NOTE

Eldred v. Ashcroft: Failure in Balancing Incentives and Access

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INTRODUCTION

On January 15, 2003, the United States Supreme Court upheld the constitutionality of the 1998 Copyright Term Extension Act ("CTEA") in *Eldred v. Ashcroft*.[1] The statute extends both future and existing copyrights by twenty years.[2] Petitioners argued that the CTEA term extension of all copyrights violates the "limited Times" requirement in the Copyright Clause.[3] By a vote of 7-2, the Supreme Court rejected petitioners' claim.[4] The Court, however, did not offer a satisfactory competing conception of the Copyright Clause or explain how lower courts should construe it.[5] Critically, the Court failed to acknowledge Congress' constitutional constraints to regulate the production of creative works.[6]

This Note examines the Supreme Court's decision to uphold the CTEA in *Eldred*. Part I outlines the basic principles of copyright law and Congress' historical exercise of its copyright power. It also provides background on the CTEA's passage. Part II lays out the procedural history of *Eldred* and the Court's analysis in reaching its decision. Finally, Part III criticizes the majority's flawed reasoning in upholding the CTEA. It examines Congress' constitutional constraints in copyright protection and the CTEA's considerable setbacks to the public domain. The Note concludes that the decision effectively leaves excessive

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[1] Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C. (Supp. IV 1998)); Eldred v. Ashcroft, 537 U.S. 186, 222 (2003).

[2] 17 U.S.C. §§ 302-304.

[3] *See Eldred*, 537 U.S. at 193.

[4] *Id.* at 193-94.

[5] *See id.*; *see also* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 558 (2000) (proposing that Court should adopt robust judicial review to prevent Congress from overstepping constitutional limitation on legislation of private rights).

[6] *See Eldred*, 537 U.S. at 193; Caren L. Stanley, Note, *A Dangerous Step Toward the Over Protection of Intellectual Property: Rethinking* Eldred v. Ashcroft, 26 HAMLINE L. REV. 679, 706 (2003) (stating that majority in *Eldred* ignored "to promote the Progress" language as independently enforceable limitation on Congress' power under Copyright Clause).

copyright expansion to the unfettered will of Congress.

I. BACKGROUND

A. *Basic Principles of Copyright Law: Incentives and Access*

Copyright law in the United States originated in England, where the first real copyright statutes were tools for government censorship and press control.[7] It took centuries for copyright law in England to evolve so that it embodied a public purpose and reduced the threat that copyright could be used as a tool for government censorship.[8] This progress is also apparent in the United States Constitution.[9] The Framers expressly incorporated into the language of the Copyright Clause a requirement that copyright serve a public purpose.[10] Article I, Section 8, Clause 8 of the Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective rights and discoveries."[11] This clause, commonly known as the Copyright Clause, empowers Congress to give creators a limited monopoly over their creations.[12] However, it also limits the means and the purpose for which Congress may grant this benefit.[13] Much like the other parts of the Constitution, framed to govern generations, the Copyright Clause contains inherently ambiguous language.[14] What exactly is the "Progress of Science"? What constitutes "useful Arts"? What is the meaning of "limited Times"? These questions necessarily arise as progress surpasses beyond what the Framers envisioned.[15]

Despite its ambiguous language, the Copyright Clause unequivocally sought a proper balance between the good of the public and the benefit

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[7] JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 25 (2002).

[8] *Id.*

[9] U.S. CONST. art. I, § 8, cl. 8; *see* COHEN ET AL., *supra* note 7, at 25 (discussing origin and development of copyright law in United States).

[10] U.S. CONST. art. I, § 8, cl. 8; *see* COHEN ET AL., *supra* note 7, at 25.

[11] U.S. CONST. art. I, § 8, cl. 8.

[12] 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2004).

[13] *Id.*

[14] Nadine Farid, *Not in My Library:* Eldred v. Ashcroft *and the Demise of Public Domain*, 5 TUL. J. TECH. & INTELL. PROP. 1, 6 (2003); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1079 (1997) (stating that Constitution does not define retroactively; therefore, parameters of constitutional limitations are inherently ambiguous).

[15] *See* Fisch, *supra* note 14, at 1079.

of the creator.[16] The Framers believed that protecting one's creative work would give the author an economic incentive to create additional works.[17] By encouraging the author's economic interests, the public would benefit from wider dissemination of artistic and literary works.[18]

As a matter of economics, copyright represents an important internal tension.[19] On one hand, copyright protection must be broad enough to provide economic incentive.[20] Inadequate protective rights will provide users free access to a less than socially desirable number and quality of works.[21] On the other hand, copyright must be limited enough to ultimately serve the public's interest in enjoying creative works.[22] Overbroad protection will impose costs on users without any compensating social benefits.[23] To meet the objective of the Copyright Clause, Congress needs to balance incentives and access when it grants a term of protection.[24] But, this auspicious constitutional foundation has failed to survive the subsequent incarnations of copyright laws.[25] As a result, the balance between the two competing interests has been all but lost.[26]

B. Congress' Past Extensions of the Copyright Term

The history of copyright duration in the United States has been an ever-lengthening term of protection.[27] Congress has frequently amended copyright protection and incrementally increased its duration since the first Copyright Act in 1790.[28] The 1790 Act was the first major copyright

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[16] *See* U.S. CONST. art. I, § 8, cl. 8; Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 400 (2000).

[17] Gifford, *supra* note 16, at 379.

[18] *Id.*

[19] Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 175 (2003); *see* PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 1.1, at 6-7 (1989).

[20] Gifford, *supra* note 16, at 379.

[21] GOLDSTEIN, *supra* note 19, at 6-7.

[22] Gifford, *supra* note 16, at 379.

[23] GOLDSTEIN, *supra* note 19, at 6-7.

[24] Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1172 (2000).

[25] *See* Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 4 (2001) (stating that progress is dead idea in contemporary copyright law).

[26] *See id.*

[27] Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002).

