THE MYTHOLOGY OF THE PUBLIC DOMAIN: EXPLORING THE MYTHS BEHIND ATTACKS ON THE DURATION OF COPYRIGHT PROTECTION

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I. INTRODUCTION

For as long as there have been copyrights, debate has raged over the appropriate term of protection.[1] Many view the current U.S. and European duration of protection—life of the author plus seventy years—as the appropriate term; others view the prior term of life plus fifty years as better reasoned. At one extreme of the debate, some argue that the ownership of copyright interests should be the same as for tangible property: perpetuity.[2] At the other extreme, some argue for a term of protection as short as ten years.[3]

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1. The House Report on the Copyright Act of 1976 begins its discussion of the term of protection by noting: "The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." H.R. REP. NO. 94-1476, at 133 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5749.

2. Congressman Sonny Bono thought that ownership of copyright should be like ownership of a house: it should last for perpetuity. *See, e.g.*, 144 CONG. REC. H9946, 9952 (1998) (statement of Mary Bono that "Sonny [Bono] wanted the term of copyright protection to last forever."). Mark Twain expressed similar feelings: "[Y]ou might just as well, after you had discovered a coal-mine and worked it twenty-eight years, have the Government step in and take it away . . . ." *Arguments Before the Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong. 116 (1906) (statement of Samuel L. Clemens, author) [hereinafter *Patent Arguments*]. "I am aware that copyright must have a limit, because that is required by the Constitution of the United States . . . When I appeared before [a] committee of the House of Lords the chairman

Those who believe that the term of protection should be less than life plus seventy years failed to persuade Congress to adopt their views. Recently, they moved their battle to the courts and the news media in an effort to have their personal views of the appropriate term adopted as U.S. law. Such efforts would at first appear futile, since Congress, not litigation in the courts, is the appropriate forum for establishing the statutory term of copyright protection.[4] However the proponents of the various alternative terms of protection, primarily academics, dreamed up a range of creative arguments for attacking the constitutionality of Congress's selection of the current term of protection. Those arguments are based in large part on a series of popular myths about copyright law which do not bear up to analytical scrutiny, even though some have been repeated so often that they have taken on lives of their own.

The dictionary defines a myth as "an unfounded or false notion . . . having only an imaginary or unverifiable existence."[5] That definition fits most, if not all, of the arguments asserted in support of the notion that the courts, rather than Congress, should determine the appropriate duration of the term of copyright protection in the United States.

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asked me what limit I would propose. I said, 'Perpetuity.'" SAMUEL CLEMENS, *Copyright, in* MARK TWAIN'S SPEECHES 323, 324-27 (1910). Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America, suggested that the term should be "forever less one day." 144 CONG. REC. H9946, 9952 (1998) (statement of Mary Bono summarizing Jack Valenti's position).

3. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 252-53 (2001) (arguing for a term of protection for computer programs of five years, renewable once). Professor Lessig also proposed that the term of copyright protection for other works should be a five-year term that could be renewed for up to an additional seventy-five years. *See id.* at 251-52; s*ee also* Stephen Shankland, *Open-source Advocate Attacks Patent Laws,* ZDNET NEWS (Aug. 30, 2001) *at* http://news.zdnet.co.uk/story/0,,t269-s2094103,00.html (reporting on a keynote address by Lawrence Lessig urging open-source software programmers and advocates to lobby for "strong but short copyright protection").

4. The general grant of power that precedes the Copyright Clause, which is the basis for most of the challenges to the Copyright Term Extension Act of 1998, clearly states: "Congress shall have the power . . . ." U.S. CONST. art. I, § 8. Not courts. Congress. The Congress is empowered to grant limited time monopolies. *See* U.S. CONST. art. I, § 8, cl. 8.

5. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 770 (Frederick C. Mish et al. eds., 10th ed. 2002).

Unfortunately, truth has taken a back seat—or, more often than not, been completely left behind—in the efforts by those opposed to the current term of copyright protection to convince the media and the courts that Congress acted without legal authority.

The philosophy behind many of the attacks on congressional extensions of the term of copyright protection begins with a myth which is crucial to all anti-copyright arguments: copyright good, public domain better. This Article will examine this unsubstantiated myth plus nine other oft-repeated myths which are used to attack the validity, the constitutionality, and the public policy behind congressional extensions of the term of protection for copyrights in the United States.

Myth #1: Congress ran rampant by granting term extensions, enacting eleven extensions in just forty years, and must be stopped by the courts.

Myth #2: Copyright good, public domain better.

Myth #3: The recent addition of twenty years to the term of copyright protection in the United States was a bad policy choice by Congress that the courts must reverse.

Myth #4: Extensions of the term of copyright protection for existing works cannot possibly promote the progress of science and the useful arts.

Myth #5: Congress lacks the authority to add twenty years to the term of copyright protection.

Myth #6: Extensions of the term of copyright protection are an affront to, and an impingement on, First Amendment rights.

Myth #7: The Myth of the Holy Internet: the arrival of the Internet changes everything.

Myth #8: The term of copyright protection in the United States is a matter only of U.S. law and has no international ramifications.

Myth #9: Judicial nullification of retroactive extensions of the term of copyright protection would be no big deal.

Myth #10: The Sonny Bono Copyright Term Extension Act of 1998 was the worst kind of special-interest legislation engineered by Disney to satisfy its insatiable corporate greed.

On the list of "Eternal Questions Which Have No Answer," the question *"What is the correct duration for copyright protection?"* is second only to *"How many angels can dance on the head of a pin?"* There is no empirical way to answer these questions, and anyone

who claims to have an empirical answer is, in reality, merely advocating their personal perspective. This Article will not suggest what the appropriate term of copyright should be, it will merely refute the arguments that Congress's determination that the appropriate term is life of the author plus seventy years was unconstitutional. This Article is thus limited to an examination of the reasons why there is no legal basis for a court to substitute its own view, or the views of any private parties, for the views of Congress on the issue of the appropriate duration of copyright protection.[6]

II. BACKGROUND TO THE RECENT LEGAL AND MEDIA ATTACKS ON THE CONGRESSIONAL EXTENSIONS OF THE TERM OF PROTECTION OF COPYRIGHTS

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA),[7] which added twenty years of protection to all copyrighted works. The additional term of protection applies to works that received statutory copyright protection under the 1909 Copyright Act,[8] to works previously protected by common law copyright to which the 1976 Act[9] for the first time conferred statutory protection, and to works created during the pendency of the 1976 Act. It applies equally to works of domestic and foreign origin.

For works created prior to January 1, 1978, the term of protection was extended from seventy-five years to ninety-five years, commencing on the earlier of first publication or registration with the Copyright Office.[10] For works created by individuals on or after January 1, 1978, the term of protection was extended from life of the author plus fifty years to life plus seventy years.[11] And for works-

6. The question of whether Congress did a wise thing is a very different question from whether Congress did an illegal thing when it added twenty years to the term of copyright protection. Highly respected copyright authorities, such as Professor Jane Ginsburg of Columbia University School of Law, have expressed the view that term extension was a bad idea, but is nonetheless not unconstitutional. *See* Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 CARDOZO ARTS & ENT. L.J. 651, 701-04 (2000) [hereinafter Symposium].

7. *See* Sonny Bono Copyright Term Extention Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

8. Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1075 (repealed 1978).

9. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

10. *See* 17 U.S.C. § 304(b) (2000).

11. *See id.* § 302(a).

for-hire after that date, the term was extended from seventy-five years to ninety-five years, commencing on the date on which the work was created.[12]

The primary factor[13] behind Congress's decision to extend the term of protection for copyrights was the implementation by the European Union of a Directive harmonizing the term of copyright protection for all E.U. Member States at life of the author plus seventy years,[14] and requiring all E.U. Member States to deny copyright protection to works of U.S. origin and works originating in other non-E.U. countries that entered the public domain in their country of origin, even though similar works of E.U. origin would still enjoy years of copyright protection.[15]

Among the voices that urged Congress *not* to extend the duration of the term of copyright protection were publishers of public domain works, libraries, archivists, and Internet activists. When Congress decided that the advantages of term extension outweighed the disadvantages, the opponents of term extension launched a

12. This same term of protection also applies to anonymous works and pseudonymous works. *See id.* § 302(c) (2000).

13. *See, e.g.*, H.R. REP. NO. 105-452, at 4 (1998) (statement of the Committee of the Judiciary noting that, upon enactment of the extension, "U.S. works will generally be protected for the same amount of time as works created by the European Union authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States."); *see also The Copyright Term Extension Act of 1995: Hearing Before the Committee on the Judiciary of the United States Senate*, 104th Cong. 4 (1995) (statement of Senator Feinstein noting that "[p]erhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms.") [hereinafter *CTEA Hearings*].

14. The Directive provides, in section 11, that "the term of protection for copyright should be harmonized at 70 years after the death of the author or 70 years after the work is lawfully made available to the public . . . ." Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 11, 24 [hereinafter Term Directive].

15. Section 23 of the Directive provides that "where a right holder who is not a Community national qualifies for protection under an international agreement [such as the Berne Convention] the term of protection of related rights should be the same as that laid down in this Directive, except that is should not exceed that fixed in the country of which the rightholder is a national." *Id.* Member States were required to implement the Term Directive by July 1, 1995. *See id.* art. 13.

litigation effort to have their view of the appropriate term imposed over Congress's views.

Backed by the free legal services of a group of law professors, Eric Eldred, the owner of an online service which distributes public domain works, launched a constitutional challenge to the validity of the CTEA.[16] Since the courts cannot merely substitute their view of the appropriate term of protection for the legislated view of Congress, the challenge focused on two constitutional arguments: (i) the extension of the term of protection is an unconstitutional violation of the First Amendment; and (ii) the application of the extended term to already-existing works is an unconstitutional violation of the limitations imposed by the Copyright Clause of the Constitution.[17]

The District Court rejected the challenge,[18] as did the Circuit Court.[19] The Supreme Court granted Eldred's petition for certiorari.[20]

With that preamble behind us, let the myth dismantling commence.

16. Since 1995, Eric Eldred has been the editor at Eldritch Press, a publisher of public domain books on the Internet, including the complete works of Nathaniel Hawthorne. A number of other plaintiffs joined the lawsuit, including the American Film Heritage Association (a non-profit film preservation group that represents film preservationists), Dover Publications, Inc. (a book publisher specializing in reprinting public domain works), Moviecraft, Inc. (a commercial film archive), and Copyright's Commons (a non-profit organization operated out of Harvard University's Berkman Center for Internet and Society).

17. "The 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 . . . ." U.S. CONST. art. I, § 8, cl. 8.

18. *See* Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999) (ruling that the CTEA does not violate the constitutional requirement that authors receive exclusive rights to their creations for only a limited time).

19. *See* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *rehearing en banc denied,* 255 F.3d 849 (2001) (affirming the district court in a 2-1 decision, holding that the twenty-year extension of the term of copyright protection was neither contrary to the Copyright Clause nor to the First Amendment).

20. *See* Eldred v. Ashcroft*,* 122 S. Ct. 1062 (2002).

III. MYTH #1: "CONGRESS RAN RAMPANT BY GRANTING TERM EXTENSIONS, ENACTING ELEVEN EXTENSIONS IN JUST FORTY YEARS, AND MUST BE STOPPED BY THE COURTS"

Congress is on a rampage and *must be stopped*![21] Or so the myth goes. This myth forms the core of petitioners' argument that the term of copyright is no longer a "limited term," as required by the Copyright Clause: "Under the recent practice of Congress—extending the terms of existing copyrights eleven times in the past forty years—copyright terms are no longer 'limited.' . . . The consequence is that no author or artist can rely upon work passing into the public domain."[22] This myth is, perhaps, the easiest to refute because it is unequivocally untrue. Not only has Congress changed the approach to the duration only twice in the past forty years (not eleven times as asserted in virtually every attack on term extension), Congress has, at the same time, significantly *shortened* the duration of copyright protection for large categories of works.

A. The Effective Duration of Copyright Protection Was Increased Twice, Not Eleven Times, Over the Past Forty Years

According to myth, Congress relentlessly extended the term of copyright eleven times in just forty years, and, unless the courts intercede, the "copyright dictators"[23] will continue to successfully pressure Congress into extending the term countless times in the future.[24]

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21. *See* Brief of Amici Curiae The Internet Archive et al. in Support of Petitioners at 8, Eldred v. Ashcroft, No. 01-618 [hereinafter Internet Archive Brief] ("There is no reason to believe [the CTEA] will be the last. Rather, it is far more likely that Congress will be pressured in 2018 to add still more term to works whose copyrights would otherwise expire.").

22. Brief for Petitioners at 18, Eldred v. Ashcroft, No. 01-618 [hereinafter Petitioners Brief].

23. Dan Gillmor, *Copyright Dictators Winning Out*, SAN JOSE MERCURY NEWS, Feb. 20, 2002, at 1C (borrowing a turn of phrase from a columnist in the *San Jose Mercury News*).

24. Lawrence Lessig told the Boston Globe: "In all of the 19th century, Congress changed the term of copyright only once. In the first half of the 20th century, they changed it once again. In the 38 years that I have been alive, they have changed it 11 times. It's one thing when courts are deferential to a well-behaved Congress. If Congress can change so much, why shouldn't the courts?" Daren Fonda, *Copyright Crusader*, BOSTON GLOBE MAG., Aug. 29, 1999, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml. Eldred's petition for a writ of certiorari states: "Con-

In fact, Congress revised its view of the appropriate duration of copyright protection only *twice* in the past forty years: once in the 1976 Copyright Act—which changed the term from an initial term of twenty-eight years plus a renewal term to a term of life of the author plus fifty years (with a commensurate increase in the term of protection for existing works); and then again in the 1998 CTEA—which added twenty years of additional protection to all existing terms of copyright. The other nine extensions were short interim extensions passed during the deliberation over the 1976 Act in order to ensure that authors of works on the cusp of falling into the public domain would not be penalized by Congress's glacial pace in enacting the new Copyright Act.

The 1909 Act provided for an original and a renewal term of statutory copyright totaling fifty-six years.[25] Congress changed this in the 1976 Act, effective January 1, 1978, to a term of life plus fifty years for new works.[26] Congress did not apply the new term to existing works, but it did add nineteen years to the term of protection for existing works which were not yet in the public domain.[27] Congress began actively working on the new Copyright Act in 1962, but it took fourteen years to reach agreement on all the details of the new Act. Ironically, the term of protection to be applied by the new Act was one of the least contentious provisions of the new law. Since the provisions of the new Act did not apply to works which entered the public domain prior to the effective date of the Act, Congress provided for a series of nine short interim extensions of copyright pending final enactment of the new law.[28]

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gress has adopted a practice that defeats the Framers' plan by creating in practice an unlimited term." Petition for Writ of Certiorari, Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (No. 01-618) [hereinafter Petition for Writ].

25. *See* 17 U.S.C. § 24 (1909).

26. *See* 17 U.S.C. § 302 (2000) ("Duration of copyright: Works created on or after January 1, 1978").

27. *See* 17 U.S.C. § 304 (2000) ("Duration of copyright: Subsisting copyrights"). The 1976 Act also brought unpublished works, which were previously covered only by common law copyright, under the term of protection of the Copyright Act. *See id.* § 303 ("Duration of copyright: Works created but not published or copyrighted before January 1, 1978").

28. *See* Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873 (continuing the interim extension up to the December 31, 1976, date on which the new Act applied to works not yet in the public domain); Act of Oct. 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (continuing the interim extension for the years 1973 and 1974); Act of Nov. 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (continuing

The congressional intent behind the interim extensions was clear: Congress felt that it would be inequitable to deny the benefit of the extended copyright term to works on the cusp of entering the public domain solely because of the long delays in the legislative process.[29]

The need for nine successive short-term extensions can be traced directly to the fact that no one expected the process of enacting the new Act would take years to complete. Indeed, in 1968, in support of the third interim extension, the Register of Copyrights told Congress:

> I confidently expect that general revision will be enacted in 1968. Since no real issue on the extension of term was raised in the Senate, the duration provisions as passed by the House in April will, I believe, be incorporated in the

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the interim extension for the year 1972); Act of Dec. 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441 (continuing the interim extension for the year 1971); Act of Dec. 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (continuing the interim extension for the year 1970); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (continuing the interim extension for the year 1969); Act of Nov. 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (continuing the interim extension for the year 1968); Act of Aug. 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (continuing the interim extension for a further two years: 1966-1967); Act of Sept. 19, 1962, Pub. L. No. 87-668, 76 Stat. 555 (extending the term of protection for an interim period of three years: 1962-1965).

