

U.S. Copyright Law Casebook

{in development}

by Eric E. Johnson
ericejohnson.com

This part:

STORY ARC 4

Duration, Formalities, and the Public Domain

Fonts used

available for free at fonts.google.com

Montserrat

EB Garamond

<https://fonts.google.com/specimen/Montserrat>

<https://fonts.google.com/specimen/EB+Garamond>

Table of Contents

Table of Contents	3
--------------------------------	----------

STORY ARC 4 Duration, Formalities, and the Public Domain.....	5
--	----------

A. Introduction, Key Concepts.....	5
---	----------

A.1. What's the question? What's the topic?	5
---	---

A.2. Summary/overview	6
-----------------------------	---

A.3. What is the public domain? How do works get there?	7
---	---

B. Registration	9
------------------------------	----------

B.1. Applying for registration	9
--------------------------------------	---

Exposition by the Copyright Office.....	9
---	---

B.2. Registration and bureaucracy; copyright in the IP context.....	13
--	----

B.3. Registration versus protection	14
---	----

C. Copyright notices.....	16
----------------------------------	-----------

C.1. Lead-in.....	16
-------------------	----

C.2. Copyright Notices – Who What, When, Why.....	16
---	----

Exposition by the Copyright Office.....	16
---	----

C.3. Surplusage, intimidation, threats, and falsehoods in copyright notices and regarding copyright status.....	20
--	----

C.3.a. Exposition.....	20
------------------------	----

C.3.b. Statute: 17 U.S.C. § 506(c)	21
--	----

C.3.c. Considering “copyfraud”	22
--------------------------------------	----

D. Duration.....	24
-------------------------	-----------

D.1. Constitutional Provision	24
-------------------------------------	----

D.1.a. Pre-reading notes.....	24
-------------------------------	----

D.1.b. Text.....	24
------------------	----

D.2. History of Copyright Duration in the U.S.....	26
--	----

D.3. Duration Details	27
-----------------------------	----

Exposition by the Copyright Office.....	27
---	----

E.	Mickey Mouse, Peter and the Wolf Escape the Public Domain 1998-2012	32
E.1.	Lead-in.....	32
E.2.	The Sonny Bono Copyright Term Extension Act.....	32
E.3.	Eldred v. Ashcroft, Part One: Taking the Case.....	33
	E.3.a. Pre-reading notes.....	33
	E.3.b. Attribution and editing notes	34
	E.3.c. Recollection by plaintiff's lawyer.....	34
E.4.	Eldred v. Ashcroft, Part Two: The Court Rules	57
	E.4.a. Pre-reading notes.....	57
	E.4.b. Opinion of the U.S. Supreme Court.....	58
E.5.	Eldred v. Ashcroft, Part Three: Hindsight.....	73
	E.5.a. Pre-reading notes.....	73
	E.5.b. Attribution and editing notes	73
	E.5.c. Recollection by plaintiff's lawyer.....	73
E.6.	International Treaties and the Public Domain	78
	E.6.a. The Berne Convention and the United States.....	78
	E.6.b. The WTO, GATT, and the Uruguay Round	79
	E.6.c. Berne, TRIPS, and the Uruguay Round	80
E.7.	Golan v. Holder, Part One: Anacrusis.....	82
	E.7.a. Pre-reading notes.....	82
	E.6.b. Interview with Golan.....	82
E.8.	Golan v. Holder, Part Two: Ictus.....	91
	E.8.a. Pre-reading notes.....	91
	E.8.b. Opinion of the Court.....	92
F.	Federal works' exclusion from copyright	103
F.1.	Exposition.....	103
F.2.	Statutory law	104
	Section 105 text and corresponding definitions	104
G.	Government Edicts Doctrine	107
G.1.	Lead-in.....	107
G.2.	Case: Georgia v. Public.Resource.Org	107
	G.2.a. Pre-reading notes.....	107
	G.2.b. Opinion of the Court.....	108
	{ END OF PART 4 ("Story Arc 4") }	121

Duration, Formalities, and the Public Domain

A. Introduction, Key Concepts

A.1. What's the question? What's the topic?

The coming swath of readings concerns the following topics, which are all related: duration, formalities, and the public domain. All of these topics concern copyright validity – i.e., whether there is a valid copyright interest in a given work.

But the questions considered here are distinct from other validity topics considered elsewhere. For context, those elsewhere topics are the following: requirements of fixation, authorship, originality, creativity; the protectability of expression vis-à-vis the exclusion of facts, ideas, systems, and methods; analytical concepts such as “abstractions” and “scènes à faire”; and the special problems of copyrightability of fictional characters and universes, code and software; clothing and other useful articles, and architectural works.

What makes formalities, duration, and the public domain different from those other topics? When it comes to formalities, duration, and the public domain we are not interested in whether the work, considered in isolation, is copyrightable subject matter. Instead, our concerns are with the circumstances and history of the work. Things like: Who authored it? When was it authored? When was it published? Was adequate paperwork filed at a certain time? Was it published with certain information that constituted an appropriate copyright notice? These things might affect the copyright status of a work,

affect remedies available in an infringement suit, or the defenses potentially available in an infringement suit.

A.2. Summary/overview

First up are formalities. The word *formalities* groups together topics – mostly copyright notices and copyright registration – that are distinct from the substance of whether something is, by its nature, copyrightable. Rather, notice and registration concern things to be done (or skipped) by those persons interested in maximally keeping their options open for becoming a plaintiff in a copyright infringement suit.

If all you care about is having basic copyright protection for a work, you don't need to worry about formalities. Just before the 1990s began, U.S. copyright law changed so that copyright status attaches automatically as soon as a copyrightable work is created.

Yet *notice* is still important for lawyers to understand, for a number of reasons. Putting a copyright notice on works distributed has various benefits today. And a defective or omitted notice in the past can mean an older work is now in the public domain and thus free for others to use as they see fit. And *registration* isn't required for copyright protection to commence. But you have to register a copyright before you can file a suit for infringement of that copyright. And registering early, or at least prior to the complained of act of infringement, can give a copyright holder valuable additional avenues for remedies.

Looking ahead:

Registration will be the topic of Section B, and then Section C covers copyright notices. The law with regard to registration and notices tends to be fairly clear-cut. This material is not like originality or fair use, where caselaw is crucial for understanding. Thus the reading here is focused on expository text rather than caselaw. Among other things, you'll learn how to write a standard, correct copyright notice, and you'll learn about some stylistic choices that can be made without affecting the validity of the notice.

Sections D and E concern the duration of copyright. This topic has a technical side, and it has a historical/constitutional/philosophical/economic/political side. In addition to expository text that will introduce you to the historical timeline and the myriad rules at play for answering real-world duration questions, you will see two big constitutional confrontations over

whether Congress has the power to provide new terms of protection to works that were created long ago. These challenges resulted in the Supreme Court's opinions in the cases of *Eldred v. Ashcroft* (U.S. 2003) and *Golan v. Holder* (U.S. 2012). The Supreme Court's opinions in these cases are only part of what fills out the story. There is also a narrative written by one of the lawyers and an interview with a plaintiff.

Section F covers the exclusion from copyright of works created by the U.S. federal government, which makes for a huge and continuing contribution to the public domain.

Finally, Section G explores the government edicts doctrine, which ensures the law itself is in the public domain.

A.3. What is the public domain? How do works get there?

