

From *Wheaton v. Peter* to *Eldred v. Reno*: An Originalist Interpretation of the Copyright Clause

This continual expansion [of the copyright term] is not surprising. Holders of copyrights about to expire have a financial interest in urging extension. Authors and publishers can lead a legislature to focus on the production and “moral” arguments for protection, while no single interest group is sufficiently affected to focus legislative attention upon the problems of dissemination. An examination of the question, however, suggests that, even if the moral argument is given its due, which is little, extension is not justified.

— Justice Stephen Breyer^a

I. INTRODUCTION

A. Eric Eldred and Eldritch Press

In 1995, Eric Eldred formed Eldritch Press as a means of publishing rare and out-of-print books on-line.¹ A former medical technician, he originally got involved in the digital publishing of public domain-books as a hobby,² starting with *The Scarlet Letter* by Nathaniel Hawthorne — a book his daughters were then reading it in high school.³ In the four years since his first “publication,” Eldred has posted more than 50 books on-line, including other works by Hawthorne, manuscripts by Oliver Wendell Holmes Sr., and writings of Henry James.⁴ Also posted were literature on World War I, small boats, French and Russian classics (with some bilingual works), science and natural histories, children’s stories, and works of general interest, such as H. L.

^a *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 324 (1970). Justice (then Professor) Breyer said this in reference to the possibility of extending the copyright term for an additional 19 years at the time the 1976 Copyright Act was under consideration.

¹ See Joyce Slaton, *A Mickey Mouse Copyright Law?*, WIRED (Jan 13, 1999) <<http://www.wired.com/news/news/politics/story/17327.html>>.

² See Carl S. Kaplan, *Free Book Sites Hurt by Copyright Law*, NEW YORK TIMES CYBERLAW JOURNAL (Oct. 30, 1998) <<http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html>>.

³ See Kaplan, *Free Book Sites*, *supra* note 2.

⁴ See Carl S. Kaplan, *Online Publisher Challenges Copyright Law*, THE NEW YORK TIMES CYBERLAW JOURNAL (January 15, 1999) <<http://search.nytimes.com/books/search/bin/fastweb?getdoc+cyberlib+cyberlib+3523+0+wAAA+eldred>>.

Mencken's *Declaration of Independence in American* and Louisa May Alcott's "An Old-Fashioned Thanksgiving."⁵ Because many of these books cannot be found in library collections or are long out of print, the public often gains access only through Eldred's on-line library.⁶

The Eldritch Press site caters to as 4,000 visitors per day and has received hits from virtually every country in the world.⁷ Many of the site's visitors are from rural areas or other locales situated far from libraries and bookstores.⁸ By providing ready access to these rare collections over the Internet, the Eldritch Press was recognized by the National Endowment for the Humanities as one of the 20 best humanities sites on the Web.⁹ Moreover, its Hawthorne and Howells pages have been endorsed as reputable links by the Nathaniel Hawthorne Society and the William Dean Howells Society Web sites.¹⁰

Eldred has continued to expand his library by posting new works upon their entry into the public domain.¹¹ The public domain consists of works free from copyright, thus making them available for use without permission of the copyright holder or payment of royalties.¹² Because Eldred both lacks the resources to track down copyright holders and request permission for reprinting and Eldritch Press is a not-for-profit endeavor which can afford to pay royalties,¹³ the public domain as a source of works is crucial to Eldred's efforts. In early 1999, Eldritch Press was planning on

⁵ See Complaint, Eldred v. Reno, (D.D.C., filed January 12, 1999) <<http://cyber.law.harvard.edu/eldredvreno/evidence/complaint.html>>. See also Eldritch Press website at <<http://eldred.ne.mediaone.net/>>.

⁶ See Complaint, *supra* note 5.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See generally, Slaton, *supra* note 1.

¹² See generally, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (Fall, 1990). The public domain generally includes three categories of works: 1) works create before the enactment of copyright statutes, such as Shakespeare's *MacBeth* or Pachabel's *Canon*; 2) works that were once subject to copyright, but were created so long ago that they are no longer protected, such as Mark Twain's *Huckleberry Finn*; and 3) works which were ineligible for U.S. copyright or failed to comply with the prerequisites for securing copyright protection. See *id.* at 975-76.

¹³ See Complaint, *supra* note 5.

featuring literary works that had been created in 1923,¹⁴ such as “New Hampshire” by Robert Frost, *Horses and Men* by Sherwood Anderson, and *Racundra’s First Cruise* by Arthur Ransome.¹⁵ However, when the Sonny Bono Copyright Term Extension Act of 1998¹⁶ was signed into law by President Clinton on October 27, 1998, these works were effectively blocked from entering the public domain for at least another twenty years.¹⁷ Eldred will have to wait those twenty years until his plans can be realized.

B. The Sonny Bono Copyright Term Extension Act of 1998

Various bills that foreshadowed the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) were introduced during the 104th (1995-1996) and 105th (1997-1998) Congresses.¹⁸ The 1998 copyright legislation introduced to the House of Representatives was in the form of H.R. 604,¹⁹ and its later reincarnation, H.R. 2589.²⁰ The Senate counterpart to the bill, S. 505,²¹ introduced March 20, 1997, was sponsored by Senator Orrin Hatch (R-UT), and co-sponsored by Senators Patrick Leahy (D-VT), Alfonse D’Amato (R-NY), Fred Thompson (R-TN), and Spencer Abraham (R-MI).²² Both the House and the Senate passed S. 505, the Sonny Bono Copyright Term Extension Act, on October 7,

¹⁴ At this time, these works would have entered the public domain, their “original” 75 year copyright protection having run its course.

¹⁵ See Complaint, *supra* note 5. Also among his desired additions were works such as A. A. Milne’s *Winnie-the-Pooh* and Ernest Hemingway’s *Three Stories and Ten Poems*, and other works about to enter the public domain. See Slaton, *supra* note 1.

¹⁶ Pub. L. No. 105-298, 112 Stat. 2827.

¹⁷ See Slaton, *supra* note 1; see also Library of Congress, *Thomas: Legislative Information on the Net* (last visited April 8, 1999) <<http://thomas.loc.gov/>> [hereinafter “*Thomas*”]. Some works that “squeaked by under the wire” when the CTEA was enacted are: *Ulysses*, by James Joyce, Samuel Butler’s translation of Homer’s *Odyssey*, and G.K. Chesterton’s *The Man Who Knew Too Much*. See Kaplan, *Free Book Sites*, *supra* note 2; Adam Clayton Powell III, *Literary Publisher Sues to Overturn 1998 Copyright Law*, THE FREEDOM FORUM ONLINE, (January 21, 1999) <<http://www.freedomforum.org/technology/1999/1/21pope.asp>>.

¹⁸ See Dennis S. Karjala, *What Are the Issues in Copyright Term Extension — and What Happened?* (last visited April 11, 1999) <<http://www.public.asu.edu/~dkarjala/what.html>>.

¹⁹ H.R. 604, 105th Cong. (1997).

²⁰ H.R. 2589, 105th Cong. (1997). This measure passed the House on March 25, 1998, and was referred to the Senate on March 26. See *Thomas*, *supra* note 17.

²¹ S. 505, 105th Cong. (1997).

²² See *Thomas*, *supra* note 17.

1998.²³ In late 1998, President Clinton signed the CTEA into law.²⁴

The duration of copyrights on literary works is generally governed by 17 U.S.C. § 301 *et seq.* The CTEA amended 17 U.S.C. § 304²⁵ in relevant part as follows:

(d) Duration of Copyright: Subsisting Copyrights. —

(1) In General. — Section 304 of Title 17, United States Code, is amended—

(B) by amending subsection (b) to read as follows:

“(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act — Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.”

These changes to § 304 became effective immediately upon passage of the CTEA. Essentially, the practical effect of the CTEA was to add twenty years to the term of most copyrights. Thus, some of the works copyrighted in 1923 that Eldred had planned to add to the Eldritch Press website²⁶ are now not available to him. With the enactment of the CTEA, the copyright term has been extended to 95 years — meaning that such works will not enter the public domain until December 31, 2018.

C. The Private Interests Affected

Without the CTEA, Mickey Mouse — created by Walt Disney in 1928 — would have entered the public domain in

²³ *See id.*

²⁴ Pub. L. No. 105-298, 112 Stat. 2827. *See Thomas, supra* note 17.

²⁵ Until it was amended by the CTEA, 17 U.S.C. § 304(b) provided:

“(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978. — The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date the copyright was originally secured.”

In addition, 17 U.S.C. § 305 states that copyrights run to “the end of the calendar year in which they would otherwise expire.” This provision means that if a copyrighted work were created in June of 1923, prior to the enactment of the CTEA, the term would have ended on December 31, 1998.

²⁶ Those copyrighted in 1923 would have fallen into the public domain on December 31, 1998, once the original 75 year term of copyright protection ended.

2003.²⁷ Other Disney characters would have soon followed: Pluto in 2005, Goofy in 2007 and Donald Duck in 2009.²⁸ Music written by George and Ira Gershwin, Cole Porter, Irvin Berlin, Hoagy Carmichael, and many others would have been available to the public free of copyright protection over the next few years.²⁹ *The Jazz Singer*, the first talking film, would have been available as well in 2004.³⁰ Also poised to enter the public domain were the novels of Ernest Hemingway and William Faulkner and the poems of Carl Sandburg.³¹

With all these works set to enter the public domain, the various copyright industries, ranging from television, movies, music, books, to computer software stand to lose a significant amount of money. The products from these industries are the United State's most important export, contributing \$60 billion in foreign sales in 1996, according to the Washington-based International Intellectual Property Alliance.³² *The Wall Street Journal*, in addition, reports that the heirs and assignees of music composers from the 1920's have already enjoyed millions of dollars of extra royalty income as a result of various copyright term extensions that have been enacted over the years.³³ With the passage of CTEA, these individuals, family trusts, and other organizations are granted an additional 20 years of royalties.³⁴

²⁷ See John Solomon, *Rhapsody in Green*, BOSTON GLOBE, Art & Commerce, January 3, 1999, at E02. (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/Solomon1-3-99.html>).

²⁸ See Associated Press, *Disney Lobbying for Copyright Extension No Mickey Mouse Effort: Congress OKs Bill Granting Creators 20 More Years*, CHICAGO TRIBUNE, (October 17, 1998). (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/ChiTrib10-17-98.html>).

²⁹ See Solomon, *supra* note 27; see also Gail Russell Chaddock, *When Is Art Free?* CHRISTIAN SCIENCE MONITOR, June 11, 1998, at B1. (Article may be found on-line at <http://www.csmonitor.com/durable/1998/06/11/fp51s1-csm.htm>).

³⁰ See Chaddock, *supra* note 29.

³¹ See *id.*

³² See *id.*

³³ See discussion of statutory extensions, *infra* at 29-33; John J. Fialka, *Songwriters' Heirs Mourn Copyright Loss*, WALL ST. J. (October 30, 1997).

³⁴ Moreover, the prices charged for uses of songs continues to rise. At the time of the Fialka article, see *id.*, the price for a nationwide license for a single Gershwin song for use in advertising has risen from \$45,000 - \$75,000 \$200,000 - \$250,000 in only fifteen years.

Moreover, the CTEA comes at a time when technology has revolutionized the way information is distributed. Digital technology, the Internet, expansion of cable television, and other such factors have converged to make old movies, cartoon characters and songs more valuable than ever.³⁵ In analyzing the commercial value of the five major Disney characters — Goofy, Mickey Mouse, Minnie Mouse, Pluto, and Donald Duck — Merrill Lynch suggests that the worth of the copyright to Disney is incalculable.³⁶ Looking at merchandising alone (and ignoring other indicia of value such as logos and brand recognition), the five cartoon characters experience a 20 percent increase in value each year.³⁷

The financial interests at stake have not escaped the attention of the copyright holders. Songwriters such as Bob Dylan and Quincy Jones, and heirs of such prominent past composers as George Gershwin and Hoagy Carmichael, visited Washington D.C. to lobby for their interests.³⁸ The Motion Picture Association of America (MPAA) has called on its head, Jack Valenti, one of Washington's best-connected lobbyists, to influence legislators.³⁹ Other important players such as Time Warner, The American Society of Composer, Authors and Publishers (ASCAP), the recording industry, and Disney have also become involved.⁴⁰

Disney, in particular, has been especially active in the debate. Disney chairman and chief executive Michael Eisner personally lobbied Senate Majority Leader Trent Lott (R-MS) and

³⁵ See Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, NEW YORK TIMES, March 28, 1998, at A13. (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/smith.html>).

³⁶ See *id.* Moreover, according to Solomon Smith Barney, Disney's consumer products division, which includes Mickey-themed merchandise, is expected to more than \$3.8 billion in sales in 1998; the Disney amusement parks are expected to make a profit of more than \$1 billion from \$4 billion in sales. See Alex Berenson, *Disney's Copyright Conundrum*, ABCNEWS.com (May 8, 1998) <<http://abcnews.go.com/sections/business/DailyNews/mickey980508/index.html>>. The two divisions together account are expected to account for more than two-fifths of Disney's 1998 income. See *id.*

³⁷ See *id.*

³⁸ See Solomon, *supra* note 27. These parties argue that copyright extension will better reflect the longer life spans of children and grandchildren, and that descendants are in the best position to be future stewards of the work. See *id.*

³⁹ See Bill McAllister, *A Capital Way to Stop a Headache: Mouse Droppings*, WASHINGTON POST, October 15, 1998, at A21. (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/WashPost10-15-98.html>); see also Berenson, *supra* note 36.

