

Eldred v. Ashcroft

Supreme Court of the United States
2003

ERIC ELDRED, et al., PETITIONERS v. JOHN D. ASHCROFT, ATTORNEY GENERAL. In the SUPREME COURT OF THE UNITED STATES. Certiorari to the United States Court of Appeals for the District of Columbia Circuit. No. 01 – 618. Argued October 9, 2002. Decided January 15, 2003. Opinion reported at 537 U.S. 186 (2003). The following narrative is from the book *Free Culture* by Lawrence Lessig, subtitle: *How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*; ISBN 1594200068; March 25, 2004; The Penguin Press. The text is licensed under the Creative Commons Attribution-Noncommercial 1.0 Generic License, available at <http://creativecommons.org/licenses/by-nc/1.0/>.

The post-case recollection of LAWRENCE LESSIG, ESQ. lead counsel for plaintiffs:

In 1995, a father was frustrated that his daughters didn't seem to like Hawthorne. No doubt there was more than one such father, but at least one did something about it. Eric Eldred, a retired computer programmer living in New Hampshire, decided to put Hawthorne on the Web. An electronic version, Eldred thought, with links to pictures and explanatory text, would make this nineteenth-century author's work come alive.

It didn't work – at least for his daughters. They didn't find Hawthorne any more interesting than before. But Eldred's experiment gave birth to a hobby, and his hobby begat a cause: Eldred would build a library of public domain works by scanning these works and making them available for free.

Eldred's library was not simply a copy of certain public domain works, though even a copy would have been of great value to people across the world who can't get access to printed versions of these works. Instead, Eldred was producing derivative works from these public domain works. Just as Disney turned Grimm into stories more accessible to the twentieth century, Eldred transformed Hawthorne, and many others, into a form more accessible – technically accessible – today.

Eldred's freedom to do this with Hawthorne's work grew from the same source as Disney's. Hawthorne's *Scarlet Letter* had passed into the public domain in 1907. It was free for anyone to take without the permission of the Hawthorne estate or anyone else. Some, such as Dover Press and Penguin Classics, take works from the public domain and produce printed editions, which they sell in bookstores across the country. Others, such as Disney, take these stories and turn them into animated cartoons, sometimes successfully (*Cinderella*), sometimes not (*The Hunchback of Notre Dame*, *Treasure Planet*). These are all commercial publications of public domain works.

The Internet created the possibility of noncommercial publications of public domain works. Eldred's is just one example. There are literally thousands of others. Hundreds of thousands from across the world have discovered this platform of expression and now use it to share works that are, by law, free for the taking. This has produced what we might call the "noncommercial publishing industry," which before the Internet was limited to people with large egos or with political or social causes. But with the Internet, it includes a wide range of individuals and groups dedicated to spreading culture generally.

As I said, Eldred lives in New Hampshire. In 1998, Robert Frost's collection of poems *New Hampshire* was slated to pass into the public domain. Eldred wanted to post that

collection in his free public library. But Congress got in the way. As I described in chapter 10, in 1998, for the eleventh time in forty years, Congress extended the terms of existing copyrights – this time by twenty years. Eldred would not be free to add any works more recent than 1923 to his collection until 2019. Indeed, no copyrighted work would pass into the public domain until that year (and not even then, if Congress extends the term again). By contrast, in the same period, more than 1 million patents will pass into the public domain.

This was the Sonny Bono Copyright Term Extension Act (CTEA), enacted in memory of the congressman and former musician Sonny Bono, who, his widow, Mary Bono, says, believed that “copy- rights should be forever.”

Eldred decided to fight this law. He first resolved to fight it through civil disobedience. In a series of interviews, Eldred announced that he would publish as planned, CTEA notwithstanding. But because of a second law passed in 1998, the NET (No Electronic Theft) Act, his act of publishing would make Eldred a felon – whether or not anyone complained. This was a dangerous strategy for a disabled programmer to undertake.

It was here that I became involved in Eldred’s battle. I was a constitutional scholar whose first passion was constitutional interpretation. And though constitutional law courses never focus upon the Progress Clause of the Constitution, it had always struck me as importantly different. As you know, the Constitution says,

Congress has the power to promote the Progress of Science . . . by
securing for limited Times to Authors . . . exclusive Right to their . . .
Writings. . . .

As I’ve described, this clause is unique within the power-granting clause of Article I, section 8 of our Constitution. Every other clause granting power to Congress simply says Congress has the power to do something – for example, to regulate “commerce among the several states” or “declare War.” But here, the “something” is something quite specific – to “promote . . .Progress” – through means that are also specific – by “securing” “exclusive Rights” (i.e., copyrights) “for limited Times.”

In the past forty years, Congress has gotten into the practice of extending existing terms of copyright protection. What puzzled me about this was, if Congress has the power to extend existing terms, then the Constitution’s requirement that terms be “limited” will have no practical effect. If every time a copyright is about to expire, Congress has the power to extend its term, then Congress can achieve what the Constitution plainly forbids – perpetual terms “on the installment plan,” as Professor Peter Jaszi so nicely put it.

As an academic, my first response was to hit the books. I remember sitting late at the office, scouring on-line databases for any serious consideration of the question. No one had ever challenged Congress’s practice of extending existing terms. That failure may in part be why Congress seemed so untroubled in its habit. That, and the fact that the practice had become so lucrative for Congress. Congress knows that copyright owners will be willing to pay a great deal of money to see their copyright terms extended. And so Congress is quite happy to keep this gravy train going.