The phrase *public domain* denotes all that is not encumbered by intellectual property rights – viz., copyright for our purposes. An otherwise copyrightable work can be in the public domain for many reasons:

- The work may be so old that it existed before copyrights existed and thus has always been in the public domain.
- The work may be old enough that any copyright that once applied must have expired by now.
- For works of a more intermediate age, issues regarding notice or registration could have caused that work to enter the public domain earlier than the maximum available term. For certain older works copyright does not apply because publication was made without a legally sufficient copyright notice. And even if published with proper notice, for certain older works the copyright may have expired before the maximum duration because no renewal registration was filed.
- A work could be in the public domain because it was born copyright-free as a work of the federal government.
- A work could be in the public domain because it constitutes law and thus, under the government edicts doctrine, it cannot be encumbered by copyright.

As you can see, the above avenues to the public domain are connected to the topics coming up in this swath of the casebook.

But the above sketch of ways works can get to the public domain leaves unaddressed this natural question: What about an author's choice to put something into the public domain? Well, it once was quite easy for people to put their works into the public domain: They could simply publish them without a copyright notice. Gaining a copyright was an opt-in proposition. Now that the law has changed away from the opt-in mode, then what, one might wonder, is the opt-out device? The answer, it turns out, is complicated and, ultimately, unclear. But in terms of casebook organization, the topic of abjuring copyright entitlements and dedicating a work to the public domain is a subject best left for another time and place. To be specific, the topic is best addressed alongside issues of copyright ownership and licensing. That's because the complexities for modern-day copyright abandonment are bound up with the legal doctrines that fall within the ownership-and-licensing domain.

Finally, there is this issue: What verb is appropriate for describing the action of a work going from copyright protection to the public domain? The answer is, it depends on the rhetorical spin you want to give it.

Persons championing copyright's beneficence are well served by using the verb "fall," as it connotes entry into the public domain as a calamity. By contrast, the maintenance of copyright status – avoiding a "fall" – is impliedly characterized as a mishap avoided.

The verb "enter" is a neutral way to talk about it.

As you read, stay alert to verb choice in this area. You will find that legal source texts make use of both "fall" and "enter," and the choice often seems not to be at random.

If you wish to emphasize the importance of the public domain and, perhaps, the role played by the "for limited times" copyright system in expanding the public domain, you theoretically could chose the verb "ascend," as in, "After 95 years under copyright, the photograph has now ascended to the public domain." But that sort of phrasing seems to be absent from the scene.

B. Registration

B.1. Applying for registration

Exposition by the Copyright Office

{The following exposition is a mixture of new and pre-existing text. It is largely U.S. Copyright Office text – mostly from Circular 2 (“Copyright Registration”) – liberally reordered and revised, and combined with some original writing (EEJ in 2026).}

Basics

An application for copyright registration contains three essential elements: (1) a completed application form, (2) a nonrefundable filing fee, and (3) a nonreturnable deposit – that is, a copy or copies of the work being registered and “deposited” with the Copyright Office.

Application form

A copyright application establishes the basic facts of a claim: the title of the work, the author of the work, the name and address of the claimant or owner of the copyright, the year of creation, whether the work is published, whether the work has been previously registered, and whether the work includes preexisting material. Once submitted to the Copyright Office, the application becomes part of the public record and can be viewed by the public upon request.

The Copyright Office has various application forms. The least unusual is **Form TX**, which is for literary works. (Presumably the “TX” corresponds to “text.”) Form TX is for registration of published or unpublished literary works including fiction, nonfiction, poetry, textbooks, reference works, directories, catalogs, advertising copy, compilations of information, and computer programs. Excluded from Form TX literary works are *dramatic* literary works – such as screenplays – which are submitted with **Form PA** (“performing arts” works). Also excluded from Form TX literary works are periodicals or serial issues – such as issues of a newspaper, magazine, or law review – which need **Form SE**.

Form VA (“visual arts”) is for registration of published or unpublished visual works, including those in the statutory category of “pictorial, graphic, or sculptural works.” Form VA works include photographs, illustrations, graphic arts works (e.g., posters), and fine arts works (e.g., paintings and sculptures).

Also included as Form VA works are maps, globes, charts, and technical drawings and diagrams.

There's also **Form SR** ("sound recording"), **Form PRE** ("preregistration"), and even more forms beyond those.

Means of submission

In many situations it is possible to register works in a group – including multiple photographs and multiple issues of a newspaper. More information is provided by the Copyright Office's Circular 34, "Multiple Works."

Copyright applications can, in general, be done online, and the Copyright Office strongly encourages this. The online system has benefits of lower filing fees; faster examination; status tracking; payment by credit card, debit card, or electronic check; and optional deposit upload. There are exceptions. As of 2026, types of claims needing a paper-based submission included registration of works in which the U.S. copyright was restored under the 1994 Uruguay Round Agreements Act (Form GATT); renewal of copyright claims (Form RE); and some types of group submissions, including group registration of databases predominantly containing content other than photographs (Form TX).

To access the online system, you first need to establish a user ID and password and provide contact information. With your user ID and password, you can complete multiple applications, save draft applications, and review submitted applications.

Then, for an application, you must (1) complete the online application; (2) submit a filing fee by credit card, debit card, bank account, or deposit account; and (3) upload an electronic deposit copy of your work or send a physical deposit copy. You must finish each step before you can move to the next.

Filing fee

The Copyright Office charges a nonrefundable filing fee for each application. Fees are subject to change. Payment of the fee is considered an essential part of the application, and the Copyright Office warns that it will cancel a registration if payment is cancelled or if a check is returned as uncollectible.

The Copyright Office publishes current registration fees in Circular 4, "Copyright Office Fees." Some examples sampled in 2026 include:

EXPOSITION

- \$45 – single online application (single author, same claimant, one work, not a work made for hire)
- \$65 – standard online application
- \$95 – grouped online registration of newspapers or newsletters
- \$55 – grouped online registration of photographs (either all published or unpublished)
- \$125 – paper filings on Form TX, Form VA, Form PA, Form SE, and Form SR
- \$125 – renewal registrations for works published or registered before January 1, 1978
- \$200 – preregistration of certain unpublished works

Deposit

Every application must be accompanied by one or more deposit copies. The term “deposit” does not refer to the filing fee. Rather, “deposit” refers to the complete copy or copies of a work that must be submitted to register the work with the Copyright Office. In general, deposit copies can be viewed by members of the public upon request.

The Copyright Office uses the deposit to examine the applicant’s claim and to maintain a public record. The deposit requirement varies depending on the nature of the work, including whether the work is published or unpublished, is in a physical or digital format, and was published in the United States or a foreign country.

For unpublished works and works available only online, an applicant must submit one complete copy. Works published outside the United States require one complete copy.

For pictorial, graphic, or sculptural works, and for a computer program, the applicant generally submits only “identifying material,” not the work itself. Identifying material is material that adequately represents the authorship claimed in the application – such as photographs or drawings of a sculpture, or source code for computer programs.

Works first published in print in the United States, and first published after January 1, 1978, may be subject to the “best edition” and “mandatory deposit” requirements of copyright law. If these requirements apply, an applicant must submit two complete copies of the best existing edition of their work.

The phrase “**mandatory deposit**” comes from the authority the Copyright Act gives to the Library of Congress to demand copies of any work published in the United States for its collections or use.

The “**best edition**” is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes. There is no need to create a new edition of a work to meet the best edition requirement. But if there are multiple editions, the Library of Congress wants what it considers “best.”

