

COPYRIGHT

ELDRED V. ASHCROFT: THE CONSTITUTIONALITY OF THE COPYRIGHT TERM EXTENSION ACT

By Michael Jones

On January 15, 2003, the Supreme Court upheld the constitutionality of the Copyright Term Extension Act (“CTEA”),¹ which extended the term of copyright protection by twenty years.² The decision has been applauded by copyright protectionists who regard the extension as an effective incentive to creators. In their view, it is a perfectly rational piece of legislation that reflects Congress’s judgment as to the proper copyright term, balances the interests of copyright holders and users, and brings the United States into line with the European Union’s copyright regime.³ However, the CTEA has been deplored by champions of a robust public domain, who see the extension as a giveaway to powerful conglomerates, which runs contrary to the public interest.⁴ Such activists see the CTEA as, in the words of Justice Stevens, a “gratuitous transfer of wealth” that will impoverish the public domain.⁵ Consequently, *Eldred*, for those in agreement with Justice Stevens, is nothing less than the “Dred Scott case for culture.”⁶

The Court in *Eldred* rejected the petitioners’ claims that (1) the CTEA did not pass constitutional muster under the Copyright Clause’s “limited

© 2004 Berkeley Technology Law Journal & Berkeley Center for Law and Technology.

1. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203, 301-304 (2002). The Act’s four provisions consider term extensions, transfer rights, a new infringement exception, and the division of fees, respectively; this Note deals only with the first provision, that of term extensions.

2. *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Justice Ginsburg wrote the opinion of the Court, in which Justices Kennedy, O’Connor, Scalia, Souter, Thomas, and Chief Justice Rehnquist joined. Justices Stevens and Breyer wrote dissenting opinions.

3. See, e.g., Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253 (2002); Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389 (2002); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

4. See, e.g., Matthew Rimmer, *The Dead Poets Society: The Copyright Term and the Public Domain*, 8 FIRST MONDAY 6 (June 2003), at http://www.firstmonday.dk/issues/issue8_6/rimmer/.

5. *Eldred*, 537 U.S. at 227 (Stevens, J., dissenting).

6. Siva Vaidhyanathan, *After the Copyright Smackdown: What Next?*, Salon.com (Jan. 17, 2003), at <http://www.salon.com/tech/feature/2003/01/17/copyright/print.html>.

Times” prescription; and (2) the CTEA violated the First Amendment’s free speech guarantee. The Court held that the Copyright Clause delegated to Congress the authority to determine the parameters of copyright protection, and that the Supreme Court ought to defer to Congress’s determinations.⁷ The Court also held that Congress’s authority to extend copyright terms did not raise First Amendment concerns that could not be adequately addressed by copyright’s established safeguards, which include the idea/expression dichotomy and the concept of fair use.⁸

This Note provides background on copyright law and the CTEA, and argues that, since Supreme Court precedent already established, with respect to the Patent Clause, that Congress “may . . . implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim,”⁹ the Court’s deference to Congress and concomitant use of a form of rational-basis scrutiny were of no surprise. Moreover, although the kind of heightened scrutiny called for by the petitioners may be consistent with recent Commerce Clause jurisprudence,¹⁰ it is at odds with longstanding notions concerning judicial competence and deference to majoritarian rule.¹¹ But while the Court was correct to rule the CTEA constitutional, this Note argues that its reasoning was far from beyond reproach, and that the particular policy preference of the petitioners—to craft a copyright regime that effectuates the goal of cultivating the public domain—was, as the Court almost seemed willing to concede, correct.¹² The *Eldred* decision will serve to focus attention on the policy debate and the need to reconceptualize copyright so as to take note of technological innovation, specifically the Internet and changing social forma-

7. *Eldred*, 537 U.S. at 222.

8. *Id.* at 221-22.

9. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966).

10. The petitioners hoped the Court would emphasize that Congress’s Commerce Clause power is limited, as the Court had in *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (limiting congressional power to use commerce power to abrogate state sovereign immunity under the Eleventh Amendment); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act). See Brief for Petitioners at 11-13, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), available at <http://eldred.cc/legal/supremecourt.html>.

11. See Schwartz & Treanor, *supra* note 3.

12. *Eldred*, 537 U.S. at 222.

tions.¹³ Copyright has always had trouble adapting to new technology,¹⁴ but *Eldred* makes clear that it must do so once again.¹⁵

I. BACKGROUND

A. Competing Visions of Copyright

From the outset, the growth of the public domain has been the end toward which the means of copyright law, a statutory enactment well within Congress's purview, has been oriented.¹⁶ The Supreme Court recognized this from as early as 1834,¹⁷ and, as recently as 1975, Justice Stewart defined the objective of copyright as follows:

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 the 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.¹⁸

This jurisprudence runs counter to recent legislation like the Copyright Act of 1976 ("1976 Act")¹⁹ and most recently, the CTEA, which have arguably de-emphasized the public domain in favor of a regime more centered on individual property rights.²⁰ Essentially, two disparate visions of

13. For the need of copyright law to respond to the digital age, see generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001), and Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63 (2002-2003).

14. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 347 (2d ed. 2000).

15. See LITMAN, *supra* note 13; Menell, *supra* note 13.

16. See MERGES ET AL., *supra* note 14.

17. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (treating copyright as, first and foremost, a means of benefiting the public interest).

18. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

19. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-808 (1994 & Supp. III 1997)).

