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Congress' Green Monster: Copyright Extension and the Concern for Cash Over the Propagation of Art

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CASE NOTES AND COMMENTS

CONGRESS' GREEN MONSTER: COPYRIGHT EXTENSION AND THE CONCERN FOR CASH OVER THE PROPAGATION OF ART

"A dwarf standing on the shoulder of a giant can see farther than the giant himself."[1]

I. INTRODUCTION

It is a truism that nothing is original, rather every new work is based on an old one.[2] Creation occurs not by creating something from absolutely nothing, but by using predecessors' stories, themes, sounds, and art as building blocks and transforming them into new works by adding the new creator's own unique spin, perspective, or style.[3] Evidently, the drafters of the Constitution recognized the mechanisms of creation and devised a way to ensure the advancement of the arts – by providing Congress the power to grant copyright protection to these creators for a limited time.[4] Hence, the Copyright Clause was conceived. As a result, the limited economic benefit it granted provided authors an incentive to invest their time and energy in producing works, while allowing other creators to build off existing works once copyright protection expired. However, Congress took its power too far and through its repeated copyright extensions, essentially negated the purpose of copyright law and the carefully crafted Copyright Clause. These extensions have whittled away a vibrant public domain and slowly strangled creativity. Congress' most recent

[1] Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945).
[2] Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 966 (1990).
[3] *Id.* at 966-67.
[4] *See* U.S. CONST. art. I, § 8, cl. 8.

extension, the Sonny Bono Copyright Term Extension Act,[5] which grants an individual author copyright protection for her life plus 70 years, further strains creativity. In effect, it grants copyright owners excessive protection and economic benefit - contrary to the Copyright Clause's aims. Consequently, Congress' actions erode away the artistic wealth of the public domain and empower copyright owners to dictate creation, while allowing the public to see only as far as the giant himself can see.

This article examines the Court of Appeals for the District of Columbia Circuit's decision in the case *Eldred v. Reno*,[6] where the court held that the Sonny Bono Copyright Term Extension Act (hereinafter, the "CTEA") was constitutional.[7] Part I outlines the basic principles of copyright law and Congress' historical exercise of its copyright power. Part II of the article describes the issues implicated by *Eldred v. Reno* and the majority's and dissent's analysis. Part III criticizes the court's decision and explains how Congress surpassed its copyright power by enacting the CTEA. It explains that the preamble of the Copyright Clause limits Congress' power to grant copyright protection. However, the extension fails to meet this Constitutional mandate by failing to promote progress, but rather inhibiting it. It also explains that economic interests were Congress' primary motivation in passing the legislation. Moreover, Part III analyzes several suggested solutions for determining when Congress violates the Copyright Clause and proposes an analysis courts should use to determine an extension's constitutionality. Finally, Part IV delves into the CTEA's impact on the progress of the creative arts.

II. BACKGROUND

Article I, Section 8, Clause 8 of the Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive

[5] Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 301-304 (1998)).
[6] 239 F.3d 372 (D.C. Cir. 2001).
[7] *Id.* at 380.

Right to their respective rights and discoveries."[8] This clause, commonly known as the Copyright Clause, gives creators a monopoly over their creative works for a fixed time, and is primarily concerned with the promulgation of artistic creation for the benefit of the public.[9] The primary goal achieved by copyright law is to secure "the general benefits derived by the public from the labors of authors."[10] As expressed in *Sony Corp. v. Universal Studios, Inc.*,[11] copyright "is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[12] Although the Supreme Court has recognized that the clause compensates authors for their creative efforts and labor, it has stated that copyright law's "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[13] The philosophy behind allowing Congress to grant a limited monopoly to authors and inventors is that the public will benefit from the talents of authors and inventors if monetary benefits encourage them to invest in their creative efforts.[14]

The congressional copyright power is further clarified by also referring to Article I, Section 8, Clause 18 of the Constitution. This clause provides Congress with the power "To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[15] In *McCulloch v. Maryland*,[16] the Supreme Court recognized that "Congress is not empowered by [the Constitution] to make all laws...but such only as may be 'necessary and proper' for carrying

[8] U.S. CONST. art. I, § 8, cl. 8.
[9] Nimmer on Copyright §1.03 [A] (2001).
[10] United States v. Paramount Pictures, 334 U.S. 131, 158 (1948).
[11] 464 U.S. 417 (1984).
[12] *Id.* at 429.
[13] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
[14] Mazer v. Stein, 347 U.S. 201, 219 (1954)(citing Washingtonian Pub Co. v. Pearson, 306 U.S. 30, 36 (1939)).
[15] U.S. CONST. art. I., § 8, cl. 18. (emphasis added).
[16] 17 U.S. 316 (1819).

them into execution."[17] The Court further construed this to mean that the end must be legitimate, within the scope of the Constitution and that "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but [consistent] with the letter and spirit of the Constitution, are constitutional."[18]

In 1790, the First Congress exercised this enumerated power and created copyright protection for works already in print, as well as future works, for an initial term of fourteen years, and a fourteen-year renewal term.[19] Effectively, the original copyright clause granted a combined twenty-eight year protection period.[20] Forty-one years later, in 1831, Congress utilized its power once again and extended the initial copyright term to twenty-eight years, resulting in a total protection period of forty-two years.[21] Nearly a century later, Congress extended the renewal term to twenty-eight years, thereby creating a fifty-six-year period of protection.[22]

Beginning in 1962, Congress frequently extended protection for subsisting copyrights by incrementally increasing their duration.[23] In 1962, copyrights subsisting in any work, on the effective date of the amendment, were extended to December 31, 1965, thereby granting a maximum copyright term of fifty-nine years.[24] In 1965, Congress extended this duration, again, to December 31, 1967, with a maximum copyright term of sixty-one years.[25]

Two years later, in 1967, the subsisting copyright was extended for another year to December 31, 1968.[26] From 1968 to 1971, Congress annually extended subsisting copyrights' protection to the following year, or in the case of 1972, for the following two

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[17] *Id.* at 413.
[18] *Id.* at 421.
[19] Act of May 31, 1790 §1, 1 Stat. 124.
[20] *Id.*
[21] Act of Feb. 3, 1831 §1, 4 Stat. 436.
[22] Act of March 4, 1909 §23, 35 Stat. 1075, 1080.
[23] Eldred v. Reno, 239 F.3d 372, 374 (D.C. Cir. 2001).
[24] H.R.J. Res. 627, 87th Cong., 76 Stat. 555 (1962).
[25] H.R.J. Res. 431, 89th Cong., 79 Stat. 581 (1965).
[26] S.J. Res. 114, 90th Cong., 81 Stat. 464 (1967).