⁴⁰ See Associated Press, *supra* note 28.

House Speaker Newt Gingrich (R-GA).⁴¹ Then, according to the Center for Responsive Politics, Disney gave Lott a \$1,000 contribution, followed by a \$20,000 donation to the National Republican Senatorial Committee.⁴² Other parties received contributions as well. Ten out of the 13 initial sponsors of the House predecessor to the CTEA received contributions from Disney's political action committee.⁴³ On the Senate side, eight of the 12 sponsors also received Disney contributions.⁴⁴ The Senate bill's chief sponsor, Senator Hatch, received \$6,000; only Senator Barbara Boxer, representing Disney's home state of California and up for re-election this fall received more.⁴⁵

It is clear that private interests are being addressed and heard. Senator Hatch framed the debate as a question of "whether the current term of copyright adequately protects the interests of authors and the *related* question of whether the terms of protection continues to provide a sufficient incentive for the creation of new works of authorship."⁴⁶ Essentially, Hatch sees the primary focus to be on authors, with secondary attention paid to copyright as an incentive to creativity. He states that an extension of copyright would allow "authors to reap the *full benefits to which they are entitled* from the *exploitation* of their creative works."⁴⁷ Simply from

⁴¹ See *id.*; see also McAllister, *supra* note 39.

⁴² See Associated Press, *supra* note 28.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ 141 CONG REC. S 3390 (1995) (statement of Sen. Hatch) (italics added). The transcript can also be found on *Thomas* at <http://thomas.loc.gov/cgi-bin/query/D?r104:3:./temp/~r104uHzo8G:e2370:>

⁴⁷ See *id.* (italics added). Senator Hatch admits as much, acknowledging that it is his numerous interviews with writers, authors, and artists, from which he concludes that they are reasonable in their expectation for copyright to be a potentially valuable resource to be passed on to their children and grandchildren and that this is the general expectation which the Framers had in mind. See *id.* at S 3392, but see discussion of Framers' intent, *infra* at 20-27.

Also important to Hatch is the increasing lifespan of the average American; "copyrights are too often expiring before they have served their purpose of allowing an author to pass their benefits on to his or her heirs." See *id.* That this is the purpose of copyright — allowing an author to pass their benefits on to heirs — is a presumptively incorrect assertion. See generally Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 348-49 (1996)

the rhetoric Hatch employs, the influence from private interests can be readily seen.

Senator Dianne Feinstein (D-CA) also admits the extent to which private interests have affected the debate.⁴⁸ She notes for the record that:

[There exists] extraordinary support for this legislation within the intellectual property community. Not only do movie and music companies strongly back this bill as written, as one would expect, but book and music publishers, performing rights societies representing America's premier songwriters and composers, and major software producing firms all concur that Congress can and must pass this important legislation.⁴⁹

Apparently, Feinstein looks to the major lobbying and campaigning by the various corporations and organizations as one of the primary reasons for extending the term of copyright protection.

The extensive efforts for the sake of a rather simple piece of legislation signal an extraordinary request underlying the various efforts of Disney, ASCAP, Time Warner, and other parties. Hayward Cirker, president of Dover Publications Inc., a company which publishes \$1 editions of classic books, sums up what he sees as the main thrust of the underlying message:

The large corporations controlling copyrights in this country would like additional revenue obtainable by limiting the public domain even more than at present, and, I suppose, would go so far as to make copyright perpetual if they possibly could.⁵⁰

While this directive is troubling enough as it stands, what troubles opponents of copyright extension even more is that there were no witnesses speaking for the public interest at the congressional hearings for the copyright term legislation.⁵¹

⁴⁸ See 141 CONG REC. S 3393-94 (1995) (statement of Sen. Feinstein).

⁴⁹ *Id.*

⁵⁰ Chaddock, *supra* note 29.

⁵¹ See *id.* Professor Karjala feels that the omission was deliberate. He writes:

The special-interest proponents of term extension were successful at making the bill look noncontroversial, as shown by the way the House Subcommittee held its "hearings". The hearings were combined with some other bills, so they were not publicized under the bill numbers for those trying to follow the legislation. The proponents of extension — surprise, surprise! — knew about the House hearings and of course testified in favor. The opponents did not even know the hearings took place until several months later!

D. The Public Interests Affected

While the private interests were well-represented, the voice of the public interest was largely absent from the debate. Like many other societal issues that are points of contention, the “collective inaction” problem has resulted in an uneven representation of viewpoints in the debate over copyright. Professor Dennis S. Karjala, a vigorous opponent of copyright term extension observes that:

The costs of term extension are, in fact, enormous, but they are spread out over so many people that few single individuals or groups feel a compelling need to fight. With only a few exceptions, such as the AAUP and the Society of American Archivists, the traditional “proxies” for the public interest in copyright matters — librarians, educators, consumer and citizen action groups — were largely silent.⁵²

Moreover, while the financial benefits to be derived from an extension of copyright are fairly easy to calculate, the financial costs from a smaller public domain are much more difficult to ascertain. There is little way to determine how many works will *not* be created as a result of a smaller pool of public domain works from which to draw inspiration or build upon.

Authors draw upon a common cultural heritage, largely informed and shaped by public domain material.⁵³ While it is possible that a work may be created wholesale without drawing inspiration from or building upon public domain ideas, characters, stories, music, and so forth, it is more likely than not that a creative work is informed somewhat by the freely available material in the public domain. As Professor Jessica Litman eloquently expresses:

Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort. . . . [T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers

Karjala, *What Are the Issues*, *supra* note 18.

⁵² Karjala, *What Are the Issues*, *supra* note 18.

⁵³ *See generally*, Litman, *supra* note 12.

transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already “out there” in some other form. This is not parasitism: it is the essence of authorship.⁵⁴

And much as authors and other artists have taken from the public domain to create their own works, so they should contribute to the public domain to stimulate and encourage others.

Indeed, some of our more extraordinary creative works are derived from public domain material. Shakespeare’s *Romeo and Juliet* was retold in the well-known musical, *West Side Story*,⁵⁵ and the big winner at the Academy Awards this year was *Shakespeare in Love*, a conflation of *Romeo and Juliet* and *Twelfth Night*, as well as containing references to *Hamlet* and *Macbeth*.⁵⁶ Other updates of Shakespeare include *Hamlet* with Mel Gibson, *Romeo and Juliet* starring Leonardo DeCaprio and Claire Danes, the upcoming *A Midsummer Night’s Dream* with Kevin Kline, Michelle Pfeiffer and Calista Flockhart, and recently released was a teenage version of *The Taming of the Shrew* entitled *10 Things I Hate About You*.⁵⁷ The Bible was retold in *Jesus Christ Superstar*,⁵⁸ and has inspired *The Ten Commandments*, *The Prince of Egypt*, *The Last Temptation of Christ*, and countless others. Jane Austen’s work has recently experienced a revival; without having been in the public domain, would the movies *Emma*, *Sense and Sensibility*, or even *Clueless* (a teenage comedy loosely based on *Emma*) have been produced? The entrance of Frances Hodgson Burnett’s *The Secret Garden* into the public domain generated a number of new book, film, and stage versions.⁵⁹ Mozart’s music was used in *Amadeus*, and Victor Hugo’s *Hunchback of Notre Dame* was turned into the 1939 classic starring Charles Laughton, as well as a Disney animated movie.⁶⁰

⁵⁴ *Id.* at 966-67.

⁵⁵ See John Horn, *Cartoon Copyrights Coming Up*, Associated Press, (February 2, 1998). (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/jhornAP.html>).

⁵⁶ See *And the winners are...* USA TODAY, March 22, 1999 at 3D.

⁵⁷ See Terry Byrne, *The Bard is, like, boffo: There’s much ado about Bard*, THE BOSTON HERALD, March 26, 1999 at S05.

⁵⁸ See Horn, *supra* note 55.

⁵⁹ See Dennis S. Karjala, *Copyright extension would enrich heirs, impoverish culture*, ARIZONA REPUBLIC Op-Ed page, September 1, 1998, at B4. (Article may be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/AzRep9-01-98.html>).

⁶⁰ See Horn, *supra* note 55.

Ironically, Disney, one of the most active advocates for the CTEA, should be especially aware of the creative and economic value of a strong public domain.⁶¹ Disney is particularly well-known for the re-crafting of various stories and characters freely available from the public domain. Some of their most popular “re”-creations include the Little Mermaid, the Hunchback of Notre Dame, Aladdin, Cinderella, Hercules, Sleeping Beauty, Snow White, Pocahontas, Beauty and the Beast, and most recently, Mulan.⁶² In due time, these creations in turn must enter the public domain as well.

As the above examples illustrate, the costs to further creativity from a more limited public domain may be substantial. The financial costs to the public should not be ignored either. Public domain material is cheaper to produce and distribute since there is no need to pay royalties or to search for copyright owners. Often, due to what are sometimes prohibitively high royalty payments, schools, churches and community theaters are only able to stage popular and well-known plays and musicals when they enter the public domain.⁶³ When a book enters the public domain, other publishers are able to produce the work, thus resulting in a wider range of versions of differing production qualities and prices — giving the public more choice at a lower price.⁶⁴ For example, before the copyright expired on Ravel’s *Mother Goose Suite*, it cost \$540 in fees to perform the piece twice publicly; now public domain material, the only cost is for its sheet music, which can be purchased for around \$70.⁶⁵

Yet copyright is not just a financial matter; control of the work and how others use it is also implicit in copyright protection. For example, the Gershwin family has a number of copyrights about to expire on various works composed by George Gershwin; understandably, they have been advocating for copyright

⁶¹ For a more complete discussion of the importance of materials from the public domain, see Timothy Phillips, *Statement in Opposition to Copyright Term Extension*, (last visited April 11, 1999) <<http://www.public.asu.edu/~dkarjala/commentary/PhillipsStmt.html>>.

⁶² See Solomon, *supra* note 27.

⁶³ See Karjala, *Copyright extension*, *supra* note 59.

⁶⁴ *Id.*

⁶⁵ See Solomon, *supra* note 27. See also the letter dated June 28, 1996, from Randolph P. Luck, President of Luck’s Music Library, to Senator Spencer Abraham of Michigan, opposing copyright term extension in the 104th Congress at <http://www.public.asu.edu/~dkarjala/letters/Luck’sMusic01.html>.

extension.⁶⁶ In explaining that control was the central issue for them, nephew Mark Gershwin noted that *Porgy and Bess* are only licensed to productions with African-American performers.⁶⁷ Yet this control is not always desirable. The Gershwin Family Trust would have prohibited Washington's Shakespeare Theatre from putting a new twist on *Othello*, when they cast a white actor, Patrick Stewart, as Othello along with an all-black cast.⁶⁸ Gershwin also lamented that *Porgy and Bess* could otherwise be turned into rap music; perhaps he forgot that the work of the Gershwin brothers drew heavily on African-American musical traditions.⁶⁹

The descendants and estates of authors are perhaps too eager to exert control — to play the role of censors. The author of a biography on Lorenz Hart was denied permission to reprint any of Hart's lyrics because his homosexuality was mentioned.⁷⁰ The Leonard Bernstein estate withdrew permission to produce *On the Town* when they found a particular dance number objectionable.⁷¹ A biography of Rodgers and Hammerstein was contingent on the author's agreement to "respect the persons" of Rodgers and Hammerstein.⁷² Perhaps closer to home is the example of Thomas Nast, who created the Santa Claus⁷³ often depicted on Christmas ornaments and books and the figure of Uncle Sam⁷⁴ used by the U.S. government.⁷⁵ Without the freedom Nast had to use materials

⁶⁶ See Gerald Nachman, *Let's Say Enough to Copyright Welfare*, NEW YORK TIMES, Letter to the Editor (Feb. 25, 1995). Article can be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/Nachman.html>. The writer won a 1988 Deems Taylor Award for music criticism from the American Society of Composers, Authors and Publishers.

⁶⁷ See *id.*

⁶⁸ See Chaddock, *supra* note 29.

⁶⁹ See Steve Zeitlin, *Strangling Culture with a Copyright Law*, NEW YORK TIMES (April 25, 1998). (Article can be found on-line at <http://www.public.asu.edu/~dkarjala/commentary/zeitlin.html>).

⁷⁰ See Nachman, *supra* note 66.

⁷¹ See *id.*

⁷² See *id.*

⁷³ The great 19th-century American cartoonist Thomas Nast created the jolly fat bearded white grandfather figure out of a "skinny, austere, judgmental Father Christmas figure in the public domain." Karjala, *What Are the Issues*, *supra* note 18.

⁷⁴ Nast also created Uncle Sam, basing his character on a public domain name and concept. See Karjala, *What are the Issues*, *supra* note 18; Solomon, *supra* note 27.