For this is the core of the corruption in our present system of government.”
Corruption” not in the sense that representatives are bribed. Rather, “corruption” in the

sense that the system induces the beneficiaries of Congress's acts to raise and give money to Congress to induce it to act. There's only so much time; there's only so much Congress can do. Why not limit its actions to those things it must do – and those things that pay? Extending copyright terms pays.~

Thus a congressional perpetual motion machine: So long as legislation can be bought (albeit indirectly), there will be all the incentive in the world to buy further extensions of copyright.

In the lobbying that led to the passage of the Sonny Bono Copyright Term Extension Act, this “theory” about incentives was proved real. Ten of the thirteen original sponsors of the act in the House received the maximum contribution from Disney's political action committee; in the Senate, eight of the twelve sponsors received contributions. The RIAA and the MPAA are estimated to have spent over \$1.5 million lobbying in the 1998 election cycle. They paid out more than \$200,000 in campaign contributions. Disney is estimated to have contributed more than \$800,000 to reelection campaigns in the 1998 cycle.

Constitutional law is not oblivious to the obvious. Or at least, it need not be. So when I was considering Eldred's complaint, this reality about the never-ending incentives to increase the copyright term was central to my thinking. In my view, a pragmatic court committed to interpreting and applying the Constitution of our framers would see that if Congress has the power to extend existing terms, then there would be no effective constitutional requirement that terms be “limited.” If they could extend it once, they would extend it again and again and again.

It was also my judgment that *this* Supreme Court would not allow Congress to extend existing terms. As anyone close to the Supreme Court's work knows, this Court has increasingly restricted the power of Congress when it has viewed Congress's actions as exceeding the power granted to it by the Constitution. Among constitutional scholars, the most famous example of this trend was the Supreme Court's decision in 1995 to strike down a law that banned the possession of guns near schools.

Since 1937, the Supreme Court had interpreted Congress's granted powers very broadly; so, while the Constitution grants Congress the power to regulate only “commerce among the several states” (aka “interstate commerce”), the Supreme Court had interpreted that power to include the power to regulate any activity that merely affected interstate commerce.

As the economy grew, this standard increasingly meant that there was no limit to Congress's power to regulate, since just about every activity, when considered on a national scale, affects interstate commerce. A Constitution designed to limit Congress's power was instead interpreted to impose no limit.

The Supreme Court, under Chief Justice Rehnquist's command, changed that in *United States v. Lopez*. The government had argued that possessing guns near schools affected interstate commerce. Guns near schools increase crime, crime lowers property values, and so on. In the oral argument, the Chief Justice asked the government whether there was any activity that would not affect interstate commerce under the reasoning the government advanced. The government said there was not; if Congress says an activity

affects interstate commerce, then that activity affects interstate commerce. The Supreme Court, the government said, was not in the position to second-guess Congress.

“We pause to consider the implications of the government’s arguments,” the Chief Justice wrote. If anything Congress says is interstate commerce must therefore be considered interstate commerce, then there would be no limit to Congress’s power. The decision in *Lopez* was reaffirmed five years later in *United States v. Morrison*.

If a principle were at work here, then it should apply to the Progress Clause as much as the Commerce Clause. And if it is applied to the Progress Clause, the principle should yield the conclusion that Congress can’t extend an existing term. If Congress could extend an existing term, then there would be no “stopping point” to Congress’s power over terms, though the Constitution expressly states that there is such a limit. Thus, the same principle applied to the power to grant copyrights should entail that Congress is not allowed to extend the term of existing copyrights.

If, that is, the principle announced in *Lopez* stood for a principle. Many believed the decision in *Lopez* stood for politics – a conservative Supreme Court, which believed in states’ rights, using its power over Congress to advance its own personal political preferences. But I rejected that view of the Supreme Court’s decision. Indeed, shortly after the decision, I wrote an article demonstrating the “fidelity” in such an interpretation of the Constitution. The idea that the Supreme Court decides cases based upon its politics struck me as extraordinarily boring. I was not going to devote my life to teaching constitutional law if these nine Justices were going to be petty politicians.

Now let’s pause for a moment to make sure we understand what the argument in *Eldred* was not about. By insisting on the Constitution’s limits to copyright, obviously *Eldred* was not endorsing piracy. Indeed, in an obvious sense, he was fighting a kind of piracy – piracy of the public domain. When Robert Frost wrote his work and when Walt Disney created Mickey Mouse, the maximum copyright term was just fifty-six years. Because of interim changes, Frost and Disney had already enjoyed a seventy-five-year monopoly for their work. They had gotten the benefit of the bargain that the Constitution envisions: In exchange for a monopoly protected for fifty-six years, they created new work. But now these entities were using their power – expressed through the power of lobbyists’ money – to get another twenty-year dollop of monopoly. That twenty-year dollop would be taken from the public domain. Eric *Eldred* was fighting a piracy that affects us all.

Some people view the public domain with contempt. In their brief before the Supreme Court, the Nashville Songwriters Association wrote that the public domain is nothing more than “legal piracy.” But it is not piracy when the law allows it; and in our constitutional system, our law requires it. Some may not like the Constitution’s requirements, but that doesn’t make the Constitution a pirate’s charter.

As we’ve seen, our constitutional system requires limits on copyright as a way to assure that copyright holders do not too heavily influence the development and distribution of our culture. Yet, as Eric *Eldred* discovered, we have set up a system that assures that copyright terms will be repeatedly extended, and extended, and extended. We have created the perfect storm for the public domain. Copyrights have not expired, and will not expire, so long as Congress is free to be bought to extend them again.

It is valuable copyrights that are responsible for terms being extended. Mickey Mouse and “Rhapsody in Blue.” These works are too valuable for copyright owners to ignore. But the real harm to our society from copyright extensions is not that Mickey Mouse remains Disney’s. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that have continuing commercial value. The real harm of term extension comes not from these famous works. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.