years.[27] Then, once more, Congress extended subsisting copyrights, set to expire in 1974, to December 31, 1976.[28]

In the final version of the Copyright Act, adopted in 1976, Congress altered the way it calculated copyright duration.[29] Instead of defining the initial term of a copyright by a set number of years, the Copyright Act of 1976 provided a basic term of copyright protection for the life of the author, plus an additional fifty years.[30] Works created prior to the effective date of the Act, January 1, 1978, were given protection for a maximum of seventy-five years from the date of publication or 100 years from creation, whichever one was less.[31]

Finally, in 1998, Congress passed the Sonny Bono Copyright Term Extension Act of 1998.[32] The CTEA provided that a work created on or after January 1, 1978, enjoys copyright protection for a term of the life of the author, plus seventy years after her death – an additional twenty years.[33] For anonymous works, pseudonymous works, and works made for hire, the Act extended the term from seventy-five years to ninety-five years from the year of its first publication, or from 100 years to 120 years from the year of its creation.[34] Finally, for a work created before 1978, for which its initial term was twenty-eight years, the CTEA extended its renewal term from forty-seven years to sixty-seven years, creating a maximum copyright term of ninety-five years.[35] Effectively, the Act added twenty years to the life of all copyright terms, for both subsisting and prospective copyrights.

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[27] *See* S.J. Res. 172, 90th Cong., 82 Stat. 397 (1968); S.J. Res. 143, 91st Cong., 83 Stat. 360 (1969); S.J. Res. 230, 91st Cong., 84 Stat. 1441 (1970); S.J. Res. 132, 92nd Cong., 85 Stat. 490 (1971); S.J. Res. 247, 92nd Cong., 86 Stat. 1181 (1972).

[28] Act of Dec. 31, 1974, Pub. L. No. 93-573 § 104, 88 Stat. 1873 (1974).

[29] S. REP. NO. 104-315, at 6 (1996).

[30] Copyright Act of 1976, Pub. L. No. 94-553 §§ 302-05, 90 Stat. 2541, 2573-76 (1976).

[31] *Id.*

[32] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 301-304 (1998)).

[33] *See id.* § 302(a).

[34] *See id.* § 302(c).

[35] *See id.* § 304(a).

III. *ELDRED V. RENO*[36]

A. Facts

After the CTEA's passage, the plaintiffs, filed suit in the District Court for the District of Columbia challenging the constitutionality of the CTEA.[37] More specifically, they alleged that, but for the CTEA, they would have legally been allowed to copy, distribute, or perform works freely that now would not enter the public domain for a period of twenty more years.[38] Among the plaintiffs were Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons (hereinafter "Plaintiffs").[39] The plaintiffs utilized works in the public domain in their occupations and businesses.[40] For example, Plaintiff Eric Eldred, Director of Plaintiff Eldritch Press, a non-profit unincorporated association,[41] launched an electronic library of public domain works on the Internet at <http://eldred.ne.mediaone.net>.[42] This library made rare and out-of-print books that were difficult to locate in libraries or bookstores, available to the public.[43] In addition, this website enabled the blind to access these works through text-to-speech converters.[44]

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[36] 239 F.3d 372 (D.C. Cir. 2001).
[37] *Id.* at 374.
[38] Eldred v. Reno, 74 F.Supp.2d 1, 2 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001).
[39] *Id.*
[40] *Eldred*, 239 F.3d at 374.
[41] Plaintiffs' Second Amended Complaint ¶ 2, *at* http://cyber.law.harvard.edu/eldredvreno/complaint_amd2.html (last visited Oct. 26, 2001).
[42] Daren Fonda, *Copyright Crusader*, THE BOSTON GLOBE MAGAZINE, August 29, 1999, *available at* www.boston.com/globe/magazine/8-29/featurestory1.shtml (last visited Oct. 22, 2001).
[43] *Id.*
[44] *Id.*

Also among the plaintiffs were a book company that reprinted rare books,[45] companies that published and sold public domain sheet music to orchestras,[46] a church choir director,[47] a non-profit film preservation group,[48] a film archive,[49] and a non-profit coalition, which promoted a rich public domain.[50]

B. Procedural History

Plaintiffs filed suit in federal District Court for the District of Columbia, seeking a declaratory judgment against the Attorney General Janet Reno, in her official capacity, that the CTEA was unconstitutional.[51] More specifically, the plaintiffs alleged that the CTEA violated the First Amendment and that its retrospective application was beyond Congress' power under the Copyright Clause.[52] Plaintiffs also sought preliminary and permanent injunctive relief against the criminal enforcement of §2(b) of the No Electronic Theft Act of 1997.[53] The District Court granted the Defendant's motion for Judgment on the pleadings, dismissing the plaintiff's case, and holding the CTEA is constitutional.[54]

On appeal, the Court of Appeals District of Columbia Circuit affirmed the District Court's dismissal of the plaintiffs' action. With Judge Ginsburg writing the majority opinion, the court held that the CTEA was constitutional, that the plaintiff-appellants did not have a First Amendment right in the copyrighted work of

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[45] *Eldred v. Reno Plaintiffs*, *at* http://cyber.law.harvard.edu/eldredvreno/plaintiffs.html (last visited Oct. 22, 2001).
[46] *Id.*
[47] Plaintiffs' Second Amended Complaint ¶ 4, *at* http://cyber.law.harvard.edu/eldredvreno/complaint_amd2.html (last visited Oct. 26, 2001).
[48] *Id.* at ¶ 8.
[49] *Id.* at ¶ 9.
[50] *Id.* at ¶ 11.
[51] Eldred v. Reno, 74 F.Supp.2d 1, 2 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001).
[52] *Id.*
[53] *Id.* at 2, n. 2.
[54] *Id.* at 2.

others, and that the Copyright Clause did not restrain Congress' power to extend copyright durations. Judge Sentelle dissented in part, arguing that the Copyright Clause limited Congress' power to extend the copyright term. The plaintiff-appellants petitioned for a rehearing *en banc*, but was denied on July 13, 2001.[55] As a result, plaintiffs have petitioned the Supreme Court for writ of certiorari, which has been granted.[56]

C. The Majority Opinion

On appeal, the appellants challenged the constitutionality of the CTEA on three basis: First, that the CTEA violated the First Amendment; second, that already existing works fail to meet the originality requirement of the Copyright Clause, and, therefore, the CTEA could not extend further copyright protection to those preexisting works; and, third, that the CTEA violated the Copyright Clause's "limited Times" requirement.[57] Writing for the majority, Judge Ginsburg addressed each of these issues in turn.