20. See Jane C. Ginsburg, *Can Copyright Become User-Friendly?* 25 COLUM.-VLA J.L. & ARTS 71 (2001) (reviewing JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001)).

the public domain form the backdrop to *Eldred*.²¹ One vision sees the public domain as a kind of wasteland. According to this vision, if works are allowed to fall into the public domain, the profit motive disappears and there is insufficient incentive to invest in the preservation or distribution of these works.²² Thus, the CTEA serves as a much-needed inducement to content providers to continue to make these works available to the public. The competing vision sees the public domain as “a vast repository of raw material out of which new creations are made.”²³ This vision is premised on the idea that new creators are “like dwarfs on the shoulders of giants,”²⁴ able to benefit from their predecessors’ labors and make advances in the cultural field as a consequence. Proponents of this view maintain that for such advances to continue, works must be allowed to fall into the public domain once the period of copyright protection which spurred their creation has expired.²⁵

It was these two visions that informed the heated policy debate in Congress prior to the CTEA’s passage. The extension was supported—and the dystopian vision of the public domain endorsed—by the movie and music industries, for whom the ease of copying and distribution provided

21. See Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC’Y (forthcoming 2004) (man. at 10), <http://www.sims.berkeley.edu/~pam/papers/post-Eldred.pdf>.

22. Jack Valenti, President and CEO of the Motion Picture of Association of America, referred in his testimony before Congress to works in the public domain as “orphans.” With regard to films specifically, he remarked:

Whatever work is not owned is a work that no one protects and preserve [sic]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan.

The Copyright Term Extension Act: Hearing on S. 483 Before the Comm. on the Judiciary, 104th Cong. 42 (1997) (prepared statement of Jack Valenti).

23. Samuelson, *supra* note 21, at 10; see also Brief of Amici Curiae The Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Brief of Amici Curiae], available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/internet-archive.html>.

24. John of Salisbury quoted his teacher, Bernard of Chartres, on the relationship of authors to past creators: “We are like dwarfs on the shoulders of giants, so that we can see more than they, and things at a greater distance, not by virtue of any sharpness of sight on our part, or any physical distinction, but because we are carried high and raised up by their giant size.” JOHN OF SALISBURY, *METALOGICON* at bk. III, ch. iv. (1159).

25. Samuelson, *supra* note 21, at 10.

by the Internet was a source of alarm.²⁶ This alarm led them to lobby Congress to institute more exacting intellectual property laws of a traditional kind. On the other side of the policy debate stood many scholars and activists led by Professor Lawrence Lessig, who argued that the Internet age demanded new forms of intellectual property laws that took account of the collaborative nature of creativity and therefore nourished the public domain.²⁷

B. History of Copyright Terms.

The Copyright Clause provides that “Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁸ In the early days of the Republic, most of the States passed state copyright laws based on England’s Statute of Anne.²⁹ The Statute of Anne vested in authors of books a limited monopoly of fourteen years, renewable for an additional fourteen years, and demanded compliance with a complex system of registration, notice, and deposit requirements.³⁰ Lack of uniformity between the states meant that a national law was needed. In one of its first actions, the first Congress passed the Copyright Act of 1790 which, like the Statute of Anne, granted protection for authors for fourteen years, with an additional fourteen years available upon renewal.³¹

This regime prevailed until 1909, when Congress extended copyright to “all writings” and lengthened the term to twenty-eight years and a further twenty-eight years upon renewal.³² Dissatisfaction with the 1909 Act led Congress to enact a series of one-year term extensions, as it investigated making major changes to the law. Finally, in 1976, all written works became protected once “fixed in a tangible medium of expression,” even if unpublished.³³ The duration of copyright became life of the author plus fifty years, or seventy-five years in the case of corporate authors, and the formal notice and registration requirements were liberalized.³⁴

26. See Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, (Magazine), at 40.

27. See *id.*

28. U.S. CONST. art. I, § 8, cl. 8.

29. Statute of Anne, 1710, 8 Anne, ch. 93 (Eng.); see, e.g., N.Y. Copyright Act of 1786, ¶ 1; S.C. Copyright Act of 1784, ¶ 1; Va. Copyright Act of 1785, § 1.

30. See 8 Anne, ch. 19 (1710) (Eng.).

31. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790).

32. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).

33. Copyright Act of 1976, § 101, 17 U.S.C. §§ 101-808 (1994 & Supp. III 1997).

34. See *id.* § 203(a)(3).

The 1976 Act constituted the most substantive change in copyright law since the ratification of the Constitution, and is the foundation of copyright law today.³⁵ Some maintain that this legislation represented a shift in the governing paradigm of copyright.³⁶ By making rights flow from creation rather than publication, as had previously been the case, the Act arguably tipped the balance in favor of a conception of copyright as an incentive to create new works, rather than a bargain granting a few exclusive rights in exchange for publication.³⁷

The CTEA is perhaps best understood as a continuation of the trend begun in 1976, a further tipping of the scales in favor of incentive over bargain, and individual rights over the larger public good. It ironically comes at a time when, due to the effect of the Internet on the availability of public domain works, we are positioned as never before to effectuate the Founders' goal of cultivating the public domain.

The 1976 Act's altering of the term of copyright to a single term of life of the author plus fifty years³⁸ was motivated in part by the desire of the United States to join the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), the oldest international copyright agreement.³⁹ The Berne Convention, established in 1909, sought to attain uniform international copyright protection.⁴⁰ Specifically, it sought, by way of a policy of reciprocity, to provide the same protection to an author in other member countries as he enjoyed at home.⁴¹ The Berne Convention requires that all signatories provide a minimum term of copyright protection of life of the author plus fifty years.⁴² The desiderata of international trade and uniformity were sufficiently compelling for the United States to join the Berne Convention in 1988.

35. See Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 370 (2000).

36. See LITMAN, *supra* note 13, at 78.

37. See *id.*

38. 17 U.S.C. § 302(a) (1994). The statute states that "[c]opyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death." *Id.*

39. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised, Paris, July 24, 1971, 25 U.S.T. 1341 [hereinafter Berne Convention].

