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Mickey Mousing the Copyright Clause of the U.S. Constitution

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MICKEY MOUSING THE COPYRIGHT CLAUSE OF THE U.S. CONSTITUTION: *ELDRED V. RENO*

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I. INTRODUCTION

The Sonny Bono Copyright Term Extension Act of 1998 ("CTEA") extends the term of all copyrights for a period of twenty years.[1] For individual authors, the copyright term was extended from fifty to seventy years after the death of the author, while the term of protection for corporate authors was extended from seventy-five to ninety-five years. Recently, in *Eldred v. Reno*, the D.C. Circuit held that the CTEA term extension of all copyrights did not violate the U.S. Constitution.[2] In effect, this holding ensured that the character of Mickey Mouse, created in 1928, does not enter the public domain in the year 2004, as it would have pre-CTEA, but rather 2024 at the earliest.[3] Additionally, after dodging the issue in their main opinion, the *Eldred* majority asserted in dicta that the "promote the Progress of Science and Useful Arts" introductory language of the Copyright Clause[4] is not a substantive limit on Congress' legislative power, and even if it was, the CTEA was within this limited power.[5] The court erred in failing to hold that the CTEA's retroactive extension of extant copyrights violates the substantive limits on Congressional copyright power found in the Copyright Clause.

This Note will argue that the *Eldred* majority wrongly suggested that the introductory language of the Copyright Clause does not substantively limit

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[1] CTEA, Pub. L. No. 105-298, §102, 112 Stat. 2827, 2827-28 (1998). Current copyright law protects all "original works of authorship fixed in a tangible medium of expression." *Id.* Copyright holders have an exclusive right to reproduce, distribute, sell or lease works, and to prepare derivative works, and to publicly perform literary, musical, dramatic and choreographic works, pantomimes, motions pictures and other audio visual works, as well as to display these and pictorial, graphic or sculptural works, including individual images of a motion picture or other audiovisual work. 17 U.S.C. §106 (2001). Ideas are never copyright protectable; only the original creative expressions of these ideas can be copyrighted. *Baker v. Selden*, 101 U.S. 99, 105 (1879).

[2] 239 F.3d 372, 373 (D.C. Cir. 2001); 255 F.3d 849 (denial of petition rehearing en banc), *cert. granted*, 70 U.S.L.W. 3514 (Feb. 19, 2002).

[3] Dennis S. Karjala, *Value of the Public Domain* <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain/PDlist.html> (accessed Feb. 17, 2002) (containing a list of some famous works prevented from entering the public domain by the CTEA).

[4] U.S. Const. art. I, § 8, cl. 8 (alternatively known as the Copyright Clause, the Patent Clause or the Intellectual Property Clause).

[5] *Eldred*, 239 F.3d at 377-78.

congressional copyright power. Furthermore, the majority's conclusion that the CTEA was a necessary and proper exercise of copyright power was based upon flawed analysis and was out of line with the accepted utilitarian theory underlying copyright. Part II of this Note will provide a background overview of the CTEA, the facts of *Eldred*, and a summary of the procedural history and the rationale behind the majority and dissenting opinions. Part III will critically analyze the *Eldred* decision, focusing primarily on the D.C. Circuit's flawed assertion that the preamble of the Copyright Clause presents no limit to congressional copyright power and their erroneous conclusion that the CTEA was a necessary and proper exercise of copyright power. Part IV will conclude that the issue of preambular limitation of congressional power under the Copyright Clause is still open to challenge.

II. BACKGROUND

The CTEA extended the term of all copyrights, those currently in existence and those to be granted in the future, for a period of twenty years.[6] Originally, copyright protection had a maximum of twenty-eight years.[7] For 119 years after Constitutional copyright protection originated, the copyright duration did not rise above forty-two years. However, beginning in 1962, Congress passed a series of incremental extensions for subsisting copyrights.[8] In all, the copyright term has been extended retroactively (applying to previously granted copyrights) eleven times and proactively (applying to all future copyrights) twice.

Prior to the passage of the CTEA, the 1976 Copyright Act defined copyright duration.[9] When the author was unknown, the creator was known but was an employee or when the work was specially commissioned, the duration was the lesser of seventy-five years from publication or one hundred years from creation.[10] The CTEA added twenty years to the term of all existing and future copyrights.[11]

As a result of the CTEA, there will not be any creative works entering the public domain until after the year 2018. The tens of thousands of works on the verge of entering the public domain, such as the pop icons *Mickey Mouse* and *Felix the Cat*, the novel *The Great Gatsby*, the film *The Jazz*

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[6] CTEA, Pub. L. No. 105-298, §102, 112 Stat. 2827, 2827-28 (1998).

[7] *Eldred*, 239 F.3d at 374.

[8] *Id.*

[9] Pub. L. No. 94-553, § 302-05, 90 Stat. 2541, 2572-76 (1976).

[10] *Id.*

[11] *Eldred*, 239 F.3d at 374.

Singer, the musical *Show Boat*, and the songs *It Had to be You*, *Who's Sorry Now*, and *Someone To Watch Over Me* will remain under a usage monopoly for an additional 20 years.[12]

In the 1999 District Court case *Eldred v. Reno*, the plaintiffs challenged the constitutionality of the CTEA.[13] The plaintiffs, including publishers, archivists and preservationists, utilize works that have entered the public domain.[14] This usage of public domain material includes copying, reprinting, performing, enhancing, restoring and selling works of art, film and literature. The plaintiffs alleged they had prepared to use works created in the 1920s, but the CTEA prevented legal copying, distribution, or performance of these works that would otherwise have entered the public domain.[15]

When the District Court sustained the constitutionality of the CTEA,[16] Eldred and his fellow plaintiffs appealed, challenging the constitutionality of the CTEA on three different grounds.[17] The D.C. Circuit rejected each of the arguments and affirmed the lower court's holding that the CTEA was constitutional.[18] This Note focuses upon the majority's treatment of the third issue.

The plaintiffs' third challenge to the CTEA was that it violated the limitations inherent to the Copyright Clause of the U.S. Constitution.[19] Article I, section 8, clause 8 of the Constitution ("Copyright Clause") provides that the Congress shall have power "[t]o promote the Progress of

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[12] Darren Fonda, The Boston Globe Magazine, *Copyright Crusader* <http://www.boston.com/globe/magazine/8-29/featurestory1.shtml> (Aug. 29, 1999); *Melody Lane* <http://www.melodylane.net/graveyard.html> (accessed Feb. 16, 2002) (listing a "graveyard" of old-time 1920's songs prevented from entering the public domain by the CTEA).