1. First Amendment

Judge Ginsburg first considered the appellants' standing to challenge the CTEA with respect to subsisting copyrighted works.[58] By the nature of the appellants' occupations and businesses, appellants benefit from public domain works.[59] Because they would have been able to utilize the additional works about to enter the public domain, but for the CTEA's enactment, the court found that they had an injury in fact, traceable to the CTEA.[60] Therefore, the appellants had standing to pursue their

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[55] Eldred v. Ashcroft, 255 F.3d 849, 852 (2001).
[56] Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted sub. nom.* Eldred v. Ashcroft, 2002 WL 232898 (U.S. Feb. 19, 2002)(No. 01-618).
[57] *Eldred*, 239 F.3d at 374.
[58] *Id.* at 375.
[59] *Id.*
[60] *Id.*

First Amendment claim.[61] In addition, the majority concluded that the appellants had standing to challenge the CTEA with respect to prospective works, because the appellants still would not benefit from works not in the public domain.[62]

After establishing the appellants' standing, the court questioned whether the appellants possessed a First Amendment interest in copyrighted works.[63] Answering in the negative, the court noted that they did not have a First Amendment right to commercially use the copyrighted works of others.[64] Relying on the idea/expression dichotomy, the majority explained that copyright law allowed free communication of facts and ideas, but extended protection only to authors' expression.[65] Building on this notion, the court argued that because only expression is copyrightable in the first place, the CTEA would only extend copyright duration to expression and not to facts.[66] Therefore, the court found there was no First Amendment concern because ideas are ineligible for copyright protection in the first place.[67]

2. Originality Requirement

The D.C. Circuit rejected the appellants' contention that the CTEA violated the originality requirement of the Copyright Clause because it extended the duration of already copyrighted works.[68] Appellants argued that because the work already existed, it failed to exhibit the requisite originality.[69] The court rejected the appellants' arguments because the work exhibited the necessary originality to obtain copyright protection in the first place, thus it was not necessary to demonstrate further originality for the

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[61] *Id.*
[62] *Eldred*, 239 F.3d at 375.
[63] *Id.* at 375.
[64] *Id.*
[65] *Id.* at 376.
[66] *Id.*
[67] *Eldred*, 239 F.3d at 376.
[68] *Id.* at 377.
[69] *Id.* at 376.

copyright to continue.[70] Furthermore, the court reasoned that Congress would not provide for copyright renewal if copyrighted works had to demonstrate further originality.[71] The court criticized appellants' failure to present any authority – neither case nor commentary – that distinguished the originality requirement for the initial grant of copyright from the extension of that already existing copyright.[72] The appellants attempted to analogize patent and trademark law to the copyright controversy.[73] They maintained, under *Graham v. John Deer Co.*,[74] Congress could not issue patents that removed knowledge from the public domain.[75] Moreover, the appellants contended that, in the *Trade-Mark Cases*,[76] the Court said that because trademarks involved something already in existence, it did not fall under the Copyright Clause.[77] While the D.C. Circuit agreed that these cases are consistent with the notion that works already in the public domain lack originality, the court emphasized that that was not the question it must answer.[78] Instead, the court found it necessary only to address whether Congress can create legislation allowing a copyright to persist beyond its renewal term. The court declined to address whether a work is copyrightable, because the works subject to the discussion are in fact already copyrightable.[79] Consequently, the court rejected the appellants' originality challenged to the CTEA.[80]

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[70] *Id.* at 377.
[71] *Id.*
[72] *Eldred*, 239 F.3d at 377.
[73] *Id.*
[74] 383 U.S. 1, 6 (1966).
[75] *Eldred*, 239 F.3d at 377.
[76] 100 U.S. 82, 94 (1879).
[77] *Eldred*, 239 F.3d at 377.
[78] *Id.*
[79] *Id.*
[80] *Id.*

3. Limited Times Restriction

Finally, the court addressed the plaintiffs' contention that the CTEA violated the "limited Times" requirement of the Copyright Clause. Plaintiffs contended that the introductory language of the clause, "to promote the Progress of Science and the useful Arts," restricts the "limited Times" requirement, to a term that achieves only that purpose.[81] Relying on the D.C. Circuit case, *Schnapper v. Foley*,[82] the court vehemently rejected this argument. The *Schnapper* court held that the preamble of the Copyright Clause did not limit Congress' power.[83] The court found the appellants' dual position problematic. The majority criticized the appellants for arguing the preamble was not a substantive limit on Congress' power, but at the same time arguing that it limited the duration more strictly than the text itself provided.[84]

4. Criticism of the Dissenting Arguments

After methodically disposing of the appellants' contentions, the court addressed the dissent's arguments.[85] The majority criticized Judge Sentelle for adopting a narrow view of *Schnapper*, as suggested by an amicus, although neither the appellants nor the appellee raised the issue on appeal.[86] Nevertheless, the court entertained the argument.[87] Judge Ginsburg reviewed the CTEA using the analysis in *McCulloch v. Maryland*.[88] The appropriate question, according to Judge Ginsburg, was whether the CTEA was a necessary and proper exercise of Congressional power granted by the Copyright Clause.[89] In other words, the CTEA

[81] *Id.* at 377-78.
[82] 667 F.2d 102, 112 (D.C. Cir. 1981).
[83] *Eldred*, 239 F.3d at 378.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Eldred*, 239 F.3d at 378. *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819).
[89] *Id.*

must be an appropriate means, plainly adapted to the end, which is the Copyright Clause mandates – to promote the progress of the creative arts.[90] The court was satisfied with Congress' finding that the extension of copyright duration would give incentive to creators to preserve older works.[91] Consequently, the court viewed the CTEA as an appropriate means for achieving the end prescribed in the preamble.[92]

The court further attacked the dissent's argument that the "limited Times" requirement restricted Congress from extending duration of copyrights, emphasizing that an identifiable term of years, which the CTEA effectively created, was, in fact, a limit.[93] The majority further rejected the dissents' contention that by allowing Congress to extend copyright duration it could effectively grant a perpetual copyright by passing a series of extensions.[94] According to Judge Ginsburg, this concern was obviously not present because the CTEA merely matched United States copyright duration to that of the European Union.[95] The court concluded that Congress properly and necessarily used its power to harmonize U.S. law to the global standard, and not to create a perpetual copyright.[96]

The D.C. Circuit disposed of the dissent's argument that extending a subsisting copyright does not promote the progression of the creative arts.[97] To the contrary, the court perceived the extension as promoting progress by "[p]reserving access to works that would otherwise disappear – not enter the public domain but disappear."[98] The court emphasized that the first congress applied