⁷⁵ See Karjala, *What are the Issues*, *supra* note 18.

from the public domain as he saw fit, those characters as we now know them might never have existed.

The issue of freedom to use materials is also of particular import to scholars, who often want the right to quote freely from copyrighted archival materials and letters. In 1988, a biography of J.D. Salinger was ill-treated when the Supreme Court upheld Mr. Salinger's right to deny permission for the biographer to quote from his writings.⁷⁶ Biographies of the late Sylvia Plath have been controlled by her husband, by denying authors permission to quote from her writings.⁷⁷ Scholars and historians believe Martin Luther King's legacy has been waning largely due to the restrictions and licensing fees imposed by King's family.⁷⁸ "The result is the scholarship is not as complete, and the influence of King and his legacy will disappear from the discourse of scholars and books because scholars cannot afford to pay."⁷⁹ This kind of control over what kind of works would be created is counter to the entire idea of copyright.⁸⁰

As these examples illustrate, it is too easy to disregard costs when they cannot be easily measured. Similarly, while the private interests at stake can easily cite numbers that graphically illustrate what they see as the cost of a "short" copyright term, they forget that a less quantifiable benefit from the public domain exists, a benefit which artists may value more than the financial returns from royalties. As Steve Zeitlin, the director of City Lore: The New York Center for Urban Folk Culture, explains:

[T]o treat all creative expression as a form of capital that cannot be recycled, reused or built upon without paying fees to the artist's decedents more than 50 years after the artist has died stifles cultural creativity. Ultimately, it does more for the longevity of the art, and the memory of the artist, to assure

⁷⁶ See Smith, *supra* note 35.

⁷⁷ See *id.*

⁷⁸ See John Christensen, *Scholars Fear King's Legacy Is Fading*, CNN.com (April 6, 1999) <<http://cnn.com/SPECIALS/1999/mlk.legacy/>>. King's family has also taken legal action against CBS, USA Today and the producer of the acclaimed documentary "Eyes on the Prize" for using King material without permission. The USA Today and documentary cases were settled out of court, but CBS won its case and the estate's appeal is pending. See *id.*

⁷⁹ *Id.*

⁸⁰ See discussion of English system, *infra* at 17-20.

that at some point the work receives the extra push of circulating royalty-free.⁸¹

In line with this thought, folk artist Woody Guthrie has been quoted as saying it would be the greatest honor of his life if his songs were to blend so completely into the cultural landscape that they were not even to be associated with him.⁸² After all, to be a contributor of a scrap to the quilt that makes up the American cultural heritage may be the better tribute to the creativity, imagination, and skill of an artist.

E. The Clashing of Interests

Once the CTEA passed, Eric Eldred felt there was little alternative but for him to shut down his website.⁸³ He felt “the public domain [was] being savaged,”⁸⁴ and given his belief in the “importance of the public’s access to its cultural heritage,”⁸⁵ Eldred had to express his opposition to the measure. Fortunately, Professor Lawrence Lessig of Harvard Law School read about his plight in the papers and offered to help him.⁸⁶ On January 12, 1999, with the work of attorneys from Hale & Dorr and the Harvard Berkman Center for Internet & Society, *Eldred v. Reno* was filed in the federal district court in the District of Columbia.⁸⁷

The suit centers around the idea that the CTEA does not fulfill the constitutional mandate pressed upon Congress.⁸⁸ Article I, § 8, cl. 8 of the United States Constitution confers upon Congress the authority:

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

⁸¹ See Zeitlin, *supra* note 69.

⁸² See *id.*

⁸³ See Kaplan, *Free Book Sites*, *supra* note 2.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Kaplan, *Online Publisher*, *supra* note 4.

⁸⁷ See generally Berkman Center for Internet & Society, *How Long Is Too Long? Recent Congressional Copyright Giveaway Claimed Unconstitutional*, Press Release (January 12, 1999) <<http://eldred.ne.mediaone.net/pr-1999-01-12.txt>> [hereinafter “Press Release”].

⁸⁸ See generally *id.*

Pursuant to that authority granted by the Copyright Clause⁸⁹, Congress has enacted numerous laws since 1790 providing for copyrights upon a variety of literary and artistic works.⁹⁰ Those statutes are codified at 17 U.S.C. § 101 et seq.

While Congress has broad discretion in choosing the method by which to fulfill its mandate, Eldred and his supporters argue that copyright legislation has been moving away from its primary purpose of “promoting the progress of the arts and sciences.” In particular, it seems clear that a *retroactive* extension of copyright provides little incentive for *future* artistic expression, thus doing little to promote the progress of the arts.⁹¹ In this sense, Congress may be overreaching the power granted to it by the Copyright Clause.⁹² The legislative record and the primary advocates of copyright term extension mention this motivation only in passing, suggesting that the public interest has perhaps been overlooked. This larger goal appears to have been obscured by the myriad arguments presented by corporations and heirs — obscured to the point where the CTEA does not rationally promote the primary purpose of copyright.

Such an argument, however, depends on the assumption that copyright’s main purpose is to promote the arts and sciences, not to reward authors for their labor. Rewarding authors is perhaps the more intuitive explanation, particularly in light of America’s leanings towards individual rights and rewards, rather than the collective.⁹³ However, a look at historical evidence and Supreme Court jurisprudence from the earliest days will reveal that the more

⁸⁹ Throughout this paper, the term “Copyright Clause” will be used to refer to Article I, § 8 of the U.S. Constitution. Although other terms such as “Patent Clause” or “Intellectual Property Clause” have been commonly used, for the purposes of this paper, “Copyright Clause” is more relevant. Similarly, the term “authors” will be used throughout this paper to encompass all “creators” covered by the Copyright Clause — “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (internal cites omitted). Finally, “works” indicates any type of creation that is capable of being copyrighted.

⁹⁰ See discussion of statutory development, *infra* at 27-33.

⁹¹ The rationale behind copyright — that the financial incentive provided by the royalties will serve to spur creative works, which promotes the arts and sciences — is discussed later in this paper.

⁹² See *id.* Additionally, Nimmer, of NIMMER ON COPYRIGHTS, argues that we need to be especially vigilant of Congress overreaching in light of the First Amendment problems raised. For more on this, see NIMMER ON COPYRIGHTS, § 1.10 [C][1].

⁹³ See generally, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED (1992).

intuitive explanation — a “natural rights” based explanation — is a major deviation from the original intent of copyright. As copyright authority David Nimmer states:

To promote the progress of science and useful arts” sums up the primary *raison d'être* for the protection of literary and artistic works. That is, congressional authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities.⁹⁴

Thus, while the copyright term legislation over years seems to have been geared towards private interests,⁹⁵ the promotion of the public good was, and should still be, the primary goal of copyright in the United States.

II. ORIGINAL INTENT OF COPYRIGHT

A. English Law⁹⁶

The need for copyright, literally meaning “the right to copy,” came with the development of printing.⁹⁷ So in 1556, the British crown chartered the Stationers’ Company, granting power over the trades of printing, binding, publishing, and dealing in books in England.⁹⁸ In return, however, the corporation of booksellers, printers, and bookbinders were subject to royal censorship, supervision, regulation, and licensing of the books to

⁹⁴ NIMMER ON COPYRIGHT, § 1.10[B] [1].

⁹⁵ See discussion of Private Interests, *supra* at 5-9.

⁹⁶ The discussion of the origins of copyright begins with English law since it is clear that the Framers were influenced by the British system. For example, the figures influential in the forming of U.S. copyright policy such as James Madison referred to English law several times, see *infra* at 26, n. 154, and the earliest copyright cases also referred to case law from England, see *infra* at 33-34. See also Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?*, 36 AM. J. LEG. HIST. 361, 362, 378 (1992). It is also particularly striking that both the English Statute of Anne and the first American copyright laws set the maximum period of protection for new works at 28 years. See discussion of Statute of Anne, *infra* at 18, and discussion of American statutory law, *infra* at 28. Moreover, before the Revolution, copyright protection in the colonies was governed by English law. See Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEORGETOWN L.J. 109, 116 (1929).

⁹⁷ See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: the Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 17 (1994).

⁹⁸ See Walterscheid, *To Promote the Progress*, *supra* note 97, at 18 n.55; Elizabeth Carter Wills, *Federal Copyright Records 1790-1800* at xv, Library of Congress (1987).

be printed.⁹⁹ Unless a printer or publisher had permission from the crown, a book could not be printed. Essentially, the English copyright system during this time was a system of informal censorship through official licensing.¹⁰⁰ As Professor Benjamin Kaplan aptly describes, “copyright ha[d] the look of being gradually secreted in the interstices of the censorship.”¹⁰¹

The Stationers’ monopoly ended in 1694, with the expiration of various licensing acts passed by Parliament.¹⁰² The Stationers, in an attempt to recapture the perpetual property right in written works which they had previously enjoyed, applied to Parliament for a bill to protect copyright.¹⁰³ Thus came into existence in 1710¹⁰⁴ the first known statutory copyright act, known as the Statute of Anne.¹⁰⁵ The Statute of Anne was passed to give greater protection to copyright, as requested by the Stationers, but it also had unexpected side effects.¹⁰⁶ The purposes of the act were twofold: to prevent piracy of printed works, and to encourage the writing of books.¹⁰⁷ Towards that end, a copyright term of 21 years was set for works published before the Statute of Anne, and for those works published after the Statute of Anne, an initial term of 14 years was established, with a possible renewal by the author for

⁹⁹ *See id.*

¹⁰⁰ *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3 (1967).

¹⁰¹ *See id.* at 4.

¹⁰² *See* COPINGER AND SKONE JAMES ON COPYRIGHT 6 (E.P. Skone James et al. eds., 13th ed. 1991).

¹⁰³ *See id.* at 7.

¹⁰⁴ *See* Walterscheid, *To Promote the Progress*, *supra* note 97, at 18. Walterscheid explains that the date of enactment is often a subject of confusion. The date is often cited as 1709, rather than 1710. *See, e.g.*, COPINGER, *supra* note 102, at 6. Although it was enacted in the calendar year 1709 and became effective April 10, 1710, it was not until 1752 that January 1 was designated as the beginning of a new year in England. *See* Walterscheid, *To Promote the Progress*, *supra* note 97, at 18 n. 55; LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 n.3 (1968). So, in a modern day understanding, 1710 was both the date of enactment and effectiveness.

¹⁰⁵ *See* Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 85 (1995).

¹⁰⁶ *See generally*, COPINGER, *supra* note 102, at 8.

¹⁰⁷ The caption to the act reads, “An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (quoting 8 Anne Ch. 19 (1710)). *See also* Walterscheid, *supra* note 105, at 84; Walterscheid, *To Promote the Progress*, *supra* note 97, at 17.

a term of 14 years.¹⁰⁸ If a work were not published, then the author could have the exclusive right to the book for as long as it remained unpublished.¹⁰⁹ Thus, the Statute of Anne, in replacing the common law system of perpetual copyright, had the unexpected effect of setting strict limits on the duration of copyright in published works.¹¹⁰

Since the act strictly limited the term of copyright, the Stationers attempted to reassert their control otherwise. In resorting to the courts, they argued that an author enjoyed a perpetual copyright under common law — that although the Statute of Anne codified protection for only 28 years, copyright protection still existed for the remainder in common law.¹¹¹ This point of view prevailed in *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769). Here, the King’s Bench agreed with the Stationers, holding that authors held a perpetual common-law property right in their works, despite the existence of the Statute of Anne which arguably codified any rights an author had in a work.¹¹²

This interpretation of the Statute of Anne ruled for only five years. In what was essentially an appeal of *Millar*, the House of Lords decided *Donaldson v. Beckett*, 98 Eng. Rep. 257 (1774), holding that regardless of common law, publication of work terminates any perpetual right an author may have, limiting the author to the protection to be granted by statutes.¹¹³ This decision is extremely significant in that the court, for all intents and purposes, interpreted the Statute of Anne as creating a “public domain.” According to the *Donaldson* court,¹¹⁴ copyright protection

¹⁰⁸ See generally, Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1139 (1983); Kaplan, AN UNHURRIED VIEW, *supra* note 100, at 7; Walterscheid, *To Promote the Progress*, *supra* note 97, at 17.

¹⁰⁹ See Kaplan, AN UNHURRIED VIEW, *supra* note 100, at 12.

¹¹⁰ See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 4 (1993).

¹¹¹ See *id.* at 4-5.

¹¹² See Walterscheid, *To Promote the Progress*, *supra* note 97, at 18.

¹¹³ See *id.*

¹¹⁴ The House invited the common law judges of England to give their opinions. The questions and answers were basically:

At common law, was there a copyright in unpublished works? Yes (10-1).

At common law, was there a copyright in published works? Yes (8-3).

lasted for a limited period of time; once that ended, it appeared that there were no limitations on the use of the work.

