiae Association of American Publishers et al., *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618), <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/opp-amici/aap.pdf>.

¹⁶⁶ See Brief of Amici Curiae Symphonic and Concert Composers, *Eldred* (No. 01-618), <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/opp-amici/composers.pdf>.

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Id.* at 9–13.

Other creators—David Mamet, Richard Avedon—filed briefs also.¹⁶⁹ All of the creative people of that sort filed briefs on the side of copyright.

The notion of a free distribution system sounds utopian and not practical.

PROFESSOR HANSEN: Okay.

Another question?

We will come back for second turns. Let's get everyone who has a first question.

QUESTIONER: My name is Jordan Altman. I am a student and I am a staff member of the *Journal*.

I know that we want to create incentives for new works to come out, but would the panel have a problem if we just gave a shorter set number of years of protection, like fifty years from the works' creation, sort of like we have in the patent system?¹⁷⁰ I just do not see the merit or incentive in counting years from the author's death in determining copyright protection.

MS. SELTZER: I would have no problem with a shorter and fixed term with a return to requirements of registration so that copyright at least serves the purpose of making known when the work was created and when it would be available to the public.¹⁷¹ I do not see particular value in assuming that the copyright should continue after the author's death when any other kind of productive worker has to make his or her own provision for heirs.

¹⁶⁹ See Brief of Amici Curiae Association of American Publishers et al., *Eldred* (No. 01-618).

¹⁷⁰ See 35 U.S.C. § 154 (2000).

¹⁷¹ *Speaker's Note*: I recognize the conflict with the Berne Convention, but a major rethinking of copyright law should at least start with a clean slate. See Petitioners' Reply Brief at 7, *Eldred* (No. 01-618) (noting that "[t]he beneficiaries of the CTEA need do nothing to receive its benefit; the gift is automatic"). See also *Festo Co. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831, 1837 (2002) (noting that "clarity is essential to promote progress A [rights] holder should know what he owns, and the public should know what he does not").

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PROFESSOR HANSEN: One distinction is that we have at least two treaties that would make it difficult.¹⁷² As a pure policy issue, what the term should be is a different matter.

I don't think there is any particular number that is right or wrong in this. But there is an analogy to others who through a lifetime of work pass on existing businesses, for example, to heirs. Creators who through a lifetime of work need to be able to pass on the result of their efforts which is contained in intangible property protected by copyright.

But I agree with Wendy. I do not think that there is any particular time that is the right time. But we are stuck with life plus fifty because of Berne. We went to the life plus fifty in the 1976 Act only because of wanting to eventually get into Berne.¹⁷³ It certainly wasn't an active policy choice of what should be the best term of protection.

MR. CARSON: I agree. It is Berne that would really prevent us from doing that, unless we decided we wanted to opt out of the international system.¹⁷⁴ In this day and age, you've heard ample evidence of how copyright has international implications. You cannot separate yourself from the rest of the world if you believe in copyright. You can't wall off the rest of the world. So we are pretty much stuck with Berne.

Personally—and I hasten to add that this isn't the Copyright Office's view—I look back wistfully at the terms of the 1909 Act in a number of respects, including copyright term and some of the formalities.¹⁷⁵ But those days are gone and the only way you will ever get them back—and you will not—will be if you decide you want to abandon the international obligations we have assumed.

PROFESSOR HANSEN: We are ready for a second question.

QUESTIONER: Ed Cramer.

¹⁷² See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; Berne Convention, *supra* note 16.

¹⁷³ See Berne Convention, *supra* note 16.

¹⁷⁴ *Id.*

¹⁷⁵ See Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909) (codified as amended in scattered sections of 17 U.S.C. (2000)).

I'd like to follow up on that and ask you whether you felt ultimately that copyright should be abolished. You gave me a quick answer. The answer was yes.