[28] *See* Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 930 (2002).

legislation in the United States.[29] This first Act was instructive, for it closely adhered to the Framers' intent and beliefs.[30] It codified the constitutional copyright provision and provided for an original term of fourteen years, with a renewal option for another fourteen years.[31] This renewal term applied only if the author was still alive.[32]

In 1831, Congress doubled the original copyright term to twenty-eight years.[33] This amendment also allowed the author's spouse or children to renew the copyright for another fourteen years, even if the author had died before the renewal time.[34] Congress extended the renewal term to equalize the copyright protection period with authors in other countries.[35] Within three years of the 1831 Act's passage, the Supreme Court squarely rejected a claim that the Constitution preserved the English common-law notion of "perpetual" right.[36] The Court reaffirmed that all works would eventually enter the public domain.[37]

In 1909, Congress again amended copyright duration.[38] Prominent artists, musicians, and writers lobbied intensively and successfully for the change.[39] Public domain concerns also influenced Congress in implementing the 1909 Act.[40] Congress noted the difficulty of protecting both musical composers' economic interests and the public's access to creative musical works.[41] The legislature resisted sweeping extensions in the 1909 Act, maintaining an initial copyright term of twenty-eight years and a renewal period of the same duration.[42]

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[29] *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (amended 1831).

[30] *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 51-53, at 5-6 (2d ed. 1995).

[31] William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 915-16 (1997).

[32] *Id.*

[33] Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 815 (2000).

[34] *Id.*

[35] 7 REG. DEB. CXIX (1830) (statement of Rep. William Ellsworth).

[36] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 601-02 (1834).

[37] *See id.*

[38] 17 U.S.C. § 24 (1909).

[39] *Id.*

[40] H.R. REP. NO. 60-2222, at 7 (1909).

[41] *Id.*

[42] *Id.*; *see also* Amy Masciola, *Timeline: A History of Copyright Law in the United States*, *available at* http://arl.cni.org/info/frn/copy/timeline.html (last visited Apr. 21, 2005) (stating that 1909 Act extended term of protection to twenty-eight years with possible renewal of twenty-eight years).

Attempts to extend copyright duration further received new momentum in the last quarter of the twentieth century.[43] The most important expansion occurred with the passage of the 1976 Act.[44] The 1976 Act abandoned the dual-rights structure and instead created a uniform fixed term beginning upon a work's creation.[45] For all works created after January 1, 1978, the copyright term is the length of the author's life plus fifty years.[46] The Act also gave works published before 1978 a forty-seven year renewal term.[47] The renewal provision effectively granted protection for a maximum of seventy-five years after publication or one hundred years from creation, whichever was less.[48] As a result, virtually no copyrighted works in twentieth century America entered the public domain, at least if the authors were attentive to their rights.[49]

Proponents of the 1976 Act provided several justifications.[50] One was to provide authors and their dependents adequate economic benefits, especially given the increases in life expectancy since the 1909 Act was passed.[51] A series of other rationales focused on the economic and utilitarian benefits of the change, particularly after the United States joined the Berne Convention in 1989.[52] These benefits included the simplicity of a single term, eliminating the costs of renewal formalities, and harmonization with other countries' life-based terms.[53] Thus, the 1976 Act dramatically shifted away from the promotion of arts and science toward the promotion of authors' rights.[54]

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[43] *See* 17 U.S.C. § 302 (1976); 17 U.S.C. §§ 302-304 (1998).

[44] 17 U.S.C. § 302.

[45] *Id.* Prior acts granted authors a renewal option once the initial term expired. *Id.* The 1976 Act abandoned this scheme and created a uniform copyright term. *Id.*

[46] *Id.*; Jerome N. Epping, Jr., Comment, *Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?*, 65 U. CIN. L. REV. 183, 186-87 (1996) (stating that maximum fifty-six-year term under 1909 Act effectually yields to term of life of author plus fifty years under 1976 Act).

[47] 17 U.S.C. § 302.

[48] COHEN ET AL., *supra* note 7, at 167.

[49] *Id.*

[50] H.R. REP. NO. 94-1476 (1976). The House Report holds precedence among the legislative history materials as the primary statement of congressional intent on the Copyright Act of 1976. *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Professor Litman thoroughly examined the legislative history of the 1976 Copyright Act and determined that Congress compromised to industry groups. *See* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 887-88 (1987). The result was expansive definitions for copyright holders' rights with narrow exceptions to

C. *The Passage of the Sonny Bono Copyright Term Extension Act*

In October 1998, two decades after the 1976 Act, President Clinton signed the Sonny Bono Copyright Term Extension Act ("CTEA") into law.[55] The CTEA further strengthened authors' rights at the expense of the public good.[56] It afforded authors longer terms of protection and fewer opportunities for works to enter into the public domain.[57]

The CTEA extended an individual's copyright protection from the life of the author plus fifty years to life plus seventy years.[58] It similarly increased the term for works-for-hire by twenty years, from seventy-five to ninety-five years.[59] The Act was both retrospective and prospective, applying to existing copyrights and future copyrights.[60] As a result, the only works that have passed into the public domain are those published before the 1920s.[61] Although important, these older works have comparatively less impact on the public today.[62] For the next fifteen years, not a single published, copyrighted work in the United States will pass into the public domain.[63]

Despite strong arguments against an extension, the CTEA's passage rested on four rationales.[64] First, proponents believed that the United States' copyright term needed harmonization with the European Union's copyright term.[65] Second, proponents argued that the CTEA would protect the United States' favorable trade balance of intellectual property.[66] Third, the CTEA's supporters felt that copyright terms should be long enough to protect the author and two succeeding

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protect the small number of information users present. *Id.*

[55] 17 U.S.C. §§ 302-304 (1998).

[56] *See* Wendy J. Gordon, Eldred v. Ashcroft: *Intellectual Property, Congressional Power, and the Constitution: Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 185-86 (2002).

[57] 17 U.S.C. §§ 302-304.

[58] *Id.*

[59] *Id.*

[60] *See* S. REP. NO. 105-453 (1998).

[61] Liu, *supra* note 27, at 413.

[62] *Id.* (noting that exceptions include public domain works such as character of Santa Claus, works of Shakespeare, and classical music, myths, and stories).

[63] *Id.* at 449.