If you look at the work created in the first twenty years (1923 to 1942) affected by the Sonny Bono Copyright Term Extension Act, 2 percent of that work has any continuing commercial value. It was the copyright holders for that 2 percent who pushed the CTEA through. But the law and its effect were not limited to that 2 percent. The law extended the terms of copyright generally.

Think practically about the consequence of this extension – practically, as a businessperson, and not as a lawyer eager for more legal work. In 1930, 10,047 books were published. In 2000, 174 of those books were still in print. Let’s say you were Brewster Kahle, and you wanted to make available to the world in your iArchive project the remaining 9,873. What would you have to do?

Well, first, you’d have to determine which of the 9,873 books were still under copyright. That requires going to a library (these data are not on-line) and paging through tomes of books, cross-checking the titles and authors of the 9,873 books with the copyright registration and renewal records for works published in 1930. That will produce a list of books still under copyright.

Then for the books still under copyright, you would need to locate the current copyright owners. How would you do that?

Most people think that there must be a list of these copyright owners somewhere. Practical people think this way. How could there be thousands and thousands of government monopolies without there being at least a list?

But there is no list. There may be a name from 1930, and then in 1959, of the person who registered the copyright. But just think practically about how impossibly difficult it would be to track down thousands of such records – especially since the person who registered is not necessarily the current owner. And we’re just talking about 1930!

The consequence with respect to old books is that they won’t be digitized, and hence will simply rot away on shelves. But the consequence for other creative works is much more dire.

Consider the story of Michael Agee, chairman of Hal Roach Studios, which owns the copyrights for the Laurel and Hardy films. Agee is a direct beneficiary of the Bono Act. The Laurel and Hardy films were made between 1921 and 1951. Only one of these films, *The Lucky Dog*, is currently out of copyright. But for the CTEA, films made after 1923 would have begun entering the public domain. Because Agee controls the exclusive rights for these popular films, he makes a great deal of money. According to one estimate, “Roach has sold about 60,000 videocassettes and 50,000 DVDs of the duo’s silent films.”

Yet Agee opposed the CTEA. His reasons demonstrate a rare virtue in this culture: selflessness. He argued in a brief before the Supreme Court that the Sonny Bono Copyright Term Extension Act will, if left standing, destroy a whole generation of American film.

His argument is straightforward. A tiny fraction of this work has any continuing commercial value. The rest – to the extent it survives at all – sits in vaults gathering dust. It may be that some of this work not now commercially valuable will be deemed to be valuable by the owners of the vaults. For this to occur, however, the commercial benefit from the work must exceed the costs of making the work available for distribution.

We can't know the benefits, but we do know a lot about the costs. For most of the history of film, the costs of restoring film were very high; digital technology has lowered these costs substantially. While it cost more than \$10,000 to restore a ninety-minute black-and-white film in 1993, it can now cost as little as \$100 to digitize one hour of 8 mm film.

By the time the copyright for these films expires, the film will have expired. These films were produced on nitrate-based stock, and nitrate stock dissolves over time. They will be gone, and the metal canisters in which they are now stored will be filled with nothing more than dust.

Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. For that tiny fraction, the copyright is a crucially important legal device. For that tiny fraction, the copyright creates incentives to produce and distribute the creative work. For that tiny fraction, the copyright acts as an “engine of free expression.”

But even for that tiny fraction, the actual time during which the creative work has a commercial life is extremely short. As I've indicated, most books go out of print within one year. The same is true of music and film. Commercial culture is sharklike. It must keep moving. And when a creative work falls out of favor with the commercial distributors, the commercial life ends.

Yet that doesn't mean the life of the creative work ends. We don't keep libraries of books in order to compete with Barnes & Noble, and we don't have archives of films because we expect people to choose between spending Friday night watching new movies and spending Friday night watching a 1930 news documentary. The noncommercial life of culture is important and valuable – for entertainment but also, and more importantly, for knowledge. To understand who we are, and where we came from, and how we have made the mistakes that we have, we need to have access to this history.

Copyrights in this context do not drive an engine of free expression. In this context, there is no need for an exclusive right. Copyrights in this context do no good.

Yet, for most of our history, they also did little harm. For most of our history, when a work ended its commercial life, there was no *copyright-related use* that would be inhibited by an exclusive right. When a book went out of print, you could not buy it from a publisher. But you could still buy it from a used book store, and when a used book store sells it, in America, at least, there is no need to pay the copyright owner anything. Thus,

the ordinary use of a book after its commercial life ended was a use that was independent of copyright law.

The same was effectively true of film. Because the costs of restoring a film – the real economic costs, not the lawyer costs – were so high, it was never at all feasible to preserve or restore film. Like the remains of a great dinner, when it's over, it's over. Once a film passed out of its commercial life, it may have been archived for a bit, but that was the end of its life so long as the market didn't have more to offer.

In other words, though copyright has been relatively short for most of our history, long copyrights wouldn't have mattered for the works that lost their commercial value. Long copyrights for these works would not have interfered with anything.

But this situation has now changed.

One crucially important consequence of the emergence of digital technologies is to enable the archive that Brewster Kahle dreams of. Digital technologies now make it possible to preserve and give access to all sorts of knowledge. Once a book goes out of print, we can now imagine digitizing it and making it available to everyone, forever. Once a film goes out of distribution, we could digitize it and make it available to everyone, forever. Digital technologies give new life to copyrighted material after it passes out of its commercial life. It is now possible to preserve and assure universal access to this knowledge and culture, whereas before it was not.

And now copyright law does get in the way. Every step of producing this digital archive of our culture infringes on the exclusive right of copyright. To digitize a book is to copy it. To do that requires permission of the copyright owner. The same with music, film, or any other aspect of our culture protected by copyright. The effort to make these things available to history, or to researchers, or to those who just want to explore, is now inhibited by a set of rules that were written for a radically different context.