40. Gifford, *supra* note 35, at 371.

41. *Id.*

42. Berne Convention, *supra* note 39, art. 7(1).

Such was the law prior to the passage of the CTEA. The CTEA has four provisions that amend various sections of the 1976 Copyright Act.⁴³ The first provision of the CTEA, section 102—and the one of sole concern to this Note—extends the duration of copyright for the various categories of protected works by amending the copyright statutes.⁴⁴ The CTEA amended section 302(a) of the 1976 Act⁴⁵ by replacing the word “fifty” with “70,” thus extending to life of the author plus seventy years the term of all works created after 1977.⁴⁶ “Anonymous Works, Pseudonymous Works, and Works Made for Hire,” were originally protected for 75 years from publication, or a term of one hundred years from creation, whichever expired first.⁴⁷ The CTEA extended both of these alternatives by twenty years, so that they are now protected for ninety-five years from first publication or 120 years from creation, whichever is shorter.⁴⁸

Significantly for *Eldred v. Ashcroft*, the CTEA did not affect works that had already fallen into the public domain at the time of its enactment.⁴⁹ All works that were in the public domain at the end of 1997 stayed there. Any works with protection that expired in 1998, prior to the enactment of the CTEA in October, were covered by the Act because the work did not fall into the public domain until December 31 of that year.⁵⁰ Thus works with a copyright term that expired between January 1 and October 27, 1998, which would have fallen into the public domain on December 31, received an added twenty years of protection.

C. Eric Eldred and the Rediscovery of the Public Domain

The new law directly affected Eric Eldred, a New Hampshire computer administrator and proprietor of the Eldritch Press, who posted public domain books online for high school students.⁵¹ Using an inexpensive computer and scanner, Eldred posted on his website books that had fallen into the public domain, thereby making HTML versions available to the public.⁵² The CTEA’s application to those works which would have fallen

43. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203, 301-304 (2000).

44. *See id.* § 102(b).

45. 17 U.S.C. § 302(a).

46. Sonny Bono Copyright Term Extension Act § 102(b)(1).

47. 17 U.S.C. § 302(c).

48. Sonny Bono Copyright Term Extension Act § 102(3)(a), (b).

49. Gifford, *supra* note 35, at 380.

50. 17 U.S.C. § 305.

51. Information about the Eldritch Press can be found at <http://209.11.144.65/eldritchpress/> (last visited Mar. 8, 2004).

52. Rimmer, *supra* note 4, at 2.

into the public domain on December 31, 1998 frustrated Eldred's plan to post a selection of works on his website. He sued to have the copyright term extension declared unconstitutional.⁵³

Eldred represents a growing number of people who, since the advent of the Internet, have given real substance to the notion of the public domain. By taking advantage of the low cost of reproduction and distribution that are signature features of the Internet,⁵⁴ they make available to the general public works that are of low commercial value but possibly high cultural value. These works would otherwise languish in out-of-print limbo, fail to find a publisher, and therefore be lost to those creators who would build on them and create new works. In performing such a service, people like Eldred have delineated a hitherto unappreciated public interest in the availability of such materials, and countered those who view the public domain as a "wasteland."

Such enterprises may seem quixotic if judged by the coordinates of traditional intellectual property models. Under such models, copyright protection provides incentive for creation. The more stringent the copyright protection, the more authors are protected against imitation and copying that will dilute the financial return on their investment. Underpinning this model is a view of creativity that is Romantic in its reliance upon the image of a sole creator plucking new works out of the ether. Such an image of creativity conflicts with the reality that no one creates *ex nihilo* but rather by building on what has come before.⁵⁵

The Internet underscores this fact by providing a forum for interactive communication and collaboration, and what has been called "sequential

53. Eldred v. Reno, 74 F. Supp. 2d 1, 1-2 (D.D.C. 1999).

54. The most important features of the digital platform have been designated as follows:

- (1) dramatic advances in microprocessor speed, memory storage, and data compression;
- (2) achievement of high sampling rates in capturing digital content;
- (3) development of improved technologies for perceiving (listening to and viewing) digital content;
- (4) essentially flawless, inexpensive, and rapid reproduction capabilities;
- (5) precise manipulability of digital content;
- (6) archive management and searchability;
- (7) portability;
- (8) development of digital networks for distributing content (including broadband); and
- (9) convergence of distribution platforms.

Menell, *supra* note 13, at 110.

55. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873, 877 (1996) (book review) (defining a "romantic author" as "a mythical, idealized figure who creates 'original' works from whole cloth").

improvement.”⁵⁶ In so doing, it also undercuts the “broadcast model” by which content providers distribute their works to passive consumers.⁵⁷ The Internet—along with the World Wide Web and peer-to-peer technology—offer a means of active engagement with cultural content at odds with the philosophical and business models of the traditional content providers. For those championing these new models, such examples as the free software movement and peer-to-peer technology point the way to an economic measure that takes account of our need and our capability to produce and share ideas. Traditional content providers must contrive new business models to adjust to this new world of digital information, and not seek to force new technology into an ill-fitting copyright regime.⁵⁸

The plaintiffs⁵⁹ filed a complaint in federal district court against then-Attorney General Janet Reno. The district court ruled that the CTEA did not violate the Constitution.⁶⁰ The Court of Appeals for the District of Columbia Circuit affirmed.⁶¹ The Supreme Court then granted certiorari to address two questions: “whether the CTEA’s extension of existing copyrights exceeds Congress’ power under the Copyright Clause; and whether the CTEA’s extension of existing and future copyrights violates the First Amendment.”⁶²

II. ELDRED V. ASHCROFT

A. The Copyright Clause Challenge

The petitioners in *Eldred* called for a bright-line rule that the Copyright Clause does not allow Congress to extend the copyright protection for works already in existence.⁶³ Alternatively, they called for a kind of heightened review to guarantee a tight fit between means and ends.⁶⁴ The petitioners maintained (a) that the CTEA extension is not “limited” in the sense required by the Copyright Clause; (b) that the CTEA is not a rational

56. Jim Bessen & Eric Massen, *Intellectual Property on the Internet: What’s Wrong with Conventional Wisdom?* 2 (1997) (unpublished manuscript), available at <http://www.researchoninnovation.org/iippap2.pdf>.