[64] *See* Patrick H. Haggerty, *The Constitutionality of The Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 659-61 (2002); Liu, *supra* note 27, at 449 (stating that Congress extended copyright term largely in response to heavy lobbying pressure from copyright industries, despite opposition by many intellectual property scholars).

[65] Haggerty, *supra* note 64, at 659-60.

[66] *Id.* at 660.

generations of heirs.[67] Fourth, they contended that a longer term of protection would serve as a greater incentive for authors to create more works.[68]

Since its passage, the majority of the debate has centered on the retroactive component of the CTEA.[69] The retroactive application of the CTEA affected tens of thousands of existing copyrighted works.[70] It was this retroactive extension that led petitioner Eldred to contest the CTEA.[71] Nonetheless, the Supreme Court's recent holding in *Eldred v. Ashcroft* endorsed Congress' passage of the Act.[72]

II. *ELDRED V. ASHCROFT*

A. Factual and Procedural History

When Congress enacted the previously mentioned extensions, it never defined a time frame for the Copyright Clause's "limited Times" restriction.[73] Yet again, the CTEA added twenty years of protection to both existing and future copyrights.[74] Eric Eldred, an Internet provider of public-domain works, filed a constitutional challenge to the CTEA.[75] Individuals and businesses that rely on the public domain joined the suit as plaintiffs.[76] Eldred alleged that the retroactive term extension exceeded Congress' enumerated powers under the Copyright Clause of the Constitution.[77]

The United States District Court for the District of Columbia granted the defendant's (United States Attorney General) motion for judgment on the pleadings.[78] The court held that the CTEA was constitutional.[79]

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[67] *Id.*

[68] *Id.* at 661.

[69] Farid, *supra* note 14, at 14; *see also* Dennis Harney, Note, *Mickey Mousing the Copyright Clause of the U.S. Constitution:* Eldred v. Reno, 27 DAYTON L. REV. 291, 291 (2002) (stating that CTEA's retroactive extension of extant copyrights violates substantive limits on congressional copyright power found in Copyright Clause); Daren Fonda, *Copyright Crusader*, BOSTON GLOBE, Aug. 29, 1999, at 12.

[70] Farid, *supra* note 14, at 14; *see also* Harney, *supra* note 69, at 291; Fonda, *supra* note 69, at 12.

[71] Eldred v. Ashcroft, 537 U.S. 186, 222 (2003).

[72] *Id.*

[73] *See* discussion *infra* Part III.A.1.

[74] 17 U.S.C. §§ 302-304 (1998).

[75] *Eldred*, 537 U.S. at 192.

[76] Brief for Petitioners at 5, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) .

[77] Eldred v. Reno, 74 F. Supp. 2d 1, 2 (D.D.C. 1999).

[78] *Id.*

On appeal, the D.C. Circuit affirmed.[80] The United States Supreme Court granted certiorari.[81] By a 7-2 vote, the Court held that the CTEA did not violate the "limited Times" requirement in the Copyright Clause.[82]

B. The Court's Rationale

In challenging the CTEA's constitutionality based on the Copyright Clause, Eldred's main argument had three distinct strands: (1) the Copyright Clause is a grant of "enumerated power" subject to limits; (2) a reading of the "limited Times" provision evidenced such limits; and (3) the introductory language "to promote the Progress of Science" restrains unlimited extension of copyright protection.[83] The majority evaluated petitioners' arguments against the backdrop of Congress' previous exercise of its authority under the Copyright Clause.[84] The Court found that text, history, and precedent confirm that the Copyright Clause empowers Congress to enact the CTEA.[85]

The *Eldred* Court interpreted the Copyright Clause as empowering Congress to prescribe copyright protection for "limited Times" to all copyright holders, present and future.[86] The Court contended that the petitioners' reading of the Copyright Clause would command a fixed or inalterable time prescription.[87] The Court emphasized that there is no distinction between the term extension under the CTEA and those under the 1831, 1909, and 1976 Copyright Acts.[88] Those earlier acts did not

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[79] *Id.*

[80] *Id.* at 3.

[81] Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 1999), *cert. granted*, 534 U.S. 1126 (2002).

[82] *See id.*

[83] *Supra* note 76, at 11-28. Congress has various constitutionally enumerated powers, including, among others, the power to collect taxes, to borrow money, and to regulate commerce. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819); *see also* Clinton v. City of New York, 524 U.S. 417, 492 (1998); City of Boerne v. Flores, 521 U.S. 507, 636 (1997); New York v. United States, 505 U.S. 144, 156 (1992) (stating that Congress has limited and enumerated powers as defined in Constitution). The Copyright Clause is one of the grants of such powers in the Constitution. U.S. CONST. art. I, § 8, cl. 8. As discussed in Part I, the Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective rights and discoveries." *Id.* A literal reading of the Copyright Clause reveals its purpose that Congress may grant copyright protection to promote "Progress of Science and useful Arts." *See* discussion *infra* Parts I, III.A.1.

[84] *See* Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

[85] *Id.* at 199.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 200-01.

create perpetual copyrights.[89] Similarly, the Court concluded, the CTEA prescribed copyright protection for a limited time.[90]

In upholding the CTEA, the Court set forth two policy justifications.[91] First, a legitimate basis for the CTEA was to harmonize United States law with European copyright law.[92] This would allow American authors to take advantage of a reciprocity provision in a European Union ("EU") copyright directive.[93] Specifically, non-EU countries that matched Europe's "life of the author plus seventy years" term were entitled to the same copyright protection as their European counterparts.[94] Harmonizing these laws might also provide authors an economic incentive to create and disseminate their works in the United States.[95] In addition, the majority justified the CTEA on economic-utilitarian grounds.[96] In light of demographic, economic, and technological changes, longer terms of protection would encourage copyright owners to invest in the restorative and public distribution of their works.[97]

The *Eldred* Court also gave significant weight to the longstanding congressional practice of copyright extensions.[98] In the past, Congress has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain.[99] The Court determined that this unbroken practice of ever-expanding protection creates a national tradition.[100] The Court found that this congressional history negates petitioners' argument that the CTEA's extension of existing copyrights fails per se to promote the progress of science and useful arts.[101]