Here is the core of the harm that comes from extending terms: Now that technology enables us to rebuild the library of Alexandria, the law gets in the way. And it doesn't get in the way for any useful *copyright* purpose, for the purpose of copyright is to enable the commercial market that spreads culture. No, we are talking about culture after it has lived its commercial life. In this context, copyright is serving no purpose *at all* related to the spread of knowledge. In this context, copyright is not an engine of free expression. Copyright is a brake.~

In January 1999, we filed a lawsuit on Eric Eldred's behalf in federal district court in Washington, D.C., asking the court to declare the Sonny Bono Copyright Term Extension Act unconstitutional. The two central claims that we made were (1) that extending existing terms violated the Constitution's "limited Times" requirement, and (2) that extending terms by another twenty years violated the First Amendment.

The district court dismissed our claims without even hearing an argument. A panel of the Court of Appeals for the D.C. Circuit also dismissed our claims, though after hearing an extensive argument. But that decision at least had a dissent, by one of the most conservative judges on that court. That dissent gave our claims life.

Judge David Sentelle said the CTEA violated the requirement that copyrights be for "limited Times" only. His argument was as elegant as it was simple: If Congress can

extend existing terms, then there is no “stopping point” to Congress’s power under the Copyright Clause. The power to extend existing terms means Congress is not required to grant terms that are “limited.” Thus, Judge Sentelle argued, the court had to interpret the term “limited Times” to give it meaning. And the best interpretation, Judge Sentelle argued, would be to deny Congress the power to extend existing terms.

We asked the Court of Appeals for the D.C. Circuit as a whole to hear the case. Cases are ordinarily heard in panels of three, except for important cases or cases that raise issues specific to the circuit as a whole, where the court will sit “en banc” to hear the case.

The Court of Appeals rejected our request to hear the case en banc. This time, Judge Sentelle was joined by the most liberal member of the D.C. Circuit, Judge David Tatel. Both the most conservative and the most liberal judges in the D.C. Circuit believed Congress had over-stepped its bounds.

It was here that most expected *Eldred v. Ashcroft* would die, for the Supreme Court rarely reviews any decision by a court of appeals. (It hears about one hundred cases a year, out of more than five thousand appeals.) And it practically never reviews a decision that upholds a statute when no other court has yet reviewed the statute.

But in February 2002, the Supreme Court surprised the world by granting our petition to review the D.C. Circuit opinion. Argument was set for October of 2002. The summer would be spent writing briefs and preparing for argument.

It is over a year later as I write these words. It is still astonishingly hard. If you know anything at all about this story, you know that we lost the appeal. And if you know something more than just the minimum, you probably think there was no way this case could have been won. After our defeat, I received literally thousands of missives by well-wishers and supporters, thanking me for my work on behalf of this noble but doomed cause. And none from this pile was more significant to me than the e-mail from my client, Eric Eldred.

But my client and these friends were wrong. This case could have been won. It should have been won. And no matter how hard I try to retell this story to myself, I can never escape believing that my own mistake lost it.

The mistake was made early, though it became obvious only at the very end. Our case had been supported from the very beginning by an extraordinary lawyer, Geoffrey Stewart, and by the law firm he had moved to, Jones, Day, Reavis and Pogue. Jones Day took a great deal of heat from its copyright-protectionist clients for supporting us. They ignored this pressure (something that few law firms today would ever do), and throughout the case, they gave it everything they could.

There were three key lawyers on the case from Jones Day. Geoff Stewart was the first, but then Dan Bromberg and Don Ayer became quite involved. Bromberg and Ayer in particular had a common view about how this case would be won: We would only win, they repeatedly told me, if we could make the issue seem “important” to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and

free culture; otherwise, they would never vote against “the most powerful media companies in the world.”

I hate this view of the law. Of course I thought the Sonny Bono Act was a dramatic harm to free speech and free culture. Of course I still think it is. But the idea that the Supreme Court decides the law based on how important they believe the issues are is just wrong. It might be “right” as in “true,” I thought, but it is “wrong” as in “it just shouldn’t be that way.” As I believed that any faithful interpretation of what the framers of our Constitution did would yield the conclusion that the CTEA was unconstitutional, and as I believed that any faithful interpretation of what the First Amendment means would yield the conclusion that the power to extend existing copyright terms is unconstitutional, I was not persuaded that we had to sell our case like soap. Just as a law that bans the swastika is unconstitutional not because the Court likes Nazis but because such a law would violate the Constitution, so too, in my view, would the Court decide whether Congress’s law was constitutional based on the Constitution, not based on whether they liked the values that the framers put in the Constitution.

In any case, I thought, the Court must already see the danger and the harm caused by this sort of law. Why else would they grant review? There was no reason to hear the case in the Supreme Court if they weren’t convinced that this regulation was harmful. So in my view, we didn’t need to persuade them that this law was bad, we needed to show why it was unconstitutional.

There was one way, however, in which I felt politics would matter and in which I thought a response was appropriate. I was convinced that the Court would not hear our arguments if it thought these were just the arguments of a group of lefty loons. This Supreme Court was not about to launch into a new field of judicial review if it seemed that this field of review was simply the preference of a small political minority. Although my focus in the case was not to demonstrate how bad the Sonny Bono Act was but to demonstrate that it was unconstitutional, my hope was to make this argument against a background of briefs that covered the full range of political views. To show that this claim against the CTEA was grounded in *law* and not politics, then, we tried to gather the widest range of credible critics – credible not because they were rich and famous, but because they, in the aggregate, demonstrated that this law was unconstitutional regardless of one’s politics.