57. See Boynton, *supra* note 26, at 44.

58. *Id.*

59. Eldred was joined in the suit by Dover Publications, which publishes public domain works by publishers of historical works, and by a non-profit film-preservation group.

60. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999).

61. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

62. *Eldred v. Ashcroft*, 537 U.S. 186, 197-98 (2003).

63. See Brief for Petitioners, *supra* note 10, at 28.

64. See *id.* at 31.

means of effectuating a copyright scheme; and (c) that the CTEA does not “promote the progress of science and the useful arts.”⁶⁵

1. *Is the Extension “Limited?”*

The Court held that, contrary to the petitioners’ argument, the CTEA’s baseline term of life plus seventy years, qualified as a “limited Time.”⁶⁶ The majority stated that “[t]ext, history, and precedent . . . confirm that the Copyright Clause empowers Congress to prescribe “limited Times” for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”⁶⁷

The Court spent very little time on text, and relied mostly on history and precedent. The main textual argument concerned the definition of “limited” in the “limited Times” provision of the clause. As there was no case law on the matter before the Court, the Court used contemporaneous dictionaries and appealed to the plain meaning of the text to hold that “limited” does not, as the petitioners maintained, mean “fixed,”⁶⁸ and that Congress is free to extend the copyright term as long as it is for a circumscribed time and not in perpetuity.⁶⁹

The petitioners read “limited Times” to evince “the Framers’ clear intent that copyright terms be fixed and that after a “short interval,” creative works pass into the public domain.”⁷⁰ This interpretation, the Court held, ran squarely against the First Congress’s extension of copyright and conferral of copyright protection on works that had already been created.⁷¹ The petitioners cited no authority contemporaneous with the Framing for the meaning of “limited” they sought to advance. Also, as the government’s brief noted, the one definition of “limited” as meaning “fixed” that the petitioners found from *Webster’s Second New International Dictionary* actually contained the notation “Obs.” for “obsolete.”⁷² The petitioners omitted the notation in their brief.⁷³

65. *See id.*

66. *Eldred*, 537 U.S. at 199.

67. *Id.*

68. In fact, in their brief, the petitioners slip from “limited” to “fixed” to “short” without explanation. *See* Brief for Petitioners, *supra* note 10, at 12; *see also* Brief for the Respondent at 15, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618), *available at* <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/government-brief.pdf>.

69. *See Eldred*, 537 U.S. at 210.

70. Brief for Petitioners, *supra* note 10, at 17.

71. *Eldred*, 537 U.S. at 196.

72. This meant that according to Webster’s the word had not been used in the sense propounded by the petitioners “in any important literary work since 1660.” Brief for the

The Court further rejected the petitioners' contention that, taken together, the string of copyright extensions constituted an extension in perpetuity, and that the CTEA should not be judged in isolation. The Court held that periodic extensions of a right were not tantamount to a perpetuity and that seventy years is literally "limited."⁷⁴ As to the difference between perpetual copyright and limited copyright that can be renewed infinitely, the Court offered no answer but was apparently persuaded by the government's argument that the petitioners' claims concerning the threats of perpetual copyright were alarmist,⁷⁵ and their distress over eleven copyright term extensions in the last forty years somewhat hyperbolic.⁷⁶

The Court's unwillingness or inability to provide a test for distinguishing between perpetual copyright and a "limited" copyright that can be renewed *ad infinitum* detracts from *Eldred's* persuasiveness, but not necessarily the soundness of its conclusions. The Court is arguably guilty of literal-mindedness in focusing on the matter of whether a term of seventy years is, in and of itself, "limited." Of course, seventy years does not even approach a perpetuity and is, strictly speaking, "limited," but the rationale for the term can be perpetually repeated—is, in effect, unlimited. As one critic observed, "the proper analysis is whether the *rationale* used by Congress to justify a statute is unlimited, not whether the exercise of such power in a specific instance is itself unlimited."⁷⁷

The Court then turned to history to determine whether Congress was permitted to extend existing copyrights, quoting Justice Holmes' famous dictum that "a page of history is worth a volume of logic."⁷⁸ According to the Court, "history reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."⁷⁹ The majority added that the Court has upheld leg-

Respondent, *supra* note 68, at 11 n.4 (citing WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1434 (1950)).

73. *Id.*

74. See *Eldred*, 537 U.S. at 199.

75. The Court held that "there is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA." *Id.*

76. One has to count the short-term limited extensions while Congress debated major substantive changes to the law to put the number of extensions at eleven. Brief for the Respondent, *supra* note 68, at 9.

77. Erik S. Jaffe, *A Page of Logic: Eldred v. Ashcroft and the Logic of a Written Constitution*, 2002-03 CATO SUP. CT. REV. 131, 145 (2003), available at <http://www.cato.org/pubs/scr2003/logic.pdf> (emphasis original).

78. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

79. *Eldred*, 537 U.S. at 199.

islative expansion of existing patents as commensurate with the Constitution. The Court saw no reason why it ought not to do the same with copyright extension.⁸⁰ Once again, the Court's preference for history and precedent over any kind of systematic textual analysis was in evidence. As Justice Stevens observed in his dissent, the fact that Congress has repeatedly acted in a certain way in the past, does not necessarily absolve the Court of its duty to adjudicate the constitutionality of those actions.⁸¹

2. *Was the CTEA a Rational Enactment?*

The Court held that the CTEA "is a rational exercise of the legislative authority conferred by the Copyright Clause."⁸² It showed considerable deference to Congress, holding that the extension was well within the province of the legislature to make,⁸³ as was the intent to respond to "demographic, economic, and technological changes" and to bring the United States into line with the terms of an EU Council Directive.⁸⁴

The demographic changes to which the Court referred were that people are living longer today and thus authors require longer terms of protection to support two generations of their descendants.⁸⁵ Technological innovations have also resulted in older works "living" longer through iterations in, for example, video and DVD.⁸⁶ Extracting the full economic benefits of these changes requires that creators receive longer terms of copyright protection.⁸⁷

More generally, the Court may have been influenced by the fact that intellectual property is now one of the most important sectors of the United States economy.⁸⁸ In 1996, intellectual property accounted for "5.7 percent of the total gross domestic product."⁸⁹ If Congress looked to

80. *See id.* at 204.