Interestingly, the Court also found patent law significant to this inquiry.[102] The Court reasoned that the patent power is derived from the same constitutional provision as copyright power.[103] The majority relied

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[89] *Id.* at 211.
[90] *Id.*
[91] *Id.* at 207 n.15.
[92] *Id.* at 198.
[93] *Id.* at 205-06.
[94] *Id.*
[95] *Id.* at 206.
[96] *Id.* at 207 n.15.
[97] *Id.*
[98] *Id.* at 212-13.
[99] *Id.* at 213.
[100] *Id.*
[101] *Id.* at 213-14.
[102] *Id.* at 201.
[103] *Id.*

on *McClurg v. Kingsland*, an 1843 patent case, in determining that the retroactive extension of the copyright term was constitutional.[104] In *McClurg*, a change in the law resulted in a grant of retroactive rights to the patent owner.[105] Relying in part on *McClurg*, the Court upheld the CTEA.[106]

C. *The* Eldred *Dissent*

Justices Stevens and Breyer dissented from the *Eldred* decision.[107] Justice Stevens argued that the grant of a patent or a copyright is similar to a contract between the inventor or author and the public.[108] He asserted that it would be unfair to the public to change the terms of that bargain by lengthening the term of protection.[109] Justice Stevens expressed the manifest unfairness of the retroactive application of the CTEA.[110] A blanket extension of all copyright, he argued, would not serve the central purpose of the Copyright Clause.[111]

Stevens also noted that the Court relied erroneously on *McClurg* to uphold the CTEA.[112] He explained that *McClurg* did not involve the legislative expansion of an existing patent.[113] The question facing the *McClurg* Court was whether the former employer of the inventor was an infringer for continuing to use the invention after the termination of employment.[114] The *McClurg* Court held that the employer's use before the amendment of the law would not invalidate the patent.[115] Stevens concluded that the case was irrelevant to the majority's discussion.[116]

Justice Breyer presented a practical evaluation of the unconstitutionality of the CTEA.[117] Breyer noted that the Framers intended the Copyright Clause to ensure the benefit of the public, not of

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[104] *Id.* at 203 (citing McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843)).

[105] *McClurg*, 42 U.S. at 210-11.

[106] *Id.* at 203, 222.

[107] *Id.* at 222-68.

[108] *Id.* at 221-41 (Stevens, J., dissenting).

[109] *Id.* at 240.

[110] *Id.*at 226.

[111] *Id.* at 227 (arguing that retroactive extension of copyright term is inconsistent with purpose of advancing progress by adding knowledge to public domain under Copyright Clause).

[112] *Id.* at 204 n.9.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 242-43 (Breyer, J., dissenting).

the private author.[118] Breyer found fault with the CTEA's retroactive nature and the statute's purpose to benefit primarily existing copyright holders.[119] In addition, the retroactive application imposed immediate expression-related costs on the public.[120] Breyer also noted that European and American copyright laws have long coexisted despite important differences.[121] Thus, the perceived uniformity under the CTEA failed to serve as a valid justification for the extension.[122]

III. ANALYSIS

With its 7-2 majority, the *Eldred* decision has far-reaching policy implications.[123] In the United States, intellectual property policy emphasizes the importance of the public domain.[124] Yet, an historical reading of the laws governing copyright proves that policy has receded in recent years to a force of word rather than deed.[125] There has never been critical judicial inquiry as to why, or how, extending copyright protection is an optimal solution to balancing incentives with access.[126] In *Eldred*, the Supreme Court once again failed to ensure legislative compliance with constitutional mandates.[127] The following discussion scrutinizes the *Eldred* Court's opinion in three respects. Section A examines the scope of Congress' power to extend copyright protection within the confines of the Constitution. Section B examines the CTEA's setbacks to the public domain and the promotion of progress. Finally, section C argues that the Court failed to balance authors' economic

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[118] *Id.* at 247 (citing congressional records stating benefiting the public was principal purpose of copyright protection).

[119] *Id.* at 248-49.

[120] *Id.* at 248. Justice Breyer emphasized the considerable costs posed to free expression by copyright holders' incursion into the public domain. *Id.*; *see also* discussion *infra* Part III.B-C.

[121] *Eldred*, 537 U.S. at 257-59.

[122] *Id.* at 260.

[123] Farid, *supra* note 14, at 18.

[124] *See* Eric Douma, *The Uniform Computer Information Transactions Act and the Issue of Preemption of Contractual Provisions Prohibiting Reverse Engineering, Disassembly, or Decompilation*, 11 ALB. L.J. SCI. & TECH., 249, 264 (2001).

[125] *See* discussion *supra* Part I.

[126] *See, e.g.*, Miller v. Universal City Studios, 650 F.2d 1365, 1369 (5th Cir. 1981) (stating that legislative history indicates revision of 1976 Act was not to change scope of copyright protection under previous law); Nat'l Bus. Lists, Inc. v. Dun & Bradstreet Inc., 552 F. Supp. 89, 92-93 (N.D. Ill. 1982) (stating that 1976 Act was largely codification of prior law). *See generally* Litman, *supra* note 54, at 896-97 (criticizing that courts had generally shown abiding fondness, with little analysis, for provisions of copyright acts).

[127] *Eldred*, 537 U.S. at 192-222.

incentives and public access to creative works. In sum, the Court's various justifications for the extended protection rest on deeply flawed assertions.[128]

A. Eldred *Failed to Recognize Congress' Constitutional Constraints in Copyright Protection*

1. Copyright Clause — "limited Times" Requirement

The Court did not directly address whether the term extension of the CTEA meets the "limited Times" restriction in the Copyright Clause.[129] The opinion provided no guidance as to the scope of Congress' legislative power to extend copyright protection.[130] Instead, the majority relied heavily on Congress' past practices.[131] The Court reasoned that Congress' historical practice of treating future and existing copyrights in parity for term extension purposes validates its further extension in the CTEA.[132]

The majority seemed to suggest that a congressional tradition of extending copyright terms automatically ratifies the constitutionality of retroactive protection.[133] The actual history of congressional practice, however, is more complex than the majority indicated.[134] More importantly, understanding the limits on congressional power will require judicial interpretation.[135] The Court has the special role of ensuring that Congress lives up to its constitutional duty as laid out in the Copyright Clause.[136] In *Eldred*, the Court failed to exercise this special

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[128] *See* discussion *infra* Part III.C.