One more case from the English law books may prove informative for a more complete understanding of copyright. In a case decided shortly after *Donaldson*, Lord Mansfield summarized what he saw as the overriding concern and motivation behind copyright. In deciding *Sayre v. Moore*,¹¹⁵ Lord Mansfield introduced his opinion with:

We must take care to guard against two extremes equally prejudicial; that one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹¹⁶

Apparently, the courts in England saw copyright as a balance between concern for the public domain and compensation sufficient to be an incentive towards creativity. Whether this concern would be maintained in the United States is discussed below.

B. The Framers and the Genesis of the Copyright Clause

Because English law governed copyright practice in the colonies, no independent colonial copyright protection existed.¹¹⁷ Not until May 2, 1783, was “the earliest known venture of the United States Government into the realm of intellectual property”¹¹⁸ issued by the Continental Congress. It suggested in a resolution that each of the states enact copyright laws.¹¹⁹ Thus,

Was the common law copyright in published works taken away by the Statute of Anne? Yes (6-5).

See LADDIE PRESCOTT AND VITORIA, *THE MODERN LAW OF COPYRIGHT AND DESIGNS* 21 (1995). For a more complete discussion of the vote, see Abrams, *supra* note 108, at 1119.

¹¹⁵ 1 East 351 n., 102 Eng. Rep. 139 n. (K.B. 1785).

¹¹⁶ Quoted in Kaplan, *AN UNHURRIED VIEW*, *supra* note 100, at 17.

¹¹⁷ See Fenning, *supra* note 96, at 116.

¹¹⁸ 24 *JOURNALS OF THE CONTINENTAL CONGRESS* 326-27 (Worthington C. Ford Ed. 1906) [hereinafter referred to as “Journals”].

¹¹⁹ See Martin A. Roberts, U.S. Library of Congress, *Records in the Copyright Office Deposited by the United States District Courts Covering the Period 1790-1870* (1939); Walterscheid, *To Promote the Progress*, *supra* note 97, at 20; Wills *supra* note 98, at xix. The resolution stated:

prior to the Constitution, U.S. copyright law was largely determined by each state.¹²⁰ Twelve of the thirteen colonies passed copyright statutes, the longest of which gave authors a total of 28 years of protection.¹²¹ However, this system presented many difficulties for authors in obtaining copyright protection. Registration systems were varied, terms of protection were different, and the unenforceability of one state's copyright in another state made the protection largely worthless.¹²² As James Madison explained to the Constitutional Convention in April, one of the weaknesses of the states was the "want of uniformity in the law concerning naturalization and literary property."¹²³

That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, . . . the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned . . . the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers. . . by such laws and under such restrictions as to the several states may seem proper.

Journals, *supra* note 118, at 326-27.

The committee recommending this resolution felt that "nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce." *Id.*

¹²⁰ Massachusetts, particularly, was especially noteworthy for its recognition of the role of the state in promoting literature:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences .

. . . .
See BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 114 (1967) (citing acts and Laws of the Commonwealth of Massachusetts 236 (Boston 1781-83)).

¹²¹ *See* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. OF THE COPYRIGHT SOC. 11 (1975 - 76). One man in particular was instrumental in the passing of copyright laws in the original states. Noah Webster, of Webster's Dictionary, traveled from state to state urging the protection of authors' rights. *See* Roberts, *supra* note 119.

¹²² *See* Walterscheid, *To Promote the Progress*, *supra* note 97, at 22.

¹²³ *See* Fenning, *supra* note 96, at 111-14. Madison also later argued in No.43 of The Federalist Papers that the states could not effectively provide such rights.

The Constitutional Convention commenced their meetings on May 14, 1787,¹²⁴ and on July 24th, a committee was appointed to draft a report a Constitution consistent with the resolutions already passed by the convention.¹²⁵ Although the Committee reported to the Convention with a draft Constitution on August 6th,¹²⁶ it is not until August 18th that any mention of patent or copyright is mentioned.¹²⁷

On August 18th, Madison introduced his proposed version to the Committee:

To secure to literary authors their copyrights for a limited time. . . .

To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries.¹²⁸

The same day, Mr. Pinckney introduced his proposal:

To secure to authors exclusive rights for a certain time.¹²⁹

Then, on Sept. 5, 1787, a Mr. Brearly introduced the current version, passed without discussion¹³⁰:

To promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.¹³¹

Unfortunately, there was no debate in the Constitutional Convention regarding the adoption of the Copyright Clause, nor are there minutes in the Committee reporting to the Convention on this Clause.¹³² The most elaborate existing record of the debates

¹²⁴ See *id.*, at 111.

¹²⁵ See *id.*

¹²⁶ See *id.* at 111-12.

¹²⁷ See *id.* at 112.

¹²⁸ 1 THE RECORDS OF THE FEDERAL CONVENTION, at 439 - 40 (August 18, 1787) (Max Farrand ed., rev. ed. 1937).

¹²⁹ *Id.* at 440.

¹³⁰ See *id.* at 512.

¹³¹ *Id.* at 510 - 11. Additionally, the fact that the third phrase was chosen rather than the others suggests the importance of the instrumental nature — the promotion of an overriding goal through the use of an exclusive right — through the ordering of the phrases and the words used. Specifically, the word “by”, which is not present in the other suggestions, may be especially important.

¹³² See Fenning, *supra* note 96, at 111.

in the Constitutional Convention were kept by Madison.¹³³ Thus, his journal may be the best source for casting light on the original intent of the copyright clause. Madison's notes indicate that the Copyright clause was adopted *nemine contradicente*¹³⁴ and without debate.¹³⁵

Scholars suggest a couple possible answers to the question of why the Copyright Clause was adopted without debate. One explanation is that the delegates may have been tired after several months of intense debate over what were perceived to be more momentous issues, such as how to structure their government, solve fiscal problems, and defend the nation.¹³⁶ Or they may have felt that this grant of power to Congress did not warrant further debate, instead simply following what they felt to be good English precedent.¹³⁷

Various indicators suggest that the English precedent was followed. For example, the language in the U.S. Copyright Clause is extremely similar to that in the title of the Statute of Anne.¹³⁸ The first statutory copyright act¹³⁹ in the U.S. is almost identical to

¹³³ *See id.*

¹³⁴ Black's Law Dictionary 1036 (6th ed. 1990) (no one dissenting).

¹³⁵ *See Walterscheid, To Promote the Progress, supra* note 97, at 26.

¹³⁶ *See id.* at 26-7.

¹³⁷ *See* discussion of English law, *supra* at note 96. Of the 55 delegates, more than half had training in the law, so it would have been natural for the delegates to look to precedent for guidance. *See Walterscheid, To Promote the Progress, supra* note 97, at 30. The English system was also cheaper than other alternatives such as providing subsidies or grants to authors; for a new federal government about to assume the debts of states from the Revolutionary War, the economics could also have played a significant role. *See id.* at 34. The only contemporaneous quote from a member of the public with respect to the Copyright Clause suggests that this is true:

As to those monopolies, which, by way of premiums are granted for certain years to ingenious discoveries in medicine, machines and useful arts; they are common in all countries, and more necessary in this, as the government has no resources to reward extraordinary merit.

Walterscheid, *Inherent or Created Rights, supra* note 105 at 91 (quoting Nicholas Cottin, 6 AMERICAN MUSEUM: OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, ETC. 303 (1789)).

¹³⁸ *See* discussion of Statute of Anne, *supra* at note 107. *See* L. Ray Patterson, *Copyright and the Exclusive Right of Authors*, 1 J. INTELL. PROP. L. 1, 15 (1993).

¹³⁹ *See* discussion of statutory development, *infra* at 27.

the English Act.¹⁴⁰ The U.S. Supreme Court, in its first copyright case, *Wheaton v. Peters*,¹⁴¹ looked to the English case of *Donaldson v. Becket*¹⁴² for its precedential value, and issued the same decision as the House of Lords.¹⁴³ These similarities and others¹⁴⁴ suggest that the English — and their policy of making the public good an important goal of copyright — had a strong influence on the shaping of the copyright policy in the U.S.

On the other hand, it may have been that the delegates did independently believe in the granting of patents and copyrights as the best way to encourage socially beneficial creation. John Adams was quoted as saying, “I should as soon think of closing all my window shutters, to enable me to see, as of banishing the Classics [sic].”¹⁴⁵ The Framers, largely educated men,¹⁴⁶ placed a high value on literature.¹⁴⁷ In line with this reasoning, Professor Lyman Ray Patterson argues that when drafting the Copyright Clause, “the dominant idea in the minds of the framers of the Constitution appears to have been the promotion of learning.”¹⁴⁸ In his view, “if the dominant idea is the promotion of learning, the primary purpose of copyright is to promote learning, and the rights of the author are recognized only as an aid in furtherance of this purpose. The interest of the public is paramount, and copyright is only a

¹⁴⁰ See Patterson, *supra* note 138 at 15.

¹⁴¹ 33 U.S. (8 Pet.) 591 (1834). See discussion of *Wheaton*, *infra* at 33.

¹⁴² See discussion of *Donaldson*, *supra* at 19-20.

¹⁴³ See Patterson, *supra* note 138 at 15-16.

¹⁴⁴ See discussion of other similarities, *supra* at note 96.

¹⁴⁵ See Donner, *supra* note 96, at 375 (quoting *John Adams to Benjamin Rush, June 19, 1789*, I LETTERS OF BENJAMIN RUSH 518 (L. Butterfield ed., 1951)). Aside from the value of these works to the Framers, this quote may also suggest that they may have believed too lengthy a copyright would effectively eliminate many “classics” from public discourse.

¹⁴⁶ Of the 55 delegates, more than half had training in the law. See Walterscheid, *To Promote the Progress*, *supra* note 97, at 30.

¹⁴⁷ See Donner, *supra* note 96, at 375.

¹⁴⁸ See PATTERSON, *supra* note 104, at 193. The value of education at this time may have also significantly influenced the path of copyright. The Honorable Barbara Ringer believes that the “cultural context” of the copyright clause is “of greater significance than any legislative history. . . . reflect[ing] the deeply-held commitment to both art and science in the new nation.” Hon. Barbara Ringer, *Two Hundred Years of American Copyright Law*, in 200 YEARS OF ENGLISH & AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 117, 134 n. 53 (American Bar Association, 1976).

statutory privilege, limited in time to prevent monopoly.”¹⁴⁹ Essentially, Patterson’s argument is based on the proposition that the American culture at this time held learning and the arts in such high regard that their advancement warranted some form of codified incentive.

The theory that the Framers *did* feel the promotion of the arts and sciences was valuable is supported by the fact that the Americans at a time had an aversion to any sort of monopoly.¹⁵⁰ The grant of a limited monopoly to authors and inventors would then have been an exception to the rule. Several records indicate that this may have been the case. Thomas Jefferson, absent from the Convention, was one of the strongest opponents of monopolies and wrote to Madison expressing his misgivings regarding even a “limited monopoly.”¹⁵¹ Madison responded with:

With regard to Monopolies they are justly classed among the greatest nuisances[sic] in Government. But is it clear that *as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?*¹⁵²

To Madison, the importance of the goal warranted the use of a monopoly; furthermore, he believes that the danger of monopolies could be ameliorated by setting the terms of the monopoly “in the grant of it.”¹⁵³ Jefferson, convinced by Madison’s argument,¹⁵⁴ later became one of the important figures in the development of patent law.¹⁵⁵

¹⁴⁹ *Id.* at 196.

¹⁵⁰ The aversion to monopolies was so strong that several delegates asked for an amendment that the power to grant monopolies be denied to Congress. *See generally*, Walterscheid, *supra* note 105, at 90-91; Walterscheid, *To Promote the Progress*, *supra* note 97, at 37-38.

¹⁵¹ *See* Walterscheid, *Inherent or Created Rights*, *supra* note 105 at 90.

¹⁵² 14 THE PAPERS OF THOMAS JEFFERSON 442-43 (J.P. Boyd ed., 1956) (quoting letter from Madison to Jefferson, Oct. 17, 1788) (italics added).

¹⁵³ This would also suggest that Madison would be against the retroactive changing of the copyright term — the “bargain” agreed to by the author and the public.

¹⁵⁴ Madison also made several ambiguous statements about English common law copyright in The Federalist No. 43. However, the focus on a few sentences by “natural rights” advocates may be misplaced. *See generally*, Walterscheid, *Inherent or Created Rights*, *supra* note 105 at 96-100. Regardless, common law copyright was held to be extinguished by the case *Wheaton v. Peters*, *see* discussion, *infra* at 33-34.

¹⁵⁵ *See generally* Walterscheid, *Inherent or Created Rights*, *supra* note 105 at 90-91.

Finally, although there is little direct historical evidence regarding the Framers' original intent for the Copyright Clause, there is evidence of a debate regarding the length of copyright terms. Those who argued for perpetual copyrights lost in the legislatures, suggesting that the original intent of copyright was to promote the public interest, rather than to reward the authors. Noah Webster, who has been called the "father of American copyright legislation,"¹⁵⁶ argued that the author should have by common law just as much property right in his product as does a farmer in *his* product — that is, a perpetual right.¹⁵⁷ Despite having traveled to speak in front of a number of the state legislatures, none of the early legislatures found Webster's argument persuasive.¹⁵⁸

¹⁵⁶ R. MOSS, NOAH WEBSTER 7 (1984) (cited in Donner, *supra* note 96, at 372).