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[90] *Id.*
[91] *Id.* at 379. More specifically, Congress found that the extension would give copyright owners, of old motion pictures, incentive to restore them. *See* S. REP. NO. 104-315, at 12 (1996).
[92] *Eldred*, 239 F.3d at 379.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Eldred*, 239 F.3d at 379.
[98] *Id.*

the Copyright Act of 1790 to subsisting copyrights.[99] Because the First Congress was contemporary with the Constitution's formation, the court deferred to its judgment.[100] Further, the court reasoned that when "the rights thus established have not been disputed [for this long], it is almost conclusive."[101] Furthermore, the court relied on the Supreme Court's acceptance of Congress' power to extend terms of existing patents.[102] According to the majority, the Court has deferred to Congress' consideration of the law at the time and changed circumstances regarding patents, and decided that there are no restraints on Congress' power to modify the term.[103] The D.C. Circuit pointed out that in copyright law, the Court has been similarly deferential to Congress' judgment.[104] It recognized that Congress has the duty to balance competing interests and to determine the appropriate copyright duration.[105] Accordingly, the court deferred to Congress' findings and concluded that the CTEA was within Congress' Copyright Clause power.[106]

D. The Dissenting Opinion

While concurring with most of the majority's opinion, Judge Sentelle, writing the dissent, disagreed with the constitutionality of the copyright extension for existing works.[107] As a guide, Judge Sentelle used *United States v. Lopez*[108] and its look into "first principles" to conduct his analysis and to determine the scope of Congress' power.[109] Under *Lopez*, the Supreme Court reiterated

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Eldred*, 239 F.3d at 380.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Eldred*, 239 F.3d at 380.
[108] 514 U.S. 549, 552 (1995).
[109] *Eldred*, 239 F.3d at 381.

the principle that Congress' Commerce Clause power is limited.[110] Consequently, it would then follow that these limits would also apply to all of Congress' enumerated powers, not just the Commerce Clause.[111] The dissent used the *Lopez* Court's analysis, as guidance in determining the limits on Congress' power under the Copyright Clause.[112] According to Judge Sentelle, the *Lopez* Court acknowledged, "that limitations on the commerce power are inherent in the very language of the Commerce Clause."[113] Analogizing this analysis to the present case, the dissent argued that the Copyright Clause gave Congress the power only "to Promote the Progress of Science and the useful Arts."[114] This could only be done by granting an exclusive right to authors for limited times, according to the "limited Times" clause.[115] The dissent argued that there was no distinction between granting copyright owners permanent protection and Congress permanently having this opportunity to extend copyright protection.[116] Judge Sentelle warned that Congress could realize permanent copyright protection indirectly by continuously extending current copyright durations.[117] Therefore, he argued that the Copyright Clause created a "definable stopping point" that prevents this pitfall of infinite protection.[118] Furthermore, the dissent rejected the defendant's arguments that the retroactive extensions promoted progress to the creative arts, but instead, saw that the limits laid out in the clause's preamble were violated.[119]

In response to the majority's assertion that *Schnapper* rejected the notion that the preamble is a limit, the dissent conceded that the D.C. Circuit case was binding until the court *en banc* or the

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* (quoting *Lopez*, 514 U.S. at 553).
[114] *Eldred*, 239 F.3d at 381.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 382.
[118] *Id.*
[119] *Eldred*, 239 F.3d at 382.

Supreme Court overruled its holding.[120] However, Judge Sentelle disagreed with the majority as to *Schnapper*'s holding.[121] Judge Sentelle argued that *Schnapper*'s scope was limited to the analysis of copyright law as it appeared to works commissioned by the United States government.[122] Although the D.C. Circuit case said that it is unnecessary for each individual work to demonstrate that it promotes progress, Judge Sentelle said it was proper to "require that the exercise of power under which those applications occur meet the language of the clause which grants Congress the power to enact the statute in the first place."[123] Furthermore, Judge Sentelle argued that the language in *Schnapper*, announcing that the preamble is not a limit, was confined to the limited analysis of the case's unique circumstances and, thus, was merely dicta, rather than a holding with binding force.[124]

Responding to the majority's attack on the dissent's adoption of an amicus' argument, Judge Sentelle argued that he was merely addressing the issue raised by the parties in the case – whether the Copyright Clause limited Congress' power to extend copyright protection.[125] The dissent points to the circuit court rules which require that amicus curiae must not repeat the parties' arguments, but elaborate on issues already raised.[126] Judge Sentelle maintains that the amicus did indeed do this and did not implicate new issues.[127] Furthermore, the court is not limited to the legal theories presented by the parties, but can "identify and apply the proper construction of governing law."[128]

Accordingly, the dissent concluded that Congress surpassed its power to grant copyright protection because it did not promote the

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 383.
[124] *Eldred*, 239 F.3d at 383.
[125] *Id.* at 383.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 384. (quoting United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993))(citation omitted).

progress of the useful arts.[129] Consequently, Judge Sentelle found the fact that the CTEA conformed to global copyright standards was irrelevant.[130]

IV. ANALYSIS

A. To Promote Progress

In addressing the appellants' contention that the CTEA violated the "limited Times" requirement of the Copyright Clause, the court refused to read the preamble of the clause as a restriction on the requirement. The majority mistakenly relied on *Schnapper v. Foley*,[131] a D.C. Circuit case, in reaching the conclusion that the clause's preamble does not limit Congress' power to grant copyright protection. A closer look at Supreme Court precedence requires a contrary conclusion.

Specifically, the Supreme Court sanctioned reading the introductory language as a restriction on Congress' power in *Goldstein v. California*.[132] The Court acknowledged that the Copyright clause "describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and arts."[133] This is reiterated in *Sony Corp. v. Universal City Studios*,[134] where the Court stated that Congress' power to grant copyright protection is:

> Neither limited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of

[129] *Eldred*, 239 F.3d at 384.
[130] *Id.*
[131] 667 F.2d 102 (D.C. Cir. 1981).
[132] 412 U.S. 546, 555 (1973).
[133] *Id.*
[134] 464 U.S. 417 (1984).

> special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[135]

These Supreme Court cases refute the majority's view that the Copyright Clause's preamble is not limiting and support the dissent's view that the inherent language of the Copyright Clause places limits on Congress' copyright power. Therefore, Congress can only exercise this enumerated power "to promote the Progress of Science and useful Arts."[136] Clearly, the Constitution's drafters intended the preamble to limit the rest of the clause, as the Copyright Clause is "one of only a few portions of the Constitution to recite a purpose."[137] The clause provides Congress the objective to be achieved – to promote progress – and the means by which to fulfill its objective – by granting copyright protection for a limited time. Therefore, the Copyright Clause not only grants Congress power, but also limits it.[138]

Assuming that the preamble restricts the "limited Times" requirement, the majority argued that Congress adequately showed that the CTEA was an appropriate means of achieving the end, to promote the progress of the useful arts.[139] However, the court gave too much deference to Congress without properly considering whether the legislation did in fact promote progress and ignored Congress' real reasons for passing the legislation. First, the legislation does not promote progress, but restricts it, thus limiting the richness of the public domain. The extension for neither subsisting copyrights nor future copyrights stimulates artistic

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[135] *Id.* at 429.