The first step happened all by itself. Phyllis Schlafly’s organization, Eagle Forum, had been an opponent of the CTEA from the very beginning. Mrs. Schlafly viewed the CTEA as a sellout by Congress. In November 1998, she wrote a stinging editorial attacking the Republican Congress for allowing the law to pass. As she wrote, “Do you sometimes wonder why bills that create a financial windfall to narrow special interests slide easily through the intricate legislative process, while bills that benefit the general public seem to get bogged down?” The answer, as the editorial documented, was the power of money. Schlafly enumerated Disney’s contributions to the key players on the committees. It was money, not justice, that gave Mickey Mouse twenty more years in Disney’s control, Schlafly argued.

In the Court of Appeals, Eagle Forum was eager to file a brief supporting our position. Their brief made the argument that became the core claim in the Supreme Court: If Congress can extend the term of existing copyrights, there is no limit to

Congress's power to set terms. That strong conservative argument persuaded a strong conservative judge, Judge Sentelle.

In the Supreme Court, the briefs on our side were about as diverse as it gets. They included an extraordinary historical brief by the Free Software Foundation (home of the GNU project that made GNU/ Linux possible). They included a powerful brief about the costs of uncertainty by Intel. There were two law professors' briefs, one by copyright scholars and one by First Amendment scholars. There was an exhaustive and uncontroverted brief by the world's experts in the history of the Progress Clause. And of course, there was a new brief by Eagle Forum, repeating and strengthening its arguments.

Those briefs framed a legal argument. Then to support the legal argument, there were a number of powerful briefs by libraries and archives, including the Internet Archive, the American Association of Law Libraries, and the National Writers Union.

But two briefs captured the policy argument best. One made the argument I've already described: A brief by Hal Roach Studios argued that unless the law was struck, a whole generation of American film would disappear. The other made the economic argument absolutely clear.

This economists' brief was signed by seventeen economists, including five Nobel Prize winners, including Ronald Coase, James Buchanan, Milton Friedman, Kenneth Arrow, and George Akerlof. The economists, as the list of Nobel winners demonstrates, spanned the political spectrum. Their conclusions were powerful: There was no plausible claim that extending the terms of existing copyrights would do anything to increase incentives to create. Such extensions were nothing more than "rent-seeking" - the fancy term economists use to describe special-interest legislation gone wild.

The same effort at balance was reflected in the legal team we gathered to write our briefs in the case. The Jones Day lawyers had been with us from the start. But when the case got to the Supreme Court, we added three lawyers to help us frame this argument to this Court: Alan Morrison, a lawyer from Public Citizen, a Washington group that had made constitutional history with a series of seminal victories in the Supreme Court defending individual rights; my colleague and dean, Kathleen Sullivan, who had argued many cases in the Court, and who had advised us early on about a First Amendment strategy; and finally, former solicitor general Charles Fried.

Fried was a special victory for our side. Every other former solicitor general was hired by the other side to defend Congress's power to give media companies the special favor of extended copyright terms. Fried was the only one who turned down that lucrative assignment to stand up for something he believed in. He had been Ronald Reagan's chief lawyer in the Supreme Court. He had helped craft the line of cases that limited Congress's power in the context of the Commerce Clause. And while he had argued many positions in the Supreme Court that I personally disagreed with, his joining the cause was a vote of confidence in our argument.

The government, in defending the statute, had its collection of friends, as well. Significantly, however, none of these "friends" included historians or economists. The briefs on the other side of the case were written exclusively by major media companies, congressmen, and copyright holders.

The media companies were not surprising. They had the most to gain from the law. The congressmen were not surprising either – they were defending their power and, indirectly, the gravy train of contributions such power induced. And of course it was not surprising that the copyright holders would defend the idea that they should continue to have the right to control who did what with content they wanted to control.

Dr. Seuss’s representatives, for example, argued that it was better for the Dr. Seuss estate to control what happened to Dr. Seuss’s work – better than allowing it to fall into the public domain – because if this creativity were in the public domain, then people could use it to “glorify drugs or to create pornography.” That was also the motive of the Gershwin estate, which defended its “protection” of the work of George Gershwin. They refuse, for example, to license *Porgy and Bess* to anyone who refuses to use African Americans in the cast. That’s their view of how this part of American culture should be controlled, and they wanted this law to help them effect that control.

This argument made clear a theme that is rarely noticed in this debate. When Congress decides to extend the term of existing copyrights, Congress is making a choice about which speakers it will favor. Famous and beloved copyright owners, such as the Gershwin estate and Dr. Seuss, come to Congress and say, “Give us twenty years to control the speech about these icons of American culture. We’ll do better with them than anyone else.” Congress of course likes to reward the popular and famous by giving them what they want. But when Congress gives people an exclusive right to speak in a certain way, that’s just what the First Amendment is traditionally meant to block.

We argued as much in a final brief. Not only would upholding the CTEA mean that there was no limit to the power of Congress to extend copyrights – extensions that would further concentrate the market; it would also mean that there was no limit to Congress’s power to play favorites, through copyright, with who has the right to speak.

Between February and October, there was little I did beyond preparing for this case. Early on, as I said, I set the strategy.

The Supreme Court was divided into two important camps. One camp we called “the Conservatives.” The other we called “the Rest.” The Conservatives included Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, Justice Kennedy, and Justice Thomas. These five had been the most consistent in limiting Congress’s power. They were the five who had supported the *Lopez/Morrison* line of cases that said that an enumerated power had to be interpreted to assure that Congress’s powers had limits.