¹⁵⁷ See *Origins of the Copyright Laws in the United States*, in NOAH WEBSTER, COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 175 - 76 (1843).

¹⁵⁸ See *id.* His own brother Daniel Webster disagreed with Noah:

But after all, property, in the social state, must be the creature of law; and it is a question of expediency, high and general, not particular expediency, how and how far, the rights of authorship should be protected. I confess frankly, that I see, or think I see, objections to make it perpetual. At the same time I am willing to extend it further than at present . . .

Id. at 176. Other early commentators on copyright law agreed with Daniel Webster — they saw objections to perpetual copyright. Augustin-Charles Renouard, for example, said that copyright law must "neither sacrifice the right of authors to the public, nor the right of the public to that of authors." THEORY OF THE RIGHTS OF AUTHORS 8 (1839) (reprinted from the AMERICAN JURIST AND LAW MAGAZINE, Oct. 1839). He continues on to say:

The perpetuity of transmission . . . would increase the price of books, and would expose them to destruction. The perpetual enhancement of the price of books, the absolute destruction of all competition, both for the present and the future, by retarding the circulation of ideas, would be mortally prejudicial to social progress. . . . Should the author's right be divided, to infinity, among all his heirs? . . . How shall one unite so many divers consents, when it may be necessary to treat? Who will undertake to find so many scattered individuals, to regulate their respective interests, and to bring their different wills to agree? . . . When the habitual course of human transactions shall have brought a work into the hands of speculators, and concentrated all the copies of it in their possession; . . . [n]ot only will it become lawful for the avarice of every heir to paralyze the circulation of a work; not only may his avidity retard or promote its propagation; but every powerful party every jealous government, every rival author, every speculation of competition, will have the power, by the aid of a little money, to destroy it entirely. . . . The works of genius will no

Rather than a perpetual copyright, the state and federal legislatures evidently preferred a limited term.

Regardless of the explanation for the lack of debate over the Copyright Clause, the various explanations appear to strongly suggest that the Framers did see the public good as the primary justification for copyright. The Constitution was ratified, and the Copyright Clause was shortly employed. In his address to Congress on January 8, 1790, President George Washington states “[T]here is nothing which can better deserve your patronage than the promotion of science and literature.”¹⁵⁹ The President further noted: “Whether this desirable object will be best promoted by affording aids to seminaries of learning already established, by the institution of a national university, or by any other expedients, will be well worthy of a place in the deliberations of the legislature.”¹⁶⁰ Pursuant to the power granted to Congress, it produced the first national copyright act to be finally approved by Washington on May 31, 1790.¹⁶¹

III. EVOLUTION OF COPYRIGHT IN STATUTORY LAW

A. The Initial Acts

Once the Framers had decided the proper weighting of the various priorities to be defined by the Copyright Clause, both Congress and the Supreme Court have since affirmed this interpretation of the overriding purpose behind the limited protection granted to creators. As stated earlier, the first United States Copyright Act was passed in 1790, and it provided for an initial term of 14 years, with a possible renewal period of 14 additional years, similar to the Statute of Anne.¹⁶² Entitled “An

longer belong to humanity; they will become mere merchandise, to be quoted on the exchange.

See id. at 39, 41, 43.

¹⁵⁹ *See* Thorvald Solberg, Register of Copyrights, *Copyright in Congress: 1789-1904* at 115(1905). In 1789, several authors petitioned Congress for private laws securing exclusive rights, for a limited time, to publish their works; these petitions, asking for exclusive rights in literary and other works, also contributed to the impetus for the passage of the first federal copyright law. *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *See* Kaplan, AN UNHURRIED VIEW, *supra* note 100, at 25.

¹⁶² Act of May 31, 1790, 1st Cong. 2d. sess., 1 Stat. 124.

Act for the encouragement of learning,” it gave an author “the sole right and liberty of printing, reprinting, publishing and vending” his “map, chart, book or books” for that time.¹⁶³ It should be noted that the men who chose this maximum of 28 years for copyright protection, as adopted in the 1790 Copyright Act, were the same men who drafted the Constitution in 1787.¹⁶⁴ Until 1909, the next major copyright act, the only major change occurred when, in 1831, Congress extended the initial copyright period to 28 years with a possibility of an additional renewal of 14 years.¹⁶⁵

B. The 1909 Copyright Act

With the passing of the 1909 Copyright Act, the renewal period was extended to 28 years.¹⁶⁶ With the 28 year initial copyright period granted in 1831, the maximum possible period of time for copyright protection became 56 years. This bipartite system survived for so long due to its promotion of the primary motivations for copyright protection. Works with little commercial value would pass into the public domain within a much shorter period of time, thus stimulating further creativity.¹⁶⁷ Only works that were popular, imparting economic benefit to the author would be worth the effort of filing for a renewal term and thus warrant an additional period of protection.¹⁶⁸

More important than the renewal term extension however, is the 1909 Copyright Act’s affirmation of the motivation for copyright. The legislative record in connection with the Act re-emphasizes the true purpose of the Copyright Clause:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right

¹⁶³ See *id.*

¹⁶⁴ See Copyright’s Commons, *Constitutional Framers’ Intent*, (last visited April 12, 1999) <<http://cyber.law.harvard.edu/eldredvreno/framers.html>>.

¹⁶⁵ Act of Feb. 3, 1831, 21st Cong. 2d. sess., 4 stat. 436. In 1870, there was also a revision of the statutes, see Act of July 8, 1870, 41st Cong. 2d sess., 16 Stat. 212, but that is irrelevant for the purposes of this paper. See also Copyright’s Commons, *Brief History of U.S. Copyright Law* (last visited April 9, 1999) <http://cyber.law.harvard.edu/eldredvreno/evidence/briefhis.htm>>

¹⁶⁶ Act of Mar. 4, 1909, 60th Cong. 2d. sess., 35 stat. 1075. See also Copyright’s Commons, *Brief History*, *supra* note 165.

¹⁶⁷ Kaplan, AN UNHURRIED VIEW, *supra* note 100, at 113.

¹⁶⁸ Plus, there was the slightly paternalistic view that this would protect a natural author “against his own improvidence in assigning or licensing the copyright.” *Id.* at 113.

that the author has in his writings. . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . . In enacting a copyright law, Congress must consider. . . two question: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.¹⁶⁹

Thus, in 1909, Congress agreed with the Framers that the overriding impetus for the inclusion of such a clause in the Constitution was the conferring of a public good.

C. The Yearly Extensions

While the copyright statutes basically remained unchanged for approximately the next fifty years, there were some indications that perhaps the tide was changing, in the direction of author's rights. Beginning around 1962, Congress started extending the renewal term by one year each year.¹⁷⁰ This succession of copyright term extensions mostly affected copyrighted works whose terms were about to expire.¹⁷¹ The overall effect of these laws was to extend copyright terms to periods as long as 70 years. In 1961, in a report to Congress, it was said that "While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. . . . [T]heir rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works."¹⁷² Thus it appeared the focus was changing from the promotion of the arts and sciences to the rewarding of authors for their creativity.

D. The 1976 Copyright Act

The 1976 Copyright Act resulted from more than 20 years of study on the possibility of revision.¹⁷³ Because of the "significant

¹⁶⁹ H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

¹⁷⁰ See Complaint, *supra* note 5. See also table of copyright term amendments, *infra* at 32.

¹⁷¹ See *id.*

¹⁷² Register of Copyrights, Copyright Law Revision, 87th Cong., 1st Sess., 6 (Comm. Print 1961)

¹⁷³ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 464 (1984). The interim extensions, from 1962 and on, may also have been influenced by the emerging results of the studies.

developments in technology and communications”¹⁷⁴ that had made the 1909 Act inadequate for the needs of the modern culture, Congress, in 1955, authorized a series of studies to be conducted on all aspects of the then current copyright law.¹⁷⁵ After years of reports, revisions, and feedback, a general revision bill was finally introduced in 1964,¹⁷⁶ but then amended after another report from the Register of Copyrights in 1964.¹⁷⁷ After some difficulty with cable television, which delayed copyright revision by from 1967 to 1974,¹⁷⁸ action on copyright revision was delayed from 1967 to 1974 by a dispute on cable television, but negotiation finally led to the passage of the 1976 Copyright Act.¹⁷⁹

The Act distinguished between those works created prior to January 1, 1978,¹⁸⁰ and those created afterwards.¹⁸¹ All works created prior to January 1, 1978 were protected for a maximum of 75 years from the date of publication, or 100 years from the date of creation whichever is less.¹⁸² This was accomplished by setting the renewal term, for pre-1978 works, at 47 years (giving them a total of 75 years of protection).¹⁸³ For those works created after the Act, the bipartite system was eliminated in favor of a single term of

¹⁷⁴ S. Rep. No. 94-473, p. 47 (1975)

¹⁷⁵ See Sony, *supra* note 173, at 464.

¹⁷⁶ See H.R. 11947/S. 3008, 88th Cong., 2d Sess. (1964)

¹⁷⁷ See Sony, *supra* note 173, at 464.

¹⁷⁸ See generally, Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, ch. V, pp. 2-26 (Draft Oct.-Dec. 1975).

¹⁷⁹ Pub. L. 94-553.

¹⁸⁰ This was the effective date of The 1976 Copyright Act. See Patterson, *supra* note ??? at 17.

¹⁸¹ See NIMMER ON COPYRIGHT, § 9.02. The requirements were retained for the old works due to the renewal expectancies created under the 1909 Act. See *id.* Essentially, this seems to be an argument about reliance on a bargain/contract made at the commencement of copyright protection. Interestingly, Congress seems to have little difficulty in ignoring the problem of reliance upon the original “term” in the case of the CTEA.

¹⁸² Copyright Act of 1976, 55 Public Law 94-553, 94th Cong. 2d. sess., 90 stat. See also Copyright’s Commons, *Brief History*, *supra* note 165.

¹⁸³ See Copyright’s Commons, *Brief History*, *supra* note 165.

protection, generally lasting fifty years after the death of the author.¹⁸⁴

While Congress certainly has the prerogative to regulate the copyright system as it sees fit, what is especially interesting is the focus of its discussion in its reasons for the change in policy from a bipartite system to a single term. The focus, unlike the 1909 Act, is centered on the author and the “costs” to him of the former copyright system. Congress, in speaking about the pre-1976 copyright law, stated that:

One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases, it is the cause of inadvertent and unjust loss of copyright.¹⁸⁵

Interestingly, Congress focuses here on the difficulty that renewal poses to the author, when the work involved is arguably no more than that required for the initial registration.¹⁸⁶ Under the older system, it would seem far more common that a reader or user of a work may have difficulty in determining whether a work was still covered by copyright, yet Congress gives this aspect short shrift.

Another justification presented by Congress for the change was the increased life expectancy of the average American, which made the former term too short “to insure an author and his dependents the fair economic benefits from his works.”¹⁸⁷ Unlike the rhetoric of earlier discussions about copyright, with multiple references to the public welfare and the instrumental role of copyright, the more recent legislative debate noticeably focuses on the private interests of copyright holders. It seems that the promotion of progress is no longer the constitutional object, but the promotion of the rights of authors.

E. The Big Picture

¹⁸⁴ *See id.* The adoption of a term of life of the author plus fifty years also gave the U.S. the same standard as the majority of international countries under the Berne Convention. *See* Act of Brussels of June 26, 1948.

¹⁸⁵ *See* NIMMER ON COPYRIGHT, § 9.02. In later studies, it was estimated that only 20 percent of registered works are subject to renewal. *See* S. Rep. No. 102-194, 102d Cong., 1st Sess. 20 (1991).

¹⁸⁶ Moreover, publishers or agents are likely to be the individuals who have the responsibility for this aspect of publishing/distribution of a work.

¹⁸⁷ *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134 (1976).

A look back at the copyright term extensions mirrors this changing perspective. From 1790 to 1962, a period of almost two hundred years, there were only three revisions of the original copyright terms set by the 1790 Copyright Act.¹⁸⁸ The following table¹⁸⁹, with the addition of the CTEA, chronicles the number of copyright term extensions in the last 36 years — a grand total of 11 extensions:

| Year | Law | Copyright Term Extension | Maximum Copyright Term |
|------|-----------------|--|------------------------|
| 1962 | Pub. L. 87-668 | Subsisting copyrights extended to 12/31/65 | 59 years |
| 1965 | Pub. L. 89-142 | Subsisting copyrights extended to 12/31/67 | 61 years |
| 1967 | Pub. L. 90-141 | Subsisting copyrights extended to 12/31/68 | 62 years |
| 1968 | Pub. L. 90-416 | Subsisting copyrights extended to 12/31/69 | 63 years |
| 1969 | Pub. L. 91-147 | Subsisting copyrights extended to 12/31/70 | 64 years |
| 1970 | Pub. L. 91-555 | Subsisting copyrights extended to 12/31/71 | 65 years |
| 1971 | Pub. L. 92-170 | Subsisting copyrights extended to 12/31/72 | 66 years |
| 1972 | Pub. L. 92-566 | Subsisting copyrights extended to 12/31/74 | 68 years |
| 1974 | Pub. L. 93-573 | Subsisting copyrights extended to 12/31/76 | 70 years |
| 1976 | Pub. L. 94-553 | Subsisting copyrights extended to 75 years | Total term 75 years |
| 1998 | Pub. L. 105-298 | Subsisting copyrights extended to 95 years | Total term 95 years |

Each extension, all retroactive in that they affected already existing copyrights, was enacted when the previous one was on the verge of ending. This suggests that the more recent legislation were the result of heavy lobbying on the part of private parties about to lose copyright protection — parties looking to extend the monopoly they have over their works. Without any countervailing benefit to

¹⁸⁸ They are The Act of 1831, 21st Cong. 2d. sess., 4 stat. 436; ; The Act of 1870, 41st Cong. 1st Sess. 16 Stat. 212-217 ; and The Act of 1909, 60th Cong. 2d. sess., 35 stat. 1075. See Sony, *supra* note 173 at 461.