29. In support of the 1962 extension, which extended the term of protection to December 31, 1965, the Report of the House Judiciary Committee stated:

> Although it is not possible to revive expired terms of copyright, it seems to the committee to be desirable to suspend further expiration of copyright for a period long enough to enable the working out of remaining obstacles to the overall revision of the copyright law, but not so long that it will impair the incentive of interested parties to reach a workable agreement.

8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, app. 8, § A, at 8-5 (2002) [hereinafter NIMMER ON COPYRIGHT]. Similar motivation was expressed in connection with each of the successive extensions. For example, in support of the 1965 extension, the Report of the House Judiciary Committee indicated:

> Although this legislation is now receiving consideration in both Houses, it is doubtful that a new law can be enacted before the expiration of the temporary extension. In these circumstances it seems desirable that the terms of expiring copyrights should be extended so that the copyright holders may enjoy the benefit of any increase in term that may be enacted by the Congress.

Id., app. 8, § B, at 8-20.

> new revision statute.[30] The poignant irony of copyrights that have already been extended in anticipation of revision being allowed to fall into the public domain only a few months short of their goal is too obvious to require elaboration. If achievement of general revision were not so close I might have some misgivings about going back to the well a third time, but as things now stand I believe that failure to give expiring renewal copyrights 1 more year would be most unfortunate.[31]

As it turned out, it took ten more years before the new Act was passed and took effect. During those ten years, the term of protection ultimately included in the new Act was never in dispute.

Characterizations of these short-term interim extensions, all of which were a part of the single congressional effort to enact a revised Copyright Act, as unrelated extensions of the term of protection, or as a recidivist congressional pattern of endlessly extending the duration of copyright are either uninformed or intellectually dishonest.

Indeed, the petitioner's request for writ of certiorari takes this intellectual dishonesty to the next level by arguing that the nine interim extensions (without ever acknowledging their status as interim extensions) were part of a congressional plot to avoid the "limited term" restriction of the Copyright Clause by repeatedly enacting one or two-year extensions to the term of protection.[32] Nowhere, in text or footnote, does the petitioner's brief disclose that Congress decided, as early as the 1960s, to shift to a term of life of the author plus fifty years, with a commensurate term for existing works, and that each of those brief extensions was expressly designed to avoid penalizing authors whose copyrights would have been lost during delays in enactment of the new Copyright Act—delays which had nothing to do with disputes over the new term of protection.

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30. This term was for the life of the author plus fifty years.

31. Statement of Abraham L. Kaminstein, Register of Copyrights, *reprinted in* NIMMER ON COPYRIGHT, *supra* note 29, app. 8, § C, at 8-31.

32. *See* Petitioners Brief, *supra* note 22, at 2 ("Congress now regularly escapes the restriction of 'limited Times' [referring to the "limited term" wording of the Copyright Clause] by repeatedly extending the terms of existing copyrights—eleven times in the past forty years. These blanket extensions were initially short (one or two years). In 1976, the extension was for nineteen years.").

Regardless of one's perspective on the wisdom of congressional thinking in extending the term of copyright protection to life plus fifty years and then to life plus seventy years, it is important to acknowledge that the portrayal of an out-of-control Congress ceaselessly extending the duration of statutory protection—creating "a perpetual [copyright] term 'on the installment plan'"[33]—is nothing more than an uneducated myth.

B. Over the Past Forty Years Congress Has Significantly Shortened the Duration of Copyright Protection for Large Classes of Works

In the process of enacting the 1976 Copyright Act, Congress dramatically *shortened* the duration of copyright protection for enormous classes of works—a fact completely ignored by those who want the courts to impose their personal view of the appropriate term of copyright protection, and a fact which refutes the claim that Congress is dismantling the public domain.[34]

Prior to the enactment of the 1976 Act, unpublished works were protected by common law copyright, rather than by statutory copyright. The duration of protection for common law copyright was perpetuity.[35] As a result, unpublished works—including unpublished novels, short stories, songs, early drafts of published works, letters, and any other material which the author did not distribute to the general public—never entered the public domain.[36]

Congress cut short these perpetual terms of protection during the 1970s through two different pieces of legislation:

- In 1972, sound recordings were brought under the scope of federal statutory copyright protection for the first time.[37] For sound recordings fixed after February 15, 1972, the duration of copyright protection is now the same as for all other types of

33. *Id.* at 18.

34. *See id.* at 3.

35. The perpetual protection accorded under common law copyright did not violate the limited term requirement of the Copyright Clause because that protection did not arise from any congressional enactment.

36. If it seemed outrageous that Sonny Bono and Mark Twain argued that the term of copyright should be perpetual (*see* Clemens, *supra* note 2), it should be kept in mind that prior to January 1, 1978, all unpublished works created by Mr. Bono or Mr. Twain were in fact accorded protection in perpetuity.

37. *See* The Sound Recording Amendment, Pub. L. No. 92-140, 85 Stat. 391 (1971).

works—and following the expiration of that newly limited term of protection, the recordings will enter the public domain.[38] Sound recordings that were fixed prior to that date are not covered by federal statutory copyright law and continue to be protected by common law copyright or other state law protection.[39]

- Effective on January 1, 1978, Congress provided that all unpublished works that were not then covered by copyright protection would be covered by federal copyright law.[40] Previously all unpublished works enjoyed perpetual protection and never entered the public domain unless the work was registered with the U.S. Copyright Office; now all of those works will enter the public domain upon expiration of the term of federal copyright protection.

When Congress extended the term of protection to life of the author plus fifty years in the 1976 Copyright Act, it justified that extension in part on the reduction in the duration of protection for unpublished works, noting that a "statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights."[41]

Since ten of the eleven extensions of the term of protection for copyrights during the past forty years were part of a single comprehensive congressional adjustment of all terms of copyright—which included a dramatic reduction in the term of protection for a large class of works—a judicial nullification of any aspect of that term extension (such as a denial of extensions of protection for existing

38. *See id.* § 3 (for the first time sound recordings were accorded statutory copyright, provided that it "shall take effect four months after its enactment . . . ." The Act was passed by Congress on October 15, 1971, and became effective on February 15, 1972).

39. *See* 17 U.S.C. § 114 (2000) (scope of exclusive rights in sound recordings); *id.* § 101 (definitions).

40. *See id.* § 303. This statute provides:

> Duration of copyright: Works created but not published or copyrighted before January 1, 1978:
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> (a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by *section 302*. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

Id. (emphasis added).

41. H.R. REP. NO. 94-1476, at 135 (1976).

works) without a linked restoration of perpetual protection for unpublished works would be a miscarriage of justice. Opponents of congressional decisions regarding the appropriate term of copyright protection have ignored this balance and thus pretended that facts that fail to support their myths simply do not exist.[42]

IV. MYTH #2: "COPYRIGHT GOOD, PUBLIC DOMAIN BETTER"

In George Orwell's classic *Animal Farm*, the sheep, in an effort to persuade the other animals that the pigs are superior leaders, chant the slogan: *"Four legs good, two legs better!"* In a similar effort to divert attention from reality, opponents of the CTEA seem to have adopted the slogan: *"Copyright good, public domain better!"*

No one denies the value of the public domain; no one denies the value of copyright. But among the opponents of term extension there has been a tendency to misstate the impact of term extension on the public domain and to rely on slogans and myths in attempting to elevate the value of the public domain over the value of copyrights.

In order to accurately assess both the appropriate place in time where the line should be drawn between copyright protection and the public domain, and whether Congress grievously and constitutionally erred in drawing that line, it is important to strip away the myths and misinformation about the value of the public domain relative to the value of copyrights. Once those myths are stripped away, it becomes clear that Congress did not act without reason when it added twenty years to the term of copyright protection.

A. Chicken Little's Decline and Fall of the Public Domain

The death of the public domain has been greatly exaggerated. The *amici curiae* brief submitted to the Supreme Court by a group of libraries and archivists argues that Congress has "transform[ed] a limited monopoly into a virtually limitless one."[43] One law professor

42. If one accepts the argument that Congress lacks the authority to extend the term of protection, it must similarly lack the authority to shorten the term of protection, since a shortened duration is, if anything, a disincentive for authors to continue creating new works.

43. Brief Amici Curiae American Association of Law Libraries et al. in Support of Petition for Writ of Certiorari at 5, Eldred v. Ashcroft, No. 01-618 [hereinafter Libraries Brief].

sowed the seeds of confusion by telling the press that "[f]or the first time in our history, almost nothing is entering the public domain."[44]

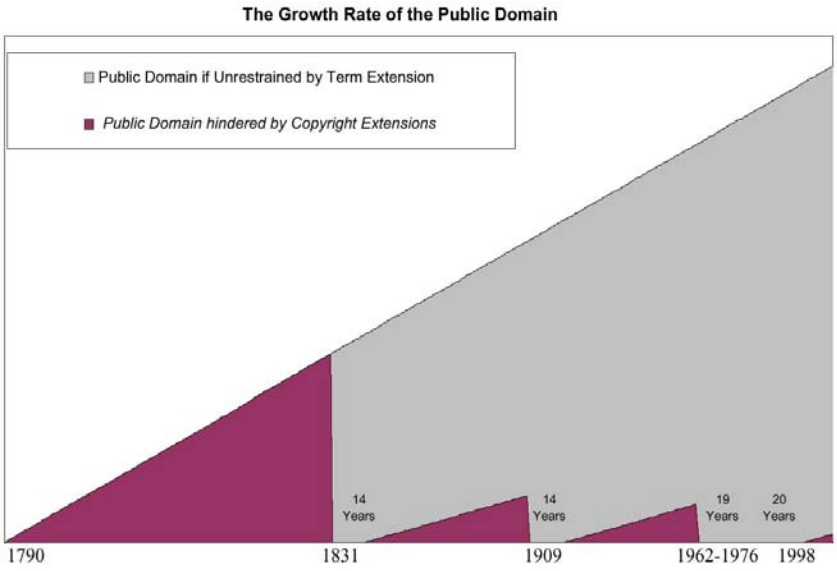
This is obvious nonsense. As discussed above, Congress created two classes of works which will enter the public domain during the coming years—works which previously would have enjoyed perpetual protection. When Congress twice recalculated and extended the term of copyright protection, it removed large classes of works from perpetual protection. This significant shortening of copyright protection, and ultimate addition to the public domain, is no where reflected in the arguments of the anti-copyright advocates. Unpublished works and sound recordings, which until the 1970s never entered the public domain, will now become a part of the public domain. Indeed, those works will continue to enter the public domain during the twenty-year period following the enactment of the CTEA. The 1976 Copyright Act provides that all unpublished works created prior to January 1, 1978, will enter the public domain on January 1, 2003, and that date remains unaffected by the CTEA.[45] There will be a twenty-year hiatus during which works previously protected by copyright law will be delayed in entering the public domain. Those have not been accorded perpetual protection and will still enter the public domain when their term expires.

The briefs submitted to the Supreme Court in support of the petition for a writ of certiorari in *Eldred* proclaim the demise of the public domain at the hands of Congress without any factual basis and without acknowledging that in the same era that the term of protection increased, the term of protection for unpublished works and

44. Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml (quoting Arizona State University Law Professor Dennis Karjala's website). Professor Karjala's website proclaims: "For the first time in over 200 years of copyright history in the United States, this legislation means that NO WORKS WILL ENTER THE PUBLIC DOMAIN FOR A FULL 20 YEARS!" Dennis Karjala, *About Copyright Term Extension*, *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/what.html (last visited Aug. 18, 2002).

45. Section 303 of the 1976 Copyright Act provides: "Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047." 17 U.S.C. § 303(a) (2000). The CTEA did not extend the effective public domain date of January 1, 2003.

sound recordings significantly decreased. Typical of this misinformation is the brief filed by a group of library and archive interests, which includes the following chart purporting to show congressional strangulation of the public domain.[46] The chart is, unfortunately, a work of misleading graphic creativity rather than a work of factual information:



The chart relies on three falsehoods in order to perpetuate the myth that Congress is dismantling the public domain. First, while visually dramatic, there is no logic to the vertical grid. Second, the chart implies that the size of public domain is decreasing when in fact all works published prior to 1922 are now in the public domain—thus the two-thirds of the chart which covers the period from 1790 through 1922 should be entirely shaded dark to reflect the scope of works now in the public domain. And third, the chart denies the single most significant increases in the public domain in the history of the United States by ignoring the fact that, for the first time ever, unpublished works and sound recordings will be entering the public domain—dramatically *increasing* the growth rate of the public domain. Far from strangling or dismantling the public domain during the years in which Congress stands accused of relentlessly

46. Libraries Brief, *supra* note 43, at 21.

expanding the term of copyright protection, Congress dramatically *increased* the scope of the public domain.

Regardless of personal views on the appropriate duration of protection, the fact that Congress increased the term of protection for certain works while reducing protection for other works demonstrates that Congress attempted to balance the policy concerns and did not single-mindedly gut the public domain.

B. Limitations Inherent in the Scope of Copyright Protection

An important element often overlooked by those who argue that the courts must expedite the rate at which copyrighted works enter the public domain are the limitations inherent in copyright which allow the creation of new works inspired by copyrighted works. Aside from the defense of fair use—that allowed an author to create the novel *"The Wind Done Gone,"* based on *"Gone With The Wind,"*[47] and allowed the rap group 2 Live Crew to create the song *"Big Hairy Woman"* based on Roy Orbison's *"Pretty Woman"*[48]—copyright protection is limited to *expression* and accords no protection for ideas.[49] The myth is that works are not available for use by the public unless they are in the public domain; the truth is that the works are available and the ideas are free for the taking.

Those who hope to have their views of the appropriate term of protection replace the term selected by Congress treat copyright law as though it provides a monopoly over ideas. Typical of the intellectually irresponsible scare tactics used in this debate is the promulgation of the myth that, had the present term of copyright been in effect in the nineteenth century, Santa Claus himself would have been protected by copyright until 1973.[50] This amusing, but baseless, myth

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

48. *See* Acuff-Rose Music, Inc. v. Campbell, 510 U.S. 569 (1994).

49. This fundamental concept of copyright law, long recognized by the courts, was expressly codified for the first time in the 1976 Copyright Act: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work." 17 U.S.C. § 102(b) (2000).

50. *See, e.g.*, Karjala, *supra* note 44, *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/what.html ("[U]nder the proposed copyright extension his rights to both Santa Claus and Uncle Sam would have continued until 1973!"); s*ee also* Gillmor, *supra* note 23, at 1C

springs from the assertion that if Thomas Nast's classic drawings for Harper's magazine (1860 through 1888) were still protected by copyright, "we may never have seen the development that we now take for granted—and Nast's descendants might be seeking royalties from everyone seeking to put out Christmas decorations."[51]

The fallacies of this myth begin with the fact that, even if copyright law still protected those drawings, the copyright would protect only the drawings. Nast did not invent St. Nick (or St. Nicholas) or Santa Claus. The name Santa Claus has been traced back as far as 1773, while settlers brought the Duge legend of Sinter Klaas to New York in the seventeenth century. And the idea of a fat bearded jolly persona of Santa is merely that: an unprotectable idea. Indeed, many of the traits which we associate with Santa can be traced not to Nast's drawing but further back in time to Washington Irving's 1809 description of St. Nick (which included the phrase "lays his finger aside of his nose") and to Clement Clarke Moore's classic 1823 poem *"A Visit From Saint Nicholas*," more commonly known as *"The Night Before Christmas."*

Thus, contrary to myth, Nast never held a copyright on the idea, persona, likeness, or name of Santa Claus, and his heirs would never have a basis for "seeking royalties from everyone seeking to put out Christmas decorations."