The criteria used to identify the best edition for a particular work are listed in the “Best Edition Statement,” in Circular 7B, “Best Edition of Published Copyrighted Works for the Collections of the Library of Congress.” By way of example, the Library of Congress prefers hard cover to soft cover, archival-quality paper to less-permanent paper, and – unsurprisingly – “library” binding to “commercial” binding. Also, sewn binding is better than glue-only binding. But glued is better than stapled. Stapled is better than spiral-bound, And bound is better than looseleaf (unless future looseleaf insertions will be issued).

Certain categories of works have special rules, considerations, or exemptions from the mandatory deposit requirement. Some examples listed by the Copyright Office are: online-only works, advertising material and catalogs, toys, dolls, games, computer programs, wallpaper, wall coverings similar to wallpaper, and floor coverings. There’s more information in Circular 7D, “Mandatory Deposit of Copies or Phonorecords for the Library of Congress.” Additionally, the Copyright Office is authorized to grant special relief from deposit requirements in appropriate circumstances. To avail yourself, send a request in writing with supporting reasons. Presumably special circumstances will include anything as welcome in the Library of Congress’s mailroom as a palate of wallpaper or commercial-kitchen-grade linoleum. Something involving laminated countertops, for example, would seem to be a strong case for relief from the deposit requirement.

Effective date of registration

When the Copyright Office registers a work, it assigns an effective date of registration to the certificate of registration. The effective date of registration is the day that the Copyright Office receives in proper form all required elements: an acceptable application, an acceptable deposit, and a nonrefundable filing fee. The effective date of registration is not set until all the required elements are in the Copyright Office’s possession. If the

Copyright Office receives incomplete materials, an unacceptable deposit, or an insufficient fee, the effective date of registration will be set on the date that the Office receives all the required materials in acceptable form. The effective date of registration is not based on how long it takes the Copyright Office to examine the materials or mail the certificate.

B.2. Registration and bureaucracy; copyright in the IP context

Among the various legal regimes under the umbrella of “intellectual property,” government bureaucracy plays varying roles.

Trade secrets and the right of publicity are at one end of the spectrum. Government offices don’t play a role in receiving applications or issuing registration certificates for trade secrets or publicity rights.

Patents are at the other end of the spectrum. When it comes to getting patent rights, bureaucracy is central. The patent office (i.e., the patent side of the U.S. Patent and Trademark Office or “USPTO”) receives your application and examines it as to form and substance. The patent office very often rejects applications, in whole or in part, for any of a multitude of reasons. And there’s no such thing as a patent unless it has been issued as such by the USPTO. (For instance a so-called “patent pending” isn’t a patent, or even really a thing at all.)

The idea of the patent system is to impose a meaningfully high bar. Theoretically, no inventor gets a patent on a purportedly useful invention unless they can convince the examiner of not only its usefulness and newness, but also its “nonobviousness.” The myriad rules and requirements mean that even for an application that results in an issued patent, there is sometimes a lot of back and forth between the applicant (or the applicant’s agent or attorney) and the patent examiner.

Trademark law simultaneously inhabits two worlds. One bureaucratized, one not.

You can apply for the registration of a trademark with the USPTO. For applicants, trademark registration is generally much less stringent than patent prosecution. Applying for and getting a registered trademark can get tricky in various circumstances – particularly if you are claiming trademark rights over something that is close to the line of protectability. But if you pick a mark that’s exceedingly straightforward, then registration is exceedingly straightforward as well.

On the other hand, you can go into business and use a mark as an indicator of the commercial source of the products you sell, and then you can sue someone for infringement – all without ever dealing with any government agency at all. (We are not counting the judiciary as “government,” of course.)

Copyright is different than all of the above.

As a process, copyright registration is the easiest of all. That is, unless you are trying to do something really weird – like getting a copyright registration for a photograph of a monkey that you claim you didn’t make yourself (because, you say, the monkey took it using your camera). No one will judge your “art” and decide whether it “merits” copyright protection.

Also, copyright registration – at least in the contemporary era – is not necessary for copyright protection. You can accumulate an infringement cause of action against someone (and they, correspondingly, accumulate infringement liability) all without any interaction with government intermediaries.

Now, as a procedural requirement, you’ll have to apply for and obtain a copyright registration before filing your complaint in federal district court. That’s mandatory. But you can wait until someone has done something litigation-worthy before you bother with the process.

B.3. Registration versus protection

{The following is derived from judicial source text: Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. 959^[prelim.] (U.S. 2019). Starting with text from the opinion, I liberally re-wrote the text to have the substance, voice, and style I thought optimal for casebook purposes. Thus: (1) I should not be accorded credit for “writing” this. (2) The court should not be blamed for problems. Why do this? Because it is efficient. That is, it makes good economic sense. Federal courts produce quality expository writing on legal topics, and its public-domain status avoids licensing fees and transaction costs.}

Under the Copyright Act of 1976, an author gains copyright protection in their work immediately upon the work’s creation – meaning the moment when there comes into being an “original” work of “authorship” that is “fixed in any tangible medium of expression.”

A copyright owner’s rights exist apart from registration. That is to say, registration is not necessary for a copyright owner to have the rights that spring from copyright.

Yet before pursuing an infringement claim in court, a copyright claimant generally must comply with 17 U.S.C. § 411(a)’s requirement that

“registration of the copyright claim has been made.” Registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.

When does “registration” happen? Registration occurs when the Copyright Office takes favorable action on the application, thereby “registering” the copyright. It is not sufficient that the plaintiff has applied for registration – i.e., has delivered to the Copyright Office the completed application, the required fee, and the required deposit copies of the work. Prior to 2019, there had been a circuit split on this issue, but a 9-0 decision, *Fourth Estate v. Wall-Street.com*, 586 U.S. 959^[prelim.] (U.S. 2019), held that registration means registration.

While a civil suit must generally wait for registration, a copyright owner can nonetheless recover for infringement that occurred both before and after registration.

In limited circumstances, provided by statute, copyright owners may file an infringement suit before undertaking registration. But even in these exceptional scenarios, the copyright owner must eventually pursue registration in order to maintain their infringement suit.

For instance, § 408(f)(2) allows a copyright owner to apply for preregistration when preparing to distribute a work of a type vulnerable to predistribution infringement – notably a movie or musical composition. The Copyright Office will then conduct a “limited review” of the application and notify the claimant upon “completion of the preregistration.” Once such preregistration has been completed by the Copyright Office, § 411(a) allows the copyright claimant to then file an infringement suit in district court. But preregistration serves only as a preliminary step prior to a full registration. An infringement suit brought in reliance on preregistration risks dismissal unless the copyright owner promptly applies for registration after the preregistered work’s publication or infringement. § 408(f)(3)-(4).

Another statutory exception to the registration prerequisite for an infringement suit is found in § 411(c). That section allows a copyright owner to sue for infringement of a live broadcast before “registration ... has been made.” But the suit faces dismissal unless registration is made within three months of first broadcast transmission.

Outside of statutory exceptions, a would-be plaintiff is obliged to wait until the Copyright Office registers the copyright.

C. Copyright notices

C.1. Lead-in

A copyright notice, properly done, looks like this:

© 2026 Eric E. Johnson

There are stylistic choices one could make. For instance, this also is a valid copyright notice:

Copyright MMXXVI Eric E. Johnson

Copyright notices used to be a lot more important than they are now. Before January 1, 1978 – the effective date of the Copyright Act of 1976 – even an inadvertent failure to include a proper copyright notice on published copies of a work would lead to the forfeiture of any copyright one had or could have had in the work. The '76 Act introduced some forgiveness into the system. Then as of March 1, 1989, as part of the U.S. entry into the international Berne treaty framework, copyright notice became non-essential to copyright protection.