81. *See id.* at 236 (Stevens, J., dissenting).

82. *Id.* at 205.

83. *Id.*

84. *See id.* at 205-06.

85. *See* Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 732 (1998).

86. *See Eldred*, 537 U.S. at 207 n.14.

87. *See The Copyright Term Extension Act, Hearings on H.R. 989 Before the Subcomm. on Courts & Intell. Prop. of the House Comm. on the Judiciary*, 104th Cong. 272 (1995) (statement of Mary Ellin Barrett, daughter of Irving Berlin).

88. *See Eldred*, 537 U.S. at 205-08. *See generally* STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2002 REPORT* (2002).

89. *See* 144 Cong. Rec. S12377-01 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch).

longer copyright terms to maintain the United States' position in the world economy, the Court declared such a decision within its bounds.⁹⁰

Similarly, as a significant portion of U.S. intellectual property exports are to European nations, the Court held that conforming to the copyright term adopted by the European Community in order to maintain our chief position in the global intellectual property arena was well within the purview of Congress.⁹¹ In 1993, the European Union issued a Directive to its member countries requiring that they adopt the life plus seventy year term by July 1, 1995; all have complied.⁹² The EU Directive requires member countries to measure copyrights of foreign works by "the rule of the shorter term."⁹³ Thus, works created in countries that have copyright terms shorter than that of the EU will only be protected in the EU for the time that they are protected in their country of origin. United States copyright owners, not surprisingly, supported passage of the CTEA so that the United States copyright term would match that of the European Community. Without passage of the CTEA, the owners argued, American authors would be at a disadvantage in European countries because they have twenty years less protection than Europeans.⁹⁴

Leaving aside the questions raised by Justice Breyer in his dissent as to whether these measures would have the desired effect of bringing about uniformity, and indeed whether the desired effect justifies both prospective and retrospective extension of copyrights,⁹⁵ the larger question, which the Court did not address, is whether the European and American copyright regimes are compatible at all, given their vastly different philosophical underpinnings. The former is more historically rooted in a conception of copyright as an individual right. An author is held to have a natural right to his work (*droit d'auteur*), and certain moral rights like the right of attribution and the right against any distortion or modification of the work that would damage his reputation.⁹⁶ In such a conception, very long copyrights, even perpetuities, are not anathema as they are under the U.S. sys-

90. *Eldred*, 537 U.S. at 209.

91. *Id.* at 205-06.

92. Hatch, *supra* note 85.

93. Council Directive 93/98, 1993 O.J. (L 290).

94. 141 CONG. REC. E379 (daily ed. Feb. 16, 1995) (statement of Rep. Moorhead).

95. *See Eldred*, 537 U.S. at 258 (Breyer, J., dissenting).

96. The United States and the European Union diverge on a number of other copyright issues like database protection, fair use, and works-made-for-hire, among others. *See* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. (forthcoming 2004) (manuscript at 15), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=436693.

tem, which has treated copyright law as a means for promoting the enrichment of the public domain.

3. *Does the CTEA Promote Progress of Science and the Useful Arts?*

The Court rejected the petitioners' contention that the CTEA does not "promote the Progress of Science," and that "the preambular language [of the Copyright Clause] identifies the sole end to which Congress may legislate."⁹⁷ It held that Congress could "promote the progress of science and useful Arts" in more than the single way envisioned by the petitioners.⁹⁸

For some of the same reasons that the Court found the CTEA rational, it found that it promotes the progress of science and the useful arts. Public benefit can be obtained from the production and dissemination of original work, and although the incentive model that informs the CTEA arguably does not promote a robust public domain, it undoubtedly promotes progress by providing incentives for creation and restoration. By helping American copyright holders seeking protection in EU countries, the CTEA also plausibly promotes progress of science and the useful arts.

To the petitioners' argument that the CTEA merely adds value to already existing works rather than engenders the creation of new works, the Court once again deferred to the legislative branch: "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."⁹⁹ The Court again noted "Congress' unbroken practice since the founding generation," and declared that this "overwhelms petitioners' argument."¹⁰⁰ Rather than viewing retroactive extension as, in the words of the petitioners a "windfall,"¹⁰¹ the majority evidently saw it once again as an unproblematic continuation of time-honored congressional practice begun in 1790.¹⁰² What the Court failed to acknowledge is

97. *Eldred*, 537 U.S. at 211.

98. The Court was evidently persuaded by the Solicitor General, who pointed out that by extending copyright prospectively and retroactively Congress arguably promotes the progress of science and the useful arts in the following ways:

It assures authors that they will not be unfairly penalized for creating or publishing earlier rather than later; it gives owners of subsisting copyrights greater incentives to preserve, restore, disseminate, and publicly exploit works that would otherwise be lost forever; and it secures appropriate international protection for the United States copyright holders' works, thereby also fostering international harmonization.

Brief for the Respondent, *supra* note 68, at 8-9.

99. *Eldred*, 537 U.S. at 212.

100. *Id.* at 212-13.