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

[14] The plaintiffs in *Eldred* included Eric Eldred, Eldritch Press, Higginson Book Co., Jill A. Crandall, Tri-Horn Intl., Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., Am. Film Heritage Assn., Moviecraft, Inc. and Copyright's Commons. *Id.* at 2-3.

[15] *Id.* at 3.

[16] The District Court for the District of Columbia granted judgment on the pleadings for defendant Janet Reno, Attorney General of the United States, and denied plaintiff Eldred's motion for judgment on the pleadings and summary judgment. *Id.* at 1.

[17] First, plaintiffs argued that the CTEA's extension of both extant and future copyrights "fails the intermediate scrutiny appropriate under the First Amendment." *Eldred*, 239 F.3d at 374. The D.C Circuit rejected this argument with the conclusion that the plaintiffs had no cognizable First Amendment right to commercially exploit the works copyrighted by a third person. *Id.* at 376. Plaintiff's second argument was that the application of the CTEA to extant copyrights "violates the originality requirement of the Copyright Clause." *Id.* The D.C. Circuit concluded that the requirement of originality is satisfied upon the initial granting of copyright and is not at issue upon extension. *Id.* at 377. The third argument is discussed in the text accompanying notes 19-22.

[18] *Eldred*, 239 F.3d at 380.

[19] *Id.* at 377-78.

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Specifically, the plaintiffs argued the CTEA violated the "limited Times" and the preambular "promote the Progress" requirements.

The majority quickly disposed of the "limited Times" argument in three short paragraphs. The majority cited *Schnapper v. Foley*[20] as rejecting the argument that the preamble of the Copyright Clause constitutes a limit on congressional power.[21] The basis of the appellant's argument was that interpretation of "limited Times" should reach only as far as justified by the "promote the Progress" preamble. But, the majority found *Schnapper* foreclosed any guiding role for the preamble.[22]

An amicus brief, filed on behalf of the *Eldred* appellants by The Eagle Forum,[23] argued the "promote the Progress" portion of the preamble is a direct and substantive limit upon congressional power and therefore directly challenged the *Eldred* majority's interpretation of *Schnapper*'s holding.[24] In refusing to consider The Eagle Forum's argument, the *Eldred* majority reasoned that since the appellant's brief did not directly question the holding of *Schnapper*, consideration of the amicus argument was not properly before the court.[25] The majority essentially held that amici cannot "expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal."[26]

Yet, in dicta, the majority went on to discuss the issue it refused to directly address by analyzing whether the means selected by the CTEA were a "necessary and proper" exercise of power conferred on Congress by the Copyright Clause.[27] The majority indicated that, if properly called upon to do so, it "might well hold that the application of the CTEA to subsisting copyrights is plainly adapted and appropriate to promoting progress."[28] To support its dicta, the majority pointed to the congressional findings that extending existing copyrights would result in preserving access to works

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[20] 667 F.2d 102, 112 (D.C. Cir. 1981) (the court in *Schnapper* rejected the argument that the Copyright Clause preamble required promotion of progress for each work obtaining copyright protection).

[21] *Eldred*, 239 F.3d at 378; *see infra* n. 52 (analyzing the holding of *Schnapper* as applied to *Eldred*).

[22] *Eldred*, 239 F.3d at 378.

[23] The Eagle Forum is a conservative watchdog group concerned with erosion of rights under the U.S. Constitution. *See generally Eagle Forum* <http://www.eagleforum.org/> (accessed Feb. 17, 2002).

[24] *Eldred*, 239 F.3d at 378.

[25] *Id.*

[26] *Id.* (quoting *Resident Council of Allen Parkman Vill. v. H.U.D.*, 980 F.2d 1043, 1049 (5th Cir. 1993)).

[27] *Id.*

[28] *Id.* at 379.

that would otherwise disappear.[29] The majority also placed great weight on the First Congress' application of the initial Copyright Act of 1790 to subsisting copyrights, and stated that because the power of the Congress to extend subsisting copyrights had not been disputed until recently, it is almost conclusive.[30] Finally, the majority held that because precedent ascribes plenary power over patent to Congress,[31] power over copyright is also plenary since both copyright and patent powers are established by the same clause.[32] The majority concluded it was not the role of the courts to alter the delicate balance Congress has established between defining the scope of limited monopoly granted to authors and appropriate public access to their work product.[33]

Judge Sentelle dissented from the *Eldred* majority's holding that the CTEA's twenty-year extension of existing copyrights was constitutional. First, Sentelle questioned whether the congressional copyright power endorsed by the *Eldred* majority had "any stopping point or whether it would lead to the regulation of all human activity."[34] Sentelle argued the government's rationale for copyright extension could lead to an unlimited view of copyright power and that the appropriate standard for limitation of power was inherent within the Copyright Clause.[35] Sentelle concluded the clause is "not an open grant of power to secure exclusive rights" but rather a "grant of power to promote progress."[36] Sentelle saw granting exclusive rights for limited times as the sole means of exercising this power and rejected the "elastic and open ended" grants of exclusivity.[37] As an example of the absence of a definable stopping point in the extent of congressional power endorsed by the majority, Sentelle pointed out that periodic extensions of protection of existing work, say from 100 to 120

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[29] *Id.*

[30] *Id.* at 380.

[31] The majority cites *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843) (stating that "the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents").

[32] *Eldred*, 239 F.3d at 380.

[33] *Id.*

[34] *Id.* at 381 (Sentelle, J., dissenting). Sentelle's analysis of "outer limits" of enumerated powers was adopted from the approach the Court took in *U.S. v. Lopez* that challenged the extension of congressional authority beyond the core of enumerated powers. 514 U.S. 549, 564 (1995).

[35] *Eldred*, 239 F.3d at 381 (Sentelle, J., dissenting). The Court in *Lopez* similarly concluded that limitations of commerce power were inherent in the Commerce Clause. 514 U.S. at 564.

[36] *Eldred*, 239 F.3d at 381 (Sentelle, J., dissenting).