Other intellectually dishonest myths include claims that Uncle Sam would have been subject to copyright until 1973, based on the Thomas Nast drawing;[52] that the Democratic and Republican parties would not be able to use the donkey or the elephant as their

("Anyone using the image of Santa Claus as a fat man with a beard and red suit would have had to pay royalties during much of the last century if the [CTEA] had been in effect when a cartoonist dreamed up that caricature in the 1880s."); Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml ("Were Nast's creations under [CTEA]-style copyright . . . every department store [would have to pay Nast's heirs] come Christmas time.").

51. Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505 "The Copyright Term Extension Act," Submitted to the Committees on the Judiciary, United States Senate and United States House of Representatives*, Jan. 28, 1999.

52. *See id; see also* Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml (last visited Aug. 12, 2002) ("Were Nast's creations under [CTEA]-style copyright . . . [m]ore than likely, Uncle Sam wouldn't be the symbol of the country.").

symbols;[53] and that, but for the public domain, rights to the Easter Bunny would be locked up.[54] In fact, the name and image of "Uncle Sam," and its patriotic associations, long predated Nast's drawing[55] and there is no evidence offered that the Easter Bunny was ever protected by copyright.

Copyright provides no monopoly over ideas—indeed it provides absolutely no protection for ideas. The 1976 Copyright Act expressly provides that "in no case does copyright protection . . . extend to any idea . . . ."[56] Yet the provisions of the fair use clause of the Copyright Act even limit the monopoly that is accorded to original *expression*.[57] Indeed, the Supreme Court made it clear on at least

53. This canard appears in an article by Daren Fonda. *See* Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml. Based on the fact that Thomas Nast also did drawings of the Democratic donkey and the Republican elephant, the reporter drew the false conclusion that "both political parties would have had to pay fees" whenever they used one of those animals. In fact, the Democratic donkey dates back to 1828, when it was associated with Democrat Andrew Jackson's presidential campaign. His opponents called him a jackass (a donkey), and Jackson responded by using the image of the strong-willed animal on his campaign posters. The donkey soon became associated with all Democratic candidates. The Republican elephant did indeed originate with Nast, in 1877. After the Republicans lost the White House to the Democrats in that year, Nast drew a cartoon of an elephant walking into a trap set by a donkey. He reportedly chose the elephant to represent the Republicans because elephants are intelligent but easily controlled. As noted above, however, only Nast's drawing of the elephant, which was unflattering to Republicans and is not used by the Republican party, would be protected, not the idea of using an elephant as the symbol of the party.

54. *See* Karjala, *supra* note 44, *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/what.html.

55. The origins of "Uncle Sam" date back to the War of 1812, during which Samuel Wilson, popularly known as Uncle Sam, operated a slaughter house in Troy, N.Y. He supplied barrels of beef to the soldiers, stamping the barrels "U.S." for "Uncle Sam's." Soldiers who received the beef began using the appellation "Uncle Sam" figuratively for the United States. This interpretation was picked up by other soldiers who began to call everything belonging to the government "Uncle Sam's." The term, as applied to the United States, quickly sprang into popular favor and the weekly periodicals soon began to use caricature likeness of Uncle Sam, with a long white beard and high hat, as the representation of the government in Washington.

56. 17 U.S.C. § 102(b) (2000). See footnote 49 for the full text of this provision.

57. The fair use clause of the Copyright Act provides:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or

two occasions that "[t]he fair use doctrine . . . 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[58]

The limitations inherent in the scope of copyright protection became increasingly clear over the past several years, gutting the myth that a work must enter the public domain before it can provide a basis for a new creative work. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court clearly established that works of parody, like other works of comment or criticism, are entitled to benefits of the fair use provision.[59] In ruling that copyright law permitted a retelling of *Gone With the Wind* from the perspective of the slaves on the plantation, the Eleventh Circuit stressed the "constitutional significance [of the fair use provisions of the Copyright Act] as a guarantor to access and use for First Amendment purposes."[60] Contrary to misleading myths, the limits inherent within the very nature of copyright protection, particularly the limitations that copyright does not protect ideas and the fair use exemption, ensure that the movement of works into public domain need not be expedited in order to prevent copyright owners from limiting access to existing works or preventing the creation of new works.[61] These facts, ignored by the anti-copyright

> phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. § 107.

58. *See Acuff-Rose Music, Inc.*, 510 U.S. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

59. *See id.* at 579-80.

60. *SunTrust Bank*, 268 F.3d at 1260 n.3.

61. Even where an icon is protected by copyright, it does not follow that the copyright owner can prevent non-infringing uses of that icon. A prime exam-

advocates, demonstrate that the policy arrived at by Congress in the CTEA was not without merit or reason.

C. Copyright Encourages, While the Public Domain Discourages, Progress in the Arts

At the risk of speaking words of heresy, it is copyright protection that *encourages* innovation and creativity, while the public domain *discourages* both innovation and creativity.

Why create something new if you can reprint or reuse something that already exists? Why invest in untested new works if you can instead distribute royalty-free existing works?

The fact that creators of new works cannot merely re-use the expression contained in copyrighted work of others without permission forces them to be creative. Composers cannot rehash the melodies created by earlier composers, they must create their own new original melodies. Writers must invent new characters and plots instead of recycling the efforts of others. Animators and motion picture studios cannot freeload on Mickey Mouse; copyright protection forces them to create their own original cartoon characters. This promotion of fresh creation is an entirely appropriate goal for Congress to pursue through legislation.

Counter to the "copyright good, public domain better" myth, an extension of the term of copyright protection at the temporary expense of the public domain *encourages* rather than *discourages* the creation of fresh new original works. Opponents of the current duration of protection argue that an earlier termination of copyright protection would encourage the copyright owner to create new works rather than relying on income from old works.[62] While such a result may ensue from earlier loss of copyright protection, if creation of

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ple is the song "Happy Birthday"—the lyrics to which are still protected by copyright in the United States (owned by Warner Chapel). Yet the song is still sung at virtually every birthday celebration without restrictions or imposition of liability.

62. For example, an NYU law professor argued, "[I]f entertainment companies like Disney want more money, they should develop new and more wonderful characters . . . . That's what we really want them to be doing with their fear that Mickey is going into the public domain." Alex Berenson, *Disney's Copyright Conundrum*, THESTREET.COM (May 8, 1998), *at* http://www.thestreet.com/stocks/topstories/14933.html (quoting Professor Rochelle Dreyfuss).

fresh works is a policy goal for copyright law, is it not better to create incentives for all creators to develop new works in lieu of free-loading on existing works than it is to encourage just one party—the copyright owner—to develop new works?

Another myth argues that the public is automatically better served when a work is in the public domain than it is when a work is protected by copyright. An example is the classic motion picture, *It's a Wonderful Life.* The film entered the public domain at the end of its first term of copyright protection because the copyright owner failed to file a timely renewal application. Opponents of the CTEA use this film as a prime example of the merits of the public domain: "Had we been operating then under our current system, this classic film would still be gathering dust (and literally rotting away) on studio shelves. This is one of the clearest and most dramatic examples of the value of the public domain."[63] The truth is quite the opposite.

Because Republic Picture, and its successor Spelling Entertainment, still own the exclusive motion picture rights to the underlying short story and to the music—neither of which is in the public domain—no one can create or exhibit copies of *It's a Wonderful Life* without the permission of Spelling. After years of neglect, Spelling began to assert copyright control over the film based on these underlying rights. Spelling subsequently granted exclusive home video rights to a distributor and exclusive television broadcast rights to NBC.[64]

Before Republic and Spelling began enforcing their claim to the underlying rights in the film, local stations and cable channels looking for no-cost programming broadcast the film endlessly, with the result that, "to put it politely, the film's currency was being devalued."[65] By the 1980s, there were multiple versions of the film, all in horrid condition.[66] The film was "often sliced and diced by local stations who stuffed it with commercials."[67] There was no quality

63. Dennis Karjala, *Value of the Public Domain*, *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain.html (last visited July 28, 2002).

64. *See It's NBC's "Wonderful Life",* ELECTRONIC MEDIA, Dec. 5, 1994.

65. Bill Carter, *Where Have You Gone, Tyrone Power?*, N.Y. TIMES, Dec. 19, 1994, at D10.

66. *See Two Days of Christmas Classics*, TORONTO STAR, Dec. 24, 2000.

67. Larry Bonko, "*Wonderful Life" Has Become a TV Treasure,* VIRGINIAN-PILOT, Dec. 24, 1999, at E1.

control over home video copies of the film—consumers had no way of knowing whether the tape they were purchasing was a poor quality bootleg version (which most were).[68] After the exclusive broadcast rights for the film were licensed to NBC, the film was spruced up and restored to the sharp, crisp production made by Capra in 1946, when Jimmy Stewart was just a few months out of his military service.[69] The press hailed the restored version: "The films, beautifully restored, offer delights almost lost to the screen . . . . I can honestly say I haven't enjoyed going to the movies so much in years."[70] The restoration of the film would not have taken place had Republic and Spelling not been able to recapture their investment through the exercise of exclusive distribution rights to the film.

When the underlying rights to the film were not being enforced, *It's A Wonderful Life* was an orphan of the public domain, exploited without regard to quality, ravaged and uncared for. Only after the copyrights in the underlying rights were enforced was anyone willing to spend the money necessary to restore and preserve the film. Contrary to the myth that *It's A Wonderful Life* is *"*one of the clearest and most dramatic examples of the value of the public domain,"[71] the film is, in fact, one of the clearest and most dramatic examples of the limitations of the public domain and the value of copyright protection.

It is a myth that expediting the movement of works like *It's a Wonderful Life* into the public domain prevents such works from gathering dust. Even if the myth were true, not everyone would agree that the public was better served when *It's a Wonderful Life* was treated as being in the public domain. And, as noted later in this Article,[72] efforts to preserve, restore, and bring motion pictures up to current levels of technological and consumer expectations can take years and cost tens of thousands of dollars. The necessary time and

68. The Chairman of Republic Pictures, Russell Goldsmith, was quoted as saying that one of his goals in enforcing copyright claims to the underlying rights in the picture was to eliminate "bootleg copies and poor quality copies of the film." James Bates, *Putting the Brakes on a Christmas Classic*, DALLAS MORNING NEWS, Nov. 25, 1993, at 10C.

69. *See* Bonko, *supra* note 67, at E1.

70. Stephen Hunter, *Auteur of Corn: A Film Retrospective Explores the Dark Side of Frank Capra's Sunny World*, WASH. POST, Jan. 2, 1998, at D01.

71. Karjala, *supra* note 63, *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain.html.

72. *See* discussion *infra* Part IV.B.

money is not allocated to that effort except when films continue to enjoy many years of copyright protection.

Regardless of whether one is more persuaded by the argument that an extension of copyright protection promotes progress in the arts or by the argument that moving works more quickly into the public domain promotes such progress, the mere existence of those two points of view demonstrates that there is no empirical way to determine the appropriate term of protection. Rather, that determination is a policy matter requiring a balancing of interests. Whether one agrees or disagrees with the balance arrived at by Congress, that decision cannot accurately be portrayed as an abuse of congressional authority.

D. The Realities of the Global Market Place

Later in this Article, I will discuss the international implications of copyright term extension.[73] However, in response to the inflated value of the public domain portrayed by opponents of term extension, it is important to note that the exploitation of works is increasingly undertaken on a global, rather than a territorial basis. As a result, expediting the movement of U.S. works into the public domain at a earlier time than they would enter the public domain in Europe contributes little to the scope of works which can be freely exploited on a worldwide basis.

In her testimony to Congress in support of the CTEA, the Register of Copyrights noted that the "development of the global information infrastructure" means that "copyrighted works now may be transmitted, virtually instantly, almost anywhere in the world."[74]

The Internet is the most obvious example of this phenomenon. A U.S.-based website can be viewed anywhere in the world. A less obvious, but equally important example, is the growth of foreign markets for U.S. audiovisual works. The value of foreign revenue has grown to such an extent that no motion picture studio will produce a feature film unless the film can also be distributed outside the United States; few studios would produce a television production unless they could, at the very least, also be exploited in Canada.

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73. *See* discussion *infra* Parts X, V.B. (comparing the international terms of copyright protection), V.C. (discussing the congressional goal of harmonization of U.S. law with international copyright norms).

74. *CTEA Hearings*, *supra* note 13, at 7 (statement of Marybeth Peters).

This international reach of copyrighted works means that most audiovisual works will not be created unless they can be distributed in the United States and beyond. Websites which contain copyrighted material must similarly make certain that their content does not infringe the copyright laws of other territories.

One result of the advent of distribution without frontiers is that a work must be in the public domain not just in the United States, but also in key foreign territories in order to be exploited without obligations to the copyright owner.[75] As a result, pushing works into the public domain in the U.S. at an earlier date than they do abroad provides little benefit for audiovisual works and other works which need international distribution in order to recoup the cost of their creation.

Example: H.G. Wells' classic novel *The War of the Worlds* entered the public domain in the United States but is still protected by copyright in most foreign territories.[76] If someone wishes to reproduce the novel on a website, distribute it electronically outside the United States, or use it as the basis for a motion picture or television production, rights must be obtained from the owner of the copyright outside the United States.[77]

With the European Community adopting the new standard of life of the author plus seventy years as the accepted duration of copyright protection, if a court invalidated the CTEA, it would have little practical impact on the exploitation of works that are in the public domain in the United States but which are still protected by copyright in other key territories.

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75. Another result of the advent of distribution without borders is the need for harmonization of copyrights laws. *See* discussion *infra* Part V.C.

76. *The War of the Worlds* was published in 1898, and entered the public domain in the United States in 1954. Wells died in 1946, so in all countries which apply a duration of protection of life of the author plus seventy years, his work continues to be protected until 2016: sixty-two years of additional protection. The same result applies to Wells's *The Island of Dr. Moreau*, *The Invisible Man*, and *The Time Machine*—all of which have been in the public domain in the United States for decades but all of which are still protected by copyright until 2016 in countries which apply the life-plus-70-years term of protection.

77. For other examples of works that are in the public domain in the United States but still protected outside the United States, see the discussion of the works of Claude Monet and Antoine de Saint-Exupéry *infra* Part V.B.2.

E. Congress Directly Addressed the Concerns of Libraries and Archives in the CTEA, Providing Those Parties With a Specific Exemption

The myth that the CTEA is a work of undiluted corporate greed, enacted without regard to the public good, ignores the fact that Congress took into consideration the concerns of libraries, which may have anticipated having the right to make free use of works for which the lapse of copyright protection was imminent. This myth is disproved on its face by the provisions of the CTEA which grant libraries and archives exemptions from copyright owners' exclusive rights during the last twenty years of any term of copyright protection.[78]

In particular, qualifying libraries "may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof," for a list of specified purposes.[79] Those purposes include "preservation, scholarship, and research."[80]

This exemption is intended to allow the preservation and use of orphaned materials that might otherwise be lost or unavailable, rather than to give free rides. As a result, the library or archive must determine, before taking advantage of this exemption and on the basis of a reasonable investigation, that three circumstances do not apply:[81] First, it must determine that the work is not subject to normal commercial exploitation.[82] Second, it must determine that a copy or phonorecord of the work cannot be obtained at a reasonable price.[83] And third, the exemption is lost if either the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the first two conditions apply.[84]

These exemptions from copyright owners' exclusive rights during the twenty-year extended term of protection are in addition to the

78. *See* 17 U.S.C. § 108(h)(1) (2000).
79. *Id.*
80. *Id.*
81. *See id.* § 108(h)(2).
82. *See id.* § 108(h)(2)(A).
83. *See id.* § 108(h)(2)(B). It should be noted that the limitation on the price that can be charged by the copyright owner acts as a form of low-cost compulsory licensing.
84. *See id.* § 108(h)(2)(C).

limitations provided by the Copyright Act on the exclusive rights of all copyrights owners for the benefit of libraries and archives.[85]

The petition for certiorari and the amici briefs urging the Supreme Court to override the judgment of Congress in enacting the CTEA ignore this crucial aspect of the law. The amicus brief filed on behalf of a group of library and archive interests falsely claims that the CTEA "prevents the timely preservation of works, deprives scholars of research materials, and reduces funds from educational institutions, thus hampering the preservation and dissemination of information, stories, and documentation of who we are as a people."[86] The brief makes only a passing footnote reference to the exemption provisions of the CTEA which vitiate their cries for urgent judicial relief.[87]

The other amicus briefs filed in support of Eldred's petition for a writ of certiorari make not a single reference to this crucial aspect of the CTEA.[88] The petitioner, in his initial petition and his reply brief,

85. *See id.* § 108(a)-(f).