[136] U.S. CONST. art. I, § 8, cl. 8.

[137] Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. L. REV. 311, 319 (1996). *See also* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1153 (2000).

[138] Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1160 (2000).

[139] *See supra* notes 91-92.

production. Second, Congress passed the legislation for economic reasons and not to promote progress, thus abusing its enumerated power.

B. The Failure to Promote Progress

The court was satisfied that the legislation would promote progress of the useful arts because Congress found that the extension would give creators the incentive to preserve older works.[140] However, this argument fails for several reasons. First, the extension does not promote progress, but in fact inhibits it. As the Supreme Court expressed in *Sony Corp.*, copyright law "is intended to motivate the creative activity of authors and inventors by the provision of special reward."[141] However, by preventing older works from entering the public domain, from which authors may take and build upon legally, this creation cannot occur. Since it does not benefit would-be creators building upon or inspired from these older works, then whom does this extension benefit? Surely it does not give incentive to the authors themselves, who initially created these older works. Many of these authors are in fact no longer alive, and therefore, can no longer create. Since the original author is deceased and cannot enjoy copyright protection, then who does? The interest in the copyright passes on to the author's heirs or to whoever owns the copyright, presumably a corporation – or more accurately, to those who had absolutely nothing to do with the work's creation.[142] Since neither the heirs

[140] Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001).
[141] Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984).
[142] Examples of copyright owners of works about to expire under the Copyright Act of 1976, who will benefit under the CTEA include: Association for Childhood Education and Time Warner for the song "Happy Birthday;" Turner Entertainment (Time Warner) for the films "Gone With the Wind" and "The Wizard of Oz;" Universal Pictures for the films "Frankenstein" and "Dracula;" Time Warner for the cartoon characters Bugs Bunny and Porky Pig; and Walt Disney for Mickey Mouse. Brigid McMenamin, *Mickey's Mine!*, FORBES MAGAZINE, August 23, 1999, at 45, *available at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Mcmenamin8-23-99 (last visited Oct. 28, 2001).

nor the corporation are the ones who created the work, how then would granting them the monopoly of copyright protection give them incentive to create? It does not. It merely grants them the benefit of copyright protection – controlling the rights to the work and reaping financial rewards – without exerting any intellectual labor, the very thing that propagates the proliferation of the useful arts. In fact, no amount of additional time will give incentives to these copyright owners to generate more creative work, since they are not the creators. Rather the extension merely grants them more time to enjoy the financial rewards and to control the dissemination of this work.

Congress attempted to argue that by granting this extension, current copyright owners will be given incentive to restore these older works.[143] However, the Constitution merely requires that Congress must promote the progress of the arts. It does not specifically limit the promotion to those current copyright owners, but is intended to provide motivation to authors generally. Others who are interested in the preservation of old works, such as the appellants, may also restore these older works once they are in the public domain. The majority argues that these older works will disappear from the public domain if Congress cannot extend the copyright terms.[144] However, the appellants have demonstrated by the nature of their vocations and businesses - among them film preservationists and a publisher of rare or out-of-print public domain books - that individuals and businesses that wish to preserve these older works exist.[145]

Furthermore, promoting progress does not mean restoring what already exists. To promote means, "to contribute to growth, enlargement or prosperity of; to forward; to further; to encourage; to advance."[146] Judicially defined in *Goldstein*, the Court stated that "the terms 'to promote' are synonymous with the words 'to

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[143] *Eldred*, 239 F.3d at 379.

[144] *Id.*

[145] As indicated *supra*, film preservationists, archives, and publishers that reprint old and rare books are among the appellants. *See supra* notes 45, 48, 49 and accompanying text.

[146] BLACK'S LAW DICTIONARY 844 (6th ed. 1991).

stimulate,' 'to encourage,' or 'to induce.'"[147]

With respect to extended copyright protection for future works, the additional twenty-year extension does not give incentive to authors to work harder or produce more creative works. Proponents of the extension maintain that this additional time will give authors a longer window to exploit their work, and, therefore, yield a greater economic reward for their efforts, which will increase creation in the first place.[148] This argument is preposterous. As with subsisting copyrights, the author from whom the creative works originated will be long dead before this additional twenty-year benefit vests. She will not personally enjoy this greater economic reward. Instead, her *heirs* or a *corporation* holding the copyright will enjoy these fruits from *her* intellectual labor. In other words, those who have not invested any time or effort to create art will be able to ride on the coattails of the dead author's genius and enjoy the copyright monopoly for an even longer period. It seems unfair to grant these freeloaders such powerful and ingratiating rights, in something she - or it - had absolutely nothing to do with.

Moreover, extending copyright protection for future works will not give incentive to authors to create more because the economic reward is insignificant.[149] Hal R. Varian, Dean of the School of Information Management Systems at the University of California-Berkeley, calculated the extension's effect on the copyright's future cash flow in present value terms.[150] More specifically, he determined the future value of $1 would be worth $(1+r)^n$ in *n* years and $1 in the future would have a present value of $1/(1+r)^n$.[151] The

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[147] Goldstein v. California, 412 U.S. 546, 555 (1973).
[148] Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. L. REV. 311, 323 (1996).
[149] *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 70 (2001); *see also* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legistlative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1174 (2000).
[150] Hal R. Varian Affidavit ¶ 1, *available at* http://cyber.law.harvard.edu/eldredvreno/varian.pdf (last visited Nov. 14, 2001).
[151] *Id.* at ¶ 5.

variable *n* represents the number of years and *r* represents the rate of interest.[152] Using these equations, he calculated the value of $1 received each year, dividing them into three periods, 1-50, 51-75, and 76-95 years, and then added the present values.[153] He assumed four different interest rates – 5%, 7%, 10%, and 12%.[154] His results revealed that at a 10% interest rate, the present value of the future cash flows are as follows: $9.92 from 1-50 years, $.08 from 51-75 years, and $.01 from 76-95 years.[155] Varian's calculations illustrate the trivial effect the copyright extension has on the economic reward given to the copyright holder. Instead, "[t]he present value of the cash flows from 76-95 years is about 1 cent today – or one tenth of a percent of the value of the cash flow in the first 50 years."[156] Hence, the additional twenty years of protection provide a mere negligible return. Therefore, it does not provide incentive for authors today to invest more time, effort, or money into generating more works today. In fact, the calculations suggest that the copyright has more value in its first fifty years than its latter years. Moreover, authors will not take into consideration this insignificant future benefit when deciding whether to create something in the first place. Nor will companies, deciding whether to create something new now, take this negligible benefit into consideration.[157] Instead, companies engaged in artistic production often do so to receive immediate economic gain.[158] The negligible future benefit received during the additional twenty years will not effect the decision now to invest. Consequently, the CTEA provides no additional incentive for authors to compose more creative works. Evidently, the extension does not promote progress for either subsisting or prospective copyrights.