¹⁸⁹ Table was taken from Complaint, *supra* note 5.

the public, such privately motivated laws are clearly counter to the Framers's ideas for copyright.

IV. DEVELOPMENT THROUGH SUPREME COURT JURISPRUDENCE

Although the trend in the legislature has been to grant more protection to authors, the judiciary has been truer to the original intent of the Copyright Clause. Over the years, the Supreme Court has consistently interpreted the Copyright Clause¹⁹⁰ as granting only a limited monopoly to artists, with the primary purpose being the promotion of the arts and sciences.¹⁹¹

A. The Beginnings

The first case in which the Court approached the question of copyright was the 1834 case of *Wheaton v. Peters*.¹⁹² Although the case did not directly address the weight to be assigned to the various interests presented in the Copyright Clause, the Court dispensed with the idea that authors had any "natural" rights in their work.¹⁹³ More precisely, the case asked whether there existed a perpetual right of copyright in the common law¹⁹⁴ and if so,

¹⁹⁰ Although courts have only rarely felt called to construe this clause, thus creating a smaller body of case law than that for other provisions of the Constitution, there is sufficient precedent to inform an analysis of the Copyright Clause. See NIMMER ON COPYRIGHT § 1.02.

¹⁹¹ Moreover, the following cases may well prove more persuasive than a historical analysis to a court of law due to the precedential value of the cases.

¹⁹² 33 U.S. 591 (1834).

¹⁹³ This case is extremely similar to the English case of *Donaldson v. Becket*, see discussion, *supra* at 19-20.

¹⁹⁴ Another case in which the question of perpetual copyright was addressed was *RCA Mfg. Co., Inc. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940). Judge Learned Hand explains his reasoning for the nonexistence of a perpetual copyright thusly:

The problem is not so simple; in dealing with a monopoly the law imposes its own limits. Certainly when the "common-law property" is in a work which the Copyright Act, 17 U.S.C.A. § 1 et seq., covers, there can be no doubt; Congress has created the monopoly in exchange for a dedication, and when the monopoly expires the dedication must be complete. . . . The fact that they are not within the act should make no difference. [We do not believe that] there is a perpetual common-law copyright in works not copyrightable under the act. . . . [W]e see no reason why the same acts that unconditionally dedicate the common-law copyright in works copyrightable under the act, should not do the same in the case of works not copyrightable. Otherwise it would be possible, at least *pro tanto*, to have the advantage of dissemination of the work at large, and to retain a perpetual though partial, monopoly in it. That is

whether the Copyright Clause extinguished that right. The operative word was “secure,” with the plaintiff arguing that that the word implied a right already in existence. According to his argument, the clause merely recognized the right and allowed Congress to provide a remedy for violation; the states themselves retain the power to offer additional remedies, and the common law, with its supposedly perpetual right, remained another source of remedy.

The Court disagreed, concluding that the Clause created the right and that there was no perpetual right in common law. In the course of its reasoning, the Court did look to English common law,¹⁹⁵ but decided that whatever rights did exist under English common law were not necessarily relevant. The state in which this case arose, Pennsylvania, was colonized before any of the English cases dealing with copyright arose. The majority concludes that absent statutory copyright protection, an author’s property right in his work is limited to the manuscript – that is, it is his work until it is published and disseminated, but once it is publicly available *it belongs to the public*.

Thus, as early as 1834, the idea of an author’s natural rights in his work, unless unpublished, was rejected. Copyright protection was seen as a statutory construction. *Fox Film Corporation v. Doyal*,¹⁹⁶ added to the gradual evolution of the current judicial understanding of the purpose of copyright. Speaking for the majority, Justice Hughes states, “As this court has repeatedly said, the Congress did not sanction an existing right, but created a new one.”¹⁹⁷ He goes on to say that:

The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like the patent, is “at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of

contrary to the whole policy of the Copyright Act and of the Constitution. Any relief which justice demands must be found in extending statutory copyright to such works, not in recognizing perpetual monopolies, however limited their scope.

¹⁹⁵ In *Wheaton*, the Court relates an incomplete account of the history of copyright law in England. See Abrams, *supra* note 108, for a more in-depth analysis of the historical origins of copyright law in England.

¹⁹⁶ 286 U.S. 123 (1932).

¹⁹⁷ See *id.* at 127.

individuals, and the incentive to further efforts for the same important objects.”¹⁹⁸

Although perhaps understood and simply not stated in *Wheaton*, copyright was seen as statutory protection with the goal of providing additional an incentive to authors and inventors to create. Yet the Court understood that this incentive was purely instrumental, a means to the end of promoting the public good. Thus, the principle that the primary purpose of copyright was to stimulate creativity for the good of the public was injected into Supreme Court jurisprudence.

This principle was refined and reaffirmed in later cases. In *U.S. v. Paramount Pictures*,¹⁹⁹ Justice Douglas states: “The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”²⁰⁰ Five years later, in the case of *Mazer v. Stein*,²⁰¹ Justice Reed explained the Supreme Court’s stance more completely, presenting a more measured exposition:

The economic philosophy behind the [copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.²⁰²

Through these statements and other such opinions, the “public good” doctrine was firmly established in American copyright law.

B. The Maturation of the “Public Good” Doctrine²⁰³

In *Graham v. John Deere Co.*,²⁰⁴ the Court moved beyond simply asserting the principle and explained the basis behind its

¹⁹⁸ See *id.* at 127 (quoting *Kendall v. Winsor*, 21 How. 327, 328).

¹⁹⁹ 334 U.S. 131 (1948).

²⁰⁰ *Id.* at 158.

²⁰¹ 347 U.S. 201 (1953).

²⁰² *Id.* at 219.

²⁰³ Admittedly, the writer’s distinctions between “The Beginnings” and “The Maturation of the Public Good Doctrine” (and later, “The Modern Copyright Cases”) are largely just for organizational purposes, rather than for providing any true theoretical framework for thinking about the cases.

²⁰⁴ 383 U.S. 1 (1966).

reasoning.²⁰⁵ The opinion included analysis of English law, the actual text of the clause, and Thomas Jefferson's thoughts on copyright.²⁰⁶ With regard to English law, the Court felt that the copyright protection granted by Congress was "unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown. . . . It was written against the backdrop of the practices — eventually curtailed by the Statute of Monopolies — of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public."²⁰⁷ In investigating the test of the Copyright Clause, the Court had this to say:

At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress 'To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.' Art. I, s 8, cl. 8. The clause is both a grant of power and a limitation. . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must

²⁰⁵ It is true that *Graham* is a patent case rather than a copyright case. Although there are important distinctions to be made between copyright and patent law, most courts and commentators have recognized that the analysis is similar:

[B]ecause they both come from invention or mental labour, and in addition, because they are so joined in the constitution; we have become accustomed to regard them as in all respects alike and equally dependent on the legislative favour for existence and protection.

See *Wheaton*, 33 U.S. at 598.

The distinction between patent and copyright law was further explored in *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979). The court explained that unlike patent law, where the inventor has the right to exclude others from the use of his discovery, "the grant of a copyright to a nonuseful work impedes the progress of the sciences and the useful arts only very slightly, if at all, for the possessor of a copyright does not have any right to block further dissemination or use of the ideas contained in his works."

²⁰⁶ It is interesting that the Court looks to Jefferson, for he was not actually at the Constitutional Convention. *See* Walterscheid, *supra* note 105, at 90. He was in France and was informed of the proceedings by mail. *See id.*

²⁰⁷ *Id.* at 5 (quoting MEINHARDT, INVENTIONS, PATENTS AND MONOPOLY 30-35 (London, 1946)).

'promote the Progress of . . . useful Arts.' This is the standard expressed in the Constitution and it may not be ignored.²⁰⁸

Finally, the *Graham* Court considered Thomas Jefferson's views on the protection to be granted authors to be important because of his large role and personal interest in the establishment of the copyright and patent system in America.²⁰⁹ The opinion follows the development of Jefferson's beliefs, starting with his aversion to monopolies. The Court explained that Jefferson's aversion to monopolies was so strong, in fact, that he originally urged James Madison to include "a Bill of Rights provision restricting monopoly, and as against the argument that limited monopoly might serve to incite 'ingenuity,' he argued forcefully that 'the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.'"²¹⁰

The opinion goes on to explain that Jefferson's views developed, and he later qualified his earlier statements to explain that "[c]ertainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. . . . Nobody wishes more than I do that ingenuity should receive a liberal encouragement."²¹¹ The Court also cites another letter written to Madison, in which Jefferson explains that the following express provision would please him:

Art. 9. Monopolies may be allowed to persons for their own productions in literature, & their own inventions in the arts, for a term not exceeding _ _ years, but for no longer term & no other purpose.²¹²

Furthermore, the Court sets out a rather detailed and lengthy explication of Jefferson's philosophy in text and footnotes.²¹³ Surprisingly, no investigation was conducted

²⁰⁸ *Id.* at 5-6.

²⁰⁹ *See id.* at 113.

²¹⁰ *Id.* at 113 (quoting V WRITINGS OF THOMAS JEFFERSON 47 (Ford ed., 1895)).

²¹¹ Letter to Oliver Evans (May 1807), V WRITINGS OF THOMAS JEFFERSON 75-76 (Washington ed.).

²¹² *Id.* at 113.

²¹³ On pages 7 to 9 of the opinion, the Court states that:

Jefferson's philosophy on the nature and purpose of the patent monopoly is expressed in a letter to Isaac McPherson (Aug. 1813), a portion of which we set out in the margin. He rejected a natural-rights theory in intellectual property rights and clearly recognized the social and economic rationale of the patent system. The patent monopoly was not designed to secure to the inventor his

by the Court of the other Framers' thoughts.²¹⁴

After such an elaborate opinion, it is not surprising that the Court later limited itself to pithier commentary on the objective and meaning of the Copyright Clause. In 1973, the Court stated rather emphatically that “[t]he objective is to promote the progress of science and the arts. . . . In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works.”²¹⁵

natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society — at odds with the inherent free nature of disclosed ideas — and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly. . . .

The first sentence of the above text had the following, rather lengthy and involved, footnote:

Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. VI WRITINGS OF THOMAS JEFFERSON 180-181 (Washington ed.).

²¹⁴ See *supra* note 206. But it has been shown that Jefferson's thought was fairly consistent with at least Madison.

²¹⁵ *Goldstein v. California*, 412 U.S. 546, 555 (1973). In light of this statement, it is rather surprising that this case upheld the possibility of a perpetual copyright available through state law. The Court refused to void a California statute for lack of a durational limitation, *despite* the federal constitutional duration limitation upon the power of Congress to grant copyrights. The Court felt that Congressional silence in the area of sound recordings

In 1975, the Court asserted that:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. . . . The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.²¹⁶

And in 1979, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979), the Court presented its "authoritative list" of the permissible pursuits of Congressional statutes:²¹⁷

First, patent [and copyright] law seeks to foster and reward invention; second, it promotes disclosure of inventions, to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent [and copyright] protection seek to ensure that ideas in the public domain remain there for the use of the public.

That the Court stated this so strongly and absolutely is particularly noteworthy, in light of the fact that the 1976 Copyright Act, which changed the structure of copyright protection rather extensively and reflected the changing sentiment of the legislature,²¹⁸ preceded this opinion. Whether this stable and consistent approach to copyright would be continued is the subject of this next section.

C. The Modern Cases

Some more recent cases suggest that even if the Court as a whole is not moving away from the general principle that copyright is only a means to the end of fostering innovation and creation, more attention is being paid to the role of the author in this equation. In the widely publicized case, *Sony Corp. v. Universal*

meant that states could legislate in this area. *See id.* at 569. The Court further explained away this exception by saying that although the scope of protection is substantial and lasts for an unlimited time, the scope of the proscribed activities is narrow. *See id.* at 550.

²¹⁶ 20th Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

²¹⁷ Although the Court is expressly speaking on patent law, it is interpreting the Copyright Clause. For all intents and purposes, the limits and duties placed on the legislature with regard to copyright are the same as those placed on patent law. *See supra* note 200.

²¹⁸ *See* discussion of statutory development, *supra* at 27-33.