86. Libraries Brief, *supra* note 43, at 3.

87. In a stray footnote, the authors of the Libraries Brief concede that *"Amici* are well aware that the CTEA provides an exemption in § 108(h) of Title 17 U.S.C. (Copyright Act) for librarians and archivists to have access to a limited group of works within the last twenty years of a work's copyright protection term. However, use of the exemption requires compliance with various conditions." Libraries Brief, *supra* note 43, at 12 n.37. In a surprising bout of honesty, the drafters of the brief do not even attempt to argue that those conditions are onerous or that they in any way defeat the valuable rights granted during the added term of copyright protection to libraries and archives at the expense of copyright owners.

88. *See* Internet Archive Brief, supra note 21; Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, No. 01-618 [hereinafter Intellectual Property Professors Brief]*;* Brief of Amici Curiae Eagle Forum Education & Legal Defense Fund and the Association of American Physicians & Surgeons, Inc. in Support of Petitioners, Eldred v. Ashcroft, No. 01-618; Brief of Jack M. Balkin et al. as Amici Curiae in Support of the Petitioners, Eldred v. Ashcroft, No. 01-618 (Constitutional Law Professors Brief). The amicus brief filed by Michael Agee and Hal Roach Studios argues that the CTEA creates uncertainty because it "can be practically impossible to identify successors in interest, or to trace every possible transfer and assignment of copyright over more than seventy-five years." Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners at 16-17, Eldred v. Ashcroft, No. 01-618 [hereinafter Hal Roach Brief]. While this is certainly true in some cases, twenty years of personal experience in researching chain of title documentation for motion pictures has shown this statement to be the rare exception and not the rule. That same brief makes the unsup-

pretends that this exemption does not exist in his efforts to persuade the court that Congress acted irrationally when it enacted the CTEA.[89]

The myth that the CTEA paralyzes libraries and archives in their efforts to conduct preservation, scholarship, and research, and that Congress is therefore an enemy of the public domain that must be stopped by the courts, fades away when exposed to the exemptions carved out from the term extension by the CTEA. No doubt this is the reason that every party arguing to the Supreme Court that certiorari should be granted pretended that those exemptions do not exist.

F. The Benefits of the Public Domain Flow to Publishers Rather Than Authors

While it has been argued that the CTEA was nothing more than "corporate welfare" which benefits publishers at the expense of individuals,[90] it was Mark Twain who pointed out that, when a work enters the public domain, publishers continue to profit from exploitation of the work; the only people who cease to benefit are the creators of the work:

> The decalogue says you shall not take away from any man his property. I do not like to use the harsher term, "Thou shalt not steal." But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land. Always talk handsomely about the literature of the land. Always say what a fine, a great monumental thing a great literature is. In the midst of their enthusiasm they turn around and do what they can to crush it, discourage it, and put it out of existence.

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ported argument that once the term of copyright protection expires for motion pictures that have been deposited with the Library of Congress, those works will immediately become freely available to the public. *See id.* at 17. In fact, the agreement by which Paramount Pictures, and all other major studios, entrusted materials to the Library of Congress contractually restricts access to the physical materials regardless of the term of copyright protection.

89. *See* Petition for Writ, *supra* note 24.

90. *See Who are the Rowdy, Assertive Babblers that the Copyright Industry Fears?*, *available at* http://www.nocopyright.org/blabblerspage.htm (last visited Aug. 5, 2002).

> I know that we must have that limit. But forty-two years is too much of a limit. I do not know why there should be a limit at all. I am quite unable to guess why there should be a limit to the possession of the product of a man's labor. There is no limit to real estate.
>
> As Doctor Hale[91] has just suggested, you might just as well, after you had discovered a coal mine and worked it twenty-eight years, have the Government step in and take it away—under what pretext?
>
> The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it . . . long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions . . . . But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of these ill-gotten gains generation after generation.[92]

When the House of Representatives extended the term of protection in the 1976 Copyright Act it noted that the public does not benefit from a shorter term, but rather the user groups derive a windfall, as prices the public pay for a work often remain the same after the work enters the public domain.[91] The concept that the public domain benefits corporations at the expense of authors is ignored by those who oppose the policy set by Congress. Whether one agrees with anti-copyright advocates who argue that copyright is "corporate welfare," benefiting publishers at the expense of individuals, or with Twain, who argued that it is the public domain which benefits publishers, the mere existence of the debate shows that the appropriate line between copyright and the public domain is a difficult policy decision. As such, it should be made by Congress, not by the courts.

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91. Edward Everett Hale (1822–1909), Unitarian minister and author of *The Man Without A Country.*

92. *Patent Arguments*, *supra* note 2, at 116-17 (statement of Samuel L. Clemens, author).

V. MYTH #3: "THE ADDITION OF TWENTY MORE YEARS TO THE TERM OF COPYRIGHT PROTECTION IN THE UNITED STATES WAS A BAD POLICY CHOICE BY CONGRESS THAT THE COURTS MUST REVERSE"

The question of whether Congress made a wise decision in extending the duration of copyright protection by an additional twenty years is a worthy topic for debate, and some noted copyright scholars believe that such an extension was not wise.[93] But, somehow, the myth arose that the courts can and should substitute someone else's view of the appropriate duration of copyright protection for the duration established by Congress after public hearings and debate.

This Article will not address the complex issue of what the most appropriate duration of protection should be. That is a policy question that cannot form a basis for a legal challenge to congressional legislation. This Article will, however, in debunking the myth that the courts must reverse that congressional determination, seek to establish that—whether you agree or disagree with the outcome—Congress did indeed have a rational basis for extending the term of copyright protection.

A. The CTEA Added Only Twenty Years to the Minimum Term Required by International Law

Lost in the rhetoric of the anti-copyright advocates is the fact that the CTEA added only twenty years to the minimum term of copyright protection required by the Berne Convention.[94] That limited increase—the first increase ever enacted by Congress above the required international minimum and an increase bringing the United States to the level of protection already in force throughout Europe—contradicts the myth that Congress is abusing its authority in determining the appropriate duration of copyright protection and must be stopped by the courts.

Congress did not extend the term of copyright protection for 300 years beyond the internationally required minimum; it did not extend

93. As previously noted, Professor Jane C. Ginsburg of Columbia University School of Law stated that term extension was a bad idea, but it is nonetheless not unconstitutional. *See* Symposium, *supra* note 6, at 695.

94. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27 (1986), 828 U.N.T.S. 221, 233 [hereinafter Berne Convention].

it for 100 years. It extended it for twenty years. Hypothetical arguments that an extension of the U.S. term of protection for 100 years beyond the international minimum would be an abuse of congressional discretion are simply not relevant.

This lack of abuse of congressional discretion is made even clearer when it is considered that the internationally required minimum term of protection—life plus fifty years—has been the standard since 1908.[95] A congressional decision to extend the term of copyright protection twenty years beyond the international minimum established *ninety-four years ago* is not the type of congressional decision which—contrary to the cries of the anti-copyright advocates—can accurately be portrayed as an abuse of discretion requiring judicial intervention.

B. The United States Still Has One of the Shortest Terms of Copyright Protection

When considering whether the decision by Congress to extend the term of protection to life of the author plus seventy years was either a baseless decision or not for a "limited term," it is important to keep in mind that the United States still has a shorter term of protection than many of its key trading partners.

Congress determined that the appropriate term of protection is the limited term of life of the author plus seventy years. While that term is, on its face, the mirror of the European standard for the term of protection, there are three twists to the calculation of that term. As a result of these twists, the United States actually protects many works for a *shorter* duration of protection accorded in other countries.

1. Calculation of the term of protection

The first twist may result in works being protected for decades longer in Europe than in the United States under the life-plus-70-years standard of protection. This difference arises from the fact that members of the European Union, and most other countries, do not recognize the work-for-hire doctrine. As a result, they treat the term of protection as lasting for the life *of the last surviving author* plus seventy years. The "authors" of an audiovisual work are defined as

95. The basic term of protection equal to life of the author plus fifty years was set forth in the Berne Convention. *See* Berne Convention, *supra* note 94.

"the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the work."[96]

If any one of these authors survives for more than twenty-five years after the date on which the audiovisual production was created, the term of protection accorded in Europe will be longer than the term accorded under U.S. law. For example, the European approach would be anticipated to add more than twenty years of protection beyond the U.S. term of protection for a film such as *Save The Last Dance*.[97] Under U.S. work-for-hire law the film will be protected until 2096.[98] If the last of the authors of the film (as defined by the E.U. Directive) dies at age seventy-seven,[99] the film will be protected by copyright until 2118—an additional twenty-two years of protection.[100]

2. Wartime extensions of the duration of protection

The second twist arises from wartime extensions of copyright protection in Europe, which can add as much as forty-four years to the term of copyright protection beyond the life-plus-70 years term.

A number of European countries extended by a period of time equal to the duration of the two World Wars the term of protection

96. Term Directive, *supra* note 14, at 9-13. Article 2, section 2 provides:

> The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, *whether or not these persons are designated as co-authors*: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

Id. art. 2(2) (emphasis added).

97. SAVE THE LAST DANCE (Paramount Pictures 2001).

98. *Save the Last* Dance was released in 2001. The term of protection for a work made for hire, under the CTEA, is ninety-five years from the date of creation. As a result, the film will be protected until 2096. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998).

99. According to statistics maintained by the National Center for Health Statistics, the life expectancy for Americans is 76.7 years. *See United States Life Tables*, 1998, *in* 48 NAT. VITAL STAT. REP. 18, 1 (2001).

100. Three of the "authors" of the film (composers of music specifically created for use in the work), Snoop Doggy Dogg, Red Man, and Method Man, were born in 1971. If any one of the three lives seventy-seven years, the seventy-year post-mortem term of protection would commence in 2048 and end in 2118.

for works created prior to or during those wars. For example, to cover the First World War, France added six years and 152 days to the term of protection for all works created prior to December 31, 1920.[101] To cover the Second World War, France added eight years and 120 days for works created prior to January 1, 1948.[102] In addition, a further term of protection of thirty years was added to the works of authors who were killed in action—including Antoine de Saint-Exupéry (author of *The Little Prince).*[103] As a result, an author who published a work prior to the outbreak of the First World War, then died in action during either war, will have his works protected for forty-four years beyond the usual life-plus-70-years term.[104]

The E.U. Term Directive took note of these wartime extensions, providing in the preamble: *"Whereas certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of the authors' works."*[105] It was generally expected that the extension of the term of protection from life of the author plus fifty years to life of the author plus seventy years would subsume the wartime extensions, but the Directive did not require Member States to abandon their wartime extensions.

When France enacted its domestic legislation implementing the Term Directive, it did not repeal the wartime extensions. A French court has since ruled that copyrights in France are protected for the life-plus-70-years term *plus* all applicable wartime extensions, which can result in a term of protection of the life of the author plus 114 years.[106]

Example: in 1906 Claude Monet painted *Water Lilies,* which is in the collection of the Art Institute of Chicago. That work entered

101. *See* Loi 3 fevrier 1919, art. 1, C. propr. intell. Art. L. 123-8.

102. *See* Loi 21 septembre 1951, art. 1, C. propr. intell. Art. L. 123-9.

103. The additional thirty-year extension applies, under C. propr. intell. art. L. 123-10 (continuing the law of 1951), where the author "died for France"—referring to the required annotation on the author's death certificate.

104. Similarly, Belgium provided a wartime extension of ten years and Italy an extension of twelve years.

105. Term Directive, *supra* note 14, pmbl.

106. *See* T.G.I. Paris, June 27, 2001. This result is consistent with the provisions of Article 10(1) of the Term Directive, which provides: "Where a term of protection, which is longer than the corresponding term provided for by this Directive . . . this Directive shall not have the effect of shortening that term of protection in that Member State." Term Directive, *supra* note 14, art. 10(1).

the public domain in the United States in 1981.[107] Under a life-plus-70-years term of protection, Monet's paintings were protected in France until 1996.[108] However both of the French wartime extensions apply to Monet's work, with the result that his works will continue to be protected in France until 2010—a term of life plus eighty-four years.[109]

3. Retroactive application of protection to works in the public domain

The third twist is that, when the term of protection for works was extended in Europe in compliance with the E.U.'s Term Directive, works by European authors that fell into the public domain were restored to copyright protection. The works of an author who had been deceased for between fifty-one and seventy years, and thus in the public domain in the U.K., were pulled from the public domain and restored to copyright protection.[110]

Professor Paul Geller provides an example: "Consider hypothetically, the painting *Broadway Boogie-Woogie.* The Dutch artist Mondrian completed it in the United States before he died there in 1944. Copyright expired in this painting in the Netherlands at the end of 1994 when the then-effective Dutch term of life plus [fifty]

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107. Under U.S. law, the painting entered the public domain in this country seventy-five years after the earlier of the dates of its first publication or registration with the U.S. Copyright Office.

108. Monet died in 1926.

109. This result was recently affirmed by the French appeals court, Tribunal de Grande Instance de Paris. A.D.A.G.P. v. Éditions Hazan, Tribunal de Grande Instance de Paris, 27 juin 2001.

110. Article 10(2) of the Term Directive provides: "The terms of protection provided for in this Directive shall apply to all works . . . which are protected in at least one Member State . . . ." Term Directive, *supra* note 14, art. 10(2). Germany had a term of protection of life plus seventy years prior to the Term Directive, and because the 1958 Treaty of Rome (the founding document of the European Community) precluded Member States from discriminating against nationals of other Member States (originally Article 7, now Article 12), Germany had to accord the life-plus-70-years term to authors of other Member States. For example, if a U.K. work was protected for life plus seventy years in Germany—even though it was only protected for life plus fifty years in the United Kingdom. Under Article 10(2) of the Term Directive the work became entitled to the longer term of protection in all Member States. The E.C. Court of Justice confirmed this result in 1993. *See* Joined Cases C-92/92 & C-326/92, Collins v. Imtrat Handelsgesellschaft mbH, 1993 C.M.L.R. 773 (1993).

years lapsed."[111] The work was still protected in Germany under the German term of life plus seventy years. Implementation of the Term Directive pulled the painting from the public domain and restored copyright protection in the Netherlands and throughout the rest of Europe.[112]

Congress could have provided for a similar result in the CTEA by applying the extended term of protection to works already in the public domain.[113] Yet Congress chose not to. As a result, U.S. copyright law provides a lower level of protection for works than the copyright laws of our European trading partners. When opponents of the CTEA promote the myth that Congress overreached or broke new ground in enacting the CTEA, they universally ignore these facts.

C. The Framers Intended the "Limited Term" Provision of the Copyright Clause to Prevent Replication of the Perpetual Term of Protection Accorded for Common Law Copyright

It is important to keep in mind that the Founding Fathers drafted the Copyright Clause against the background of common law copyright that then existed in the colonies. Common law copyright granted perpetual protection.

The Copyright Clause did not extinguish this notion of perpetual copyright. Similarly, the Copyright Acts of 1790, 1831, 1870, and 1909 did not extinguish the notion. Until January 1, 1976, a work that was fixed in a tangible form but not published[114] enjoyed perpetual copyright protection in this country. Indeed, throughout the eighteenth and nineteenth centuries and well into the twentieth

111. Paul Edward Geller, *Zombie and Once-Dead Works: Copyright Retroactivity after the E.C. Term Directive*, ENT. & SPORTS LAW, Summer 2002, at 9.

112. *See id.*

113. Congress did provide for restoration of "lost" copyrights in the Uruguay Round Act. The Act automatically restores copyright protection for certain foreign works effective January 1, 1996. Although restoration is automatic, the copyright owner must file a Notice of Intent to Enforce the Restored Copyright with the Copyright Office in order to enforce rights against reliance parties. Works covered by the Act are works of non-U.S. origin which lost copyright protection in the United States due to a failure to file a timely renewal application or failure to include the statutorily mandated copyright notice, provided that the work is still protected by copyright in its country of origin. *See* 17 U.S.C. § 104A (2000).