[129] *See Eldred*, 537 U.S. at 192-222.

[130] *Id.* at 208.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 212-14.

[134] *See id.* at 227-38 (Stevens, J., dissenting).

[135] Haggerty, *supra* note 64, at 688.

[136] *See Eldred*, 537 U.S. at 242 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); Paul Schwartz & Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2359 (2003); *see also* Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337, 340, 375-77 (2002). The judicial branch, not Congress, has the power and the duty to define constitutional words and phrases. Haggerty, *supra* note 64, at 688. Generally, constitutional review of a statute requires the Court to complete three steps: defining terms, identifying the statute's measures and goals, and comparing what Congress has done with what the Constitution has empowered Congress to do. *Id.*

role.[137]

The Copyright Clause expressly constrains Congress' power to create exclusive rights in creative works.[138] The words "limited Times" go hand in hand with the "promote progress" language.[139] Read in this context, "limited Times" must mean a duration limited to a term that will promote arts and science.[140] Copyright protection compensates authors for their creative efforts and labor.[141] However, copyright law's ultimate goal is, through this incentive, to stimulate creative production for the general public good.[142]

This limit reflects a substantive concern of those who drafted the Constitution.[143] The Framers recognized the tension between granting exclusive rights to use and benefit from creative works and promoting creative production for the public good.[144] The constraint they heeded is not primarily the textually obvious "limited Times" requirement.[145] Rather, it is the requirement that exclusive rights in creative works actually can promote the progress of science and useful arts.[146] To determine whether an extension meets the "limited Times" requirement is to determine whether the grant has met the objective of the Copyright Clause.[147] If the additional grant of time does not promote the progress of the creative arts, then Congress has not achieved this constitutional goal properly.[148] Consequently, the additional grant has not satisfied the limited time requirement.[149] Thus, Congress' power over copyright law is not unlimited, but rather tied to the public purpose the clause identifies.[150]

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[137] *See Eldred*, 537 U.S. at 192-222.

[138] U.S. CONST. art. I, § 8, cl. 8.

[139] *Id.*

[140] Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 319 (2002).

[141] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[142] *See Sony*, 464 U.S. at 429; *Twentieth Century Music*, 422 U.S. at 156; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) (citing Washington Pub. Co. v. Pearson, 306 U.S. 30, 36 (1939)).

[143] *Mazer*, 347 U.S. at 203-12.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Christine Quintos, *Case Notes and Comments: Congress' Green Monster: Copyright Extension and the Concern for Cash over the Propagation of Art*, 12 DePaul-LCA J. ART & ENT. LAW 109, 136 (2002).

[148] *Id.*

[149] *Id.*

[150] Haggerty, *supra* note 64, at 674.

The enactment of the CTEA, especially the retroactive term extension, exceeded Congress' legislative authority under the Copyright Clause. The retrospective portion of the CTEA extends the term of the copyright monopoly without creating any new incentive to produce and without benefiting the public.[151] Proponents of the Act conceded that a copyright for a subsisting work would not induce authors to create.[152] But, they argued that the CTEA still promotes "progress" because it would create incentives to restore or preserve existing works.[153] One can hardly argue, however, that such an extension encourages an artist's creativity or a publisher's investment, because the work already exists.[154] Even recognizing the possibility of some small incentive effect on the future production of works, the argument is untenable. The imbalance between such uncertain benefits and significant costs imposed on consumers makes the retroactive application particularly unfavorable.[155] It creates private monopolies well beyond the scope of what the Framers had contemplated.[156] Consequently, the public domain loses valuable works, decades of time, and the very reason for its existence: the intangible body of knowledge that promotes the progress of society.[157] This is directly contrary to the constitutional goal of knowledge dispersion and Supreme Court copyright jurisprudence.[158]

Unfortunately, the *Eldred* Court abdicated its role in evaluating congressional grants of these monopoly privileges.[159] The majority applied classic deferential review to the legislation and refrained from second-guessing congressional intent.[160] In essence, the Court quitclaimed its principal responsibility to ensure that congressional

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[151] *See* discussion *infra* Part III.B.1.

[152] Government Brief at 39, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618); *see* Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?,"* 52 FLA. L. REV. 989, 1031 (2000) (admitting that knowledge of historical retroactive copyright extensions does little to promote progress).

[153] Davis, *supra* note 152, at 1031.

[154] *See* Dennis S. Karjala, Eldred v. Ashcroft*: Intellectual Property, Congressional Power, and the Constitution: Judicial Review of Copyright Term Extension*, 36 LOY. L.A. L. REV. 199, 221 (2002) (stating that Congress heard no evidence indicating that retroactive extension would have incentive effect on creation of existing works).

[155] ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION AND THE MAKING OF COPYRIGHT POLICY 182 (1999).

[156] *See generally* Karjala, *supra* note 154, at 250 (stating that upholding CTEA would permanently remove textual limitations on congressional power from Constitution).

[157] Farid, *supra* note 14, at 25.

[158] *See* Pollack, *supra* note 136, at 375-77.

[159] Eldred v. Ashcroft, 537 U.S. 186, 224 (2003) (Stevens, J., dissenting).

[160] *See id.* at 193.

actions comply with constitutional limitations.[161] The decision effectively sanctions the excessive longevity of monopolies to copyright owners at the expense of the progress of society.