The Rest were the four Justices who had strongly opposed limits on Congress’s power. These four – Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer – had repeatedly argued that the Constitution gives Congress broad discretion to decide how best to implement its powers. In case after case, these justices had argued that the Court’s role should be one of deference. Though the votes of these four justices were the votes that I personally had most consistently agreed with, they were also the votes that we were least likely to get.

In particular, the least likely was Justice Ginsburg’s. In addition to her general view about deference to Congress (except where issues of gender are involved), she had been particularly deferential in the context of intellectual property protections. She and her daughter (an excellent and well-known intellectual property scholar) were cut from the

same intellectual property cloth. We expected she would agree with the writings of her daughter: that Congress had the power in this context to do as it wished, even if what Congress wished made little sense.

Close behind Justice Ginsburg were two justices whom we also viewed as unlikely allies, though possible surprises. Justice Souter strongly favored deference to Congress, as did Justice Breyer. But both were also very sensitive to free speech concerns. And as we strongly believed, there was a very important free speech argument against these retrospective extensions.

The only vote we could be confident about was that of Justice Stevens. History will record Justice Stevens as one of the greatest judges on this Court. His votes are consistently eclectic, which just means that no simple ideology explains where he will stand. But he had consistently argued for limits in the context of intellectual property generally. We were fairly confident he would recognize limits here.

This analysis of “the Rest” showed most clearly where our focus had to be: on the Conservatives. To win this case, we had to crack open these five and get at least a majority to go our way. Thus, the single overriding argument that animated our claim rested on the Conservatives’ most important jurisprudential innovation – the argument that Judge Sentelle had relied upon in the Court of Appeals, that Congress’s power must be interpreted so that its enumerated powers have limits.

This then was the core of our strategy – a strategy for which I am responsible. We would get the Court to see that just as with the *Lopez* case, under the government’s argument here, Congress would always have unlimited power to extend existing terms. If anything was plain about Congress’s power under the Progress Clause, it was that this power was supposed to be “limited.” Our aim would be to get the Court to reconcile *Eldred* with *Lopez*: If Congress’s power to regulate commerce was limited, then so, too, must Congress’s power to regulate copyright be limited.

The argument on the government’s side came down to this: Congress has done it before. It should be allowed to do it again. The government claimed that from the very beginning, Congress has been extending the term of existing copyrights. So, the government argued, the Court should not now say that practice is unconstitutional.

There was some truth to the government’s claim, but not much. We certainly agreed that Congress had extended existing terms in 1831 and in 1909. And of course, in 1962, Congress began extending existing terms regularly – eleven times in forty years.

But this “consistency” should be kept in perspective. Congress extended existing terms once in the first hundred years of the Republic. It then extended existing terms once again in the next fifty. Those rare extensions are in contrast to the now regular practice of extending existing terms. Whatever restraint Congress had had in the past, that restraint was now gone. Congress was now in a cycle of extensions; there was no reason to expect that cycle would end. This Court had not hesitated to intervene where Congress was in a similar cycle of extension. There was no reason it couldn’t intervene here.

Oral argument was scheduled for the first week in October. I arrived in D.C. two weeks before the argument. During those two weeks, I was repeatedly “mooted” by lawyers who had volunteered to help in the case. Such “moots” are basically practice rounds, where wannabe justices fire questions at wannabe winners.

I was convinced that to win, I had to keep the Court focused on a single point: that if this extension is permitted, then there is no limit to the power to set terms. Going with the government would mean that terms would be effectively unlimited; going with us would give Congress a clear line to follow: Don’t extend existing terms. The moots were an effective practice; I found ways to take every question back to this central idea.

One moot was before the lawyers at Jones Day. Don Ayer was the skeptic. He had served in the Reagan Justice Department with Solicitor General Charles Fried. He had argued many cases before the Supreme Court. And in his review of the moot, he let his concern speak:

“I’m just afraid that unless they really see the harm, they won’t be willing to upset this practice that the government says has been a consistent practice for two hundred years. You have to make them see the harm – passionately get them to see the harm. For if they don’t see that, then we haven’t any chance of winning.”

He may have argued many cases before this Court, I thought, but he didn’t understand its soul. As a clerk, I had seen the Justices do the right thing – not because of politics but because it was right. As a law professor, I had spent my life teaching my students that this Court does the right thing – not because of politics but because it is right. As I listened to Ayer’s plea for passion in pressing politics, I understood his point, and I rejected it. Our argument was right. That was enough. Let the politicians learn to see that it was also good.

The night before the argument, a line of people began to form in front of the Supreme Court. The case had become a focus of the press and of the movement to free culture. Hundreds stood in line for the chance to see the proceedings. Scores spent the night on the Supreme Court steps so that they would be assured a seat.

Not everyone has to wait in line. People who know the Justices can ask for seats they control. (I asked Justice Scalia’s chambers for seats for my parents, for example.) Members of the Supreme Court bar can get a seat in a special section reserved for them. And senators and congressmen have a special place where they get to sit, too. And finally, of course, the press has a gallery, as do clerks working for the Justices on the Court. As we entered that morning, there was no place that was not taken. This was an argument about intellectual property law, yet the halls were filled. As I walked in to take my seat at the front of the Court, I saw my parents sitting on the left. As I sat down at the table, I saw Jack Valenti sitting in the special section ordinarily reserved for family of the Justices.

When the Chief Justice called me to begin my argument, I began where I intended to stay: on the question of the limits on Congress’s power. This was a case about enumerated powers, I said, and whether those enumerated powers had any limit.

Justice O'Connor stopped me within one minute of my opening. The history was bothering her.

JUSTICE O'CONNOR: Congress has extended the term so often through the years, and if you are right, don't we run the risk of upsetting previous extensions of time? I mean, this seems to be a practice that began with the very first act.