City Studios, Inc.,²¹⁹ which measured the boundaries of “fair use,” the majority seems to depict the problem as one of balancing, rather than instrumentality. Similar to the reasoning of previous opinions, the Court’s analysis begins with the statement that:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors . . . by the provision of a special award, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.²²⁰

What has changed is the Court seemed to adopt a more deferential tone towards Congress, painting the copyright power in more expansive terms, rather than the “negative” ones used in previous opinions.²²¹ The opinion explains that the difficult balancing act that Congress has been charged with requires changing copyright law:

As the test of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.²²²

While the practical change in the Court’s attitude may appear to be slight, the strongly worded dissent suggests a move away from the public good and toward the individual author.²²³ Like the circuit court below,²²⁴ Justices Blackmun, Marshall,

²¹⁹ 464 U.S. 417 (1984).

²²⁰ *Id.* at 429.

²²¹ *See, e.g., Graham, supra* note 24, at 6 (ital. added). The Congress in the exercise of the patent power *may not* overreach the restraints imposed by the stated constitutional purpose. *Nor may* it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress *may not* authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. . . . This is the standard expressed in the Constitution and it *may not* be ignored.

²²² *Id.* at 429.

²²³ *See id.* at 457-500.

²²⁴ The 9th Circuit wrote that:

Powell, and Rehnquist look more at the “author’s” rights. For example, the dissent states that: “[t]he fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.”²²⁵ The focus here is on the authors, with only an indirect reference to the public interest. Where previous opinions placed primary weight on the public’s interest in an author’s works, the presumption here has been reversed.

In *Harper and Row v. Nation Enterprises*,²²⁶ also discussing the parameters of fair use, the focus on authors seemed to continue. In reversing the lower court’s holding, the opinion states that:

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.²²⁷

However, the Court does qualify the previous assertion, explaining that the limited grant is only a means to an end: “to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”²²⁸ Interestingly, the Court supports its argument by also

Despite what is said in some of the authorities that the author’s interest in securing an economic reward for his labors is a ‘secondary consideration,’ it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and that this purpose is to be achieved by the reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by the permitting him to control the cost of and access to his novelty.

Universal City Studios, Inc. v. Sony Corp., 659 F. 2d 963, 965 (9th Cir. 1981), *rev’d* 464 U.S. 417 (1984).

²²⁵ *See id.* at 479.

²²⁶ 471 U.S. 539 (1985).

²²⁷ *Id.* at 545-46.

²²⁸ *Id.* at 546.

quoting the dissent in *Sony*,²²⁹ and continues on to say that “it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”²³⁰ Thus, it would appear the Supreme Court was following the lead of the legislature.

Four years later, the Supreme Court backtracked,²³¹ again looking to Thomas Jefferson for guidance. Although *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,²³² was a patent case, as explained earlier in this paper, the Court has consistently treated copyright and patent in a similar manner.²³³ Early in the opinion, the Court devotes some discussion to balance:

The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the “Progress of Science and useful Arts.” As we have noted in the past, the Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration. . . . From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.²³⁴

After some discussion of Jefferson, the Court relates the

²²⁹ See *id.* at 546. Quoting *Sony*, “The monopoly created by copyright thus rewards the individual author in order to benefit the public.” *Sony* at 464 U.S. 417, 477 (dissenting opinion).

²³⁰ *Id.* at 558.

²³¹ However, in *Stewart v. Abend*, 495 U.S. 207 (1990), one year after *Bonito Boats*, the Court wrote an opinion containing some troubling language. Although the case can be easily distinguished on the basis that the Court was not looking at the Copyright Clause, but specifically at the renewal requirements of the Copyright Acts of 1909 and 1976 (or lack thereof), the Court upheld Congress’ interpretation of how to best effectuate the Copyright Clause. So although “the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors,” see *id.* at 228, “the limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use,” see *id.* at 229. Thus, although it appears the focus has shifted back to the author again, it more accurately reflects the Court’s deference to Congress and its presumed intent in promulgating a particular section of the Copyright Act.

²³² 383 U.S. 141 (1989).

²³³ See discussion, *supra* note 200.

²³⁴ *Id.* at 146.

following observation:

[A] congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception. Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure. . . . To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use.²³⁵

Here, the Court has effectively declared that the suggested presumption in favor of the author, introduced by the dissent in *Sony*,²³⁶ is incorrect — the assumption, rather, is that an author’s right to her work is an exception to the general rule.

Two years later, the Court confirmed the applicability of the principles articulated in *Bonito Boats* to copyright law. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,²³⁷ presented the question of whether a compilation of facts was subject to copyright protection. In rejecting the “sweat of brow” theory advanced by the plaintiff, the Court explained that:

It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” and a constitutional requirement. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.²³⁸

The Court proceeded to explain that the “sweat of brow” theory was contrary to the intent of copyright, that “to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of ‘writings’ by ‘authors.’”²³⁹ Thus, it appears that the importance of encouraging creativity returned to the world of copyright.

With *Fogerty v. Fantasy, Inc.*,²⁴⁰ the Court decisively²⁴¹ reaffirmed the return to the equilibrium it maintained during most

²³⁵ *Id.* at 151.

²³⁶ See discussion of *Sony*, *supra* at 40.

²³⁷ 499 U.S. 340 (1991).

²³⁸ *Id.* at 349-50 (internal cites omitted).

²³⁹ *Id.* at 354 (citing Nimmer § 3.04, p. 3-23).

²⁴⁰ 510 U.S. 517 (1994).

of its history. It briefly states that “the Copyright Act’s primary objective is to encourage the production of original literary, artistic, and musical expression for the good of the public.”²⁴² The Court restates this idea, declaring that “We have often recognized the monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.”²⁴³ The Court repeats this idea once again, but this time adding that “Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the law’s boundaries be demarcated as clearly as possible.”²⁴⁴

From 1834 to the present day, the Supreme Court has left a fairly steady legacy of cases with which to interpret the Copyright Clause. However, for the purposes of *Eldred v. Reno*, the standards which have been delineated in the various opinions provide very little real guidance beyond what may have already been patently clear from the language of the Clause itself. For example, from *Bonito Boats*, the Court gravely states that monopolies of “unlimited duration” would not be constitutional.²⁴⁵ Is this not simply a restatement of the Constitutional mandate that rights be granted to authors for “limited times”? For the parties involved in *Eldred v. Reno*, such statements by the Supreme Court, although useful as general guidelines, contribute little beyond what may already be obvious.

D. What May Be Too Long?

Although the Supreme Court provides very little substantive guidance in defining the outer boundaries of “for limited times,” the D.C. Circuit may shed some light in this area.²⁴⁶ In 1987, the appeals court decided *United Christian Scientist v. Christian Science Board*.²⁴⁷ An action had been brought, seeking a declaration that a private copyright law was unconstitutional.

²⁴¹ There were no dissents, and one concurrence. The concurrence focused its reasoning on statutory interpretation rather than any discussion of the objective of copyright.

²⁴² *Id.* at 524.

²⁴³ *Id.* at 526.

²⁴⁴ *Id.* at 527.

²⁴⁵ *See* 383 U.S. 141, 146.

²⁴⁶ *Eldred v. Reno* was filed within its jurisdiction.

²⁴⁷ 829 F. 2d 1152 (D.C. Cir. 1987).

Although the case was decided on the basis of the Establishment Clause, the opinion did include a discussion of what may constitute an unusually long period for copyrights. Realizing that the private law granted a copyright for term of 140 years or more, the court states that:

The copyright Congress conferred upon First Church through Private Law 92-60 is, however, far from ordinary. . . . the copyright granted by means of Private Law 92-60 is exceptional in scope and duration. Even if not construed as a copyright in perpetuity, it purports to confer rights of unprecedented duration: the term of protection for the 1906 edition of Science and Health, which would have expired in 1981 if treated under the general copyright laws, is now until 2046; and numerous editions of Science and Health which. . . were in the public domain because their copyrights had expired [or were]. . . never copyrighted, are now subject to the long-term copyright First Church derived from Private Law 92-60. Scant authority, if any, exists for such a dramatic departure from copyright practice.²⁴⁸

In the eyes of the D.C. Circuit, 140 years is overly long for copyright protection.²⁴⁹ Moreover, the court takes issue with the retroactive grant of copyright protection for various works. While not entirely analogous to retroactive grants of copyright, the retroactive extension of copyright may warrant similar treatment from the judicial system.

V. OTHER ARGUMENTS

Although the strong legacy of Supreme Court opinions would suggest that the originalism argument is the most convincing argument for the unconstitutionality of the CTEA, other lines of reasoning also support the claim that the Copyright Clause would forbid enforcement of the CTEA. Although discussion of some of the more complicated and involved doctrines is omitted,²⁵⁰ brief discussions of other arguments follow below.

²⁴⁸ *Id.* at 1169-70.

²⁴⁹ See also ROBERT L. BARD AND LEWIS KURANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENSION, AND THE MAKING OF COPYRIGHT POLICY (1998).

²⁵⁰ First Amendment concerns, parallels with patent law, international issues, the public trust doctrine, and other such aspects of this case require a much more involved analysis than can be provided within the scope of this paper, and other commentators render such an analysis redundant. For example, free speech issues are thoroughly addressed by L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VANDERBILT L. REV. 1 (1987). See also NIMMER ON COPYRIGHT §1.10 [B]&[C]. With regard to the public trust doctrine, Richard A. Epstein presents a well-reasoned and succinct statement of the general principle's in *Congress's Copyright Giveaway*, the December 21, 1998, "Rule of

A. Textualism²⁵¹

An analysis of the actual text of the Copyright Clause suggests certain interpretations of the power granted. The clause gives Congress the power “[t]o promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”²⁵² Each of the various elements may cast some light on the meaning to be gained from a close reading of the text and suggests certain minimal conditions to be met by copyright legislation.²⁵³

First, the clause explicitly sets out a purpose for the power granted — to promote the progress of science and the useful arts²⁵⁴ — thus, making it one of the few clauses in the Constitution to recite a purpose.²⁵⁵ Webster’s Dictionary²⁵⁶ defines “promote” as “to contribute towards the growth or prosperity of” and lists “advance” and “further” as synonyms. In line with this interpretation, Courts have held that the phrase “to promote” is the same as the terms “to stimulate,” “to encourage,” and “to induce.”²⁵⁷ It is a rather complicated argument one must make to transform a

Law” piece in the Wall Street Journal. *See also* Copyright’s Commons, *Legal Information: Public Trust Doctrine* (last visited April 9, 1999) <<http://cyber.law.harvard.edu/eldredvreno/evidence/legal.htm>>; Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

²⁵¹ A limited discussion of the various phrases and words follow. Nimmer provides a somewhat more complete discussion of the clause. *See* NIMMER ON COPYRIGHT, Chapter 1.

²⁵² U.S. CONST. art. 1, § 8, cl. 8.

²⁵³ *See* Hon. Ralph Oman, *The Copyright Clause: A Charter for a Living People*, in CELEBRATING THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION 90 (American Bar Association, Section of Patent, Trademark, and Copyright Law, 1988).

²⁵⁴ While “arts and sciences” is fairly self-explanatory, a textual analysis ends up being somewhat complicated. However, it will not be addressed here, for the end meaning arrived at the end of a closer scrutiny is essentially the same as an understanding attained through the use of common sense. *See* NIMMER ON COPYRIGHT, § 1.03 n.1 for a more detailed explanation.

²⁵⁵ *See* Donald W. Banner, *An Unanticipated, Nonobvious, Enabling Portion of the Constitution: The Patent Provision — The Best Mode*, in CELEBRATING THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION 13, 7-62 (American Bar Association, Section of Patent, Trademark, and Copyright Law, 1988).

²⁵⁶ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 941 (Merriam-Webster, Inc., 1998).

²⁵⁷ *Goldstein v. California*, 412 U.S. 546, 555 (1973).

retroactive extension of copyright into an incentive for future creation. More importantly, the Copyright Clause is unique amongst the congressional powers in that it explicitly sets out the method — by securing rights for limited times — by which to accomplish its purpose.²⁵⁸ This suggests that not only is the purpose particularly important, as historical analysis supports, but also that the Framers felt certain that securing a “limited monopoly” for the author was the best method by which to realize that purpose.

On the other hand, it should be noted that the word “secure” may be ambiguous. Commentators have taken the words “to secure” to signify the pre-existence of rights to the work which the author inherently possessed.²⁵⁹ Congress’ enactment of any statutory protection thus may be interpreted as only assisting the author in “securing” her rights to control over her creation by formally recognizing her claim and creating a statutory remedy for any encroachments on her rights. Regardless, any ambiguity which may have existed had been settled in 1834 by *Wheaton v. Peters*,²⁶⁰ when the Supreme Court held that the term referred to the securing of a future statutory, rather than an already existing, right.

However, the full phrase “by securing *for limited times*” should be read as a very real limitation on Congress’ power to grant copyright protection. Although it is clear that a federal copyright statute granting perpetual protection is unconstitutional,²⁶¹ it is unclear where the boundaries lie on the idea of “limited times.”²⁶² Congress has broad discretion in deciding the period of protection; it is now for the courts to decide whether that discretion has been abused.