114. "Publication" in this context means distribution of copies to the public.

century, this perpetual protection for unpublished works embraced such art forms as music, theater, speech, and phonograph records—because those works did not involve distribution of copies to the public.[115]

The "limited term" language of the Copyright Clause indicates nothing more than the Founding Fathers' intention that Congress should not replicate the common law system of perpetual copyright. There is no indication that the Founding Fathers intended to prevent Congress from enacting a term of protection which endures for a fixed term of years following the death of the author or that the Founding Fathers used the words "limited term" when what they really meant was "short term" (or "very short term"). Taken in its historical perspective, the "limited term" restriction of the Copyright Clause prohibits only an unlimited (perpetual) term; it does not mandate a "short" term of protection. As a result, the authority of courts to review the duration of copyright, established as a policy matter by Congress, is limited to the question of whether the term of protection is finite; the courts have no jurisdiction to second guess the appropriateness of any finite term of protection.

D. Examination of Congressional Rationales Behind Enaction of the CTEA

The myth is that Congress had absolutely no basis for its decision to add twenty years to existing terms of copyright protection, and that Congress merely did the bidding of copyright robber barons. Even those who disagree with congressional wisdom when it extended the term of copyright must acknowledge that, contrary to this myth, Congress had legitimate substantive reasons for adopting term extension.

Since attacks on the duration of copyright protection extend beyond the CTEA to include the extension of the term of copyright protection in the 1976 Act, and the nine interim extensions which were a part of that new term of protection, it is worth taking a moment to consider the congressional rationale for the 1976 term extension.

Prior to the enactment of the 1976 Act, federal copyright law measured the term of protection as commencing upon the publication of the work or its registration with the U.S. Copyright Office,

115. Phonograph records were not considered copies.

whichever came earlier. A renewal term followed the initial term of protection.[116] The 1976 Act replaced this system with a single, non-renewable term of protection that commenced on the date the work was created (rather than on the date the work was published or registered with the Copyright Office) and continued for the life of the author plus a set term of years.

The House Committee Report[117] set forth the following rationales for this dramatic change in the system for determining the duration of copyright protection:

> 1. The fifty-six-year term under the 1909 Act was not long enough to assure an author and his dependants a fair economic return, given the substantial increase in life expectancy;
>
> 2. The growth in communications media substantially lengthened the commercial life of a great many works, particularly serious works which might not initially be recognized by the public;
>
> 3. The public does not benefit from a shorter term, but rather the exploiters of works derive a windfall, as prices that the public pays for a work often remain the same after the work enters the public domain;
>
> 4. A system based upon life of the author avoids confusion and uncertainty, because the date of death is clearer and more definite than the date of publication, and it means that

116. The concept of two terms of protection consisting of a fixed number of years, commencing on the date of the first publication of the work, dates back to the year 1709 and the English Statute of Anne:

> [T]he Author of any Book or Books already composed and not printed and published or that shall hereafter be composed and his Assignee or Assignes shall have the sole Liberty of printing and reprinting such Book and Books for the Term of Fourteen Years to commence from the Day of the first publishing the same and no longer . . . . Provided always That after the Expiration of the said Term of Fourteen Years the sole Right of printing or disposing of Copies shall return to the Authors thereof if they are then living for another Term of Fourteen Years.

Statute of Anne, 1709, 8 Ann., c. 21 (Eng.).

By the time the U.S. 1909 Copyright Act was enacted, the two terms of protection had evolved into an initial twenty-eight-year term and a potential renewal term for a second twenty-eight-year term, thus offering a maximum term of protection of fifty-six years.

117. *See* H.R. REP. NO. 94-1476, at 134-35 (1976).

> all of a given author's works will enter the public domain at the same time instead of seriatim as under a term based upon publication;
>
> 5. The renewal system, with its highly technical requirements, often resulted in inadvertent and unfair loss of copyright protection;
>
> 6. A statutory term of life plus fifty years is fair recompense for those who, under the 1909 Copyright Act, owned common law copyrights which prior to the 1909 Act enjoyed protection in perpetuity; and
>
> 7. A majority of the world's countries have a term of life plus fifty years. To adopt the same term expedited international commerce in literary properties and opened the way for United States membership in the Berne Convention.[118]

These rationales also provide justification for the extension of the term of protection in the CTEA. But we need not surmise this. The legislative history of the CTEA is replete with evidence of congressional intent. The primary congressional rationale for the extension of the duration of copyright protection, as expressed in the legislative history of the CTEA, was harmonization with international norms. Some critics of term extension dismiss harmonization as nothing more than an effort to keep up with the Joneses, as the blind following the blind.[119] A more informed view of harmonization sees it as a movement towards a worldwide agreement on the protection which should be accorded to copyrights. Such agreement is necessary in the age of the Internet, where copyright exploitation is no longer contained within the boundaries of any one country.[120]

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118. The United States did indeed finally adhere to the Berne Convention twelve years later. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (amending scattered sections of 17 U.S.C. (1988)).

119. *See, e.g.*, Gillmor, *supra* note 23, at 1C ("Another peculiar rationale for the [CTEA] was to make U.S. copyright terms match their European counterparts. By that logic, the United States should bring all of its laws in line with the worst statutes around the world. Heck, they don't have free speech in China, so we might as well do away with it here.").

120. *See CTEA Hearings*, *supra* note 13, at 8, 10 (prepared statement of Marybeth Peters noting that the importance of international harmonization of copyright laws is enhanced by the "development of the global information infrastructure," which means that copyrighted works now may be transmitted, virtually instantly, almost anywhere in the world).

It is readily apparent that harmonization does not require an exact match of laws. This is contrary to the myth created by a group of law professors who filed an amicus brief in support of the attack on term extension.[121] According to their myth, the CTEA does not harmonize U.S. copyright law with European copyright law because disparities remain between the term of protection for certain classes of works. Harmonization is, however, not the same as duplication; harmonization only requires that laws work in harmony together. Laws that vary by twenty years in the term of protection accorded to all copyrighted works are not harmonious; laws that vary in their details can be, and are, harmonious.

The United States is a shamefully late arrival in the international copyright arena. Since virtually the founding of the nation we have under-protected copyright owners.[122] The United States was catching up in 1909, catching up in 1976, and catching up in 1998 with the CTEA. It took the United States until 1989 to join the international Berne Convention.[123] The characterization of a Congress run amok enacting copyright standards invented by United States corporations without precedent or basis is simply untrue.

The European Union, in extending the term of protection to life plus seventy years, did not act in a capricious manner. When the Council of European Communities enacted the Copyright Term Directive, requiring Member States to adopt a copyright term of life plus seventy years, it reasoned that:

> "[T]he minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas

121. *See* Intellectual Property Professors Brief, *supra* note 88, at 16-19.

122. Professor Jane Ginsburg has noted that "for the first 100 years or so of our existence, we were a pirate nation. We lived happily by copying other nations' literary works, particularly England's. One reason that we did not have particularly strong copyright laws until relatively late in the game was that we thought the balance of economics favored piracy over protection. When the balance shifted . . . we changed from being a pirate nation to a major copyright-producing nation. We then increased the scope of copyright protection, as well as its duration." Symposium, *supra* note 6, at 696-97.

123. *See generally* Berne Convention *supra* note 94 (international treaty requiring member nations to maintain high levels of protection for artistic works); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (amending scattered sections of 17 U.S.C. (1988)).

> the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations . . . ."[124]

Harmonizing U.S. law with international norms is not just keeping up with the Joneses. If the United States sends the message that it does not view copyrights as worthy of the level of protection accorded by international norms, it will be far more difficult to persuade other countries that accord even lower levels of protection that *they* must comply with international norms.[125] When all is said and done, disagreement over whether international harmonization is a proper goal for copyright legislation is nothing more than a dispute over policy and provides no basis for a legal challenge to such legislation.

VI. MYTH #4: "EXTENSIONS OF THE TERM OF COPYRIGHT PROTECTION FOR EXISTING WORKS CANNOT POSSIBLY PROMOTE THE PROGRESS OF SCIENCE AND THE USEFUL ARTS"

In order to perpetuate the myth that an extension of the duration of protection for existing works does not promote the progress of science and the useful arts, anti-copyright advocates ask a self-serving question and then supply the only possible answer. The question asked is: copyright law promotes the creation of new works, but once a work is created, how can an extension of the term of protection promote the creation of a work which already exists? The answer, of course, is that it cannot. In other words, "[e]xtensions [of the term of copyright protection] can't be retroactive, because the Constitution gives Congress the right to grant exclusive rights only if those rights create incentives to produce more speech. Extending these benefits retroactively doesn't serve any purposes the copyright clause was designed for."[126]

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124. Term Directive, *supra* note 14, at 9-13.

125. For those who dismiss harmonization as an important goal for Congress to pursue, it should also be kept in mind that the public domain is already limited by de facto harmonization: a work which is in the public domain only in the United States and not in other countries cannot be exploited in any medium which is distributed outside of the United States.

126. Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml (quoting Lawrence Lessig, counsel for plaintiff in *Eldred*). I would ask Professor Lessig: "Where is the requirement of 'more' speech found in the Copyright Clause?"

According to this myth, there is no way in which retroactive extensions of the term of protection can promote the progress of science and useful arts.[127] As a result, the anti-copyright forces argue that any extension of protections for existing works is a violation of the "limited term" wording of the Copyright Clause.[128]

This myth is irrelevant in light of the fact that the wording of the Copyright Clause is introductory only and does not impose any limits on congressional power, as discussed above. However, even if the Founding Fathers' use of those words did limit congressional power, this myth still suffers from four independently fatal flaws. First, the Copyright Clause is aimed at promoting the *progress* of science and useful arts. As such, an extended term of protection for existing works promotes the creation of new works. Second, by encouraging copyright owners to preserve and restore works and to adapt those works to current consumer expectations, Congress promoted the progress of science and the useful arts. Third, the progress of science and useful arts requires international cooperation and coordination. Fourth, authors rely on the fact that their works will continue to enjoy appropriate copyright protection after the author's death.

It should also be kept in mind throughout this discussion that if the myth did indeed have merit, the 1909 Act would also be unconstitutional because federal statutory protection attached to works upon the earlier of either publication or registration. Thus, the only works which were accorded copyright protection already existed. Creation, the coming into existence of the work, was irrelevant. Under this theory, all works protected under the 1909 Act would now be stripped of copyright protection. A similar result would occur under the 1976 Act, which accords protection to works which exist but were not published as of the effective date of the Act. They, too, would lose their copyright protection, since protection was already

127. Indeed, the test must be the absolute test of "in no way." If there is any way in which a retroactive extension of the term of copyright protection does promote the progress of science and the useful arts, the extension is not in violation of the powers accorded Congress by the Copyright Clause.

128. Petitioners pin their argument on the myth that "a blanket extension of existing copyrights cannot be a 'limited Time[]' that 'promote[s] the Progress of Science.' It cannot, because the incentive is being given for work that has already been produced. Retroactive extensions cannot 'promote' the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more." Petitioners Brief, *supra* note 22, at 22.

accorded to already-existing works. As silly as it sounds, this myth forms the core argument of the anti-copyright advocates.

A. Application of Term Extension to Existing Works Promotes the Progress in Science and the Arts by Fostering the Creation of New Works in Lieu of the Mere Re-circulation of Existing Works

Those who argue that retroactive extension of the term of protection cannot possibly promote the progress of the arts, and that Congress lacks the authority to extend the scope of protection accorded to the works of deceased authors, ignore the fact that the promotion of progress in the arts requires the creation of new works. Progress is better served when new works are created than when existing works are re-circulated, even when existing works are re-circulated at a lower cost.

Copyright law promotes the creation of works by according copyright protection for a limited term; it promotes the spread of ideas by providing that copyright protection does not extend to ideas; and it promotes the creation of fresh, original works by providing that the expression of a protected work cannot be reused. Indeed, Congress rejected the argument that the public benefits from increasing the number of works in the public domain as "contrary to the real public purpose for copyright protection . . . ."[129]

Existing works need not be in the public domain in order to promote the creation of new works. In addition to the fact that ideas are not protected by copyright law, the law recognizes that the creation of certain desirable classes of works should be promoted by permitting the use of portions of protected *expression*: including works of criticism, comment (including parody), news reporting, teaching (allowing multiple copies for classroom use), scholarship, and research.[130]

Whether individuals or courts agree with the choices made by Congress, the extension of the term of protection for existing works clearly promotes the *progress* of the arts by fostering the creation of new works and discouraging the recycling of existing works. Therefore, the enactment of the CTEA—whether wise or shortsighted—was unequivocally within the powers of Congress.

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129. S. REP. NO. 102-94, at 6 (1991).
130. *See* 17 U.S.C. § 107 (2000).

B. Encouraging Copyright Owners to Preserve and Restore Copyrighted Works Furthers the Progress of Science and the Arts

Opponents of term extension assert the myth that the CTEA impedes the preservation of motion pictures,[131] when the truth is quite the opposite. The gaping hole in this myth arises from the express exemption provided in the Act for preservation of works, which was discussed in detail earlier in this paper.[132] The other hole lies in common business sense. Few people will invest years of time and tens of thousands of dollars necessary to create a quality restored or preserved version of a film absent adequate copyright protection. There will be little chance of recouping the investment of time and money if everyone is immediately free to duplicate and distribute the restored version.

Preservation and restoration includes efforts undertaken by all Hollywood studios to resurrect damaged films. It also includes efforts to bring older works up to current levels of technological standards and consumer expectations. For example, Paramount Pictures recently restored two films from the 1950s: Billy Wilder's *Sunset Boulevard* and William Wyler's *Roman Holiday*. That effort took a year and a half to complete and was motivated in large part by the desire to have the best possible versions of the films available for transfer to digital video disc ("DVD"). The restoration effort extended to restoring the films at 2000-line resolution (DVD resolution is 525-line resolution), making them suitable for theatrical release. Phil Murphy, who headed the restoration effort, noted that:

> Both films started life as nitrate films, and the original nitrate negatives disintegrated many years ago. So being able to walk into a movie theater and put a 35mm film on the projector and show it virtually the same way that they did in the early '50s is quite an accomplishment.[133]

If those works did not have many years left in their term of copyright protection, it is unlikely that such time and money would have been allocated to that effort.

We often hear about the very real problem of "orphan" films—films for which no one is willing or able to invest the time and

131. *See, e.g.*, Hal Roach Brief, *supra* note 88, at 13.
132. *See* discussion *infra* Part IV.E.
133. HOLLYWOOD REPORTER, July 2002, at 39.

money to preserve and restore. Cutting short the term of protection accorded by the CTEA will only *increase* rather than decrease the number of orphan films, since all evidence shows that, with only a handful of exceptions, it is solely copyright owners who spend the time and money to preserve and restore films.

Some anti-copyright advocates argue that the Copyright Clause does not give Congress the power to encourage the preservation, restoration, and technical updating of works. This idea stems from copyright opponents' efforts to deny the fact that encouraging "progress in sciences and the arts" is not limited by text or context to the encouragement of entirely *new* works. Investing substantial time and money in the restoration of films such as *Sunset Boulevard* and *Roman Holiday* so that they can be enjoyed by vast new audiences on DVD is indisputably a direct promotion of the sciences and useful arts.

C. Application of Term Extension to Existing Works Promotes the Progress in Science and the Arts by Permitting the United States to Adhere to International Copyright Treaties and to Protect Its Copyrights Worldwide

Promoting progress in the arts requires international cooperation. The United States cannot go it alone. The days when the United States could have a balkanized system of copyright laws that ignored international standards *and* a thriving copyright sector faded in the 1970s, and disappeared in the 1990s with the advent of truly international distribution of U.S. copyrights.