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[152] *Id.*
[153] *Id.* at ¶ 8.
[154] *Id.*
[155] Hal R. Varian Affidavit ¶ 8, *available at* http://cyber.law.harvard.edu/eldredvreno/varian.pdf (last visited Nov. 14, 2001).
[156] *Id.* at ¶ 9.
[157] Lavigne, *supra* note 2, at 968.
[158] *Id.*

Not only does the CTEA fail to promote progress, it also stifles creation. It effectively prevents works from entering the public domain for another twenty years. This moratorium prevents authors from building upon these works during this time. It is from this public domain authors may take material freely and add their own innovation and experience to fabricate new works.[159] Their memories, experiences, inspirations, and influences can all profoundly affect an older work and transform it into new expression and art.[160] However, because of the CTEA, authors who wish to use their experiences and unique perspectives must first seek the permission of the copyright owners to use the work. Therefore, further creation is at the behest of the copyright owners. Would-be creators wishing to build upon these older works must gain permission from current copyright owners, pay a royalty for use of the work, no matter how much, and must abide by the limitations the copyright owner places on the author's use of the work. The creator may even be entirely denied permission.

The Gershwin Family Trust is an excellent example of the immense power a copyright owner has over a creative work. The Gershwin Family Trust, who owns the copyright to the play, "Porgy and Bess," created in 1935, only allows an all-black cast to perform the play.[161] Marc G. Gershwin, a co-trustee of the family trust stated:

> The monetary part is important, but if works of art are in the public domain, you can take them and do whatever you want with them. For instance, we've always licensed 'Porgy and Bess' for the stage performance only with a black cast and chorus. That could be debased. Or someone could turn [it]

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[159] Litman, *supra* note 149, at 2.
[160] *Id.* at 1007-08.
[161] Gail Russell Chaddock, *When is Art Free?*, THE CHRISTIAN SCIENCE MONITOR, June 11, 1998, *available at* http://www.csmonitor.com/durable/1998/06/11/p51s1.htm (last visited Oct. 22, 2001).

into rap music.[162]

Gershwin's statement illustrates the control copyright owners have not only over the work, but also the creation of new work. The CTEA grants this copyright owner further economic reward - not earned from investing its own intellectual labor but that of someone else - and blesses it with the power to strangle creation.

Admittedly, the works will still go into the public domain. However, the difference between the work entering the public domain in twenty-five years as opposed to five years is significant. The monopoly duration of the life of the author plus an additional fifty years after the author's death already restricts the work significantly. This lengthy period of protection has already deprived authors from influencing and reshaping the work to reflect the events and culture of the present time. Assuming the original author of a work is twenty-five years old when she writes a novel and she does not die until she is seventy-five, the work has already been restricted for fifty years. Under the 1976 Act, the work is restricted for another fifty years, equaling a 100-year monopoly over the work. During those 100 years, many historical events would have taken place affecting not only the society at large, but also the creations from that society. The CTEA only adds more time the work is restricted.

To illustrate, let us imagine that an author creates a musical in 1900, dies in 1950, and the musical's copyright protection under the CTEA does not expire until 2020. During this span of time, the United States has experienced unprecedented events such as Women's Suffrage, The Civil Rights Movement, WWI, WWII, the Vietnam War, the Cold War, and the AIDS epidemic. Looking at these major historical events alone, one can see the development of the United States as a nation and the different political and social issues affecting it. Musically, the nation experienced the era of big band, felt the impact of the British invasion, the rock innovation of

[162] Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at A13, *available at* http://cyber.law.harvard.edu/eldredvreno/nyt32898.html.

Elvis Presley, and Seattle's grunge, witnessed the birth and evolution of rap, hip-hop, and even bubble gum pop. Clearly, these historical and cultural influences could deeply impact art produced at that time. However, the copyright restricts the musical work during these 120 years of exclusive rights and grants the copyright owner with the power to filter how the historical and musical events affect the work. The twenty-year extension of the CTEA negatively impacts creation by excluding even more events and generations of creators from influencing the work to reflect the culture of the time. Not only would this deprive another generation of authors from creating new art, the public would be deprived of art influenced by different generations of people exposed to different events and encountering different cultural experiences. Admittedly, these historical and cultural events can still influence works once the copyright expires, however, their impact would be most significant at the time these events are actually occurring. Authors can actively impact works in the public domain with contemporaneous events, instead of trying to remember the events, attempting to recapture all the emotions and impressions incited when they first occurred, and trying to recreate the gravity of their impact on them, as well as art, at a much later time. Additionally, that author may not have been alive during the occurrence of the past event to give an accurate perspective of that time.

Current cultural experiences can have an enormous impact on the creative arts. For example, the recent production of the "Bomb-itty of Errors," a modern day hip-hop, rap version of William Shakespeare's "Comedy of Errors," transformed Shakespeare's trademark iambic pentameter cadence into modern urban rhythm in the form of rap to tell the story.[163] In addition, the play's creators adapted the characters into modern, urban individuals.[164] This version is clearly impacted by the different era of music and urban influences of the late twentieth century. If

[163] Richard Christiansen, *'Bomb-itty of Errors' Delivers Refreshing Jolt*, CHICAGO TRIBUNE, *available at* http://www.bomb-itty.com/press_trib.htm (last visited Dec. 14, 2001).
[164] *Id.*

Shakespeare's work was not available in the public domain, the "Bomb-itty of Errors" creators – four New York University students who created it as a class project[165] – would have had to first seek the permission of the current copyright owners, who may or may not allowed them to use the work, depriving the public of their artistic innovation. Furthermore, without the availability of old works in the public domain, Disney could not have created such noteworthy, and arguably influential, films and productions of our time such as "Pocahontas," "Snow White and the Seven Dwarfs," "The Hunchback from Notre Dame," "Apocalypse Now," or "Jesus Christ Superstar."[166]

Another more recent example of historical, social, and cultural influences impacting past works is Alice Randall's novel, "The Wind Done Gone." Randall's book tells the story of Margaret Mitchell's best-selling novel, "Gone With the Wind," through the eyes of a slave.[167] Randall's novel attempts to correct the pre-Civil War depiction of blacks in Mitchell's novel, published in 1936.[168] Randall's work reflects the change of African-Americans' place in society today and the United States' consciousness of racial discrimination and equality, shattering the racist stereotypes depicted by Mitchell's pre-Civil War and pre-Civil Rights Movement perspective.[169] From looking at these examples, it is evident how present day social, historical, and cultural events and values impact older works, transforming them into new and different works.