101. Brief for Petitioners, *supra* note 10, at 23.

102. *Eldred*, 537 U.S. at 213-14.

that the Act of 1790, the very inception of federal copyrights, replaced state copyrights that, in many cases, provided longer protection.¹⁰³ Thus instead of resulting in increased protection for authors, the 1790 Act expedited the public availability of existing works—the exact opposite of the effect of the CTEA.¹⁰⁴

B. First Amendment Challenge

To counter petitioners' contention that the CTEA runs afoul of the First Amendment, specifically, that "it is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment,"¹⁰⁵ the Court again looked to history. The Court maintained that the Copyright Clause and First Amendment were virtually coeval, and that "in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to promote the creation and publication of free expression."¹⁰⁶ There is thus, according to the Court, no tension between the Copyright Clause and the First Amendment. In fact, First Amendment concessions inhere in the copyright law: specifically, the idea/expression dichotomy, which ensures that only the latter is taken from the public domain; and the fair use provision, which gives the public access to facts, ideas and, in some circumstances, expression itself.¹⁰⁷

Once again, the Court's reliance on history betrays a dearth of analysis. It is left unexplained just how the proximity of adoption of the First Amendment and the Copyright Clause means that the latter is automatically compatible with the former in almost, if not all, instances. Furthermore, the idea/expression dichotomy upon which the Court relies may not sufficiently accommodate the First Amendment interests at stake. The CTEA's twenty-year copyright extension deprives the public not only of access to an author's ideas but his expression as well.¹⁰⁸ Similarly, "fair use" is a limited defense and falls far short of the Founders' ideal of full free use.¹⁰⁹ Creators could make valuable use of many copyrighted materials, but because of the limited nature of the fair use defense, the possibility of liability for infringement remains distinct.¹¹⁰ Given the equally distinct

103. *Id.* at 232 (Stevens, J., dissenting).

104. *See* Jaffe, *supra* note 77, at 154.

105. Brief for Petitioners, *supra* note 10, at 23.

106. *Eldred*, 537 U.S. at 219.

107. *See id.* at 218-19.

108. Brief for Petitioners, *supra* note 10, at 36.

109. *See* Jaffe, *supra* note 77, at 156-57 ("The fair use defense . . . does not eliminate the substantial burden on uses not subject to the defense.").

110. *See id.*

possibility that the CTEA may have a chilling effect on speech without offering a “countervailing benefit”¹¹¹ to the public, one might have expected the Court to have subjected it to more rigorous scrutiny. The Court concluded with a reference to the petitioners’ “inventive constitutional interpretation,” and appeared to concede that the CTEA’s term extension may be bad policy—just not bad enough for the Court to overturn.¹¹²

Both Justice Stevens and Justice Breyer wrote dissenting opinions. Justice Stevens contended that Congress may no sooner extend copyright beyond its allotted time than it may extend the scope of a patent monopoly.¹¹³ As already noted, he rejected the Court’s reliance on past congressional practice, remarking that “the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case.”¹¹⁴ He argued further that it was for the Court to determine the scope of Congress’s power under the Constitution, and that this determination was a judicial rather than a legislative matter.¹¹⁵ Finally, he noted that the Court’s ruling meant there was nothing to stop Congress from extending copyrights *ad infinitum*.¹¹⁶

Justice Breyer was even more vigorous in his dissent. He argued that the extension added virtually no economic value, meant that copyright was, to all intents and purposes, perpetual, and that it did not promote but rather impeded the progress of Science.¹¹⁷ Justice Breyer argued that the prospective and retrospective extensions implicated First Amendment interests and therefore warranted a level of scrutiny higher than that applied by the Court.¹¹⁸ He further argued that uniformity with EU copyright terms did not justify both prospective and retrospective extensions to copyright, and rejected as “constitutionally perverse” the argument advanced by publishers that extension would expedite the dissemination of existing works.¹¹⁹

111. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 450-51 (1984).

112. *Eldred*, 537 U.S. at 222. Justice Breyer argued that, contrary to the majority’s opinion, the statute is so unwise as to be unconstitutional. *See id.* at 242 (Breyer, J., dissenting).

113. *Id.* at 222-23 (Stevens, J., dissenting).

114. *Id.* at 235 (Stevens, J., dissenting).

115. *Id.* (Stevens, J., dissenting).

116. *Id.* at 241-42 (Stevens, J., dissenting).

117. *See id.* at 242-67 (Breyer, J., dissenting).

118. *Id.* at 244 (Breyer, J., dissenting).

119. *Id.* at 261 (Breyer, J., dissenting).

III. THE LEGISLATIVE AFTERMATH

A. The Public Domain as Social Movement

Although the Petitioners' constitutional arguments were unavailing, their effort underscored the need to create a copyright regime more commensurate with the Internet age. The Internet is an electronic infrastructure with unique information storage capability. As a result, it affords society the opportunity to effectuate one of the original goals of copyright law that has been deemphasized, at least since the 1976 Act, in the effort to secure individual intellectual property rights.¹²⁰ That goal is to gather information and facilitate public access to it. In the words of an amicus brief filed with the Court:

Digital technology allows us the opportunity to build a "universal" library out of these materials—a library that dwarfs the collections of the Alexandria and even our modern Library of Congress. This library will expand our understanding of "public access." It will make information accessible in formats that uniquely support and promote creativity in the arts and sciences—allowing individuals to clip and sample millions of public domain words, films, and sound recordings with ease.¹²¹

With the Internet, an extraordinary amount of knowledge and culture can be provided free to schools, to libraries, and to other creators. The public policy goal of creating a vast repository of information first evident in copyright's deposit requirement is now within our grasp. And there is reason to think it can be attained without threatening the profits of copyright holders.

While it was not declared unconstitutional, the CTEA's effect is nevertheless to tip the balance in favor of the individual author and away from the larger public good. The CTEA also increases rewards to individuals at the expense of secondary creativity or public dissemination, a distributive effect that may be out of step with the complex demands of the current age.¹²² The 1990s saw the emergence of a social movement centered on the public domain.¹²³ Professor Lessig has become a spokesperson of a movement variously dubbed the "CopyLeft" or the "free culture movement."¹²⁴ This movement, comprised of lawyers, scholars, and grassroots

120. LITMAN, *DIGITAL COPYRIGHT*, *supra* note 13, at 78.

121. Brief of Amici Curiae, *supra* note 23, at 2.

122. *See generally* LITMAN, *supra* note 13.