Without cooperative international efforts to protect and enforce U.S. copyrights, the interests of U.S. copyright owners will be prejudiced, producers of audiovisual works—including motion picture and television productions—will be discouraged from hiring American creators in favor of hiring European creators, productions may be moved overseas to take advantage of more favorable copyright laws, and there will be a significant negative impact on the balance of trade. [134]

International cooperation in the protection and enforcement of copyrights requires adherence to international norms for copyright protection—for existing works as well as for future works. Thus, the

134. *See* discussion *infra* Part X.

harmonization of U.S. copyright law with those norms promotes the progress of the arts. Without harmonization, the progress of U.S.-created arts will be severely prejudiced. [135]

D. Application of Term Extension to Existing Works Promotes the Progress in Science and the Arts by Encouraging Authors to Continue Creating New Works with the Knowledge that Existing Works Will Not be Treated Inferiorly

One of the constant criticisms of Congress's decision to extend the term of copyright protection for existing works is that Congress went far beyond what was necessary to provide incentives to authors to create new works. Critics assert that "it is highly unlikely that a musical artist or composer would be deterred from performing or composing by the recognition that his royalties will cease fifty years, rather than seventy years, after his death."[136]

If the measure for the appropriate term of protection were indeed the number of days necessary to induce the creation of new works, *and not one day more*, any increase in length would most likely be inappropriate. But there is nothing in the Constitution or anywhere else that imposes such a limitation on congressional authority.[137]

To the extent, if any, that the words "promote the Progress of Sciences and the useful Arts" in the Copyright Clause limit congressional power, the correct question is whether the increase in the term of protection for existing works provides any incentive for the creation of new works. The answer is clear: increasing the term of protection for existing works achieves that goal.

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135. Petitioners acknowledge that harmonization "might well be an actual or legitimate" basis for Congress's decision to apply extensions of copyright protection to existing works, but then they reject that basis with a stroke of the pen, declaring—without thought or discussion—that such a goal cannot meet the "progress" requirement of the Copyright Clause. *See* Petitioners Brief, *supra* note 22, at 22.

136. Robert L. Bard & Lewis Kurlantzick, *Copyright Duration at the Millennium,* 47 J. COPYR. SOC'Y 13, 25 (2000).

137. To recap: "The 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. . . ." U.S. CONST. art. I, § 8, cl. 8. The Clause does not state "to create an economic incentive to produce the next work."

Legislation that provides an incentive for authors to continue creating new works is legislation that "promote[s] the progress of sciences and the useful arts." As discussed above, harmonization of U.S. copyright law with international norms is an important component of effective enforcement of U.S. copyrights abroad.[138] Effective enforcement of copyrights is indisputably an incentive for the creation of new works. For example, no motion picture studio would continue to invest millions of dollars in the creation of new audiovisual works if it did not have the assurance that its copyrights could be enforced in key territories worldwide. This concern of studios is not limited to enforcing copyrights future works, but extends to the copyrights in their library works as well. The revenue generated by those existing works is the source of the tens of millions of dollars spent on the creation of each new audiovisual work.

VII. MYTH #5: "CONGRESS LACKS AUTHORITY TO ADD TWENTY YEARS TO THE TERM OF COPYRIGHT PROTECTION"

The myth that Congress lacks the authority to add twenty years to the term of copyright protection is based on four unsupportable arguments: (1) the Copyright Clause requires a finite term of protection and life plus seventy years is not a finite term; (2) the Copyright Clause requires an appropriately short duration of protection and the courts, not Congress, have the final word as to what is appropriate; (3) the words "to promote the Progress of Science and the useful Arts" in the Copyright Clause are an unequivocal limitation on Congress's ability to extend the duration of copyright protection; and (4) the Copyright Clause gives Congress the power to grant but not to extend the term of copyright protection.

The weakness of this myth is, perhaps, best demonstrated by the fact that the petitioners did not use it in their petition for certiorari to the Supreme Court in *Eldred*.[139]

138. *See* discussion *supra* Part V.D.

139. The two arguments made to the Court in the petition for certiorari are: (1) that the circuit court erred in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights; and (2) that any extension of the term of copyright protection is subject to challenge under the First Amendment. *See* Petition for Writ, *supra* note 24, at 7-10.

The first argument can be quickly discarded because there is no credible argument that a period of a person's life plus seventy additional years is not a finite period of time.

The second argument should be discarded just as quickly. As discussed above, Congress added twenty years to the internationally required minimum term for copyright protection – a minimum established ninety-four years ago, and that extended term is equal to the term of protection accorded throughout Europe.

The Copyright Clause does not limit congressional authority to extend copyright protection only "for a limited time coextensive with the life of the author" or "the life of the author plus one generation of the author's heirs." When the Council of the European Communities enacted the Copyright Term Directive harmonizing the duration of copyright protection in Europe at a life-plus-70-years term, it noted that the life-plus-50-years term of protection was intended to provide protection for the author and the first two generations of his descendants. The European Union noted that life expectancy has, over time, "grown longer, to the point where this term is no longer sufficient to cover two generations."[140] Similarly, Congress has the authority to extend the term of copyright to benefit future generations of authors' heirs.

The criticisms lodged with the courts about Congress's decision to adopt the European standard of life plus seventy years for copyright protection are nothing more than the policy arguments that were heard and considered by Congress. When the question is asked: "What author is going to decide not to write another book because copyright royalties will flow only for 50 years, not 70 years, after her death?,"[141] the issue raised is one of policy, not one of law. Since a copyright term of life of the author plus seventy years is, indisputably, both a finite and a limited term—regardless of whether one agrees with the choices made by Congress as to where that limit should be drawn—the claim that the CTEA extended copyright protection beyond a limited term is without merit.

The third argument holds that the phrase "[t]o promote the Progress of Science and useful Arts . . ." in the Copyright Clause is an absolute limitation on the powers of Congress when enacting

140. Term Directive, *supra* note 14, § 5.

141. Stephen R. Barnett & Dennis S. Karjala, *Copyright From Now Till Practically Forever*, WASH. POST, July 14, 1995, at A21.

legislation, and any copyright legislation which does not directly promote the progress of sciences and the useful arts is unconstitutional.[142]

The truth is that the phrase can only be read "in the nature of a preamble, indicating the purpose of the power," and not as a limitation on its exercise.[143] If the phrase created the strict limitation that opponents to term extension pretend it does, Congress would not have the authority to protect any works that are not "useful" arts. The courts have, however, correctly concluded that, "Congress need not 'require that each copyrighted work be shown to promote the useful arts . . .' That being so, we cannot accept . . . [the] argument that the introductory language of the Copyright Clause constitutes a limit on congressional power."[144]

The fourth argument, that Congress has the power to grant but not to extend copyright protection, is the unsubstantiated invention of the Circuit Court's dissenter in *Eldred*.[145] According to this myth, the Copyright Clause grants Congress only the power to secure exclusive rights in copyrights for a limited period: "the means employed by Congress here are not the securing of the exclusive rights for a limited period, but rather a different animal altogether: the extension of exclusivity previously secured. This is not within the means authorized by the Copyright Clause, and it is not constitutional."[146] In other words, the Copyright Clause empowers Congress to grant, but not to extend, copyright protection.

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142. U.S. CONST. art. I, § 8, cl. 8.

143. NIMMER ON COPYRIGHT, *supra* note 29, § 1.03[A]; *see also* Hutchinson Tel. Co. v. Fronteer Directory Co. of Minn., 770 F.2d 128, 130 (8th Cir. 1985):

> ([T]he phrase 'To promote the progress of science and useful arts . . .' [contained in the Copyright Clause of the United States Constitution must be read as largely in the nature of a preamble, indicating the purpose of the power [granted Congress to pass copyright legislation] but not in limitation of its exercise . . . . [A]lthough the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, those purposes do not limit Congress's power to legislate in the field of copyright.).

144. M.B. Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 948 (1982) (alteration in original) (internal citations omitted); *see also* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980) (discussing the constitutionality of the 1909 Act).

145. *See* 239 F.3d 372, 382 (D.C. Cir. 2001).

146. *Id.*

The District of Columbia Circuit's majority opinion treated this argument as total nonsense, noting that the dissent failed to identify anything in text or in history which would suggest that the duration of the "limited Time" of protection cannot be changed.[147] In addition, the fallacy of this myth can be traced all the way back to 1790. The argument that the Copyright Clause must be construed in such a limiting fashion is inconsistent with congressional interpretations beginning in 1790, when the Framers of the Constitution were still members of Congress. The majority decision of the District of Columbia Circuit in *Eldred* noted that:

> The position of our dissenting colleague is made all the more difficult because the First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states.[148] The construction of the Constitution "by [those] contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive."[149]

The following historical facts provide other examples of the inconsistency of this argument:

- The Copyright Clause vested Congress with the authority to protect "writings" (i.e., only books, maps, charts, and periodicals);[150] yet copyright protection extends to paintings, sculpture, sheet music, audiovisual works, sound recordings, and computer programs;

147. *See id.* at 379.

148. *See* Act of May 31, 1790, §§ 1, 3, 1 Stat. 124-25.

149. Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884)) (brackets in original).

150. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124 (current version at 17 U.S.C. § 102 (2000)). The 1790 Act accorded protection only to maps, charts, and books. If the preamble is to be read as a strict limitation on the powers of Congress, the 1790 Act and only the 1790 Act was constitutional, and all subsequent copyright acts which extended the scope of protection beyond such "writings" are unconstitutional and must be struck down by the courts.

- The Copyright Clause grants Congress the right to accord *exclusive* rights in copyright, yet the Copyright Acts address both exclusive and non-exclusive rights;
- The Copyright Clause grants Congress the power to accord copyright protection for "limited Times," not "multiple limited Times," yet works created prior to 1978 were accorded two separate terms of protection (an initial term and a renewal term);[151] and
- The Copyright Clause uses the words "by securing for limited Times" and not "by securing *or changing*," yet this does not mean that Congress has the authority to *set* the limited time but lacks the authority to ever *change* the duration of that limited time (an argument which, if true, would have limited the term of copyright to the duration established in 1790).

Therefore, the myth that the Copyright Clause empowers Congress to grant, but not to extend, copyright protection is contradicted by the language of the Copyright Clause and by 212 years of copyright law.

VIII. MYTH #6: "EXTENSIONS OF THE TERM OF COPYRIGHT PROTECTION ARE AN AFFRONT TO AND AN IMPINGEMENT ON FIRST AMENDMENT RIGHTS"

The fallacy of the myth that extensions of the term of copyright are an affront to, and impingement on, First Amendment rights can be seen through an examination, first, of the interplay between First Amendment guarantees and copyright, and second, of the interplay between extensions of the term of copyright protection and the First Amendment.

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151. Petitioners argue that Congress cannot extend the term of protection for existing works because, based on the Supreme Court decision in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340 (1991), copyright protection can only be granted to works which are original. According to petitioners' argument, existing works are not original and thus cannot be granted "new" protection. *See* Petitioners Brief, *supra* note 22, at 32-33. Petitioners fail to explain why, if the Court were to adopt this argument, the renewal terms of copyright accorded by the Copyright Acts of 1890, 1909, and 1976 are not invalid on the same grounds: the grant of a second term of protection for copyrighted works is equally a grant of new protection for a work which already exists and thus is not original.

A. Copyright and the First Amendment

There are two long-recognized reasons why copyright laws do not impinge upon First Amendment rights. The first is the idea/expression dichotomy that arises from the fact that copyright law protects only expression and not ideas or facts. This inherent limitation of copyright law "'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"[152]

The second guarantee of First Amendment rights lies in the fair use doctrine, which allows the expression itself to be copied when the purpose of the copying is a use such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Professor Jane Ginsburg suggested a third analysis: First Amendment guarantees of free speech grant the right to speak original speech and to repeat the ideas of others, but it does not create a constitutional right to repeat a prior speaker's *expression* without his consent.[153]

Indeed, the Supreme Court recognized that copyright laws are the engines of free speech.[154] Anti-copyright advocates, unable to reargue the well-settled point that copyright does not impinge on the First Amendment, are left with a much narrower argument. They claim that, while copyright protection does not violate First Amendment rights, the addition of twenty years to that protected right *does* violate the First Amendment.[155]

152. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (brackets in original); s*ee also* N.Y. Times Co. v. United States, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring) (copyright laws are not restrictions on freedom of speech as copyright protects only forms of expression and not the ideas expressed).

153. Professor Ginsburg inquires about the nature of the "speech" at issue here: "What Eric Eldred proposes to do is recirculate *other people's* speech. The First Amendment is certainly about the freedom to make your *own* speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt." Symposium, *supra* note 6, at 701.

154. *See Harper & Row*, 471 U.S. at 558.

155. *See* Petitioners Brief, *supra* note 22, at 33-47.

B. Term Extension and the First Amendment

Scholars offer two theories in support of the claim that extending the term of copyright protection violates the rights of the public. These are the improper tax theory and the public trust doctrine.

According to Lawrence Lessig, the CTEA infringes individuals' freedom of speech. He claims that "[t]he extension takes works that would have entered the public domain and privatizes them improperly; the result is like a tax on freedom of expression. Eldred can't publicly utter these words now without paying a penalty imposed by the government."[156] Stripped of irrelevant asides, the argument is that copyright laws are a tax on freedom of expression and, as a result, are unconstitutional intrusions on First Amendment rights.

According to the "public trust doctrine," when a work is created the public gains an immediate vested interest in that work going into the public domain at the end of the then-current term of copyright protection. If Congress subsequently adds additional years to that term of protection, Congress has improperly deprived the public of its vested interest.[157] In other words, any time Congress passes legislation that attaches new rights or extends the duration of protection to existing copyrights, it violates the First Amendment by imposing a tax on freedom of expression and it deprives the public of vested property rights.

The unconstitutional-tax argument fails because it applies to all copyright laws, regardless of the term of protection. Advocates of these theories cannot explain why a life-plus-70-years term represents a tax on the freedom of expression but a life-plus-50-years term does not.

The public trust doctrine similarly fails to provide a logically consistent basis for attacking the legality of a life-plus-70-years term of protection. Professor Jane Ginsburg noted that:

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156. Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml (quoting Lessig).

157. For a discussion of the "public trust doctrine," see Richard Epstein, *The Public Trust Doctrine*, 7 CATO. J. 411 (1987) (arguing that the public trust doctrine should prohibit the transfer of public property to private parties where there is no "reason to believe that the private owner of the asset can make better use of it than the public owner"); *see also* Richard Epstein, *Congress's Copyright Gateway*, WALL ST. J., Dec. 21, 1998, at A19 (arguing that the CTEA harms ordinary consumers).

> If the public has a vested interest in a work falling into the public domain on the date expected at the time of the work's creation, then it follows that every term extension after 1790 is constitutionally infirm. The *Eldred* papers do not offer a limiting principle to help us understand how the public's interest could have been any less 'vested' in 1831, 1909, every year in the 1960s, and 1994 than it is today. Why is the [CTEA] term extension more noxious than every other term extension?
>
> By the same token, one could say that the scope of the public domain was actually defined in 1790, when Congress protected maps, charts, and books against reproduction. Congress did not include pictures, music, a derivative works right, or a public performing right. Sound recordings were brought within the scope of the Copyright Act only in 1972, and a digital performance right in sound recordings was enacted only a couple of years ago. Under the theory that the scope of the public domain was defined in 1790, every one of those congressional acts constituted an incursion into the public domain . . . . That would mean, for example, that any sound recording created before enactment of the Digital Performance Right in Sound Recordings Act of 1995 should not enjoy such a performance right today.[158]

The very same limitations of copyright law which ensure that copyright does not impinge on First Amendment rights—the idea/expression dichotomy and the fair use defense—apply to extensions of the term of protection in precisely the same manner as they do to the original term of protection.[159]

Unable to assert any persuasive argument that a twenty-year increase in the term of copyright infringes in any way on First Amendment rights, the anti-copyright advocates attempt a diversionary tactic. The petition for a writ of certiorari seizes on the statement by the circuit court in *Eldred* that "copyrights are categorically

158. Symposium, *supra* note 6, at 703-04 (citations omitted).

159. Indeed, the twenty years of the extended term of protection are limited by the provisions of section 108 of the Copyright Act—limitations which do not apply to the original term of protection. *See* discussion of section 108 *supra* Part IV.E.

immune from challenges under the First Amendment."[160] The anti-copyright advocates, in their efforts to find a basis for overturning the circuit court's ruling, remove the statement from its context and distort its meaning.[161]

What the circuit court actually held is that there is no First Amendment right to make commercial use of the copyrighted works of others, and such uses are therefore immune from First Amendment challenge.[162] Contrary to the portrayal of this ruling by anti-copyright advocates, the court did not rule that *all* copyright laws are categorically immune from challenges under the First Amendment;[163] it ruled only that there is no basis for a claim under the First Amendment that there is a right to make unauthorized commercial

160. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Dir. 2001) (citing United Video, Inc. v. FCC, 890 F.2d 1173, 1176-78 (D.C. Cir. 1989)).