Now, BMI (Broadcast Music, Inc.) was a client of mine for about seventeen years. I became its President and Chief Executive for nineteen years. Neither BMI nor the ASCAP (American Society of Composers, Authors, and Publishers) operate for profit, so that profit motive that you were talking about does not exist for them.¹⁷⁶ Hundreds of thousands of writers depend upon that income.¹⁷⁷

So if you do not have organizations like that, which are predicated on copyright protection, because you don't find people coming up and voluntarily paying for that music—no go, you can't get a nightclub or a gin mill or a radio—they are not going to pay you unless you have copyright protection. Without that protection—I am not talking about the term—but without that protection, which was your ultimate answer, then big trouble for creative people.

PROFESSOR MOGLEN: Well, we feel differently about that, not because we feel differently about the role of the intermediaries, although, as I'm sure you understand, there are lots of musicians who think that the nonprofit status of ASCAP and BMI has not prevented their capture by the recording industry. But I am with you about this.

The intermediaries and the collection societies are important, regardless of whether what they are distributing are voluntary contributions or coerced contributions.

I disagree with you that there is any reason to suppose that a coercive system of music production and distribution in which you can only have it if you pay for it actually rewards artists better than a free system of distribution in which people pay what they want for music. The reason is that the recording industry presently

¹⁷⁶ See The American Society of Composers, Authors and Publishers, at http://ascap.com/1p_about_ascap.html (last visited Feb. 5, 2003); BMI, *About BMI*, at <http://www.bmi.com/about/backgrounder.asp> (last visited Feb. 5, 2003).

¹⁷⁷ *Id.*

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keeps ninety-four percent of the dollar.¹⁷⁸ We can do a lot better for artists if we take that ninety-four percent which currently goes to thugs and rebate a smaller proportion of it to artists overall.

What happens in the twenty-first century is that it becomes much easier to pay not just musicians but recording engineers and songwriters and others through the work of collection societies, such as BMI or its follow-ons. It becomes easier because the network is the means by which, at the point of delivery of music, the listener has an opportunity to remunerate easily and frictionlessly the people that she wants to pay, the consequence of which is a very much improved situation for the producers.

This is what we show with respect to computer software in the world of free software. This is what the Future of Music Coalition¹⁷⁹ and the other parties conducting that conversation for the benefit of the creative community are modeling for them so they can make their own decisions.

In the end, again I am with Professor Hansen about this. It's a matter of choice. Within the next ten years, I believe, and I think even Carey Sherman¹⁸⁰ believes, that you are going to see recording artists deserting the recording system in droves.

My friend, Chuck D, I think is correct about this.¹⁸¹ In five years, he says, there will be 5,000 recording companies and a million recording artists. Nobody makes \$10 million a record and no musician has a day job.¹⁸² That is justice. It is worth fighting for. You should too.

¹⁷⁸ See, e.g., Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 505 (2002), ("Artists receive royalties from the record company usually ranging from 10% to 20% of the suggested retail list price, less the dubious deductions for packaging (20% to 25% of the retail price), promotional and other giveaways, returns, and breakage (10%).").

¹⁷⁹ See *Future of Music Coalition*, at <http://www.futureofmusic.org> (last visited Mar. 10, 2003).

¹⁸⁰ Carey Sherman is the General Counsel for the Recording Industry Association of America. See Matt Richtel, *New Suit Filed to Bar Trading Music on Net*, N.Y. TIMES, May 25, 2001, at C2.

¹⁸¹ Chuck D is a member of the rap group *Public Enemy*. See Geoffrey Himes, *Chuck D Hits Close to Home*, WASH. POST, Oct. 23, 1996, at D07.

¹⁸² See, e.g., Chuck D, *'Free Music' Can Free the Artist*, N.Y. TIMES, Apr. 29, 2000, at A13.

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QUESTIONER: You didn't answer my question.

PROFESSOR HANSEN: I think we have just gotten the word that the time is up.

Let me say I am happy to agree with Eben on this, since I think the recording companies have had some horrible practices to account for, and if this leads to their downfall, I am with you on that.

PROFESSOR MOGLEN: Thank you.

PROFESSOR HANSEN: Let me say that it has been a tremendous panel. I apologize if I have offended anyone. Let's have a round of applause for our speakers.