2. Commerce Clause — "Necessary and Proper" Requirement

Another constitutional issue impacted by the CTEA is congressional power to regulate copyright under the Commerce Clause.[162] Even if Congress exceeded its authority under the Copyright Clause, the Act's proponents argue that Congress may nonetheless regulate cultural goods under the Commerce Clause.[163] The CTEA is a legislative reaction to changed economic circumstances — the increasing significance of intellectual property in our national economy and international trade.[164] According to these proponents, courts are poorly positioned to gather and assess the data needed to evaluate economic decisions.[165]

This view is misconceived. The Constitution provides Congress with the power to make laws that are "necessary and proper" to carry out the enumerated powers in the Constitution, including the commerce power.[166] The Supreme Court has further construed this to mean that the end must be legitimate and within the scope of the Constitution.[167] Particularly, the means shall be rationally related to the constitutionally specified object.[168] The Copyright Clause imposes a constraint on the exclusive rights in creative works that Congress can legislate.[169]

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[161] *See id.*; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that if Supreme Court identifies conflict between constitutional provision and congressional statute, Court has authority (and duty) to declare statute unconstitutional and to refuse to enforce it).

[162] *See* discussion *infra* Part III.A.2.

[163] According to Congress, the substantial purpose of the CTEA is to benefit the United States by equalizing its protection period with Europe's. *Eldred*, 537 U.S. at 204-06. As the discussion in Part III.A.2 shows, regulation of international trade in this regard is outside the scope of congressional authority under the Copyright Clause. *Id.* at 207; *infra* Part III.A.2.

[164] *See Eldred*, 537 U.S. at 207 (stating that Congress enacted statute in light of demographic, economic, and technological changes). Among the evidence that Congress considered in enacting the CTEA was testimony from prominent musicians, such as Quincy Jones, Bob Dylan, Don Henley, and Carlos Santana. Schwartz & Treanor, *supra* note 136, at 2351. The authors proposed that the copyright system should ensure fair compensation for themselves and their heirs as an incentive to create. *Id.* Longer copyright protection would thus usefully further various economic-utilitarian goals. *Id.*

[165] *See* Schwartz & Treanor, *supra* note 136, at 2351.

[166] U.S. CONST. art. I, § 8, cl. 18.

[167] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413, 421 (1819).

[168] *Id.*

[169] *See* U.S. CONST. art. I, § 8, cl. 8; Haggerty, *supra* note 64, at 674 (stating that Copyright

Therefore, Congress may regulate copyright under the justification of the Commerce Clause only if it does not thereby circumvent the Copyright Clause's limitations.[170] Otherwise, legislation contrary to these constraints, enacted under a different power, could too easily undermine the Framers' intent in drafting the Copyright Clause.[171]

B. Eldred *Failed to Preserve the Public Domain*

The chief failure of the CTEA is that it ignores the public domain's significance, in direct contravention of the Framers' intent.[172] Modern definitions characterize the "public domain" as the metaphysical place where once-protected works or patents go after their protectible rights have expired.[173] Traditionally, the grant of an intellectual property right has operated as a statutory bargain — the public agrees to give the inventor or author an exclusive right for a limited time.[174] In exchange, the patent or copyright holder makes the work available to the public by

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Clause is structural constraint on Congress' placement of private reward above public interest).

[170] *McCulloch*, 17 U.S. (4 Wheat.) at 551; *see* Anant S. Narayanan, Note, *Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality*, 27 GEO. WASH. J. INT'L L. & ECON. 457, 483 (1993) (stating that policies implicit in Copyright Clause may constrain Congress from using Commerce Clause powers to extend copyright protection).

[171] Narayanan, *supra* note 170, at 483.

[172] *See* Edward Lee, *The Public Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 115 (2003).

[173] *Id.* In *Wheaton v. Peters*, the Supreme Court made it clear that by using the word "secure," the Framers of the Constitution did not mean to imply that patents and copyrights were natural pre-existing rights of the inventor or author. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 684 (1834). By prescribing "limited Times," the Framers ensured that all patented inventions and copyrighted works of authorship would enter the public domain at the end of that limited period. *Id.*

[174] *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1989). The Court noted that the federal patent system embodies a carefully crafted bargain. *Id.* It encourages inventors to create and disclose new, useful, and non-obvious advances in technology and design in return for the exclusive right to practice the invention for a period of years. *Id.*; Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.") (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)); United States v. Dubilier Condenser Corp., 289 U.S. 178, 186 (1933). The Court interpreted the term "monopoly" as the giving of an exclusive privilege for buying, selling, working, or using a thing that the public freely enjoyed before the grant. *Id.* Inventors deprive the public of nothing that it enjoyed before their discoveries. *Id.* But, they give something of value to the community by adding to the sum of human knowledge. *Id.* They may keep their inventions secret and reap the fruits indefinitely. *Id.* In consideration of their disclosures to the community, the public grants them exclusive enjoyment of their inventions for a limited period of years. *Id.*

disclosure or publication.[175] This property-like interest, however, is a very different right from a perpetual and exclusive property right.[176] At the end of the limited period, the invention or work enters the public domain.[177] Consequently, the public has the right to use these informational products freely for its own progress and advancement.[178] While waiting for this privilege to take effect, the public pays to use the work.[179] Once the work enters the public domain, it becomes irrevocable.[180]

1. The Irrevocable Nature of the Public Domain

A well-established concept of a patent or copyright is that its subject matter is not subject to removal from the public domain.[181] The Supreme Court stated that Congress may not authorize the issuance of patents whose effects are to remove the existing knowledge from the public domain or to restrict free access to materials already available.[182] Lower federal courts have repeatedly upheld this principle of irrevocability in cases concerning copyright.[183] Despite this well-established principle, the

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[175] Farid, *supra* note 14, at 25.

[176] *See* Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 DAYTON L. REV. 215, 263 (2002) (stating that one major difference is that at end of limited period, anyone can utilize these works without restraint).

[177] *Sony*, 464 U.S. at 429 (stating that purpose of patent and copyright is "to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Dubilier*, 289 U.S. at 186-87 (stating that once patent expires, knowledge of invention inures to public, which is able to benefit and profit from use without restrictions); *see* Garter v. Goodman Group Music Publishers, 848 F. Supp. 438, 442 (S.D.N.Y. 1994).

[178] *See* cases cited *supra* note 177.

[179] *See* cases cited *supra* note 177.

[180] *See* discussion *infra* Part III.B.1.