161. *See* Petition for Writ, *supra* note 24, at 17 ("[u]nder the D.C. Circuit's rule, there can be no First Amendment challenge to a copyright statute, as any challenge to a copyright statute is simply a demand for access to particular copyrighted works"); s*ee also* Petitioners Brief, *supra* note 22, at 33 (extensions of copyright terms are not immune from First Amendment challenge).

162. *See Eldred*, 239 F.3d at 375.

163. *See* Petition for Writ, *supra* note 24, at 18. Petitioners, in their brief to the Supreme Court, make the inflammatory and irrelevant argument that, based on the circuit court's ruling:

> Congress could evade First Amendment review should it amend the copyright statute to eliminate the idea/expression distinction or to constrict the scope of fair use. Nor would *Harper & Row* immunize from First Amendment review a copyright act that was content-based simply because it reached expression only. (If France, for example, adopted a statute banning copyright for 'hate speech,' and Congress sought to 'harmonize' with that rule, *Harper & Row* would not preclude First Amendment review.

Petitioners Brief *supra* note 22, at 35. The circuit court merely ruled that petitioners had failed to present any argument as to why an extension of the term of an existing right, without alteration of any kind of that right, should not be immune from First Amendment attack based on decades of prior consistent case law. The two examples used in petitioners' brief fail again to answer the question asked by the circuit court. A law eliminating the idea/expression distinction or constricting the scope of fair use would alter the very basis for the court's finding that copyright law does not conflict with First Amendment rights and would of course be open to challenge; a law banning hate speech would not be a copyright law, but in any event such a law would not be limited to an extension unchanged of existing rights, rather it would be a new limitation on those rights and thus subject to First Amendment scrutiny.

use of copyrighted works. That narrow ruling is entirely consistent with Supreme Court precedent.[164]

The plaintiffs did not contest that statement. Instead, they argued that it should not apply to *their* challenge since they are contesting "'the constitutionality of the statute granting a [copy]right in the first instance.'"[165] The court rightly rejected this statement as wholly illusory.

The CTEA does not extend copyright protection to a new class of works, nor does it expand the scope of rights protected by copyright. The Act simply takes the existing scope of rights for the existing class of works and extends it, unmodified, for an additional twenty years. The court quite rightly concluded that a challenge to the CTEA on the grounds that it creates some new form of copyright interest is immune from a First Amendment claim since no such rights are created, and the constitutionality of the existing rights is well established.

While not all copyright laws are immune from First Amendment challenge—and the circuit court did not hold that they would be—the anti-copyright advocates failed to offer any credible theory under which a twenty-year extension of already-existing rights should trigger unique and unprecedented scrutiny under the First Amendment.

IX. MYTH #7: "THE MYTH OF THE HOLY INTERNET: THE ARRIVAL OF THE INTERNET CHANGES EVERYTHING"

The Myth of the Holy Internet holds that, in light of the arrival of Internet distribution of copyrighted works, the courts must overturn the judgment of Congress as to the appropriate duration of copyright protection.[166] One of the amicus briefs filed in support of the petition for a writ of certiorari in *Eldred* argues:

> The *Eldred* decision comes at a critical time for our culture and its artifacts. For the second time in history the collection of *all recorded information* is within our grasp. [The first being the Greek library of legend at Alexandria.]

164. *See* Harper & Row Publishers Inc. v. National Enters., 471 U.S. 539 (1985); N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

165. *Eldred*, 239 F.3d at 376.

166. *See* Petition for Writ, *supra* note 24, at 9 ("just at the time that the Internet is enabling a much broader range of individuals to draw upon and develop this creative work 'without restraint'. . . extensions of copyright law are closing off this medium to a broad swath of our common culture.").

> Digital technology allows us the opportunity to build a 'universal' library that dwarfs the collections of the Alexandria Library and even our modern Library of Congress.[167]

These arguments are, however, nothing more than policy arguments. They provide no basis for a court to overturn the congressional judgment that the benefits of twenty years of additional protection for copyrighted works, with its promotion of the creation of original works and increase in trade balances, outweigh the disadvantages of waiting twenty years for the hypothetical benefit of royalty-free access to those works.[168]

Professor Arthur Miller noted the fallacy of the myths that copyright law stifles the development of the Internet and that works must be moved into the public domain at a more expeditious rate due to the Internet:

> I wish I were alive at Antietam during the Civil War to watch Matthew Brady taking photographs and listen to the nineteenth-century Eldreds say, "My God, my God, the sky is falling. Copyright will never be the same. Now every human being with a Kodak Brownie can take a photograph and it will be copyrighted and subjected to governmental regulation, and it will eviscerate our freedom." Now there was nobody at Antietam as smart as the people making the arguments in the *Eldred* case today. If there were, that argument would have been made about the photograph, it would have been made about radio, it would have been made about the motion picture. It would have been made about the phonograph record. It would have been made about television. It would have been made about the computer. And today, of course, it is made about the Internet.[169]

If the arrival of the Internet has any impact on an analysis of the appropriate term of copyright protection, it is to support the decision of Congress to adopt the CTEA. The impact of the Internet on

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167. Internet Archive Brief, *supra* note 21, at 3.

168. These arguments also ignore the carve-out from the extended term of protection that Congress granted to libraries and archives. *See* discussion *supra* Part IV.E. ("Congress directly addressed the concerns of libraries and archives in the CTEA, providing for them with a specific exemption").

169. Symposium, *supra* note 6, at 691-92.

copyrights supports the wisdom behind the United States joining the Europe in protecting copyrights for a term of life of the author plus seventy years.

The Internet has had three significant impacts on copyrights. First, it has made piracy user-friendly and has globalized the distribution of content to an extent not dreamed of by even the most ambitious multinational corporation. The advent of user-friendly piracy has, almost overnight, resulted in a world in which a song or other copyrighted work can be stolen with the click of a mouse and instantly duplicated to third parties. Indeed, piracy via the Internet has become so easy and so widespread that many people think of it as "sharing" instead of "stealing." The second impact has been the globalization of distribution, which renders international cooperation a mandatory component of copyright protection and enforcement. The third impact is the increased opportunity for individuals to become authors of distributed works.

The first impact provides a further justification for lengthening the term of copyright protection. With online infringement rampant and the losses to copyright owners from online infringement outstripping all revenues from Internet exploitation, the extension of the term of copyright protection provides a small measure of compensation to copyright owners for the losses that result from the Internet.[170]

The second impact further demonstrates the need for international harmonization of copyright laws. Copyrights created and owned by U.S. citizens can, in the world of Internet infringement, be effectively protected only through international cooperation—including effective enforcement of laws in countries that are sources of pirated materials. As noted above, if the United States sends the message that it does not view copyrights as worthy of the level of protection accorded by international norms, it will be far more difficult to persuade other countries that provide unacceptably low levels of protection that *they* must comply with international norms (norms which provide enormous benefits to the United States).

170. Online infringements are not limited to the Napster model of file swapping. During the first six months of 2001, the Recording Industry Association of America (RIAA) identified 8,716 online auctions offering illicit sound recordings for sale. This number represented an increase of 418% from the number of illicit auctions during the same period of the year 2000.

The third impact is the increased opportunity created by the Internet for individual authors to distribute their works. This facilitation of distribution for an ever-growing number of works supports the congressional policy of increasing, rather than decreasing, the protection accorded to copyrights in the age of the Internet.

In response to the widespread distribution of works via the Internet, Congress chose a policy not of abandoning or weakening the engine of creation provided by copyrights, but a policy of strengthening that engine to ensure that more works of higher quality and originality will be made available for Internet distribution. Whether one agrees with the pro-copyright arguments or with the anti-copyright arguments, it is indisputable that Congress had a rational basis for choosing the copyright polices represented by the CTEA. Those policies will result in an increase in the quality of works made available for distribution on the Internet.

X. MYTH #8: "THE TERM OF COPYRIGHT PROTECTION IN THE UNITED STATES IS A MATTER OF U.S. LAW AND HAS NO INTERNATIONAL RAMIFICATIONS"

The question of whether Congress had the necessary constitutional authority to enact the CTEA is a question of international law as well as U.S. law, contrary to portrayals of this debate as an issue only of U.S. law. International law has a bearing on the debate because Congress correctly considered the international advantages of term extension when weighing the merits of extending the term of protection versus the merits of increasing the speed with which works enter the public domain.

As discussed above, the goal of harmonization of U.S. law with international norms for copyright law was a major factor in the decision by Congress to extend the term of copyright protection.[171] If the United States steps back from compliance with international norms for the protection of copyrights, it would no longer be in a position to chastise or threaten economical sanctions on other countries that fail to comply with international norms—particularly in the realm of piracy.

Equally important as the *policy* aspect of the United States continuing to be in compliance with international norms are the

171. *See* discussion *supra* Part V.D.

economic aspects of this issue. Intellectual property is one of the largest export sectors for the United States, with the European Union forming one of our most important markets. At the time Congress was considering the CTEA, works such as motion pictures, television programs, and home video provided a surplus balance of trade of more than $4 billion.[172] The continuation of the surplus balance of trade, which would be threatened by a judicial repeal of the CTEA, was certainly a valid factor for Congress to consider when weighing where it should draw the line between copyright protection and the public domain.[173]

The first threat to the continued growth of this surplus, were the Court to strike down the CTEA, would result from what is known as the "law of the shorter term." Pursuant to the European Union's Copyright Term Directive, all Member States of the European Union must refuse to accord protection to works by non-E.U. authors following the expiration of protection in the work's country of origin.[174]

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172. *See CTEA Hearings*, *supra* note 13, at 42 (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America).

173. Promotion of trade in U.S. intellectual property is a clear motivating factor for Congress. Congressman Howard Coble, Chair of the House Subcommittee on Courts and Intellectual Property, has noted that:

> Congress has enacted [copyright] laws since 1790, resulting in the development of American intellectual property that is the envy of the world. It is one of the top US exports, generates billions of dollars in revenue, creates jobs, and enriches the lives of the American people and the world.

State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary, 106th Cong. 1 (2000) (statement of Rep. Howard Coble, Chairman, Subcomm. On Courts and Intellectual Property), *available at* http://www.house.gov/judiciary/cobl0727.htm.

174. This result is mandated by the E.U. Copyright Directive. Section 23 of the Directive provides that:

> [W]here a rightholder who is not a Community national qualifies for protection under an international agreement [such as the Berne Convention] the term of protection of related rights should be the same as that laid down in this Directive, except that is should not exceed that fixed in the country of which the rightholder is a national.

Term Directive, *supra* note 14, at sec. 23. Exceptions to this obligation are accorded to Member States that have pre-existing international obligations (i.e., bilateral agreements) which mandate longer terms of protection. *See id.* sec. 24. However, no new agreements of this type may be concluded. *See id.* sec. 26.

In other words, even though the E.U. has a term of protection of life plus seventy years, if the CTEA is repealed the European Union will protect U.S. works for only a term of life plus fifty years, twenty years less than the term of protection accorded to European works. As a result, works by U.S. writers, painters, sculptors, composers, recording artists, and other authors would no longer receive royalties from the exploitation of their works in Europe during that twenty-year period.

The second international economic threat will arise if the courts strike down all extensions of copyright protection for existing works. Such a result would eliminate protections for certain sound recordings and the digital performance right. Absent those rights, it will be difficult, if not impossible, for U.S. copyright owners and talent guilds to collect their share of equitable remuneration tariffs (such as blank tape levies), since our ability to collect is dependant on having reciprocal legal arrangements.

The third international threat lies in the risk that a repeal of the term extension will hamper the anti-piracy efforts of the U.S. government around the world. If the United States will not bring its laws into alignment with international norms, it will be more difficult to persuade countries which are the source of pirated material that *they* should bring their laws up to the level of international norms.

Finally, the fourth economic threat lies in the inevitable impact of works by European authors having a longer term of protection than works by U.S. authors. Jobs which otherwise would have gone to Americans will go to Europeans. If a U.S. motion picture studio can gain an additional twenty years of copyright protection for its works in virtually all territories outside the United States merely by hiring a British director instead of an American director, or a French composer instead of a U.S. composer, the studios will do exactly that.[175]

Although this Article focuses on the myths cited in efforts to persuade the courts to overturn the CTEA, it should be noted that Professor Lessig's proposal that the appropriate term of copyright protection is five years, with the possibility of five-year extensions if

175. The E.U. Term Directive requires that duration of protection for cinematogaphic and audiovisual works be measured by the nationality of the director, screenwriter(s), and composer of the music, rather than by the country in which the work was created. *See id.* art. 2(2).

certain formalities are complied with,[176] would result in the expulsion of the United States from membership in the Berne Union (which requires protection of not less than a life-plus-50-years term or the equivalent with formalities permitted).[177] Any benefits that might spring from such a radical truncation of copyright protection, if indeed there would be any, pale in comparison to the injury that would be done to U.S. copyrights beyond the borders of the fifty states.[178]

XI. MYTH #9: "JUDICIAL NULLIFICATION OF CONGRESSIONAL EXTENSIONS OF THE TERM OF COPYRIGHT PROTECTION WOULD NOT BE A BIG DEAL"

The implication behind the arguments in favor of a judicial annulment of the CTEA is that it would be no big deal; it would merely turn back the clock to the way things were prior to the effective date of the Act. The myth ignores the fact that, were the courts to adopt either one of the main arguments of the anti-copyright advocates, the implications for all of copyright law would be enormous. The arguments used to attack Congress's power to enact the CTEA are not limited in application to that Act, they are also inconsistent with over 200 years of copyright legislation. Furthermore, the anti-copyright advocates offer no limiting principles or explanations that would contain their theories to attacks merely on the twenty-year extension created by the CTEA.

The attack on the extension of the term of copyright protection for already-existing works is not limited to the extensions contained in the CTEA; it applies to all such extensions ever enacted by

176. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 251-52 (2001).

177. Berne Convention, Article 7 sets the term of protection at life of the author plus fifty years; Article 5 indicates that:

> 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 94 at 4-7 (1986).

178. One immediate impact would be that other countries would no longer be obligated to accord any copyright protection for works of U.S. origin unless obligated to do so by a bilateral or other agreement.

Congress.[179] The petitioners offer no satisfactory explanation of how the Supreme Court can accept the argument that the CTEA is unconstitutional because it extends the duration of protection of existing works, without also having to strike down all prior laws that extended the duration of protection for existing works. Those laws stretch back to the first Copyright Act of 1790—which extended protection to already-existing works, not merely to works created after 1790.

Gone, under these theories of attack, would be the extension of protection for existing works in the 1976 Act and the interim extensions that led up to the passage of that Act.[180] Gone would be the statutory protection for existing unpublished works. Gone along with them would be U.S. membership in the Berne Union—since the United States would no longer comply with Berne Convention's minimum requirements for the protection of copyrights.

Evaporating with these rights would be the value of copyrights upon which parties relied when investing in the production, acquisition, and preservation of works. Also evaporating would be employment opportunities for U.S. creators, as production entities

179. According to Lawrence Lessig, "[e]xtensions [of the term of copyright protection] can't be retroactive, because the Constitution gives Congress the right to grant exclusive rights only if those rights create incentives to produce more speech. Extending these benefits retroactively doesn't serve any purposes the copyright clause was designed for." Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml.