C.2. Copyright Notices – Who What, When, Why

Exposition by the Copyright Office

{Abridged from USCO's Circular 3: Copyright Notice, revised 03/2021. Text was abridged, reformatted, and adapted for casebook purposes. The portion marked "Synopsis" was text set off, in terms of layout, from the main text. Portions of text may have been excised without notation.}

Synopsis

Copyright notice provides information to the public regarding copyright ownership. Notice is optional for works created after March 1, 1989, but is generally required for works created before that date.

Copyright notice is a statement placed on copies or phonorecords of a work to inform the public that a copyright owner is claiming ownership of it. A notice consists of three elements that generally appear as a single continuous statement:

- The copyright symbol © (or for phonorecords, the symbol Ⓗ); the word “copyright”; or the abbreviation “copr.”;

- The year of first publication of the work; and
- The name of the copyright owner.

Example: © 2017 John Doe

The use of a copyright notice is the responsibility of the copyright owner and does not require permission from, or registration with, the Copyright Office.

Copyright notice was required for all works first published before March 1, 1989, subject to some exceptions discussed below. If the notice was omitted or a mistake was made in using copyright notice, the work generally lost copyright protection in the United States. Copyright notice is optional for works published on or after March 1, 1989, unpublished works, and foreign works; however, there are legal benefits for including notice on your work.

Works Requiring Notice

Different laws govern works first published before January 1, 1978, and works first published between January 1, 1978, and February 28, 1989.

Copies That Must Display Notice

In general, for works first published before March 1, 1989, the copyright owner was required to place an effective notice on all publicly distributed “visually perceptible” copies. A visually perceptible copy is one that can be seen or read, either directly or with the aid of a machine. Examples of visually perceptible copies include a book, sheet music, a photograph, or film. A visually perceptible copy does not include a CD, a vinyl record, or an .MP3 recording of a literary, dramatic, or musical work.

When a copyright owner published a phonorecord that embodied a sound recording, an effective notice had to appear on all publicly distributed phonorecords. The phonorecord symbol – © – was needed only for publicly distributed copies of a sound recording embodied in a phonorecord.

Form of Notice

An effective notice includes three general elements, as described above, as a single continuous statement. It was permissible to omit the year of publication for works reproduced on greeting cards, postcards, stationary,

jewelry, dolls, toys, or any useful article. See the following sections of chapter 2200 of the Compendium for specific issues regarding the elements of notice:

- Section 2204.4 for variations on the © or ® symbol, or the word “copyright”
- Section 2205.1 for variations on the year of publication
- Section 2205.2 for variations on the name of the copyright owner

Placement of Notice

The copyright notice had to be placed on copies or phonorecords in a way that was permanently legible to an ordinary user of the work and could not be concealed from view upon reasonable examination. The Office adopted specific regulations for the placement of notice on {various types of works, including literary works, contributions to collective works, musical works, sound recordings, motion pictures, pictorial/graphic/sculptural works, and machine-readable copies of works}.

Omission of Notice and Errors of Notice

An omission or mistake in using a copyright notice may not have invalidated the copyright to works published between January 1, 1978 and March 1, 1989 if:

- The notice was omitted from no more than a relatively small number of copies or phonorecords distributed to the public;
- The work was registered before or within five years after the publication without notice and a reasonable effort was made to add notice to all copies or phonorecords distributed in the United States after the omission was discovered;
- The omission violated an express written agreement to include proper notice as a condition of public distribution of copies or phonorecords; or,
- The notice was removed from the copies or phonorecords without the authorization of the copyright owner.

When Notice Is Optional

Copyright notice is optional for unpublished works, foreign works, or works published on or after March 1, 1989. When notice is optional, copyright owners can use any form of notice they wish. However, works first published after March 1, 1989 may need to comply with statutory formalities to prevent a defendant from invoking an innocent infringement defense in a copyright infringement action.

Unpublished Works

A copyright notice has never been required for unpublished works. The Copyright Office will register an unpublished work that does not bear a notice, regardless of whether the work was created before or after March 1, 1989. Nonetheless, because the dividing line between a preliminary distribution and actual publication is sometimes difficult to determine, copyright owners may want to place copyright notices on copies or phonorecords that leave their control to indicate that rights are claimed in a work. For example, an appropriate notice for an unpublished work is “Unpublished Letters of John Doe © 2017 John Doe,” where 2017 refers to the year the work was created.

Foreign Works and the Uruguay Round Agreements Act

For certain foreign works, the Uruguay Round Agreements Act (URAA) of 1994 modifies the effect of publication without notice. The URAA restored copyrights for foreign works that lost copyright protection in the United States for failure to comply with notice requirements prior to March 1, 1989. They include (a) works created by an author who, at the time of the work’s creation, was a citizen of, or domiciled in, a country that had entered into a copyright treaty with the United States, and (b) works first published, or sound recordings first fixed, in a country that had entered into a copyright treaty with the United States. Although restoration is automatic in eligible works, the URAA directs the owner of a restored work to notify reliance parties if the owner plans to enforce his or her rights in the work. For more information, see Copyright Restoration Under the URAA (Circular 38B).

Advantages to Using a Copyright Notice

Although notice is optional for unpublished works, foreign works, or works published on or after March 1, 1989, using a copyright notice carries the following benefits:

- Notice makes potential users aware that copyright is claimed in the work.
- In the case of a published work, a notice may prevent a defendant in a copyright infringement action from attempting to limit his or her liability for damages or injunctive relief based on an innocent infringement defense.
- Notice identifies the copyright owner at the time the work was first published for parties seeking permission to use the work.
- Notice identifies the year of first publication, which may be used to determine the term of copyright protection in the case of an anonymous work, a pseudonymous work, or a work made for hire.

C.3 Surplusage, intimidation, threats, and falsehoods in copyright notices and regarding copyright status

C.3.a. Exposition

A copyright notice is simple: just “copyright” (word, symbol, or abbreviation), a year, and a name. Yet there are a lot of other things you often see in the neighborhood of copyright notices. Such extra wording may have any of various rationales in terms of signaling, educating, deterring, and so forth. Some are legitimate. Some are fairly pointless. Some are sketchy. Some are crimey.

Here’s a common sight next to a copyright notice:

All rights reserved.

That’s something someone can say if they want to. It’s not part of the “copyright notice” as such. To the extent it has a legal function, it would probably be to provide evidence at trial that would tend to rebut a defendant’s claim of implied license.

Then there are things like this:

No part of this text may be reproduced, transmitted, downloaded, decompiled, reverse engineered, or stored in or introduced into any information storage and retrieval system, in any form or by any means, whether electronic or mechanical, now known or hereafter invented, without the express written permission of Harper Collins e-books.

That text – reproduced from a Harper Collins e-book by means already invented – isn't a copyright notice and plays no role in creating or preserving the copyright status of the book with which it is associated. Rather, the passage is an assertion of legal rights that is mostly a mix of falsehoods and posturing.

Here's a famous one:

This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited.

Essentially every bit of that statement is nonsense or false. The NFL has a track record of claiming legal rights they don't have – which is just part of the much the league has done that is both clever and bumbling with regard to intellectual property. (For some storytelling in this regard, see Eric E. Johnson, *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 N.D. L. Rev. 759 (2010).)