[37] *Id.*

years, 120 to 140 years, and so on, could effectively accomplish limitless terms of protection.[38]

Judge Sentelle next questioned the majority's acceptance of congressional findings that the CTEA accomplishes the purpose of promoting useful arts.[39] On this point, Sentelle urged that congressional extension of previously acquired copyright promotes nothing and was outside the purpose of the Copyright Clause and hence unconstitutional.[40] Sentelle countered the majority's reliance upon *Schnapper*[41] by narrowly interpreting the decision as holding that "Congress need not require that *each* copyrighted work be shown to promote the useful arts."[42] Sentelle interpreted *Schnapper* as blocking only case-by-case analysis of promotion of progress but not blocking the requirement that the congressional exercise of copyright power meets the language of the Copyright Clause.[43]

Sentelle's dissent also objected to the majority's focus upon the "limited Times" argument and its refusal to address the "promote the Progress" argument raised in the amicus brief.[44] Sentelle argued that the issue of whether the Copyright Clause constrains Congress from extending extant and future copyrights was before the court and it properly included the "promote the Progress" argument, regardless of whether it appeared in the amicus or appellant brief.[45] Finally, Sentelle rejected the majority's assertion that the first Congress extended extant copyrights because the initial copyright act created the first federal copyright protection and hence could not have extended non-existent federal copyrights.[46]

A petition for rehearing en banc was denied for this case in July of 2001.[47] A petition for a writ of certiorari was filed on October 11, 2001[48] and granted on February 19, 2002.[49]

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[38] *Id.* at 382.

[39] *Id.*

[40] *Id.*

[41] 667 F.2d 102; *supra* nn. 20-22 and accompanying text (explaining the majority's reliance on *Schnapper*).

[42] *Eldred*, 239 F.3d at 382-83 (Sentelle, J., dissenting) (emphasis added) (quoting *Schnapper*, 667 F.2d at 112).

[43] *Eldred*, 239 F.3d at 383 (Sentelle, J., dissenting).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001) (denial of petition rehearing en banc).

[48] Petition for Certiorari, *Eldred v. Ashcroft*, No. 01-618 (D.C. Cir. Oct. 11, 2001) (accessible on <http://eon.law.harvard.edu/openlaw/eldredvashcroft/cert-petition.pdf>).

[49] *Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002), *amended by* 2002 U.S. LEXIS 1182 (2002).

III. ANALYSIS

A. The CTEA's Retroactive Extension of Extant Copyrights Violates the Copyright Clause of the Constitution

In holding to the contrary, the majority in *Eldred* greatly narrowed the issue before the court but went on to analyze the broader issue in dicta. This approach is flawed in several ways. First, the majority was wrong to not directly analyze the issue of limitation of copyright power in light of the preambular language of the Copyright Clause. The majority should have concluded that the "promote the Progress" preamble of the clause is a substantive limitation on congressional power. This is in keeping with recent Supreme Court jurisprudence that has recognized and enforced the substantive limitations on other congressional powers enumerated in the Constitution.[50] Second, extending extant copyrights does not "promote the Progress of Science and the useful Arts," as the majority blindly accepted. Third, the substantial purpose behind the CTEA was a regulation of international trade; yet, this purpose is outside the scope of the enumerated powers of the Copyright Clause. Lastly, the majority's opinion was out of line with the accepted utilitarian theory underlying copyright. Thus, the court erred by failing to hold that the CTEA's retroactive extension of extant copyrights violated the substantive limits on congressional power found in the Copyright Clause.

1. The Preamble of The Copyright Clause Represents a Substantive Limit of Congressional Power and the Majority's Dicta to the Contrary Was Wrong

The majority should have directly decided whether the preamble of the Copyright Clause placed substantive limits upon congressional power. In order to avoid the issue, the majority mischaracterized the issue presented as excluding the "promote the Progress" argument.[51] In dismissing the

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[50] *See Lopez*, 514 U.S. 549; *U.S. v. Morrison*, 529 U.S. 598 (2000).

[51] The issue Eldred framed was "[w]hether the CTEA is beyond Congress' enumerated powers under the Copyright and Patent Clause of the United States Constitution." Opening Br. of Appellant, *Eldred*, 239 F.3d 372 (D.C. Cir. 2001) (accessible on <http://eon.law.harvard.edu/openlaw/eldredvreno/appealbrief.html> (accessed Feb. 17, 2002)). Therefore, the proper question before the court was whether the CTEA itself exceeded the limited enumerated exercise of power the Copyright Clause confers upon Congress. The arguments of Eldred

plaintiffs' mischaracterized argument, the majority relied upon a broad and erroneous interpretation of *Schnapper*.[52] Further, the majority refused to consider the alternate argument of the amicus brief.[53] Given that Eldred, a party to the action, raised the issue of limitation of congressional power, the majority was wrong in failing to consider an argument relating to this issue just because it appeared in the amicus brief and not the appellant's brief. As the dissent correctly points out, Eldred may not have explicitly adopted the amicus brief argument, but he was ready to take full advantage of it.[54] Certainly nothing prohibited the majority from including their analysis of the "promote the Progress" argument in their main holding rather than relegating it to dicta.

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and the amicus both addressed this issue. Eldred argued that the "limited Times" of copyright term should extend only as far as is justified by the preambular "promote the Progress" and that Congress exceeded this limit by continually extending the copyright term through a series of incremental extensions which did nothing to promote progress. The amicus brief argued that the "promote the Progress" portion of the preamble prevented Congress from extending the copyright term because the extension of existing copyrights has not been shown to promote the progress of science and the useful arts. Amicus Br. of Eagle Forum, *Eldred*, 239 F.3d 372 (D.C. Cir. 2001) (accessible on <http://eon.law.harvard.edu/openlaw/eldredvreno/eagleforum-amicus.pdf> (accessed on Feb. 17, 2001)). Both of these arguments addressed the same issue: whether the preamble of the Copyright Clause places substantive limits upon congressional power to extend extant and future copyrights. Each argument simply tackled the issue in a different way.

[52] 667 F.2d 102. The court in *Schnapper* did not hold that the introductory clause represented no limit upon Congress' copyright power as the *Eldred* majority states. The *Schnapper* court stated, "Congress need not require that each copyrighted work be shown to promote the useful arts . . . [t]hat being so, we cannot accept appellants' argument that the introductory language of the Copyright Clause constitutes a limit on congressional power." *Id.* at 112 (internal quotations and citations omitted). Any extension of *Schnapper* past a writing-by-writing application of the "promote" requirement, such as the *Eldred* majority's assertion that the preamble presents no substantive limit upon copyright power, is merely dicta because it exceeded the issue before the *Schnapper* court.