C. Congress' Economic Motivation

By upholding the CTEA in *Eldred*, the D.C. Circuit ignored the real reason for Congress' legislation. When this legislation was

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[165] *Id.*
[166] *See supra* note 42.
[167] Suntrust Bank v. Houghton Mifflin Co., 136 F.Supp.2d 1357, 1364 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).
[168] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001).
[169] Netanel, *supra* note 149, at 2.

considered in Congress, the Senate reported that the bill's purpose was "to ensure adequate protection for American works in foreign nations and the continued economic benefits of healthy surplus balance of trade in the exploitation of copyrighted works."[170] The Senate explained that the extension would give the United States "significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve the benefit fully from their exploitation of their works."[171] The Senate continues to argue its economic justifications for promoting the CTEA throughout its report.[172] It is evident that Congress was not seeking to promote progress of the useful arts, but simply to put the United States economy and its authors in the most advantageous economic position as possible.

Congress contended that the CTEA aligns United States' copyright law with the European Union's ("EU") law; however; as Judge Sentelle of the dissent point out, the EU must not follow the United States constitution, but the U.S. must.[173] Congress' emphasis on the economic harm on the U.S. indicates that its primary concern was not the advancement of the arts. Since the Constitution mandates that Congress grant copyright protection for a limited time *only* to promote the progress of the useful arts, Congress went beyond its enumerated powers.

Moreover, Congress' concern of protecting the economy will backfire. Congress argued that intellectual property is the United States' second largest export.[174] It reasoned that without the alignment of U.S. copyright law with the European Union's law, the U.S. would be deprived of millions of dollars in export

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[170] S. REP. NO. 104-315, at 3 (1996).
[171] *Id.*
[172] *Id.* at 6. For example, the Senate reviewed technological developments, demographic and international changes, concluding that the current copyright protection was "no longer sufficient to protect adequately our Nation's economic interests in copyrighted works, and more importantly, the interests of American authors and their families." *Id.*
[173] Eldred v. Reno, 239 F.3d 372, 384 (D.C. Cir. 2001).
[174] S. REP. NO. 104-315, at 9-10 (1996).

revenues.[175] By extending the term, according to Congress, the U.S. will benefit from exploiting these works longer instead of letting the European Union take advantage of the U.S.' limited monopoly term.[176] However, because the legislation gives copyright owners twenty more years to financially benefit, these works will not enter the public domain for another twenty years. In effect, the public domain remains stagnant and the promulgation of new works is stifled for these twenty years. Consequently, there will be fewer works in the future for the United States to exploit abroad from which it may reap financial benefits. The United States will not only have less creative works to exploit under the 1976 Act term of life of the author plus fifty years, but also under the twenty year extension. It seems then that it would be more damaging to the economy. Moreover, as Professor Dennis Karjala points out, the United States is the biggest market for older works, not the European Union.[177] He explains that the United States' trade surplus with the European Union are from newer works and not from older works from the 1920s and 1930s - copyrights that would have expired if it were not for the CTEA's passage.[178]

In short, the D.C. Circuit incorrectly analyzed the constitutionality of the CTEA by blindly accepting Congress' excuse for passing the legislation. Not only did Congress improperly pass the CTEA for economic reasons, rather than to promote the progress of the useful Arts as the Copyright Clause requires, but the CTEA also will stifle the progress of the creative arts. Consequently, the D.C. Circuit erred in affirming the district court's dismissal of plaintiffs' claims.

D. Limited Times

The majority weakly argued that the extension met the "limited Times" requirement because Congress did in fact grant copyright

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[175] H.R. REP. NO. 105-452, at 3 (1998).
[176] *Id.*
[177] *See supra* note 42.
[178] *Id.*

protection for a fixed term of years.[179] Furthermore, the court relied on Congress' position that it was merely adhering to international copyright standards, therefore, could not possibly be trying to make copyright protection perpetual.[180] This limited monopoly is illusory.

As long as Congress grants a term of years, according to the majority, any amount of time achieves the limited time requirement.[181] Construing the clause in this manner gives Congress excessive power to grant as much time as it desires, effectively creating a perpetual copyright. Defining the limited time requirement in this manner is too elastic. Congress could merely extend copyright protection to subsisting copyrights every time protection is set to expire under the guise of enumerated powers and a term of years. In fact, Congress has done this many times, particularly from 1962 to 1976, when it extended protection for subsisting copyrights seven times.[182] According to Professor Nimmer, "continuous extension of protection at some point must cross over the line, to becoming *de facto* perpetual in violation of the Constitutional command."[183] It seems that Congress' actions – its repetitive extensions – have crossed this line. In effect, Congress has given permanence to copyright protection by extending its duration many times and has stripped the Copyright Clause of any meaningful limits on congressional power.[184]

What then does meet the limited time requirement? One argument is that once a copyright has been granted, the duration of that grant is the maximum, limited time.[185] Therefore, any attempt to extend the length fixed by this grant would violate the limited

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[179] Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001).
[180] *Id.*
[181] *Id.*
[182] *See supra* notes 24-29 and accompanying text.
[183] Nimmer on Copyright §1.05[A][1] (2001).
[184] *Copyright Craziness*, THE WASHINGTON POST, Aug. 17, 2001, at A22, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=opinion&contentId=A22911-2001Au (last visited Oct. 22, 2001).
[185] Robert Patrick Merges and Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 60 (2000).

times requirement.[186] This "once granted" approach is problematic. The very purpose of granting copyright protection is to promote the progress of the useful arts. If the current copyright protection is deemed no longer effective and the creative arts are no longer progressing, this approach would strike down any attempt by Congress to lengthen the protection. If this strict approach had been invoked at the inception of the First Copyright Clause, copyright protection would be cemented at fourteen years of protection with a fourteen-year renewal term. Congress would have no means of correcting its miscalculation of a workable copyright term.