Then there are those who place a copyright notice, attributing copyright to themselves, of something that is clearly in the public domain. A number of museums, for instance, claim copyright over paintings in their collection despite the fact that the works are far too old to be within copyright protection. On the other hand, some museums have not only sought to avoid making false copyright claims but have also done a conspicuously good job marking images that are in the public domain – including the Metropolitan Museum of Art in New York and the Art Institute of Chicago.

Museums have different senses of priorities and values. Where some museums see a duty of curation and a mission of providing access to the artistic treasures they steward, other museums see a potential revenue stream.

C.3.b. Statute: 17 U.S.C. § 506(c)

In copyright, criminal and civil liability are quite different. For instance, only some of the things that create civil liability can also create criminal

liability. But there are, however, provisions for criminal liability that have no clear civil counterpart. The Copyright Act does, notably, provide for criminal liability for fraudulent copyright notices.

§ 506. Criminal offenses

Section (c):

(c) Fraudulent copyright notice. Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

C.3.c. Considering “copyfraud”

Legal scholar Jason Mazzone used the phrase “copyfraud” in discussing the phenomenon of false assertions of copyright:

Copyfraud⁷ refers to claiming falsely a copyright in a public domain work. These false copyright claims, which are often accompanied by threatened litigation for reproducing a work without the putative “owner’s” permission, result in users seeking licenses and paying fees to reproduce works that are free for everyone to use, or altering their creative projects to excise the uncopyrighted material.⁸ Copyright law suffers from a basic defect: The law’s strong protections for copyrights are not balanced by explicit protections for the public domain. Accordingly, copyright law itself creates strong incentives for copyfraud. The limited penalties for copyfraud under the Copyright Act, coupled with weak enforcement of these provisions, give publishers an incentive to claim ownership, however spurious, in everything.

Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028-1030 (2006).

Professor Mazzone recounts a long list of examples – some of which are so ironic and outrageous as to be funny. But Mazzone notes:

Copyfraud has serious consequences. In addition to enriching publishers who assert false copyright claims at the expense of legitimate users, copyfraud stifles valid forms of reproduction and creativity and

undermines free speech. Copyright is a limited exception to the Constitution's strong commitment to free expression. By extending control over writings and other works beyond what the law provides, copyfraud upsets the constitutional balance and undermines First Amendment values.

Id. at 1030.

D. Duration

D.1. Constitutional Provision

D.1.a. Pre-reading notes

The following is the portion of the U.S. Constitution that provides Congress with the power to create copyright law, as well as patent law. The particular clause – identified by number as *Article I, section 8, clause 8* – has been variously nicknamed the “Copyright Clause,” the “Copyright and Patent Clause,” the “Intellectual Property Clause,” and the “Progress Clause.”

The clause gives Congress the power to establish a law that bestows copyrights to persons. But the clause does not, itself, confer copyrights to anyone. Quite to the contrary, the clause is understood by the courts to limit the extent to which and under what circumstances Congress may confer copyrights to persons. Many of the requirements and limits of copyright – including authorship, originality, fixation, and duration – are understood by the courts to be constitutional. Thus, understanding these aspects of copyright requires understanding not merely the caselaw and statutory aspects, but the constitutional aspects as well.

Commonly a great deal of discussion of constitutional legal questions is done without reference to the text of the U.S. Constitution itself. But it is useful, every once in a while, to look at the relevant text and its neighboring words in the document. No great revelations may come from doing so. But even for a student who has already taken the Constitutional Law course, re-reading the text of the Constitution itself can help refresh one’s recollection as to the nature of the document and its place in American history.

D.1.b. Text

U.S. Constitution

Article I, Section 8

{as transcribed by the National Archives}

(drafted 1787, ratified 1788)

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and

CONSTITUTION

general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular

States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

D.2. History of Copyright Duration in the U.S.

{The following was composited/authored by EEJ, starting with federal judicial opinion source text (Eldred v. Ashcroft, 537 U.S. 186 (2003)) and re-writing and adding to it.}

The following describes the history of copyright terms as set by Congress. It is intended to illustrate the general evolution of the law. ***This is not an exhaustive restatement of copyright duration useful for determining a given work's copyright status.*** As one example, an aspect left out entirely is sound recordings, which are peculiar with regard to copyright in many ways, including as to duration. The point with this timeline is to get a general idea of how Congress's treatment of copyright terms has changed over time.

1790: 14 + 14 = 28

Copyright duration in the U.S., under the first copyright statute passed in 1790, was 14 years from the date of publication, renewable for an additional 14 years.

1831: 28 + 14 = 42

In 1831, Congress extended copyright terms to 28 years from publication, renewable for 14 more years, for a total of 42 years. The extension retroactively applied to existing works.

1909: 28 + 28 = 56

With the passage of the Copyright Act of 1909 – for which Mark Twain testified in a hearing in favor of longer copyright terms – Congress added 14 more years to the renewal term for a total term of 56 years. Again, the term began on publication, and, again, existing works' terms got the extension.

1976: life + 50 years; 75 years; or 100 years

When Congress did a clean-sheet overhaul of the copyright statute in 1976, Congress lengthened terms and made their structure dependent on the circumstances of the creation of the work. For works created by natural persons and published under their names, copyright protection lasted from the work's creation (not publication) until 50 years after the author's death, or, in the case of co-authored works, the death of the last surviving co-author. (Existing but unpublished works, previously susceptible to common-law copyright protection, were treated separately.) For works made by a corporate entity, works made for hire, anonymous works, and pseudonymous works, the copyright expired 75 years after publication or 100 years after creation – whichever came first.

1998: life + 70 years; 95 years; or 120 years

The Sonny Bono Copyright Term Extension Act (CTEA) passed in 1998 added 20 years to the duration of copyrights (including those then in existence). The following applies to newly created works:

- authored by natural persons and published under their names: upon creation for the life of the author or last surviving co-author plus 70 years
- authored by an entity (work made for hire), anonymous, or pseudonymous: 95 years from publication, with a hard limit of 120 years after creation

D.3. Duration Details

Exposition by the Copyright Office

{From Circular 15A: Duration of Copyright, revised 01/2025. Text was reformatted for casebook purposes. The portion marked "Synopsis" was the first paragraph of main text. }

Synopsis

The provisions of copyright law dealing with duration are complex. Different standards apply depending on whether federal statutory copyright protection was secured before or on or after January 1, 1978, the date the current law – the Copyright Act of 1976 – took effect. In addition, several amendments enacted since January 1, 1978, affect duration. {The following} describes the changes to the law that affect duration and gives details about terms of protection for copyrights secured and renewed on certain dates.

{Note regarding sound recordings

Sound recordings are subject to different provisions regarding duration. This document concerns works other than sound recordings.}

Works First Securing Federal Statutory Protection on or after January 1, 1978

For works securing federal statutory protection for the first time on or after January 1, 1978, the Copyright Act of 1976, as amended in 1998, establishes a single copyright term and different methods for computing the duration of a copyright. Works of this kind fall into two categories.

Works Created on or after January 1, 1978

The law automatically protects a work that is created and fixed in a tangible medium of expression on or after January 1, 1978, from the moment of its creation and gives it a term lasting for the author's life plus an additional 70 years. For a "joint work prepared by two or more authors who did not work for hire," the term lasts for 70 years after the last surviving author's death. For works made for hire and anonymous and pseudonymous works, the duration of copyright is 95 years from first publication or 120 years from creation, whichever is shorter (unless the author's identity is later revealed in Copyright Office records, in which case the term becomes the author's life plus 70 years). For more information about works made for hire, see *Works Made for Hire* (Circular 30). For details about pseudonymous works, see *Pseudonyms* (Circular 32).