180. Petitioners are aware that their argument that any extension of the term of copyright protection is unconstitutional would require the Court to strike down the 1831, 1909, and 1976 copyright acts. *See* Petitioners Brief *supra* note 22, at 30. Having identified the problem, in an effort to provide a delimitating line for the Court to follow, petitioners suggest one baseball argument and one internally inconsistent argument. The baseball argument is: "Whether or not two extensions in 150 years are excusable, the eleventh in forty years must be held to have crossed the line." *Id.* Sort of a three-strike rule: Congress can violate the Constitution by twice applying extended copyright terms of existing works but after that they *must be stopped*. The inconsistent argument is that the retroactive extensions in the 1831 and 1909 Acts required authors to take affirmative steps by filing renewal applications and paying a fee. *See id.* at n.13. Leaving aside the fact that this argument does not provide a safe harbor for the extensions granted by the 1976 Act, petitioners' opposition to extension of protection for existing works lies in the myth-based argument that such extension provide no "progress" since the works already exist; how then does a registration and fee-payment obligation suddenly create "progress"? *See id.*

switch to employing European authors (including directors and composers for audiovisual works) in order to qualify their works for the longer European term of protection. Balance of trade advantages would fade as foreign works enjoyed protection for twenty years longer than U.S. works. The United States would retreat to the position of being a copyright rogue nation, denying its creators the protections afforded by virtually all other developed countries.

It is incumbent upon those who advocate these arguments to explain why their theories are not inconsistent with over 200 years of copyright law. To date they have failed to do so. Similarly, those who argue that the term of protection of life plus seventy years is not a "limited term," as required by the Copyright Clause of the Constitution, offer no explanation why life plus fifty years is a *limited term* but life plus seventy years is an *unlimited term.*

Two arguments have been offered in support of the claim that life plus seventy years is not a limited term: (i) the eleven extensions by Congress over the past forty years of the term of copyright protection prove that the term of protection is not limited; and (ii) relative to the 1790 term of copyright, which was twenty-eight years, the current term is not sufficiently short (i.e., limited).

The first argument is discredited by the following facts: Congress changed the approach to copyright duration only twice, not eleven times, during the past forty years; there is no express or implied constitutional limitation on how often Congress can adjust the term of protection; and regardless of the number of changes in the duration of protection the current duration remains a finite term.

Petitioners, in their petition for a writ of certiorari, argue that the term of copyright protection is not a limited term as a result of congressional increases over the years.[181] Yet they fail to offer any explanation why the CTEA crossed the constitutionality line but the 1976 Copyright Act and the 1996 Uruguay Round Act did not cross that line. If the current term is not limited because it is significantly longer than the 1790 term of twenty-eight years, no guidance is offered why the 1909 Act or the 1976 Act were constitutional but the CTEA is unconstitutional.

A decision by the Supreme Court to strike down the CTEA, but not the 1909 or 1976 Acts, under petitioners' First Amendment

181. *See* Petition for Writ, *supra* note 24, at 8-9.

theory would be arbitrary and capricious. But if petitioners are suggesting that the Court should go further and strike down aspects of the term of protection set by the 1976 Act, the United States will no longer be in compliance with its international obligations, it will be excluded from membership and participation in the Berne Union, and the United States will be reduced to the status of a rogue copyright nation. Advocates of the First Amendment challenge offer no explanation as to how this result can be avoided.

Finally, the anti-copyright advocates fail to explain how the Supreme Court could strike down the CTEA on First Amendment grounds without having to strike down every copyright act since 1790 which extended the term of copyright protection for existing works or which added new protections for existing works. And since those statutes were the results of balanced public policy decisions on the part of Congress—such as the 1976 Act which added nineteen years of protection to existing works while simultaneously decreasing the term of protection for all unpublished works—the advocates of this theory failed to explain why it would be equitable for the courts to exercise a line-item veto, cherry picking the parts of the copyright acts which they would have written differently.

The implications of the courts striking down every copyright act since 1790 are self evident. Even if the Supreme Court limited its decision to a line-item veto to the extension of protections for existing works, the effect would be as discussed above: The United States would be renouncing its international obligations, retreating into a nineteenth-century view of copyright protection, and turning its back on the global nature of copyright exploitation. Instead of promoting the myth that the challenge to the CTEA is no big deal, it would be more productive if the advocates of that myth offered satisfactory explanations of how their theories can be limited to that Act and why those theories are not inconsistent with copyright law dating back to 1790.

XII. MYTH #10: "THE CTEA WAS THE WORST KIND OF SPECIAL-INTEREST LEGISLATION, ENGINEERED BY DISNEY TO SATISFY ITS INSATIABLE CORPORATE GREED"

The "Mouse" did it! The evil corporate Mouse engineered this profit-mongering special interest legislation and the Mouse must be stopped! This myth appears to be an amalgamation of five

sub-myths: public domain good—corporations bad—Disney evil; Disney was about to lose all rights to Mickey Mouse and would stop at nothing to get the term of protection extended; the CTEA was snuck through Congress without proper debate; Disney improperly lobbied Congress to obtain the term extension; and the CTEA was special-interest legislation that only Disney cared about.

A. Sub-myth A: "Public Domain Good, Corporations Evil, Disney Totally Evil"

This first sub-myth has a nostalgic twinge of Marxism: the public domain is good, corporations are bad, and Disney is evil.[182] Differing views about the appropriate duration of copyright protection are longstanding and fully understandable; disagreement about the constitutionality of the CTEA, while lacking in merit, can be well intended; but the vitriolic nature of the public attacks on Disney for its prominent support of the CTEA are somewhat of a mystery.[183]

If we reject the possible explanation that such attacks are linked to unhappy childhoods, the remaining explanation appears to be an anti-capitalist view that Disney should be taken to task for advocating a position which benefits it shareholders. Determination of the appropriate term of copyright protection is a balancing act, and Disney's advocacy of a lengthened term of protection is no more inappropriate than is advocacy by others in favor of retaining the life-plus-50-years term.

182. Anyone who believes that Marxist thinking is a thing of the past has not studied the positions of the pro-public domain/anti-copyright advocates who advocate public ownership over private property. They favor taking from the capitalists [the copyright owners] the means of production [copyrights] and transferring it to the workers [users of works]. They also portray the debate over copyright term as a class struggle between copyright owners (capitalists) and the public users (workers) and object to the fact that the difference between what users would (hypothetically) pay for a public domain work versus for a copyrighted work is appropriated by the capitalist copyright owner. Furthermore, they depict the extension of the term of copyright protection as increasing the immiseration of the proletariat (the users), who demand revolution (courts substituting their view of the appropriate duration of protection for the views of Congress), and who long for a classless society in which the state (copyright) will wither away. Ah, nostalgia.

183. For example, a website dedicated to opposing copyright term extension encourages support from "anyone who does not like Disney on principle." *The No Copyright Party*, *at* http://www.nocopyright.org/babblerspage.htm (last visited Aug. 1, 2002).

More importantly, regardless of one's view of corporations and media conglomerates, those views are irrelevant to a debate over the appropriate term of protection for copyright—protection which applies equally to writers, playwrights, poets, composers, musicians, painters, sculptors, and other individual creators of copyrights.

B. Sub-myth B: "Disney was About to Lose All Rights to Mickey Mouse and Would Stop at Nothing to Get an Extension of the Term of Copyright Protection"

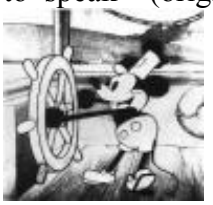
According to this myth, Disney was on the verge of losing all rights to Mickey Mouse and the CTEA was special-interest legislation aimed solely at preserving Disney's financial bottom line. Disney was not, in fact, ever at risk of losing all of its rights to Mickey Mouse, which is a trademarked character.[184] It is only the early cartoons featuring Mickey that were on the cusp of falling into the public domain. How, exactly, would the world be a better place if *Steamboat Willie* enters the public domain, not in 2003, but instead twenty years later?[185] Is there a huge market anxiously awaiting the

184. Disney holds federal trademark registrations that, unlike copyright, can confer perpetual protection for classes of goods, including motion pictures, cartoon strips, songs, books and newspapers, paper goods and other printed matter, clocks and watches, entertainment services, hair shampoo, lip gloss, bubble bath, skin soap, sunglasses, decorative refrigerator magnets, jewelry, photograph albums, address books, appointment books, paper party bags, ball point pens, binders, paper gift wrap bows, paper cake decorations, calendars, gift cards, greeting cards, pen and pencil cases, decorative paper centerpieces, paper table cloths, paper party decorations, diaries, gift wrapping paper, pencils, stationery, athletic bags, baby backpacks, backpacks, book bags, duffel bags, gym bags, tote bags, coin purses, fanny packs, knapsacks, waist packs, umbrellas, wallets, decorative non-metal boxes, beverage glassware, bowls, lunch boxes, hair brushes, hair combs, cake molds, wind chimes, decorative plates, cookie jars, mugs, paper cups, paper plates, soap dishes, vacuum bottles, bed sheets, pillow cases, comforters, curtains, dust ruffles, towels, bathing suits, robes, beachwear, underwear, sweaters, dresses, infant wear, jackets, pajamas, pants, sweat pants, sweatshirts, shirts, shorts, sleepers, t-shirts, tank tops and vests, Christmas tree ornaments, rubber balls, plush toys, action skill games, bath toys, board games, toy building blocks, dolls, children's play cosmetics, electric action toys, jigsaw puzzles, kites, music box toys, inflatable pool toys, and children's multiple activity toys.

185. *Steamboat Willie* was the first cartoon released with sound. In its initial theatrical release it played ahead of the feature film *Gang War,* a crime drama starring Mabel Albertson. While the feature film was quickly forgotten, the impact of an animated cartoon with synchronized sound—during the cartoon

royalty-free distribution of a 1928 black-and-white cartoon over the Internet?[186]

Even had *Steamboat Willie* entered the public domain, it is important to note that the Mickey we know today has notable differences from the Mickey of 1928. Over the intervening years, Mickey gained distinctive colors, put on weight, gained eyeballs and eyelashes, acquired white gloves and an opposable thumb, and learned to speak (originally he could only whistle and play music), among other changes. At left is Mickey as he appeared in *Steamboat Willie* in 1928; at right is the updated Mickey as he appears today.[187] Had the original Mickey entered the public domain in 2003, the thoroughly modern Mickey would still have continued to enjoy copyright protection for many years to come, and the trademark protections would have continued in perpetuity.



According to one published report, Disney's consumer products division and theme parks brought in $8 billion in 1998 through the use of Mickey Mouse.[188] Since Disney would not have lost the right to use Mickey Mouse, would not have lost any rights in the modern Mickey Mouse, and would not have lost any of its trademark rights to control the commercial use Mickey Mouse, it is difficult to see how the entry of *Steamboat Willie* into the public domain would have had any impact on those financial figures.

Mickey made music by squeezing barnyard animals until they mooed, brayed, or squawked—was revolutionary.

186. One of the organizations raising money to support the Supreme Court challenge to copyright extension is using the rallying cry: FREE MICKEY. The image of a poor mouse, imprisoned by an evil corporation, pining to be set free, is amusing, but is that really a basis for a constitutional challenge to congressional legislation? *See Openlaw: Eldred v. Ashcroft*, *at* http://eon.law.harvard.edu/openlaw/eldredvashcroft (last visited Aug. 1, 2002).

187. The modern Mickey has red pants with white buttons, bright yellow shoes, white gloves, and a flesh colored face. The Mickey who appeared in *Steamboat Willie* was, of course, black and white.

188. *See* Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml (quoting a report from the New York investment bank Salomon Smith Barney).

C. Sub-myth C: "The CTEA was Snuck Through Congress Without Debate and Without Legislative History"

The myth has been repeated, mantra-like, that the CTEA was a work of special-interest lobbying which sailed through Congress with no opportunity for public debate. Eric Eldred,[189] for one, told the *Boston Globe* that the CTEA was slipped through when no one would notice, without debate.[190]

That assertion is simply not true. At the congressional hearings on the issue of copyright term extension held on September 20, 1995, Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, and Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, testified on behalf of the Administration.[191]

The Committee also heard testimony from Jack Valenti, president and chief executive officer of the Motion Picture Association of America; Alan Menken, composer, lyricist, and representative of AmSong; Patrick Alger, president of Nashville Songwriters Association; and Professor Peter A. Jaszi, American University, Washington College of Law. In addition, written statements were received from Senator Christopher J. Dodd, the American Society of Composers, Authors and Publishers, the National Music Publishing Association Inc., the Songwriters Guild of America, the Graphic Artists Guild, the National Writers Union, the Coalition of Creators and Copyright Owners, Author Services Inc., the Midwest Travel Writers Association, Donaldson Publishing Co., the American Library Association, the American Film Heritage Association, the Society for Cinema Studies, Lawrence Technology, Bob Dylan Jr., Don Henley, Carlos Santana, Stephen Sondheim, Mike Stoller, E. Randol Schoenberg, Ginny Mancini, Lisa M. Brownlee, Professor William Patry, and Professor Dennis Karjala writing on behalf of forty-five intellectual property law professors.

189. A re-publisher of public domain books and the named plaintiff in the court challenge to the constitutionality of CTEA.

190. Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml.

191. *See generally CTEA Hearings*, supra note 13 (testimony before Senate Judiciary Committee).

D. Sub-myth D: "Disney Improperly Lobbied Congress to Obtain Passage of the CTEA"

It is difficult to understand the sentiment that there is something inherently wrong about Disney lobbying Congress for legislation that benefits both Disney and its shareholders. The press quoted, at length, the amounts Disney and other entertainment industries contributed to Congress, without any effort to differentiate between contributions typical of any corporations with significant legislative concerns (ranging from trade policy to regulation of broadcast operations) and lobbying specifically directed at this particular piece of legislation.[192] Imagine the outrage of shareholders if media corporations did *not* make an effort to have their views heard on the wide range of legislation which has an enormous impact on their day-to-day operations.

What is particularly unclear is why those who excoriate Disney for lobbying Congress feel that it is acceptable for themselves to lobby the courts with briefs filled with unsubstantiated myths.

E. Sub-myth E: "The CTEA was Special-Interest Legislation that Only Disney Cared About"

This myth overlooks that fact is that a wide coalition of copyright interests supported the CTEA, not just Disney. In addition to Disney, major vocal supporters of the Act included the Motion Picture Association of America, the American Society of Composers, Authors, and Publishers, the Rodgers and Hammerstein Organization, the George Gershwin estate, and others.

XIII. CONCLUSION

I conclude with a plea to those who oppose the current duration of copyright protection to argue from a position of intellectual honesty. Views can legitimately differ about the appropriate term of protection. But for there to be a productive and useful debate myths must be abandoned and the following facts acknowledged:

192. One published report indicated that "media companies and their political action committees contributed more than $6.5 million to members of Congress during the 1997-98 election cycle." *See* Fonda, *supra* note 24, *available at* http://www.boston.com/globe/magazine/8-29/featurestory1.shtml.

- Congress has rethought the appropriate term of copyright protection twice, not eleven times in the past forty years;
- In the same era in which Congress extended the term of protection, it removed perpetual protection for unpublished works and for sound recordings, with the result that those classes of works will now, for the first time, enter the public domain;
- At the same time Congress extended the term of copyright for an additional twenty years it created a broad exemption to copyright holders' exclusive rights during those additional years for the benefit of libraries and archives;
- The CTEA extended the term of copyright protection for just twenty years beyond the internationally required *minimum* term of copyright protection which was established ninety-four years ago, and that extended term is equal to or shorter than the duration of protection already in effect across Europe;
- Congress can promote the progress of science and the useful arts by extending the term of copyright for existing works because such an extension promotes the creation of fresh works where otherwise existing works might merely have been recycled, and because harmonization and compliance with international norms promotes domestic creation of new works and enhances the ability of U.S. creators to enforce their rights outside of the United States;
- The limitation of copyright protection to expression and not ideas, coupled with the ever-expanding doctrine of fair use ensures that copyright protection for works—regardless of the term of protection—does not conflict with the mandates of the First Amendment, regardless of which level of scrutiny is applied to the analysis;
- Finally, disagreement—even vehement disagreement—with the congressional balancing of competing interests when determining the appropriate term of copyright protection does not empower a court to substitute its judgment for congressional judgment.

Only when the debate over the appropriate term of copyright protection is based on a discussion of all of the relevant facts, rather than

on baseless myths or selective and skewed presentations of facts, can a meaningful dialogue ensue.