[181] *See, e.g.*, Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966) (stating that Congress may not enlarge copyright monopoly by removing existent knowledge from public domain); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 16 (1829) ("It has not been, and indeed cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way, they become absolute."); Merriam v. Holloway Pub. Co., 43 F. 450, 451 (1890) (stating that public is free to use works after author's statutory right of monopoly has expired).

[182] *Graham*, 383 U.S. at 6.

[183] *See* Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (Stevens, J., dissenting). For more cases on the public domain principle, see *Mayhew v. Allsup*, 166 F.3d 821, 822 (6th Cir. 1999) (stating that if work was published without valid copyright notice, work irretrievably entered public domain); *Dolman v. Agee*, 157 F.3d 708, 713 (9th Cir. 1998) (stating that if owner failed to satisfy 1909 Act's requirements, work was injected irrevocably into public domain); *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1166 (9th Cir. 1996) (stating that publication of work in United States without statutory notice of copyright fell into public domain, precluding forever subsequent copyright protection of published work); *Bridge*

Eldred Court wrongfully ratified Congress' incursion into the public domain.[184]

2. *Eldred* Contributes to the Demise of the Public Domain

The *Eldred* majority failed to address the public domain issue.[185] The Court effectively upheld the CTEA's conversion of intellectual commons into private property.[186] The decision constitutes judicial approval of the legislative moratorium of the constitutional mandate that copyright protect the public domain.[187] *Eldred* contradicts longstanding policy that copyright primarily serves to benefit the public.[188] The cumulative effect of such continuous extensions essentially gives authors perpetual monopolies over their works and makes entry into the public domain more and more remote.[189]

The major justification for delaying entry of works into the public domain is the special characteristics of movies.[190] Walt Disney and other large corporate interests lobbied for the copyright term extension.[191] They contended that the special characteristics of movies require prolonged protection.[192] As an equitable matter, they argued that society should reward authors of great works that have enduring social and economic value.[193]

Publ'ns v. F.A.C.T. Net, 183 F.R.D. 254, 262 (D. Colo. 1998) (stating that once work enters public domain, it remains there irrevocably); *Int'l Film Exch., Ltd. v. Corinth Films, Inc.*, 621 F. Supp. 631, 636 (S.D.N.Y. 1985) (stating that films irrevocably entered public domain upon expiration of initial term of copyright); *Dow Jones & Co. v. Bd. of Trade*, 546 F. Supp. 113, 116 n.5 (S.D.N.Y. 1982) (stating that when work has entered public domain, all copyright protection is lost, permanently).

[184] *See* discussion *infra* Part III.B.2.

[185] *See Eldred*, 537 U.S. at 186-222.

[186] L. Ray Patterson, Comment, Eldred v. Reno: *An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 223 (2001).

[187] *Id.*

[188] *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954) (citing Washington Pub. Co. v. Pearson, 306 U.S. 30, 36 (1939)).

[189] *See* cases cited *supra* note 177.

[190] Chris Sprigman, *The Mouse that Ate the Public Domain: Disney, the Copyright Term Extension Act, and* Eldred v. Ashcroft, Mar. 5, 2002, *available at* http://writ.corporate.findlaw.com/commentary/20020305_sprigman.html.

[191] *Id.* Walt Disney lobbied aggressively for the extension because Mickey Mouse was about to fall into the public domain, and Disney did not want to lose such a valuable expression. *Id.*

[192] *Id.*

[193] *Id.*; *see* Government Brief at 31, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (contending that "the principal class of works for hire that are likely to have significant economic value at the end of the former seventy-five year term of protection are motion

Reliance on the unique economic value of great works reveals the unreasonable overbreadth of the CTEA.[194] Indeed, if the economic value of movies presents a special case, then a special restoration right for movies will achieve the end at a reasonable cost.[195] A blanket extension of protection for all works limits dissemination with significant costs attendant to such a change.[196] Not only is the CTEA over-inclusive, it is also under-inclusive in this regard.[197] Many films in need of preservation are not commercially exploitable.[198] Their preservation would require some other measure, such as a direct financial incentive.[199]

The blanket extension of all copyrights has a far-reaching impact on the public domain.[200] Ironically, the CTEA proponents' livelihoods depend on utilizing works in the public domain.[201] In the meantime, however, they attempt to keep their own works out of the public domain.[202] Likewise, numerous businesses, organizations, artists, and authors borrow freely from the public domain and use the material therein to expand, create, and, ultimately, profit.[203] To deprive them of an ever-growing, enriched public domain is, in fact, to deprive them of some of the incentive to create.[204] As part of the "bargain" with the public domain, authors and artists have the right to own their work.[205] But, authors and artists are also beneficiaries of the public domain, and they, too, are at a disadvantage as the public domain shrinks.[206]

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pictures").

[194] Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (Stevens, J., dissenting).

[195] *See* Dan T. Coenen & Paul J. Heald, *Means/Ends Analysis in Copyright Law:* Eldred v. Ashcroft *in One Act*, 36 LOY. L.A. L. REV. 99, 102 (2002).

[196] *Eldred*, 537 U.S. at 239 (Stevens, J., dissenting) (arguing that "the interest in preserving perishable copies of old copyrighted films does not justify a wholesale extension of existing copyrights").

[197] Karjala, *supra* note 154, at 68.

[198] Ginsburg, et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 666 (2000).

[199] *Id.*

[200] *See* Harney, *supra* note 69, at 304.

[201] *Id.*; COHEN ET AL., *supra* note 7, at 17 (stating that every new work is in some sense based on works that preceded it).

[202] *See* Farid, *supra* note 14, at 26.

[203] *See id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*

C. Eldred *Failed to Balance Incentives and Access*

As discussed in Part III.A, the promotion of progress language of the Copyright Clause and the principle of the public domain work together to limit congressional action.[207] Congress must set a term that achieves a balance between incentives and access.[208] When a term goes beyond the socially optimal point and no longer promotes progress, Congress' discretion becomes constitutionally limited.[209] If the *Eldred* Court had recognized its power of review, it would have found that both the CTEA's retrospective and prospective aspects are indefensible.