Works in Existence but Not Published or Copyrighted on January 1, 1978

The law automatically gives federal copyright protection to works that were created but neither published nor registered before January 1, 1978. The duration of copyright in these works is generally computed the same way as for works created on or after January 1, 1978: life plus 70 years or 95 or 120 years, depending on the nature of authorship. However, all works in this category are guaranteed at least 25 years of statutory protection. The law specifies that in no case would copyright in a work in this category have expired before December 31, 2002. In addition, if a work in this category was published before that date, the term extends another 45 years, through the end of 2047.

Works Already Under Statutory Protection before 1978

For works that had already secured statutory copyright protection before January 1, 1978, the 1976 Copyright Act retains the system in the previous copyright law – the Copyright Act of 1909 – for computing the duration of protection, but with some changes.

Duration under 1909 Act

Federal standards for copyright duration differ substantially under the 1909 act compared with the 1976 act because of the renewal term contained in the 1909 act. Under the 1909 act, federal copyright was secured on the date a work was published or, for unpublished works, on the date of registration. A copyright lasted for a first term of 28 years from the date it was secured. The copyright was eligible for renewal during the final, that is, 28th year, of the first term. If renewed, the copyright was extended for a second, or renewal, term of 28 years. If it was not renewed, the copyright expired at the end of the first 28-year term, and the work is no longer protected by copyright. The term of copyright for works published with a year date in the notice that is earlier than the actual date of publication is computed from the year date in the copyright notice.

Effect of 1976 Act on Length of Subsisting Copyrights

The 1976 Copyright Act carried over the system in the 1909 Copyright Act for computing copyright duration for works protected by federal statute before January 1, 1978, with one major change: the length of the renewal term was increased to 47 years. The 1998 Copyright Term Extension Act increased the renewal term another 20 years to 67 years. Thus the maximum total term of copyright protection for works already protected by January 1, 1978, has been increased from 56 years (a first term of 28 years plus a renewal term of 28 years) to 95 years (a first term of 28 years plus a renewal term of 67 years). Applying these standards, all works published in the United States before January 1, 1927, are in the public domain.

Automatic Extension for Works in Renewal Term

Works originally copyrighted after 1922 and renewed before 1978. These works were automatically given a longer copyright term. Copyrights that had already been renewed and were in their second term at any time between December 31, 1976, and December 31, 1977, inclusive, do not need to be renewed again. They have been automatically extended to last for a total term

of 95 years (a first term of 28 years plus a renewal term of 67 years) from the end of the year in which they were originally secured. For more information about renewal of copyright, see *Renewal of Copyright* (Circular 6A).

Copyright Extensions before 1976 Act

Before passage of the 1976 Copyright Act, Congress enacted a series of nine acts that provided interim extensions for works whose copyright protection began between September 19, 1906, and December 31, 1918, if they were in their renewal terms. Without these interim extensions, copyrights commencing during that time would have expired after 56 years, at the end of their renewal terms, between September 19, 1962, and December 31, 1976.

Example: A work that first secured federal copyright protection on October 5, 1907, and was renewed in 1935, would have fallen into the public domain after October 5, 1963. The first act extended the copyright to December 31, 1965; the second act extended it to December 31, 1967; the third act extended it to December 31, 1968; the fourth act extended it to December 31, 1969; the fifth act extended it to December 31, 1970; the sixth act extended it to December 31, 1971; the seventh act extended it to December 31, 1972; the eighth act extended it to December 31, 1974; the ninth extended it to December 31, 1976; and the 1976 Copyright Act extended the copyright through the end of 1982 (75 years from the end of the year in which the copyright was originally secured).

Mandatory Renewal

Works originally copyrighted between January 1, 1950, and December 31, 1963. Copyrights in their first 28-year term on January 1, 1978, still had to be renewed to be protected for the second term. If a valid renewal registration was made at the proper time, the second term will last for 67 years. However, if renewal registration for these works was not made within the statutory time limits, a copyright originally secured between 1950 and 1963 expired on December 31 of its 28th year, and protection was lost permanently.

Automatic Renewal and Voluntary Registration

Works originally copyrighted between January 1, 1964, and December 31, 1977. Congress amended the copyright law on June 26, 1992, to automatically renew the copyright in these works and to make renewal registration for them optional. Their copyright term is still divided between a 28-year original term and a 67-year renewal term, but a renewal registration is not required to secure

the renewal copyright. The renewal vests on behalf of the appropriate renewal claimant upon renewal registration or, if there is no renewal registration, on December 31 of the 28th year. For details about the benefits of making a renewal registration, see *Renewal of Copyright* (Circular 6A).

Year-End Expiration of Copyright Terms

The 1976 Copyright Act provides that all terms of copyright will run through the end of the calendar year in which they expire. This provision affects the duration of all copyrights, including those in either their first or their second term on January 1, 1978. For works eligible for renewal, the renewal filing period begins on December 31 of the 27th year of the copyright term.

NOTE: Under the 1909 Copyright Act, terms of copyright and renewal filing periods corresponded with dates of publication or registration, not calendar years.

Restoration of Copyright in Certain Foreign Works

Under the provisions of the Uruguay Round Agreements Act (URAA), certain foreign works whose U.S. copyright protection had been lost because of noncompliance with formalities of U.S. law, were restored as of January 1, 1996. Among the informalities subject to restoration is failure to renew. Restoration occurs automatically, and the duration of the restored term is based on the term of protection the work would have had without the informality. For details, see *Copyright Restoration Under the URAA* (Circular 38B).

E. Mickey Mouse, Peter and the Wolf Escape the Public Domain 1998-2012

E.1. Lead-in

Here we look at copyright law and the issue of copyright duration in the context of politics, lobbying, activism, policy, constitutional law and theory, lawyering, and high-stakes impact litigation.

The story, as it is relayed here, begins with the Sonny Bono Copyright Term Extension Act of 1998. Before Congress passed the law, many old works – generally written by long-dead authors – were on the precipice of entering the public domain. We’ll read about this act, and then we’ll read a narrative account by lawyer and legal scholar Larry Lessig about his representation of Eric Eldred. Eldred, an amateur web developer and literature enthusiast, sought to challenge the constitutionality of extending existing copyright terms. That fight went to the U.S. Supreme Court. That narrative account is broken into two parts, between which we’ll read the resulting Supreme Court opinion upholding the constitutionality of the law: *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The outcome of Eldred was that Congress can delay the entry of existing works into the public domain. But could Congress pull works out of the public domain and place them under copyright?

That question is at the heart of the sequel to the Sonny Bono and Eric Eldred story: *Golan v. Holder*, 565 U.S. 302 (2012). Congress sought to bestow copyright on certain foreign works that were in the public domain in the United States with 1994’s Uruguay Round Agreements Act – legislation dovetailing with recently incurred treaty obligations. We’ll read an interview with the plaintiff, symphony conductor Lawrence Golan. Then we’ll read the Supreme Court’s opinion upholding the law’s constitutionality.

E.2. The Sonny Bono Copyright Term Extension Act

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (Public Law 105-298). The act extended copyright terms by 20 years, including for copyrights then in existence as well as for future works yet to be created. For the most part, that meant an extension from 75 years to 95 years for corporate works, or for natural persons’ works an extension from the life of the author (or last surviving co-author) plus 50 years to life plus 70 years.

The legislation was championed by Mary Bono, member of the House of Representatives representing a district in Southern California. Mary Bono won a special election for the seat after it was left vacant by the death of her husband, Congressman Sonny Bono, a former entertainer/singer/actor known particularly for his duet performances with then-wife Cher (as “Sonny and Cher”) and the singing of the song “I Got You Babe.”