The provision also grants an exclusive right to a particular group of individuals — “authors and inventors”; nowhere else in the Constitution is there a similar clause.²⁶³ While one may argue

²⁵⁸ See Banner, *supra* note 255, at 13.

²⁵⁹ See *id.*

²⁶⁰ 33 U.S. 591 (1934). See also discussion of Supreme Court jurisprudence, *supra* at 33.

²⁶¹ See *Twentieth Century Music Corp.*, 422 U.S. 151, 156 (1975).

²⁶² Thus came into existence *Eldred v. Reno*, the case at hand. Although retroactivity of the CTEA is the primary issue, the additional question of whether 95 years is too long is also being presented before the courts. See also discussion of *Christian Scientists*, *supra* at 45.

²⁶³ See, e.g., Banner, *supra* note 255 at 13.

that the explicit listing of the benefiting parties would warrant stronger protection of their rights, given that the Clause sets up the public interest as a check on the parties' rights would imply that this right is limited. Instead, perhaps the Framers were limiting the number of parties that may benefit from the copyright granted.²⁶⁴ Under this interpretation, the huge corporations²⁶⁵ and authors' estates would have been beyond the scope of the Framers' intent.

B. The Economics of the CTEA

Moreover, it should be pointed out that for most authors, the economic incentive from an additional 20 years of copyright protection, 75 years in the future, may be virtually nonexistent.²⁶⁶ The extension's financial benefit to an author would probably not be a significant factor in encouraging her productivity. More importantly, when weighed against the detriment to the public interest, the economic benefit to be derived from the CTEA is largely insubstantial.

For example, the economic benefit from the protection may be measured by looking at the value to an author today of a dollar transferred to her at some point in the future. The formula for calculating the present value (PV) of a future dollar is:

²⁶⁴ Professor Patry argues that, contrary to the constitutional mandate that the exclusive rights be granted to authors, the more recent extensions benefit largely descendants of authors and distributors. See 72 NOTRE DAME L. REV. 907 (1997). And as Pete Seeger quite sagely put it, "The grandchildren should be able to find some other way to make a living, even if their grandfather did write 'How Much Is That Doggie in the Window.'" See Zeitlin, *supra* note 69. The following are examples of works owned by corporations: Sergey Prokofiev's *Peter and the Wolf* is owned by Walt Disney; Paul McCartney's *Yesterday* is owned by L. Michael Jackson and Sony Music; Irving Berlin's *God Bless America* is owned by Girl Scouts of America; Buddy Holly's *That'll Be the Day* is owned by McCartney Productions Ltd. See *Ideas, Culture: Who Owns It?* CHRISTIAN SCIENCE MONITOR (June 11, 1998) <<http://www.csmonitor.com/durable/1998/06/11/fp54s3-csm.htm>>; J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L. J. 625 (1996).

²⁶⁵ This calls into question the constitutionality of "works made for hire." While dicta in various opinions suggest that this would be constitutional, a more complete discussion is not possible within the limits of this paper. For more on this, see NIMMER ON COPYRIGHT, § 1.06

²⁶⁶ A more complete discussion of the economic costs and benefits of the CTEA can be found in the statement of intellectual property law professors submitted to Congress. See Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, "The Copyright Term Extension Act*, (Jan. 28, 1998) <<http://www.public.asu.edu/~dkarjala/legmats/1998Statement.html/Incentives#Costs>> and <<http://www.public.asu.edu/~dkarjala/legmats/1998Statement.html/Incentives#Incentives>>.

$$PV = \$1 / (1+r)^n$$

with n = number of years, assuming annual compounding, and r = discount rate. One method of using this formula would be to calculate the value of a dollar 75 years in the future and then 95 years in the future. Using an extremely conservative value of 5% for r , the difference in value of a dollar during the additional 20-year period of protection would be approximately \$0.016.²⁶⁷ A more realistic r would probably be somewhat higher,²⁶⁸ which would yield a smaller value differential; for example, an increase in the r to 8% would yield a value differential of \$0.002. Thus, for an additional benefit to the author of approximately one cent on the dollar, Congress has decided to keep works from the public domain for another twenty years.

Advocates of the CTEA may argue that such a calculation of the economic benefit ignores the fact that the extension also results in additional royalties being paid for each of years during the extension period. Using an r of 5% again for illustrative purposes, a royalty of a dollar paid each and every year of the 20-year extension period would be worth less than \$0.32.²⁶⁹ A more realistic r would again result in a much lower benefit to be derived.

While the value of the 20-year extension granted by the CTEA may be substantial for a corporation such as Disney, for the great majority of authors such an extension is largely worthless.²⁷⁰

²⁶⁷ This number was calculated by subtracting the present value of a dollar 95 years from now ($\$1 / 1.05^{95} = .0097$) from the present value of a dollar 75 years from now ($\$1 / 1.05^{75} = .0258$).

²⁶⁸ See, e.g., RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE (5th ed. 1996).

²⁶⁹ The intuitive method of calculating this number is by summing up the present value of a dollar for 76 years from now, for 77 years from now, for 78 years from now, and so forth until year 95.

²⁷⁰ Moreover, one could also compare the marginal utility an author would derive from a directly-received dollar, 75 years from now, versus the utility she would derive from her estate receiving the royalty. I would suspect that most people would prefer to receive it personally such that the fact that their estates will likely receive it will tend to lower the utility of the present value even further. This observation was made over 150 years ago by Macaulay as well:

[T]he evil effects of the monopoly are proportioned to the length of its duration. But the good effects for the sake of which we bear with the evil effects are by no means proportioned to the length of its duration. . . . [I]t is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly

If the purpose of copyright is to encourage creativity in authors, the minimal additional incentive granted by the CTEA could not reasonably outweigh the cost the public domain. Particularly when the insignificant economic benefit to the author is considered in conjunction with the attenuated link of creations such as Mickey Mouse with the original author, the importance of the public interest over the financial interest of the copyright owner is particularly urgent.

VI. CONCLUSION

While *Eldred v. Reno* pits an individual plaintiff against the U.S. government, the issues at stake are much larger. Eldritch Press may be a relatively small operation, but it is emblematic of the various interests that Congress has ignored in its consideration of copyright in the last 37 years.²⁷¹ A brief look at the origins of the CTEA show that the main factors in play were those of copyright holders whose terms of protection were soon to expire. That this general piece of legislation seems to be solely driven by the interests of present copyright holders²⁷² is troubling enough. Even more troubling is the realization that these interests have also likely driven the last eleven pieces of copyright legislation. Unless the courts find the CTEA unconstitutional, this trend is likely to continue.

The influence of parties such as Disney and Time-Warner comes from their financial power — power derived from 75 years of copyright protection already granted. With the rewards they have received from the “limited monopoly” granted by the government, they seek to extend their monopoly, to continue to control the works for even longer. For example, Disney’s character, Mickey Mouse, would have entered the public domain in 2004.²⁷³ Disney already makes several billion dollars a year from selling

perceptible. . . [A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. . . .

See 8 Macaulay, Works (Trevelyan ed. 1879) 199, *quoted in* Chafee, *Reflections on the Law of Copyright*: II, 45 COLUM. L. REV. 719 (1945), *requoted in* R. Gorman & J. Ginsburg, COPYRIGHT FOR THE NINETIES 307 (4th ed. 1993).

²⁷¹ The first copyright extension after The Act of 1909 was in 1962. *See* discussion of the yearly extensions, *supra* at 29.

²⁷² And it is only a small percentage of the current copyright holders—those who have a lot of money at stake.

²⁷³ *See* Berenson, *supra* note 36.

Mickey Mouse-related products and services; the possibility of an additional twenty years of royalties and licensing fees makes it patently clear why the CTEA is so important to Disney and other such parties.²⁷⁴ It is apparent the extended term of protection benefits the private parties, but it is also evident that the other constitutionally required element of copyright—the benefit to the public—is sorely lacking.

Research into the origins of the Copyright Clause and the subsequent interpretive cases reveals that the Framers had clearly intended copyright to be an incentive to creation, in order to encourage the arts and sciences for the benefit of all. Article I, section 8, of the U.S. Constitution has set out a delicate balance. This balance specifies a formula by which Congress is to accomplish its goal. “The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. This tax is tolerated only to the extent that the public will receive a reciprocal benefit through the production of creative works.”²⁷⁵ Essentially, for a specified term, authors of creative works will receive a stream of royalty, but at the end of that term, they must pay their constitutional dues: dedication of their work to the public domain, making it “freely available to all to enjoy and to use in creating newer works.”²⁷⁶ Nimmer expressly sets out the corollary to this principle. “Implicit in this rationale is the assumption that in the absence of such public benefit, the grant of a copyright monopoly would be unjustified.”²⁷⁷

In catering to private interests, Congress was derelict in its duty to ensure that such legislation would also be to the benefit of the public. The CTEA does not efficiently encourage²⁷⁸ the

²⁷⁴ The general public may be willing to give Disney those additional years of copyright protection in order to protect Mickey Mouse from corruption and perversion. One contemporary swore, “I’d do anything to protect Mickey Mouse!” (interview of April 8, 1999). However, trademark protection of Mickey Mouse would still be available to Disney. Moreover, Santa Clause, the Easter Bunny, and other such childhood figures are in the public domain. Although there may be some parodies, by and large these characters are still “pure.”

²⁷⁵ Lavigne, *supra* note 47 at 322-23 (internal cites omitted).

²⁷⁶ See Karjala, *What Are the Issues*, *supra* note 18.

²⁷⁷ NIMMER ON COPYRIGHT, § 1.03 [A].

²⁷⁸ Opponents to this perspective may point to the phrase “efficiently encourage” as indicative of the major weakness with the challenge to the CTEA. There is no constitutional requirement for “efficiency” and Congress is granted broad discretion over how to best effectuate its constitutional mandate. It perhaps cannot be denied that 20 years of additional creation may prove to be an extra incentive to create. But it simply

production of new works for the public good. A retroactive extension of copyright protection cannot create incentives for artistic expression,²⁷⁹ and in extending the benefits available to current copyright holders, it did not provide any counterbalancing benefit to the public. Simply put, the additional costs to the public of 20 years of copyright protection and the diminished public domain were not given sufficient weight by Congress in the consideration of the CTEA. Commentators estimate the licensing fees and royalties of the additional 20 years will cost churches, theatre groups, and schools millions of dollars.²⁸⁰ Academics, libraries, artists, and other users of creative expression are denied cheap access to work that would otherwise be in the public domain. Even if the public domain work may only contribute marginally to a new work, it is still beneficial. “The world goes ahead because each of us builds on the work of our predecessors. A dwarf standing on the shoulders of a giant can see farther than the giant himself.”²⁸¹ As less work enters the public domain, the ability to create derivative works, to have access to the classics, to be inspired by the creations of others, is dramatically reduced. Such loss of artistic expression is not offset by the stimulation of additional creative enterprises. As such, the CTEA cannot possibly be consistent with the intent of copyright—“to promote the progress of science and useful arts.”

In speaking with contemporaries about this principle, the general reaction seems to be surprise. The right of an author to receive the rewards from his work is a more natural concept to Americans than what one person termed, “a Communist system of making me create, and then letting everybody else freeload off me.”²⁸² Professor Benjamin Kaplan responded to this last idea during a series of lectures at Columbia Law School:

“does not follow that a longer term automatically drives creative authors to work harder or longer to produce works that can be enjoyed by the public.” Lavigne, *supra* note 47 at 324-25 (quoting Hearings on H.R. 989, Statement of Dennis S. Karjala, Professor of Law, Arizona State University College of Law). The law of diminishing returns would suggest that at a certain point, lengthening protection would be illogical.

²⁷⁹ The works were created in the past; thus an extension enacted today could have no incentive effect on the author, particularly since in most cases, the authors are already dead. A *prospective* extension of copyright, however, may be more likely to escape the problem of unconstitutionality. *But see* discussion of what may be too long, *supra* at 45.

²⁸⁰ *See* Karjala, *Statement*, *supra* note 266.

²⁸¹ Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (internal citations omitted).

²⁸² Interview, *supra* note 274.

Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities: it recognizes the importance of these excitations for the development of individuals and society. Especially is copyright directed to those kinds of signals which are in their nature “fragile” — so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders. To these signals copyright affords what I have called “headstart,” that is, a group of rights amounting to a qualified monopoly running for a limited time. . . . The headstart conferred (which is the encouragement given, the inducement held out) should be moderate in all its dimensions. . . . [*Serious is the danger of hobbling unduly the reception and enjoyment of the signals by their potential audience, or of clogging the utilization of the signals by other authors in the creation of further or improved signals for additional audiences.*]²⁸³

The message Professor Kaplan delivers is often forgotten in the debate over copyright. Creation without appreciation from others who view, admire, and applaud the results of the creative effort may be an empty exercise. While the sharing of one’s work sometimes results in its unjust misappropriation, it must be remembered that even a truly creative enterprise is the result of inspiration that often has its origins in the works of others.

²⁸³ KAPLAN, AN UNHURRIED VIEW, *supra* note 100, at 74-76.