1. Retrospective Grant

The majority accepted respondent's argument that the CTEA would promote the progress of useful arts by creating incentives to preserve older works.[210] The Court overlooked the fact that extending copyright to restore older works is just as likely to inhibit, as it is to promote, progress.[211] Restoration recalls the work from the public domain, which restores the power to control access to the work.[212] But, the reason for the limited copyright term in the first place is to protect and enrich the public domain by terminating that power.[213] By preventing older works from entering the public domain, from which new works may legally take and build upon, the incentive for new creations dissipates.[214]

Professors William Landes and Richard Posner developed an economic model of copyright that reaches the same conclusion.[215] Their model includes determining the present discounted value of a copyright income stream.[216] The authors argue that society, as a whole, will likely

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[207] *See* Davis, *supra* note 152, at 992.

[208] *See* discussion *supra* Part III.A.

[209] Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 361 (2000).

[210] Eldred v. Ashcroft, 537 U.S. 186, 227 (2003). In the instant case, petitioners Eldred and other individuals and businesses named the United States Attorney General as respondent. *Id.* at 186.

[211] *See* Quintos, *supra* note 147, at 126 (arguing that by preventing older works from entering public domain, new creation cannot occur).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (arguing that costs will most likely outweigh benefits as result of retrospective extension). Landes and Posner's economic model is a strong argument against making increases in copyright term retroactive. *See generally id.*

[216] *Id.* at 326.

be worse off with a retrospective copyright extension.[217] This is because an increased monopoly would increase the costs for all works while increasing benefits for only a subset of those works.[218] Therefore, the retrospective term extension has no rational connection with enhancing the public domain and thereby promoting progress.[219] For similar reasons, the prospective term extension cannot survive a rational basis analysis.[220]

2. Prospective Grant

The Court emphasized Congress' authority to define the scope of an author's limited monopoly to give the public appropriate access to his or her works.[221] Even conceding that the Copyright Clause gives Congress discretion to adopt a prospective grant, economic analysis suggests that the current period is too long.[222] Copyright protection imposes several costs.[223] Such costs include higher prices for the works, transaction costs to obtain permission to use a work, and administrative and enforcement costs.[224]

Scholars' economic analyses demonstrate that the prospective extension of copyright terms provides little added incentive, as well.[225] Additional increases in the copyright term result in ever-decreasing amounts of additional incentive.[226] For the vast majority of works, there will be little demand more than fifty years after the author's death.[227] Even for those few works that retain some market value, the present value of any future income streams will be minuscule.[228] The time value

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[217] *Id.*

[218] *Id.* The authors called these associated costs "expression costs." *Id.*

[219] *See* Haggerty, *supra* note 64, at 679 (arguing retrospective provisions of CTEA do not enhance public domain).

[220] *See* discussion *infra* Part III.C.2.

[221] Eldred v. Ashcroft, 537 U.S. 186, 204-08 (2003).

[222] *See, e.g.*, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 482 (2003).

[223] *Id.*

[224] *Id.*

[225] *See* Avishalom Tor & Dotan Oliar, *Incentives to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 437, 449-57 (2002) (finding that as terms grow longer, relative contribution that renewal term adds to authors' economic incentive grows smaller; expected value added by extending copyright term past fiftieth year is virtually zero); *see also* Karjala, *supra* note 154, at 74 (summarizing Avishalom Tor and Dotan Oliar's analysis).

[226] *See* Tor & Oliar, *supra* note 225, at 449-57.

[227] *Id.*

[228] *Id.*

of money and uncertainty of return is unlikely to motivate authors to create more works.[229] As a result, this extension cannot possibly stimulate the creation of any new works.[230]

3. Speculative Advantages of International Harmonization

In addition to the Court's failure to give an independent assessment to the retroactive and prospective issues, the Court's international-harmonization rationale fails.[231] In upholding the CTEA, the *Eldred* majority found one more "legitimate" basis for the legislation — harmonization of United States law with European copyright.[232] By extending the baseline of the United States copyright term to life plus seventy years, Congress sought to ensure that American authors would receive the same copyright protection in EU countries as their European counterparts.[233] The Court agreed that harmonization would ensure stronger protection for United States works abroad and provide significant trade benefits.[234]

However, these benefits are quite small because international harmonization does not provide gains to non-EU countries.[235] The EU directive required a single copyright length in order to respect the core treaty commitment to the creation of a single, internal economic market.[236] Its objectives to commit to a single trading unit are irrelevant to United States international trade policy.[237] Furthermore, the additional twenty-year protection would likely not result in any substantial shift of trade or investment decisions.[238] In light of the significant costs on domestic consumers and the stifling effect on the public domain, these

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[229] *Id.*

[230] *Id.*

[231] *See* discussion *infra* Part III.C.3.

[232] *See* Eldred v. Ashcroft, 537 U.S. 186, 204 (2003).

[233] *See id.* at 204-06 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002)).

[234] *See id.*; S. REP. NO. 104-315, at 3 (1996).

[235] BARD & KURLANTZICK, *supra* note 155, at 191; *see, e.g.*, Treaty Establishing the European Economic Community, March 25, 1957, arts. 3a, 8a, 12-13, 48, as amended by Single European Act, *reprinted in* OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 207, 223, 227, 234-35, 265 (1987); D. LASOK & K.P.E. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 379-410 (6th ed. 1994).

[236] *See* 1 TREATIES ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITIES, *supra* note 234.

[237] BARD & KURLANTZICK, *supra* note 155, at 191.

[238] *Id.*

speculative advantages hardly justify the term extension.[239]

CONCLUSION

In passing the CTEA, Congress has overstepped constitutional bounds by extending the copyright term by another twenty years. *Eldred* provided the Supreme Court with the opportunity to review the scope of congressional copyright power and identify the outer bounds of this power. The Court, however, avoided construction of the fundamental limiting terms of the Copyright Clause. The steady extension of the copyright term has a profound, pernicious effect. It conditions the public to generally accept a world in which cultural objects are private properties. The *Eldred* decision potentially imposes diffuse social, economic, and moral costs that are likely to persist in the future.[240]

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[239] *See* discussion *supra* Part III.B.

[240] Benkler, *supra* note 19, at 196.