The Sonny Bono Copyright Term Extension Act (CTEA) was introduced in the Senate sponsored by Orrin Hatch of Utah. The legislation proceeded through Congress in a manner indicating its very broad support. The bill passed the Senate by unanimous consent – meaning no senators opposed it. In the House, the bill passed by voice vote – meaning individual votes and vote totals were not recorded. The CTEA was signed into law by President Bill Clinton.

While meeting apparently little resistance on Capitol Hill, the act did have detractors on both sides of the political spectrum. Many critics derisively associated the bill with Disney and Disney’s flagship cartoon character Mickey Mouse. Disney had many highly successful animated movies that were beginning to approach the expiration of their copyright term. Among the very oldest – and thus nearest to its copyright’s end – was the 1928 black-and-white animated short *Steamboat Willie*, which bore the first instantiation of Mickey Mouse. Because of the CTEA, 1928 works like *Steamboat Willie* (and its depiction of Mickey Mouse) avoided entering the public domain for an additional two decades. Putting aside *Steamboat Willie*’s deficiencies in its displayed copyright notice – which Disney vigorously insisted did not affect copyright validity – then the movie, along with its whistling, boat-steering skipper, finally reached public domain status in 2024.

E.3. Eldred v. Ashcroft, Part One: Taking the Case

E.3.a. Pre-reading notes

Lawyer and law professor Lawrence Lessig (more often called Larry Lessig) took on the project of challenging the constitutionality of the retroactive extension of copyright terms under the CTEA (Sonny Bono Copyright Term Extension Act). Here, we have his recollection about the case’s beginnings up through the argument before the Supreme Court.

It’s unusual to have a narrative account of litigation by one of the party’s lawyers. And that’s too bad, because law students – who are about to become

lawyers – have a lot to gain from hearing from lawyers about their practice. But judicial opinions are free for the taking – no licensing, royalties, or copyright issues to deal with. A lawyer’s expression fixed in a tangible medium? Well, you know what that means.

As it turns out, Lessig and some others started a project called “Creative Commons,” which has produced and stewards a set of blanket licenses that copyright owners can put on their works, giving advance permission for others to reproduce and alter their works without payment. And Lessig placed such a license on his narrative recollecting his representation of Eldred.

E.3.b. Attribution and editing notes

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 following is the copyright notice in the book:

Copyright © Lawrence Lessig, 2004

This abridgement by Eric E. Johnson, originally published separately in 2010. All endnotes have been removed without notation. Omissions are marked with ~. The unabridged text, which includes many citations, was available via <http://www.free-culture.cc/index.html>. This abridgement – insofar as it involves separately copyrightable expression by Eric E. Johnson – is © 2010 Eric E. Johnson and licensed under the Creative Commons Attribution-Noncommercial 1.0 Generic License, available at <http://creativecommons.org/licenses/by-nc/1.0/>

E.3.c. Recollection by plaintiff’s lawyer

Eldred v. Ashcroft

(et sub nom.: Eldred v. Reno)

U.S. District Court for the District of Columbia
 U.S. Court of Appeals for the District of Columbia
 Supreme Court of the United States
 (1999–2003)

Filed as ERIC ELDRED and ELDRITCH PRESS, plaintiffs v. JANET RENO, in her official capacity as Attorney General of the United States, defendant, U.S. District Court for the District of Columbia, No. CA 99-0065. On appeal: U.S. Court of Appeals for the District of Columbia Circuit. No. 01 – 618. ELDRED v. RENO, 345 U.S. App. D.C. 89, 239 F.3d 372 (D.C. Cir. 2001). On certiorari: ERIC ELDRED, et al., PETITIONERS v.

JOHND. ASHCROFT, ATTORNEY GENERAL, argued October 9, 2002 by Lawrence Lessig for the plaintiffs-petitioners and Theodore B. Olson for the government. Decided January 15, 2003.

The post-case recollection of LAWRENCE LESSIG, counsel for plaintiffs-petitioners:

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 “copyrights 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.

~{To be continued ... }

E.4. Eldred v. Ashcroft, Part Two: The Court Rules

E.4.a. Pre-reading notes

This lawsuit sought – unsuccessfully – to challenge the constitutionality of the Copyright Term Extension Act (CTEA) of 1998, with which Congress extended the duration of copyrights on existing works, including many near expiration, by 20 years. The decision was 7-2, with the court’s opinion written by one of two justices with the most intense interest in copyright, Ruth Bader Ginsburg. The other justice with a long-running interest in copyright, Stephen Breyer, wrote a dissent, as did John Paul Stevens. The dissents are not reproduced here.

Justice Ginsburg’s opinion for the court held that the “limited times” language in the Constitution’s grant of power to Congress to create copyrights did not restrict Congress from retroactively extending the terms of copyrights for works already produced and published. The opinion also held that the First Amendment did not bar the extension.

E.4.b. Opinion of the U.S. Supreme Court

Eldred v. Ashcroft

Supreme Court of the United States
537 U.S. 186 (2003)

ERIC ELDRED, et al., PETITIONERS v. JOHN D. ASHCROFT, ATTORNEY GENERAL. Certiorari to the United States Court of Appeals for the District of Columbia Circuit. No. 01 – 618. *Eldred v. Reno*, 345 U.S. App. D.C. 89, 239 F.3d 372 (D.C. Cir. 2001). *In the U.S. Supreme Court*: Argued October 9, 2002 with Lawrence Lessig arguing for the petitioner and Theodore B. Olson arguing for the respondent. Decided January 15, 2003.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority the Constitution assigns to Congress to prescribe the duration of copyrights. The Copyright and Patent Clause of the Constitution, Art. I, § 8, cl. 8, provides as to copyrights: “Congress shall have Power ... to promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings.” In 1998, in the measure here under inspection, Congress enlarged the duration of copyrights by 20 years. Copyright Term Extension Act (CTEA), Pub. L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304). As in the case of prior extensions, principally in 1831, 1909, and 1976, Congress provided for application of the enlarged terms to existing and future copyrights alike.

Petitioners are individuals and businesses whose products or services build on copyrighted works that have gone into the public domain. They seek a determination that the CTEA fails constitutional review under both the Copyright Clause’s “limited Times” prescription and the First Amendment’s free speech guarantee. Under the 1976 Copyright Act, copyright protection generally lasted from the work’s creation until 50 years after the author’s death. Pub. L. 94-553, § 302(a) (1976 Act). Under the CTEA, most copyrights now run from creation until 70 years after the author’s death. 17 U.S.C. § 302(a). Petitioners do not challenge the “life-plus-70-years” time span itself. “Whether 50 years is enough, or 70 years too much,” they acknowledge, “is not a judgment meet for this Court.” Congress went awry, petitioners maintain, not with respect to newly created works,

but in enlarging the term for published works with existing copyrights. The “limited Time” in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend. See *ibid.* As to the First Amendment, petitioners contend that the CTEA is a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for such regulations.

In accord with the District Court and the Court of Appeals, we reject petitioners’ challenges to the CTEA. In that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations.

I

A

We evaluate petitioners’ challenge to the constitutionality of the CTEA against the backdrop of Congress’ previous exercises of its authority under the Copyright Clause. The Nation’s first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term.[#] The 1790 Act’s renewable 14-year term applied to existing works (*i.e.*, works already published and works created but not yet published) and future works alike.[#] Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years).[#] Both times, Congress applied the new copyright term to existing and future works[#]; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective[#].