She was quite willing to concede "that this flies directly in the face of what the framers had in mind." But my response again and again was to emphasize limits on Congress's power.

MR. LESSIG: Well, if it flies in the face of what the framers had in mind, then the question is, is there a way of interpreting their words that gives effect to what they had in mind, and the answer is yes.

There were two points in this argument when I should have seen where the Court was going. The first was a question by Justice Kennedy, who observed,

JUSTICE KENNEDY: Well, I suppose implicit in the argument that the '76 act, too, should have been declared void, and that we might leave it alone because of the disruption, is that for all these years the act has impeded progress in science and the useful arts. I just don't see any empirical evidence for that.

Here follows my clear mistake. Like a professor correcting a student, I answered,

MR. LESSIG: Justice, we are not making an empirical claim at all. Nothing in our Copyright Clause claim hangs upon the empirical assertion about impeding progress. Our only argument is this is a structural limit necessary to assure that what would be an effectively perpetual term not be permitted under the copyright laws.

That was a correct answer, but it wasn't the right answer. The right answer was instead that there was an obvious and profound harm. Any number of briefs had been written about it. He wanted to hear it. And here was the place Don Ayer's advice should have mattered. This was a softball; my answer was a swing and a miss.

The second came from the Chief, for whom the whole case had been crafted. For the Chief Justice had crafted the *Lopez* ruling, and we hoped that he would see this case as its second cousin.

It was clear a second into his question that he wasn't at all sympathetic. To him, we were a bunch of anarchists. As he asked:

CHIEF JUSTICE: Well, but you want more than that. You want the right to copy verbatim other people's books, don't you?

MR. LESSIG: We want the right to copy verbatim works that should be in the public domain and would be in the public domain but for a statute that cannot be justified under ordinary First Amendment analysis or under a proper reading of the limits built into the Copyright Clause.

Things went better for us when the government gave its argument; for now the Court picked up on the core of our claim. As Justice Scalia asked Solicitor General Olson,

JUSTICE SCALIA: You say that the functional equivalent of an unlimited time would be a violation [of the Constitution], but that's precisely the argument that's being made by petitioners here, that a limited time which is extendable is the functional equivalent of an unlimited time.

When Olson was finished, it was my turn to give a closing rebuttal. Olson's flailing had revived my anger. But my anger still was directed to the academic, not the practical. The government was arguing as if this were the first case ever to consider limits on Congress's Copyright and Patent Clause power. Ever the professor and not the advocate, I closed by pointing out the long history of the Court imposing limits on Congress's power in the name of the Copyright and Patent Clause – indeed, the very first case striking a law of Congress as exceeding a specific enumerated power was based upon the Copyright and Patent Clause. All true. But it wasn't going to move the Court to my side.

As I left the court that day, I knew there were a hundred points I wished I could remake. There were a hundred questions I wished I had answered differently. But one way of thinking about this case left me optimistic.

The government had been asked over and over again, what is the limit? Over and over again, it had answered there is no limit. This was precisely the answer I wanted the Court to hear. For I could not imagine how the Court could understand that the government believed Congress's power was unlimited under the terms of the Copyright Clause, and sustain the government's argument. The solicitor general had made my argument for me. No matter how often I tried, I could not understand how the Court could find that Congress's power under the Commerce Clause was limited, but under the Copyright Clause, unlimited. In those rare moments when I let myself believe that we may have prevailed, it was because I felt this Court – in particular, the Conservatives – would feel itself constrained by the rule of law that it had established elsewhere.

The morning of January 15, 2003, I was five minutes late to the office and missed the 7:00 A.M. call from the Supreme Court clerk. Listening to the message, I could tell in an instant that she had bad news to report. The Supreme Court had affirmed the decision of the Court of Appeals. Seven justices had voted in the majority. There were two dissents.

A few seconds later, the opinions arrived by e-mail. I took the phone off the hook, posted an announcement to our blog, and sat down to see where I had been wrong in my reasoning.

My *reasoning*. Here was a case that pitted all the money in the world against *reasoning*. And here was the last naïve law professor, scouring the pages, looking for reasoning.

I first scoured the opinion, looking for how the Court would distinguish the principle in this case from the principle in *Lopez*. The argument was nowhere to be found. The case was not even cited. The argument that was the core argument of our case did not even appear in the Court's opinion.

Justice Ginsburg simply ignored the enumerated powers argument. Consistent with her view that Congress's power was not limited generally, she had found Congress's power not limited here.

Her opinion was perfectly reasonable – for her, and for Justice Souter. Neither believes in *Lopez*. It would be too much to expect them to write an opinion that recognized, much less explained, the doctrine they had worked so hard to defeat.

But as I realized what had happened, I couldn't quite believe what I was reading. I had said there was no way this Court could reconcile limited powers with the Commerce Clause and unlimited powers with the Progress Clause. It had never even occurred to me that they could reconcile the two simply *by not addressing the argument*. There was no inconsistency because they would not talk about the two together. There was therefore no principle that followed from the *Lopez* case: In that context, Congress's power would be limited, but in this context it would not.

Yet by what right did they get to choose which of the framers' values they would respect? By what right did they – the silent five – get to select the part of the Constitution they would enforce based on the values they thought important? We were right back to the argument that I said I hated at the start: I had failed to convince them that the issue here was important, and I had failed to recognize that however much I might hate a system in which the Court gets to pick the constitutional values that it will respect, that is the system we have.

Justices Breyer and Stevens wrote very strong dissents. Stevens's opinion was crafted internal to the law: He argued that the tradition of intellectual property law should not support this unjustified extension of terms. He based his argument on a parallel analysis that had governed in the context of patents (so had we). But the rest of the Court discounted the parallel – without explaining how the very same words in the Progress Clause could come to mean totally different things depending upon whether the words were about patents or copyrights. The Court let Justice Stevens's charge go unanswered.