[53] *Eldred*, 239 F.3d at 378. The majority found the "promote the Progress" argument of the amicus brief was not properly before the court because it was an argument not raised by the plaintiffs. *Id.* In support of this position, the majority cites *Resident Council*'s holding that an amicus brief cannot raise issues not raised by a party. *Eldred*, 239 F.3d at 378; *Resident Council of Allen Parkman Vill.*, 980 F.2d at 1049 (holding that amici cannot "expand the scope of an appeal to implicate *issues* that have not been presented by the parties to the appeal") (emphasis added). *Resident Council* addresses only issues outside the plaintiff's position and not alternative arguments directly addressing the same issue raised by the plaintiff as was the case in *Eldred*.

[54] *Eldred*, 255 F.3d at 853 n. 1 (Sentelle, J., dissenting) (reciting the statements of Lessig, attorney for Appellant, "Mr. Jaffe's brief is a brief that makes textualist arguments that we believe are quite strong. . . . We formally acknowledge them in our briefs"); *but see Eldred*, 255 F.3d at 850-51 (where the majority asserts that the plaintiffs-appellants themselves took the position, diametrically opposed to that of the amicus); *Eldred*, 239 F.3d at 378 (majority asserts, "although that argument is rejected by the actual parties to the case and therefore is not properly before us").

2. The General Notion of Congressional Power Is One of Limited Enumerated Powers Explicitly Provided for by the Constitution

The Supreme Court recognizes that Article I, section 8, the constitutional provision giving rise to both congressional copyright and patent powers, is both a grant of power and a limitation, and that in exercising this power, the Congress "may not overreach the restraints imposed by the stated constitutional purpose."[55] As early as 1867, courts recognized that

> the power to pass what are called copyright and patent laws . . . is given not generally, but only as a means to this particular end 'to promote the progress of science and useful arts.' . . . . Hence, it expressly appears that Congress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of 'science and useful arts.'[56]

Courts also widely recognize that the financial benefit of an award of copyright is merely a secondary effect of the primary purpose, which is promoting the progress of science and useful arts.[57] The granting of a temporary monopoly in the form of a copyright promotes creative activity by providing economic incentive, but more importantly ensures that the public will have unfettered access to the work after a limited period of time.[58] This unfettered access to works in the public domain provides the building blocks for the continued creation and dissemination of culturally and economically valuable work.[59]

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[55] *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966).

[56] *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (C. C. Cal. 1867).

[57] *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that the primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts") (quoting U.S. Const. art. I, § 8); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 543-44 (2nd Cir. 1964) (stating, "copyright protection is designed 'To promote the Progress of Science and useful Arts,' and the financial reward guaranteed to copyright holder is but an incident of this general objective, rather than end in itself").

[58] *West Pub. Co. v. Mead Data C., Inc.*, 616 F. Supp. 1571, 1582 (D. Minn. 1985) (stating that the power granted to Congress by this clause "is a means by which an important public purpose may be achieved. It is intended to motivate creative activity by the provision of a special reward, and eventually allows the public total access to the products of the genius after the limited period of exclusive control has expired").

[59] The public domain consists of property rights that belong to the community at large. The significant public benefit of freedom to make creative works based upon public domain material is illustrated by "musical plays like Les Miserables, Jesus Christ Superstar, and West Side Story, as well

As recent Supreme Court cases have pointedly demonstrated, the breadth of enumerated powers should be defined in light of the text of the granting clause.[60] The Supreme Court has explicitly stated that the enumerated powers of Congress are subject to "outer limits."[61] Nevertheless, the majority in *Eldred* refused to allow for the possibility that Congress' copyright power has any outer limit. Instead, the majority advocates plenary copyright power and maintains that the introductory language, "Congress shall have power . . . To promote the Progress of Science and useful Arts," in no way constitutes a limit upon the congressional power to issue and extend copyright monopolies. This is wrong. Any time Congress is provided the power to take something from the American people, there must be an "outer limit" to the reach of their power.[62] The Supreme Court has explicitly recognized that the Intellectual Property Clause is indeed "both a grant of power and a limitation" and that congressional power under this clause "may not overreach the restraints imposed by the stated constitutional purpose."[63] In the case at hand,

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as satires like Rosencratz and Guildenstern are Dead and even literary classics like James Joyce's Ulysses." H.R. Subcomm. on Cts. and Intell. Prop. of the Jud. Comm., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989*, 104th Cong. 281-422 (text accompanying nn. 6-7) (July 13, 1995) (containing written testimony of Dennis Karjala on behalf of U.S. Intellectual Property professors).

[60] *See Lopez*, 514 U.S. at 567 (holding that a law banning guns in schools was outside the limited enumerated power contained in the Commerce Clause); *Morrison*, 529 U.S. at 627 (holding that broad regulation designed to prevent violence against women was outside the scope of the Commerce Clause); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (holding that Congress' abrogation of a state's immunity from age discrimination lawsuits of private individuals exceeded the limitations of power in the Enforcement Clause of the Fourteenth Amendment).

[61] In *Lopez*, the Court held the Gun-Free School Zones Act of 1990 to be outside the "outer limits" of the enumerated power under the Commerce Clause. 514 U.S. at 557.

[62] For an in-depth argument that the Copyright Clause imposes implied limits upon congressional power, which is based upon history, constitutional structure and precedent, consult Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1142-60 (2000).

[63] *Graham*, 383 U.S. at 6. The context for these quotes is revealing. The Supreme Court noted, that:

> "[Art. I, §8, cl. 8] is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.' It was written against the backdrop of the practices - eventually curtailed by the Statute of Monopolies - of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power *may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby*."

Id. (internal citations omitted; emphasis added). While the opinion was written with regards to patent power, granted parallel with copyright power in the same clause, there is no apparent reason why

extension of existing copyrights takes twenty years of public domain usage from the American people and such taking must be justified and empowered by the words of the Copyright Clause, or it "overreaches" the power granted to Congress.