Another argument suggests that Congress is not required to find the optimal length of time to stimulate creation.[187] Instead, Congress needs merely to stimulate some creativity when it grants a term of copyright protection.[188] Although this argument makes perfect sense, it provides little guidance. How then are the courts to determine whether Congress has violated the limited times requirement? The only plausible way to determine whether an extension meets the limited time requirement is to determine whether the objective of the Copyright Clause has been met. If the additional grant of time does not promote the progress of the creative arts, then Congress has not used the means, which the Constitution has provided to achieve this goal properly. It has not granted protection for a limited time. Although Congress has broad discretion to determine what the appropriate limited time is, it is the courts' role to ensure that Congress is abiding by this requirement. The only way to do this is to determine whether the additional grant promotes progress. How then does one measure what length stimulates growth? Economic analysis of the additional benefit bestowed upon the copyright holder is an appropriate starting point. As Professor Varian demonstrated through his calculations of future cash flows at present value, calculating the economic benefit given to the copyright holder is indicative of creation incentives. Also, the courts should look at

[186] *Id.*
[187] Heald and Sherry, *supra* note 138, at 1172.
[188] *Id.*

who is receiving these benefits. Is it the author, who is the target of stimulation, or it merely the author's heirs or a corporation benefiting from the work of another? And does this benefit provide greater incentive to the author to create more works or work harder? At this point – life of the author plus seventy years protection – the likely answer is no.

V. IMPACT

As Professor Dennis Karjala of Arizona State University warns, "[F]or the first time in our history, almost nothing is entering the public domain."[189] As discussed earlier, this is stifling to artistic innovation and advancement. If the public domain continues to be restricted in this manner, the freedom to create new interpretations of existing works is endangered. According to Harvard Law School Professor Lawrence Lessig, a vibrant public domain could result in a cultural windfall.[190] In other words, the more material freely accessible in the public domain, the more works – or building blocks – creators will have to work with and build onto, which could result in an abundance of new art to the public's benefit. It then follows that without a plentiful public domain, American culture is deprived. Current creators would be limited to what is already in the public domain – works already exhausted by other creators. They would have to seek out the permission of the copyright owner for use of the work. Furthermore, the would-be creator would have to pay the copyright owner's requested royalty – whatever the price – and be subject to the owner's conditions of use. This effectively places boundaries on the author's creativity and innovation. The effect an all-powerful copyright owner can have on creators is evident in the Gershwin Family Trust's control over "Porgy and Bess," as discussed earlier. Furthermore, a twenty-year moratorium of works entering the public domain prevents a whole generation of authors from contemporaneously using their unique cultural experiences and perspectives to

[189] *See supra* note 42.
[190] *Id.*

influence the adaptations, interpretations, or transformations of old works.

Of course it would be difficult to pinpoint precisely of what America's culture is being deprived, as these works are not yet created. However, we can possibly foresee the impact of *Eldred v. Reno*[191] and the restriction of the public domain by viewing, in retrospect, what has been contributed to the arts from the public domain. Our modern day symbol of Santa Claus, Uncle Sam, the Democratic donkey, and the Republican elephant were all created by the 19th-century cartoonist, Thomas Nast.[192] Had these symbols' copyright owner been granted the protection under the CTEA, they might not have become the cultural icons or national symbols in the United States that they are today. Instead, the government would have been forced to acquire the permission from the copyright owner before publishing its version in political posters or wartime propaganda posters and pay the requested royalty fees.[193] If William Shakespeare's play "Romeo and Juliet" were granted CTEA-like protection, its present-day copyright owners might not have licensed its use for the creation of the New York gang war musical, "West Side Story."[194] And even Disney - one of the most adamant lobbyists for the CTEA - pillaged through public domain characters and works, to create some of its most successful products.[195] Among these successes are "Pocahontas," "Snow White" and the "Seven Dwarfs," The Hunchback of Notre Dame, the film "Apocalypse Now" (from the novel, "Heart of Darkness"), and the musical "Jesus Christ Superstar" (from the Bible).[196] The negative effects the CTEA would have on the public domain and the progress of creative arts is substantial and evident. As previously discussed in depth, the additional twenty-

[191] 239 F.3d 372 (D.C. Cir. 2001).
[192] *See supra* note 42.
[193] *Id.*
[194] John Solomon, *Rhapsody in Green*, THE BOSTON GLOBE MAGAZINE, January 3, 1999, *available at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Solomon1-3-99.html (last visited Oct. 22, 2001).
[195] *See supra* note 42, 196.
[196] *Id.*

year moratorium the CTEA creates prevents historical events, current culture, and authors from a particular generation from building off those works that would otherwise be in the public domain. Their insight, experiences, and perspectives would have to wait the additional twenty years to the already lengthy protection period, to influence older works. Even though the works would eventually end up in the public domain, the delay could affect the way past events impact the older works. Creators would have to recapture and recreate the emotions and impressions incited by the past historical, social, and cultural events. The twenty-year delay could alter the author's perception of the events or influences. She may forget the events' gravity, perceive the events differently due to time's passage, or may no longer be influenced by the events at all.

If the court had struck down the CTEA instead, rich copyright owners – often time lucrative corporations such as Disney – would not be able to rely on its old works to realize an economic windfall. Instead, these copyright owners would be forced to create new and vibrant characters and works to maintain their substantial economic benefit and in effect, contribute to the intellectual and artistic marketplace. It is vital to remember that copyright law exists not to compensate authors, but to benefit the public.[197] Any financial benefit realized by an author is merely a secondary concern and an avenue by which copyright's primary goal may be achieved. What is that primary goal? The Constitution and a myriad of Supreme Court cases tell us that it is "to promote the Progress of Science and useful Arts."

VI. CONCLUSION

The Constitution's drafters created the Copyright Clause with one interest in mind and one interest only – to ensure the creative arts' vitality. Article I, Section 8, Clause 8 empowered Congress to give creators a limited monopoly over their creations. However, it also limited the way and for what purpose Congress could grant

[197] Lavigne, *supra* note 137, at 318.

this benefit. Because creation does not occur by creating something out of nothing, but by building off or transforming the works of others, copyright law's primary concern is to propagate the creative arts for the public's benefit, and not to provide an unrestricted and indefinite monopoly to authors or their heirs. Therefore, a work's copyright protection persists for a limited time and then it passes into the realm of the public domain. From this public domain, authors may freely access these older works and build off them. They may use their memories, historical events, cultural influences, and personal experiences to transform the old work into new expression. Old works are reincarnated into new life and enable readers, observers, and listeners to experience them with a whole new perspective or spin. It is this public domain that enables creativity to continue and the creative arts to prosper. The Constitution grants Congress the power and charged it with the duty to promote this progress. Congress must use its copyright power to do just this and nothing more. And it is the courts' role to make sure Congress abides by this Constitutional mandate.

Christine Quintos