Justice Breyer's opinion, perhaps the best opinion he has ever written, was external to the Constitution. He argued that the term of copyrights has become so long as to be effectively unlimited. We had said that under the current term, a copyright gave an author 99.8 percent of the value of a perpetual term. Breyer said we were wrong, that the actual number was 99.9997 percent of a perpetual term. Either way, the point was clear: If the Constitution said a term had to be "limited," and the existing term was so long as to be effectively unlimited, then it was unconstitutional.

These two justices understood all the arguments we had made. But because neither believed in the *Lopez* case, neither was willing to push it as a reason to reject this extension. The case was decided without anyone having addressed the argument that we had carried from Judge Sentelle. It was *Hamlet* without the Prince.

Defeat brings depression. They say it is a sign of health when depression gives way to anger. My anger came quickly, but it didn't cure the depression. This anger was of two sorts.

It was first anger with the five “Conservatives.” It would have been one thing for them to have explained why the principle of *Lopez* didn’t apply in this case. That wouldn’t have been a very convincing argument, I don’t believe, having read it made by others, and having tried to make it myself. But it at least would have been an act of integrity. These justices in particular have repeatedly said that the proper mode of interpreting the Constitution is “originalism” – to first understand the framers’ text, interpreted in their context, in light of the structure of the Constitution. That method had produced *Lopez* and many other “originalist” rulings. Where was their “originalism” now?

Here, they had joined an opinion that never once tried to explain what the framers had meant by crafting the Progress Clause as they did; they joined an opinion that never once tried to explain how the structure of that clause would affect the interpretation of Congress’s power. And they joined an opinion that didn’t even try to explain why this grant of power could be unlimited, whereas the Commerce Clause would be limited. In short, they had joined an opinion that did not apply to, and was inconsistent with, their own method for interpreting the Constitution. This opinion may well have yielded a result that they liked. It did not produce a reason that was consistent with their own principles.

My anger with the Conservatives quickly yielded to anger with myself. For I had let a view of the law that I liked interfere with a view of the law as it is.

Most lawyers, and most law professors, have little patience for idealism about courts in general and this Supreme Court in particular. Most have a much more pragmatic view. When Don Ayer said that this case would be won based on whether I could convince the Justices that the framers’ values were important, I fought the idea, because I didn’t want to believe that that is how this Court decides. I insisted on arguing this case as if it were a simple application of a set of principles. I had an argument that followed in logic. I didn’t need to waste my time showing it should also follow in popularity.

As I read back over the transcript from that argument in October, I can see a hundred places where the answers could have taken the conversation in different directions, where the truth about the harm that this unchecked power will cause could have been made clear to this Court. Justice Kennedy in good faith wanted to be shown. I, idiotically, corrected his question. Justice Souter in good faith wanted to be shown the First Amendment harms. I, like a math teacher, reframed the question to make the logical point. I had shown them how they could strike this law of Congress if they wanted to. There were a hundred places where I could have helped them want to, yet my stubbornness, my refusal to give in, stopped me. I have stood before hundreds of audiences trying to persuade; I have used passion in that effort to persuade; but I refused to stand before this audience and try to persuade with the passion I had used elsewhere. It was not the basis on which a court should decide the issue.

Would it have been different if I had argued it differently? Would it have been different if Don Ayer had argued it? Or Charles Fried? Or Kathleen Sullivan?

My friends huddled around me to insist it would not. The Court was not ready, my friends insisted. This was a loss that was destined. It would take a great deal more to show our society why our framers were right. And when we do that, we will be able to show that Court.

Maybe, but I doubt it. These Justices have no financial interest in doing anything except the right thing. They are not lobbied. They have little reason to resist doing right. I can't help but think that if I had stepped down from this pretty picture of dispassionate justice, I could have persuaded.

And even if I couldn't, then that doesn't excuse what happened in January. For at the start of this case, one of America's leading intellectual property professors stated publicly that my bringing this case was a mistake. "The Court is not ready," Peter Jaszi said; this issue should not be raised until it is.

After the argument and after the decision, Peter said to me, and publicly, that he was wrong. But if indeed that Court could not have been persuaded, then that is all the evidence that's needed to know that here again Peter was right. Either I was not ready to argue this case in a way that would do some good or they were not ready to hear this case in a way that would do some good. Either way, the decision to bring this case – a decision I had made four years before – was wrong.

While the reaction to the Sonny Bono Act itself was almost unanimously negative, the reaction to the Court's decision was mixed. No one, at least in the press, tried to say that extending the term of copyright was a good idea. We had won that battle over ideas. Where the decision was praised, it was praised by papers that had been skeptical of the Court's activism in other cases. Deference was a good thing, even if it left standing a silly law. But where the decision was attacked, it was attacked because it left standing a silly and harmful law. *The New York Times* wrote in its editorial,

In effect, the Supreme Court's decision makes it likely that we are seeing the beginning of the end of public domain and the birth of copyright perpetuity. The public domain has been a grand experiment, one that should not be allowed to die. The ability to draw freely on the entire creative output of humanity is one of the reasons we live in a time of such fruitful creative ferment.~

The image that will always stick in my head is that evoked by the quote from *The New York Times*. That "grand experiment" we call the "public domain" is over? When I can make light of it, I think, "Honey, I shrunk the Constitution." But I can rarely make light of it. We had in our Constitution a commitment to free culture. In the case that I fathered, the Supreme Court effectively renounced that commitment. A better lawyer would have made them see differently.



This abridgement by Eric E. Johnson, available at: eejlaw.com/c/eldred_v_ashcroft_110.pdf.

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