Thus, the preamble to the Copyright Clause should be read as a substantive limitation upon congressional power. The *Eldred* majority was wrong when it avoided serious analysis of this issue by simply citing *Schnapper* rather than addressing properly raised arguments. Yet, after asserting that no limitation existed, the majority proceeded in dicta to explain why the CTEA did not violate any supposed power limitation imposed by the preamble. As shown in the next section, the rationale underlying the majority's analysis was flawed.

B. Congressional Findings the Majority Cites Are Not Sufficient Justification for the Assertion that the CTEA Was a Necessary and Proper Exercise of Congressional Copyright Authority

In dicta, the *Eldred* majority stated they might hold that application of the CTEA to existing copyrights was plainly adapted and appropriate to promoting progress. In so stating, the majority erroneously relied upon congressional findings that extension of extant copyrights would give copyright holders an incentive to preserve older works.[64] Simply citing unsupported congressional findings as the majority suggests does not satisfy a "necessary and proper" analysis of the exercise of an enumerated power.[65]

As the recent cases *U.S. v. Morrison* and *U.S. v. Lopez* indicate, the Supreme Court has warned against blind judicial acceptance of Congressional findings when exploring the limitations of Congressional exercise of power.[66] "[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality" of legislation under an enumerated power of the Constitution.[67] Simply put, Congress' conclusion that a given piece of legislation serves a constitutional purpose does not

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Congress may overreach copyright power while it is restrained from action while exercising patent power.

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

[65] The *Eldred* dissent asserted that a congressional conclusion of permissible constitutional purpose is not enough to satisfy a judicial inquiry into the constitutionality of a statute. *Id.* at 382 (Sentelle, J. dissenting).

[66] *Morrison*, 529 U.S. at 614; *Lopez*, 514 U.S. at 557 n. 2 (stating, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so").

[67] *Morrison*, 529 U.S. at 614.

end judicial enquiry. If the *Eldred* majority had truly addressed the question whether the CTEA exceeded Congress' power, then a mere legislative declaration that the CTEA promotes progress "does not necessarily make it so."[68]

Retroactive copyrights under the CTEA provide a windfall for copyright holders, but do nothing to promote the progress of science and the useful arts. A few members of Congress recognized the potential for a windfall as illustrated by the statement that the "[CTEA] provides a very generous windfall to the entertainment industry by extending the term of copyright for an additional 20 years."[69] In their analysis of the CTEA, the *Eldred* majority ignored this obvious windfall justification. Instead, it cited the congressional finding that extension of extant copyright protection, and the accompanying financial benefit, would provide copyright holders with an incentive to preserve older works, such as motion pictures in need of restoration.[70]

But, the proponents of the CTEA made no effort to show that any benefit of the term extension would outweigh associated costs.[71] For example, the *Eldred* majority's restoration-reasoning ignores the fact that if these films had entered the public domain earlier, film-restorers such as *Eldred* plaintiff American Film Heritage Association might have been able to gain access to them before such serious deterioration occurred. Copyright holders will surely not bring out the films in need of restoration now when they have failed to do so previously. The preservation incentive argument also ignores the Congressional Library's opinion that the greatest threat to motion pictures of the 1920s is the deterioration of orphan films, or works with owners who cannot be found or are unable to ensure the preservation of such works.[72] The CTEA eliminates the ability, as well as the incentive, to preserve many of these 1920s "orphan films" because they will not be entering the public domain any time soon. The *Eldred* majority simply refused to even consider the balance of work restored by groups such as the appellants and the creation of new work as compared to work restored by copyright holders.

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[68] *Hodel*, 452 U.S. at 311.

[69] 144 Cong. Rec. H1459 (daily ed. Mar. 25, 1998) (statement of Rep. Sensenbrenner).

[70] *Eldred*, 239 F.3d at 379 (stating that "[p]reserving access to works that would otherwise disappear... 'promotes Progress' as surely as does stimulating the creation of new works").

[71] *See* H.R. Subcomm. on Cts. and Intell. Prop. of the Comm. on Jud., *The Copyright Term Extension Act of 1995: Hearings of H.R. 989*, 104th Cong. 281-422 (July 13, 1995) (containing the written testimony of Dennis Karjala on behalf of forty U.S. Intellectual Property professors).

[72] H.R. Subcomm. on Courts and Intell. Prop. of the Comm. on Jud., *The Copyright Term Extension Act of 1995: Hearings of H.R. 989*, 104th Cong. 423-502 (June 1, 1995) (containing an insertion entitled *Redefining Film Preservation: A National Plan, Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board*).

The congressional findings the *Eldred* majority cites as a justification that the CTEA was a necessary and proper exercise of power were based upon faulty data.[73] The only hearings concerning the CTEA occurred in the previous 1995 Congress, which heard testimony primarily from industry lobbyists representing groups such as Disney and the Motion Picture Association of America, all of who stood to financially benefit from the CTEA.[74] In passage of the CTEA, there was an absolute lack of Congressional floor debate exploring concerns over the extension of copyright term.[75] The Senate passed the bill without a quorum[76] while the House passed the bill by a vote under suspension of the rules.[77] Legal scholars opposed to copyright extension point out that the CTEA term extension legislation has the effect of a direct subsidy to preferred industries but does so in a way that erodes political accountability by slipping it in below public awareness.[78] What was apparent from the passage of the CTEA was exactly who was benefiting: "extended protection for existing works will provide added income with which to subsidize the creation of new works. . . . This is particularly important in

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[73] The legislative history cited throughout this Note is most easily accessible on *LEXIS-NEXIS Congressional Universe* <http://web.lexis-nexis.com/congcomp> (CIS index search by Pub. L. number).

[74] *See* H.R. Subcomm. on Cts. and Intell. Prop. of the Jud. Comm., *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearings on H.R. 521*, 105th Cong. (June 27, 1997) (98 CIS H 5219) (containing testimony from representatives of the Am. Society of Composers, Authors, and Publishers and the Natl. Music Publishers' Assn.); H.R. Subcomm. on Cts. and Intell. Prop. of the Jud. Comm., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989*, 104th Cong. (June 1, 1995) (containing testimony from representatives of the Motion Picture Assn., Am. Society of Composers, Authors, and Publishers, Assn. of Moving Image Archivists; Natl. Music Publishers' Assn., AmSong, Inc, Dirs. Guild; Video Software Dealers Assn., Writers Guild of Am., East and Broadcast Music, Inc); Sen. Jud. Comm., *Copyright Term Extension Act of 1995: Hearings on Sen. 483*, 104th Cong. (Sept. 20, 1995) (97 CIS S 52142) (containing testimony from representatives of the Motion Picture Assn.; AmSong, Inc; and Nashville Songwriters Assn. Intl.).