123. *See generally* Boynton, *supra* note 26.

124. *See id.*

activists, objects to what it sees as a kind of land grab in cyberspace on the part of major content industries. Indeed, some have compared what is taking place today to the fencing off of the commons in pre-industrial England,¹²⁵ and the activism on behalf of the public domain and the Internet has been likened to the Environmental movement of the 1960s.¹²⁶

What unites this disparate group is an urgent sense that the public must be educated as to what is happening to copyright law before important freedoms are lost forever, and the culture which depends on a vital public domain is permanently impoverished. In the words of one commentator, “[w]e are at a moment in our history at which the terms of freedom and justice are up for grabs.”¹²⁷ The ultimate success of the movement and final determinant of the question whether copyright may be infinitely renewed, may well depend on the cultural capital that an organization like Professor Lessig’s Creative Commons can acquire.¹²⁸ Founded in 2001, Creative Commons not only collects public domain information but allows creators to exercise control over the scope of copyright protection of their works. Its software application for the Web permits a copyright holder to commit his work to the public domain or to license it on terms that allow copying and reuse.¹²⁹ Thus, if a writer or musician wants to make his work available for use without charge, or an artist seeks raw materials which can be altered or sampled without infringement, Creative Commons provides an invaluable forum. How well such communitarian ventures fare will play a large part in future Courts’ treatments of Congressional extensions of copyright, and perhaps an even larger part in Congress’s deliberations over future term extensions.

B. A Proposed Alternative to the CTEA

The Internet’s facilitation of distributed storage and reproduction marks a dramatic change from the context in which the 1976 Copyright Act was passed. At that time, the idea of a universally accessible reposi-

125. See James Boyle, *Fencing Off Ideas: Enclosure and the Disappearance of the Public Domain*, DAEDALUS, Spring 2002, at 13, available at <http://www.wcl.american.edu/pub/faculty/boyle/intprop.htm>. Cf. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (arguing that the enclosure movement threatens to impede information flow and abridge free speech).

126. See JAMES BOYLE, *A POLITICS OF INTELLECTUAL PROPERTY: ENVIRONMENTALISM FOR THE NET?* (1997).

127. See Boynton, *supra* note 26, at 43.

128. Information about Creative Commons can be found at <http://creativecommons.org/> (last visited Mar. 8, 2004).

129. See Boynton, *supra* note 26, at 44.

tory of free works might very well have seemed far-fetched. It is unsurprising, therefore, that the 1976 Act liberalized renewal requirements without fully contemplating the significant social and cultural benefit of letting work pass into the public domain. But times have changed, and there are those like Eldred who seek, for example, to make available books that are out of print but under copyright. Moreover, they are able to do so with relative ease thanks to the emergence of the Internet.¹³⁰

Such people are impeded, however, by a copyright law blind to the need to encourage investment in so-called lower-value areas of content for the good of the public domain. Soon after arguing before the Court, Professor Lessig began a legislative initiative designed to remedy this situation.¹³¹ He launched an online petition in the hopes of persuading Congress to require copyright holders to pay a one dollar fee every fifty years in order to extend their copyrights.¹³² This petition lent some support to the bill introduced before Congress by Representative Zoe Lofgren entitled the Public Domain Enhancement Act (“PDEA”), an effort to create a “mechanism by which abandoned American copyrights can enter the public domain.”¹³³

Essentially, the PDEA calls for an end to automatic copyright renewal, and for the return of the formality of the payment of a maintenance fee.¹³⁴

130. Menell, *supra* note 13, at 118-19, describes the change in these terms: “The digital platform has untethered content from the inherent limitations on reproduction and distribution that ensured a steady flow of revenue to content publishers and creators—the traditional basis for funding and raising capital for the creation of new content.”

131. The battle is being fought on other fronts. William Fisher of the Berkman Center at Harvard has sought ways for technologies like peer-to-peer to develop while still providing a reward to copyright holders. Under Fisher’s plan, all online works would be registered with a central office which would monitor how often the work is used and then compensate the creator accordingly. The money to pay the artists would come from a tax imposed on content-related devices like CD burners and DVD recorders. The Berkman Center can be found at <http://cyber.law.harvard.edu/home> (last visited Mar. 8, 2004). See also Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARVARD J.L. & TECH. 2 (2003); William Fisher, *An Alternative Compensation System*, available at <http://cyber.law.harvard.edu/people/tfisher/PTKChap6.pdf>.

132. See Paul Festa, *Lessig Mobilizes Copyright Reform*, ZdNet (June 6, 2003), at http://zdnet.com.com/2100-1104_2-1013939.html.

133. H.R. 2601, 108th Cong. (2003).

134. Formalities are government-imposed requirements on authors that “are necessary to obtain copyright protection but that do not relate to the substance of the copyright.” MERGES ET AL., *supra* note 14, at 368. The renewal requirement proposed in the PDEA would create a system similar to that which obtains under patent law. See U.S. Pat. & Trademark Office, *Patent Maintenance Fees*, at <http://www.uspto.gov/web/offices/pac/maintfee/> (last modified Nov. 15, 2003) (requiring payment of fees at regular inter-

One hurdle standing in the way of this return to formalities is that the United States is a signatory to the Berne Convention, which states that the enjoyment and exercise of the right to protection of literary and artistic work “shall not be subject to any formality.”¹³⁵ Indeed, it was the decision to join the Berne Convention that accounted for the change to the more permissive copyright regime, under which compliance with the formalities is largely voluntary.¹³⁶ The formalities of the pre-1976, pre-Berne copyright regime were responsible for the entry into the public domain of thousands of works;¹³⁷ but, unfortunately, conditioning copyright protection on formalities would be inconsistent with U.S. obligations under the Berne Convention. It is an irony of the age that an international treaty whose mission was to promote uniformity and globalization may be out of step with the most boundary-erasing medium yet devised—the Internet.