[75] *See* 144 Cong. Rec. H1456 (daily ed. Mar. 25, 1998) (debate limited to the Sensenbrenner amendment for music licensing exemption for food service and drinking establishments); 144 Cong. Rec. H9946 (daily ed. Oct. 7, 1998) (debate limited to Fairness in Music Licensing Act, the House-Senate compromise on the Sensenbrenner amendment); 144 Cong. Rec. S11672 (daily ed. Oct. 7, 1998) (no views counter to copyright extension expressed).

[76] 144 Cong. Rec. S11675 (daily ed. Oct. 7, 1998).

[77] 144 Cong. Rec. H9954 (daily ed. Oct. 7, 1998).

[78] Heald & Sherry, *supra* n. 62 at 1175. *See* Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 Fla. L. Rev. 989, 996 (2000) (discussing the one-sided legislative history of the CTEA). Dennis Karjala, an Arizona State University law professor specializing in copyright law, submitted a letter with forty other law professors to Congress opposing copyright extension. Karjala later equated the CTEA with corporate welfare, also adding "[t]he media companies gave heavily in return for extra protection." Fonda, *supra* n. 12.

the case of corporate copyright owners, such as motion picture studios and publishers."[79]

The inadequate and unsubstantiated findings which the *Eldred* majority relies upon in its analysis of whether the CTEA was a proper exercise of enumerated power are the same breed of congressional findings found insufficient to support federal legislation in a number of other cases exploring Constitutional limits on congressional authority. In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990 because guns in schools, a non-commercial activity, had no apparent substantial affect on interstate commerce and there were no Congressional findings demonstrating an effect.[80] In *Morrison*, Congress had made detailed findings that gender-motivated violence discouraged interstate travel and employment, but the Supreme Court rejected this reasoning as too attenuated a casual chain to show the legislation was a proper exercise of power under the Commerce Clause.[81] Similarly, in *Kimel*, when Congress failed to identify any pattern of age discrimination in the states, the Supreme Court found this failure confirmed that Congress had no reason to believe broad age discrimination legislation was a necessary and proper exercise of enumerated power.[82]

In the case at hand, Congress provided a twenty year income stream windfall to predominantly corporate copyright assignees in the hope they would spend some of this money on preservation of deteriorating works, in spite of the lack of evidence to believe they would. Like *Morrison*, this reasoning is far too attenuated to justify legislation that prevents free public access to this threatened work for another twenty years. The twenty year maintenance of royalties provided by the CTEA is directed to the relatively few works from the 1920s and 1930s that still have economic value today. So, in order to ensure that the likes of Mickey Mouse, Pluto, Goofy and Donald Duck make billions of dollars for companies like Walt Disney, all work created in the same era is barred from the public domain for twenty years.[83] This is the same sort of overly broad, blanket legislation rejected in *Kimel*.

In exploring the limits of the enumerated powers of the Copyright Clause, the courts cannot simply point to the statements of lobbyists

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[79] Sen. Rpt. 104-315, at n. 530-531 (July 10, 1996).

[80] 514 U.S. at 557.

[81] 529 U.S. at 615 (noting that the congressional findings were substantially weakened when they relied on a but-for causal chain from the initial occurrence of a violent crime to the crime's attenuated effects upon interstate commerce).

[82] 528 U.S. at 89-91.

[83] Phyllis Schlafly, *Eagle Forum, Why Disney Has Clout with the Republican Congress* <http://www.eagleforum.org/column/1998/nov98/98-11-25.html> (Nov. 25, 1998). The Boston Globe reported that the character Mickey Mouse helped bring in $8 billion in 1998. Fonda, *supra* n. 12.

looking for financial gain that happen to have been collected under the auspices of congressional findings. If the *Eldred* majority had been faithful to the teachings of *Lopez*, *Morrison*, and *Kimel* and had actually examined the emptiness of the preservation rationale or looked at the sparseness of the Congressional record, it is doubtful it would have so easily concluded the CTEA was a necessary and proper exercise of constitutional copyright power.

C. The Substantial Purpose of the CTEA, Regulation of International Trade, Is Outside the Scope of Congressional Authority under the Copyright Clause

As shown by the legislative record, the substantial purpose of the CTEA was to match United States copyright law with that of the European Union so as to extend the copyright revenue stream of existing works for another twenty years.[84] Extending copyrights to boost the gross national product and control the trade deficit will only indirectly "promote the Progress of Science and the useful Arts" and so, according to the *Lopez* framework of analysis, violates the limits underlying the Copyright Clause. In the CTEA, Congress was using the Copyright Clause to regulate international trade, a goal outside the purpose of its constitutional copyright power.

The Senate report cites the purpose of the CTEA as first providing significant trade benefits by matching U.S. copyright law to that of the European Union, and second, ensuring continued compensation for American creators.[85] The trade balance purpose behind the CTEA is even more apparent from the statements of Congressmen supporting the bill. "If we do not [extend copyrights to the same level of other countries], then the United States is going to lose hundreds of millions of dollars in revenue from other countries that should come in to the United States."[86] The lost revenues referred to are presumably licensing fees paid to American authors by foreign users over periods longer than the pre-CTEA copyright term. The focus on the effect of copyright term upon our national economy and trade balance with Europe is the major theme present throughout the Congressional record. One Congressman noted, "we cannot afford to not pass this bill if we hope to control this burgeoning trade deficit and protect

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[84] Sen. Rpt. 104-315, at § I (July 10, 1996) (stating, "[s]uch an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works").

[85] *Id.*

[86] 144 Cong. Rec. H1480 (daily ed. Mar. 25, 1998) (statement of Rep. Gordon).

our national economic well-being . . . . Just imagine what our trade deficit would be if that $50 billion annual surplus were at risk or declining."[87]

As the legislative history suggests, the CTEA is simply a mechanism to preserve the trade balance with Europe; "[i]f we fail to extend our copyright term as well, our intellectual property industry would lose millions of dollars in export revenues, and the U.S. balance of trade would suffer commensurately."[88] But this rationale ignores the fact that whatever extra amount Europeans are paying to use copyrighted work for an extra twenty years, so too are the American people. Nor does the congressional record suggest how any benefit will outweigh associated harms: "Nowhere is there evidence in the hearing record of how the proposed copyright term extension will increase the number or quality of works for the public benefit. On the other hand, there is clear evidence of public harm when the public is denied open access to these works for another twenty years."[89] Unless the monopoly extension, which results in higher cost and more limited access to the American public, can be shown to "promote the Progress of Science and the Useful Arts," it simply does not comply with the limitations inherent in the Copyright Clause.

Although the CTEA may in some attenuated way be consistent with the Commerce Clause, this is not sufficient to override the express limitation of another constitutional clause.[90] For instance, when legislation aiding the employees of one insolvent railroad conflicted with the "uniform [geographic] Laws" requirement of the Bankruptcy Clause,[91] Congress attempted to bypass this limitation by relying upon the Commerce Clause in the enactment of the Rock Island Transition and Employee Assistance Act (RITEAA).[92] However, in *Railway Labor Executives' Assn. v. Gibbons*, the Supreme Court struck down the RITEAA as unconstitutional because it conflicted with the Bankruptcy Clause, even though the purpose of the Commerce Clause may have supported it.[93] Thus, justification under the Commerce Clause is not sufficient to salvage the CTEA if it conflicts with the Copyright Clause.

The lesson of *Lopez* and *Morrison* is that the Congress cannot use its enumerated power to accomplish goals outside the scope of that grant of

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[87] *Id.* at 1463 (statement of Rep. Delahunt).

[88] *Id.* at 1460 (statement of Rep. Berman).

[89] Sen. Rpt. 104-315, § X (July 10, 1996) (Statement of Sen. Brown).

[90] *See* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 Cardozo Arts & Ent. L.J. 47, 56 (1999).

[91] U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

[92] Pollack, *supra* n. 90, at 56.

[93] 455 U.S. 457, 465 (1982).

power. Specifically dealing with Article I, section 8, the Supreme Court has said that the "promote the Progress" preambular power limitation "is the standard expressed in the Constitution and it may not be ignored."[94] Given these accepted limitations of power, it is important to recall that the purpose of Congress in passing the CTEA was substantially directed toward achieving international trade benefits and not promoting progress. Therefore, the CTEA exceeds the power of Congress because it is an attempt to regulate international trade, a power that is not granted by the Copyright Clause. While it may be argued that a strong national economy will in some way stimulate the creation of new creative work, this is the same sort of attenuated link flatly rejected in both *Lopez* and *Morrison*.[95] In the absence of evidence that copyright extension promotes the progress of science and given that a substantial reason for CTEA passage was regulation of international trade, Congress exceeded its copyright power in passing the CTEA.

D. Neither the Majority Opinion nor the CTEA Is in Line with the Currently Accepted Utilitarian Justification of the Constitutional Copyright Monopoly

The majority opinion is out of line with the accepted utilitarian justification of copyrights. Generally, theories underlying protection of intellectual property are of two types: those based on some perceived intrinsic quality (natural rights theories) or those based on some value that a society wishes to achieve (utilitarian theories). The utilitarian justification underlies United States copyright protection, while the courts and legislatures alike have historically rejected the natural law justification.[96]

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[94] *Graham*, 383 U.S. at 6 (discussing the inherent limitations of patent power, which is parallel to copyright power within Art. I § 8).

[95] *Lopez*, 514 U.S. at 567 (holding that the link between gun possession and a substantial effect on interstate commerce was too attenuated to use commerce power to ban guns near schools); *Morrison*, 529 U.S. at 615. (rejecting congressional findings which connected the impact of violent gender-crimes upon victims to decreased interstate commerce as "but-for" reasoning).

[96] From its early inception, United States copyright law takes utilitarian view, which states that "authors have no natural right in their creation but only the rights that the state has conferred by reason of policy to encourage the creation of new works." Shelley Warwick, *Is Copyright Ethical? An Examination of the Theories, Laws and Practices Regarding the Private Ownership of Intellectual Work in the United States*, 1999 B.C. Intell. Prop. & Tech. Forum, 060505 (1999) <http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060505.html> (accessed June 4-5, 1999) (quoting H.R. Rpt. 60-2222 (1909) (report accompanying the Copyright Act of 1909)).

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and the useful Arts."[97] Limitations upon congressional copyright power reflect a utilitarian theory of copyright law by which "the protection and security of [creative works] would greatly tend to encourage genius [and] to promote useful discoveries."[98] The Supreme Court has often interpreted the preamble of the Copyright Clause as a primarily utilitarian rationale of Copyright Clause.[99] In *Sony Corp. v. Universal City Studios, Inc.*, the Court stated that "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."[100] Similarly, in *Mazer v. Stein*, the Court stated, "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[101]

Utilitarian theory suggests that the need to encourage invention must be carefully balanced against the evils of monopoly that stifle competition without promoting progress in science and the useful arts.[102] The utilitarian nature of the American system of copyright dictates that Congress may grant exclusive monopoly rights only if the grant secures a countervailing benefit to the public. Analogizing to contract law, a twenty year extension of an existing copyright deprives the American public of the benefit of the bargain struck at the time the copyright was originally issued. The copyright holder has provided no additional consideration to justify bestowing an additional twenty year income stream upon him. Analogizing to property law, a creative work's intellectual property rights can be thought of as divided into a present possessory interest and a remainder. At the creation of a new work, we the people provide (through statute) the author with the present intellectual property interest in the form of a *fixed* copyright term; at the same time, the remainder interest, consisting of the right to freely use the work at the expiration of the *fixed* copyright term,

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[97] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 581 (1985); *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (stating that "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration").

[98] Heald & Sherry, *supra* n. 62, at 1142-60 (quoting *24 Journals of the Continental Congress 1774-1789* 326-27 (Washington Govt. Printing Off. 1922)).

[99] *See e.g. Feist Publications*, 499 U.S. at 349.

[100] 464 U.S. 417, 429 (1984).

[101] 347 U.S. 201, 219 (1954) (internal quotations omitted).