It is not clear whether the PDEA’s proposed renewal requirements would violate the Berne Convention, but the full context of *Eldred* underlines the need to reassess whether the overall benefit of eradicating formalities outweighs the harm. The current lack of formalities that are strictly enforced arguably makes it more difficult to differentiate between protected and unprotected works, including those in the public domain and those in which the author does not wish to claim copyright. The lack of registration, for example, makes it more difficult to identify the copyright owner in order to seek permission or license to republish a work.¹³⁸ Under the regime proposed in the PDEA to make registration a requirement for copyright protection, the term of protection would no longer vest in a single, uniform term applicable to all works.¹³⁹ Rather, it would require that copyright holders take an affirmative step to retain their copyrights, after the initial term has expired.¹⁴⁰ As the proposed legislation shows, registra-

vals to “maintain the patent in force” and providing grace period for payments after deadlines).

135. The Berne Convention provides:

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

Berne Convention, *supra* note 39, art. 5, cl. 2.

136. See *id.*

137. See Brief of Amici Curiae, *supra* note 23, at 4-5.

138. See Boynton, *supra* note 26, at 45.

139. H.R. 2601 § 306(a) (2003).

140. *Id.*

tion would require little more than paying a small maintenance fee and, presumably, filing a form with the Register of Copyrights.¹⁴¹ This would not seem overly burdensome to a party seeking the full benefit of the law. Indeed, the Internet itself would make filing a simple matter and could create a centralized resource for parties seeking to clarify the status of a work. The consequence of failing to perform these minimal actions would be for the work to move into the public domain.

The idea of conditioning copyright protection upon renewal is not new. Indeed, this proposal would effectively return us to the situation that obtained prior to the 1976 Copyright Act. Under earlier copyright law, works automatically received twenty-eight years of protection and could be renewed for another twenty-eight years. The benefit to the public was that the vast majority of copyrights were not renewed, and the public domain was thereby enriched.¹⁴²

Congress's implementation of automatic renewal, on the other hand, has had a deleterious effect on the public domain.¹⁴³ Internet information repositories are prohibited from including vast amounts of information that could benefit the public and yet are of no value to the copyright holders. As a result of the CTEA, no copyrights will pass into the public domain in the next twenty years, although a million patents will expire in the same period.¹⁴⁴ Absent the CTEA, untold numbers of works would enter the public domain, including some that are still being commercially exploited.¹⁴⁵

141. H.R. 2601, 108th Cong. § 306(a) provides:

Maintenance fee for published United States works,

(a) FEE.—The Register of Copyrights shall charge a fee of \$1 for maintaining in force the copyright in any published United States work. The fee shall be due 50 years after the date of first publication or on December 31, 2004, whichever occurs later, and every 10 years thereafter until the end of the copyright term. Unless payment of the applicable maintenance fee is received in the Copyright Office on or before the date the fee is due or within a grace period of 6 months thereafter, the copyright shall expire as of the end of that grace period.

142. See Brief of Amici Curiae, *supra* note 23, at 4-5.

143. Justice Breyer's dissent in *Eldred*, specifically his economic analysis showing that "only about 2% of copyrights can be expected to retain commercial value at the end of 55 to 75 years," provides support for the position that the CTEA does not facilitate the public policy goals of free flow of information and the cultivation of the public domain. See *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting).

144. Russell Roberts, *An Interview with Lawrence Lessig on Copyrights*, The Library of Economics and Liberty (April 7, 2003), at <http://www.econlib.org/library/Columns/y2003/Lessigcopyright.html>.

145. *Id.*

The PDEA could reach a middle ground. If the PDEA's maintenance fee scheme were in place, a mass of unrenewed content would fall into the public domain, and, as *Eldred* showed, there is now no shortage of individuals and organizations willing to make use of this content. They would now be in a position to do so because they would not have to pay costs associated with identifying and clearing copyrights, nor would they have to abandon their efforts altogether because of legal uncertainty.¹⁴⁶ This change would result in the commercial and noncommercial exploitation of the liberated content, making it widely available to other creators and to libraries, schools, museums and other teaching institutions.¹⁴⁷ Still, this new activity in the public domain would not interfere with the exploitation of commercially valuable copyrights; the PDEA would allow the owners of those copyrights to renew them and to continue to take advantage of their exclusive rights.¹⁴⁸

IV. CONCLUSION

The Supreme Court has ruled that it was constitutional for Congress to grant a twenty-year extension to existing and future copyrights. And it is difficult to imagine a different outcome at present. The Court tellingly echoed the judgment and, in some instances, the language of the Solicitor General¹⁴⁹ when it characterized the petitioners' arguments as variously "novel," "bold," and "inventive."¹⁵⁰ It was thus not surprising that the petitioners failed to persuade the Court that their constitutional theory was worth unsettling over two hundred years of copyright law or, in the words of Solicitor General Olson, was compelling enough "to repudiate two centuries of settled practice as resting on a 'mistaken' understanding that James Madison, Thomas Jefferson, and Justices Washington and Story all apparently shared."¹⁵¹ However, the Court's reasoning *en route* to this outcome was less than airtight, and the movement surrounding the public domain is gathering momentum. The Court's rejection will have—indeed already has had—the beneficial effect of focusing attention on the petitioners' worthy public policy arguments.

146. *Id.*

147. Brief of Amici Curiae, *supra* note 23, at 2.

148. See H.R. 2601, 108th Cong. § 306(a) (2003).

149. See Brief for the Respondent, *supra* note 68, at 45.

150. *Eldred*, 537 U.S. at 208, 217, 222.

151. Brief for the Respondent, *supra* note 68, at 15-16.