[102] *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (stating that the need to encourage innovation must be balanced with the avoidance of monopolies which stifle competition without advance in the progress of science and useful arts).

becomes vested in the public domain. When Congress extended the present interest (by extending the term of extant copyrights), it took a portion of the public's remainder interest with no compensation.[103] These analogies to contract and property law demonstrate that the windfall provided by the CTEA is counter to the basic premise of the predominantly accepted utilitarian justification of copyright.

The majority opinion in *Eldred* and the CTEA itself are improperly aligned with a natural law justification of copyright that says "nothing is more properly a man's own than the fruit of his study."[104] This focus upon rewarding the copyright holder is also a major theme in the legislative history behind the CTEA.[105] The *Eldred* majority saw the "temporal thrust" of the CTEA as providing "obvious practical benefits for the exploitation of copyrights" through matching the United States copyright term with the term granted by the European Union.[106] The majority went on to say these practical benefits to copyright holders are a "powerful indication that the CTEA is a 'necessary and proper' measure to meet contemporary circumstances."[107] However, these "practical benefits for exploitation of copyrights" can only go to the copyright holder, for he alone holds the monopoly on exploitation. Furthermore, these additional benefits provided to holders of existing copyrights come at the expense of the American people. As the *Eldred* dissent points out, the appellees "offered no tenable theory as to how retrospective extension can promote the useful arts."[108]

The CTEA undermines the utilitarian justification of Copyright and flunks the Copyright Clause's "incentive" requirement. As the Supreme Court has stated:

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[103] This argument is similar to Eldred's "Public Trust Doctrine" argument. *See* Pl.'s Compl. ¶ 69 (June, 1999) (accessible on <http://cyber.law.harvard.edu/eldredvreno/complaint_amd2.html>) (stating that "[w]hile copyright creates a present interest in the copyright holder, it simultaneously creates a future interest in the public. The Public Trust Doctrine holds that government may not transfer the public property of a commons into private hands in the absence of any public benefit in exchange. While this doctrine has traditionally been applied in the context of public lands, the same principle should apply to the reallocation of public rights in intangible property, such as copyright"). This argument was quickly shot down by the U.S. District Court as follows: "Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine." *Eldred*, 74 F. Supp. 2d at 4.

[104] Heald & Sherry, *supra* n. 62, at 1148 (quoting *24 Journals of the Continental Congress 1774-1789* at 326-27). In addition to a Lockean reward for labor, natural rights also include a right of attribution and right of integrity, but these are outside the scope of this Note.

[105] Sen. Rpt. 104-315, at nn. 530-31 (July 10, 1996) (stating that "[b]y extending the copyright term for an additional 20 years for all existing and future works, the bill allows American authors to benefit from these increased opportunities for commercial exploitation of their works").

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

[107] *Id.*

[108] *Id.* at 382.

> [c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[109]

Public access to creative works is necessary in that we stand upon the shoulders of those before us. While a constitutional right of creators, copyright exists only for "limited times," after which the writing must go into the public domain for all to freely use and enjoy. The Supreme Court has said, "the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors."[110] Denying open public access to copyrighted works for another twenty years will harm the public and other creators who are inspired by the great works of the past.[111] This certain harm is imposed for uncertain gains.

Extension of existing copyrights does not promote progress of science or the useful arts; rather, it promotes the agenda of lobbyists. The CTEA windfall for corporate copyright holders provides a clear indication that copyright is being transformed into a tool for securing property interests instead of a mode of encouraging new works.[112] This windfall award of twenty additional years of protection goes beyond a fair return for authors and fails to promote broad availability of creative work to the public. The *Eldred* majority should have considered that the accepted utilitarian justification of copyright provides no support for their assertion that the CTEA was a necessary and proper exercise of the Congress's copyright power.

IV. CONCLUSION

While the *Eldred* majority refused to acknowledge any limit on Congressional copyright power arising out of the introductory language of the Copyright Clause, the issue is still open to challenge. Most of the *Eldred* opinion that dealt with the issue was dicta and its persuasiveness is undermined by faulty reasoning and unsupported assertions. In the *Eldred*

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

[110] *Stewart v Abend*, 495 U.S. 207, 228 (1990).

[111] *See supra* n. 89 and accompanying text.

[112] *See supra* n. 79 and accompanying text.

decision, the majority suggested the issue of whether the preamble of the Copyright Clause bars the extension of subsisting copyrights may be "revisited only by the court sitting en banc in a future case in which a party to the litigation argues the point."[113] But, the denial of Eldred's petition for rehearing en banc emphasizes the court insistence upon a new party with similar facts.[114] A case presenting similar facts and issues has indeed been filed, but not in the D.C. Circuit.[115] However, Eldred's recent grant of a writ of certiorari provides an alternative to waiting for the unlikely occurrence of another party with similar facts presenting the same issue to the D.C. Circuit.

When *Eldred* reaches the Supreme Court, perhaps the appellants can expect at least one sympathetic vote from Justice Stephen Breyer. As a Harvard professor in 1970, Justice Breyer questioned the propriety of copyright. "Authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection," said Breyer.[116] Justice Breyer continued, "[t]aken as a whole, the evidence now available suggests that, although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it."[117]

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[113] *Eldred*, 239 F.3d at 380.

[114] *Eldred*, 255 F.3d at 849.

[115] A second suit, *Golan v. Ashcroft*, No. 01-B-1854, challenging the constitutionality of the CTEA has been filed in the Federal District Court in Denver. Attorneys for the plaintiff include Professors Lawrence Lessig and Edward Lee of Stanford and Professors Jonathan Zittrain and Charles Nesson of Harvard. Similar to the parties involved in *Eldred*, *Golan* plaintiffs include a diverse group of book and music publishers, and film restorers and archivists. The plaintiff's argue that retroactive extension under the CTEA violates the restrictions of Article I, § 8, cl. 8 and is unconstitutional. They also argue that extension of both extant and future copyrights violates the First Amendment by suppressing speech without advancing any countervailing legitimate governmental interests. Finally, plaintiffs argue that the CTEA greatly upsets the settled expectations of the plaintiffs and deprives them of property without due process of law. *See* Pl.'s Compl. ¶ 6-11, 99, 105, 116, *Golan v. Ashcroft*, No. 01-B-1854 (Sept. 19, 2001) (accessible at <http://www.law.stanford.edu/library/special/ashcroft-01-B-1854.pdf>).

[116] Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 282 (1970).

[117] *Id.* at 284.