In 1976, Congress altered the method for computing federal copyright terms. 1976 Act §§ 302-304. For works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work’s creation, not – as in the 1790, 1831, and 1909 Acts – its publication; protection would last until 50 years after the author’s death. § 302(a). In these respects, the 1976 Act aligned United States copyright terms with the

then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works.[#] For anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first. § 302(c).

These new copyright terms, the 1976 Act instructed, governed all works not published by its effective date of January 1, 1978, regardless of when the works were created. §§ 302-303. For published works with existing copyrights as of that date, the 1976 Act granted a copyright term of 75 years from the date of publication, § 304(a) and (b), a 19-year increase over the 56-year term applicable under the 1909 Act.

The measure at issue here, the CTEA, installed the fourth major duration extension of federal copyrights.²

²Asserting that the last several decades have seen a proliferation of copyright legislation in departure from Congress' traditional pace of legislative amendment in this area, petitioners cite nine statutes passed between 1962 and 1974, each of which incrementally extended existing copyrights for brief periods. See Pub. L. 87-668, 76 Stat. 555; Pub. L. 89-142, 79 Stat. 581; Pub. L. 90-141, 81 Stat. 464; Pub. L. 90-416, 82 Stat. 397; Pub. L. 91-147, 83 Stat. 360; Pub. L. 91-555, 84 Stat. 1441; Pub. L. 92-170, 85 Stat. 490; Pub. L. 92-566, 86 Stat. 1181; Pub. L. 93-573, Title I, 88 Stat. 1873. As respondent (Attorney General Ashcroft) points out, however, these statutes were all temporary placeholders subsumed into the systemic changes effected by the 1976 Act. Brief for Respondent 9.

Retaining the general structure of the 1976 Act, the CTEA enlarges the terms of all existing and future copyrights by 20 years. For works created by identified natural persons, the term now lasts from creation until 70 years after the author's death. 17 U.S.C. § 302(a). This standard harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993.[#] For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first. 17 U.S.C. § 302(c).

Paralleling the 1976 Act, the CTEA applies these new terms to all works not published by January 1, 1978. §§ 302(a), 303(a). For works published before 1978 with existing copyrights as of the CTEA’s effective date, the CTEA extends the term to 95 years from publication. § 304(a) and (b). Thus, in common with the 1831, 1909, and 1976 Acts, the CTEA’s new terms apply to both future and existing copyrights.

B

Petitioners’ suit challenges the CTEA’s constitutionality under both the Copyright Clause and the First Amendment. On cross-motions for judgment on the pleadings, the District Court entered judgment for the Attorney General (respondent here).[#] The court held that the CTEA does not violate the “limited Times” restriction of the Copyright Clause because the CTEA’s terms, though longer than the 1976 Act’s terms, are still limited, not perpetual, and therefore fit within Congress’ discretion. The court also held that “there are no First Amendment rights to use the copyrighted works of others.”

The Court of Appeals for the District of Columbia Circuit affirmed.[#] In that court’s unanimous view, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), foreclosed petitioners’ First Amendment challenge to the CTEA.[#] Copyright, the court reasoned, does not impermissibly restrict free speech, for it grants the author an exclusive right only to the specific form of expression; it does not shield any idea or fact contained in the copyrighted work, and it allows for “fair use” even of the expression itself.[#]

A majority of the Court of Appeals also upheld the CTEA against petitioners’ contention that the measure exceeds Congress’ power under the Copyright Clause. Specifically, the court rejected petitioners’ plea for interpretation of the “limited Times” prescription not discretely but with a view to the “preambular statement of purpose” contained in the Copyright Clause: “To promote the Progress of Science.”[#] Circuit precedent,[#] the court determined, precluded that plea. In this regard, the court took into account petitioners’ acknowledgment that the preamble itself places no substantive limit on Congress’ legislative power.[#]

The appeals court found nothing in the constitutional text or its history to suggest that “a term of years for a copyright is not a ‘limited Time’ if it may later be extended for another ‘limited Time.’”⁴⁴ The court recounted that “the First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states.” *Ibid.* That construction of Congress’ authority under the Copyright Clause “by [those] contemporary with [the Constitution’s] formation,” the court said, merited “very great” and in this case “almost conclusive” weight. *Ibid.* (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57, 1884 Dec. Comm’r Pat. 186 (1884)). As early as *McClurg v. Kingsland*, 1 How. 202, 42 U.S. 202 (1843), the Court of Appeals added, this Court had made it “plain” that the same Clause permits Congress to “amplify the terms of an existing patent.” 239 F.3d at 380.⁴⁵

Concerning petitioners’ assertion that Congress might evade the limitation on its authority by stringing together “an unlimited number of ‘limited Times,’”⁴⁶ the Court of Appeals stated that such legislative misbehavior “clearly is not the situation before us.”⁴⁷

We granted certiorari to address two questions: whether the CTEA’s extension of existing copyrights exceeds Congress’ power under the Copyright Clause; and whether the CTEA’s extension of existing and future copyrights violates the First Amendment. We now answer those two questions in the negative and affirm.

II

A

We address first the determination of the courts below that Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe “limited Times” for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.

The CTEA’s baseline term of life plus 70 years, petitioners concede, qualifies as a “limited Time” as applied to future copyrights. Petitioners contend, however, that existing copyrights extended to endure for that same

term are not “limited.” Petitioners’ argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever “fixed” or “inalterable.” The word “limited,” however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: “confined within certain bounds,” “restrained,” or “circumscribed.” S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); see T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) (“confined within certain bounds”); Webster’s Third New International Dictionary 1312 (1976) (“confined within limits”; “restricted in extent, number, or duration”). Thus understood, a time span appropriately “limited” as applied to future copyrights does not automatically cease to be “limited” when applied to existing copyrights. And as we observe, *infra*, at 18, there is no cause to suspect that a purpose to evade the “limited Times” prescription prompted Congress to adopt the CTEA.

To comprehend the scope of Congress’ power under the Copyright Clause, “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.

Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights. See, *e.g.*, Act of Jan. 7, 1808, ch. 6, 6 Stat. 70 (patent); Act of Mar. 3, 1809, ch. 35, 6 Stat. 80 (patent); Act of Feb. 7, 1815, ch. 36, 6 Stat. 147 (patent); Act of May 24, 1828, ch. 145, 6 Stat. 389 (copyright); Act of Feb. 11, 1830, ch. 13, 6 Stat. 403 (copyright); see generally Ochoa, Patent and Copyright Term Extension and the Constitution: A Historical Perspective, 49 J. Copyright Society 19 (2001). The courts saw no “limited Times” impediment to such extensions.

Further, although prior to the instant case this Court did not have occasion to decide whether extending the duration of existing copyrights complies with the “limited Times” prescription, the Court has found no constitutional barrier to the legislative expansion of existing patents.

McClurg v. Kingsland, 42 U.S. 202, 1 How. 202, (1843), is the pathsetting precedent. The patentee in that case was unprotected under the law in force when the patent issued because he had allowed his employer briefly to practice the invention before he obtained the patent. Only upon enactment, two years later, of an exemption for such allowances did the patent become valid, retroactive to the time it issued. *McClurg* upheld retroactive application of the new law. The Court explained that the legal regime governing a particular patent “depends on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity.” *Id.*, 1 How. at 206. Neither is it a sound objection to the validity of a copyright term extension, enacted pursuant to the same constitutional grant of authority, that the enlarged term covers existing copyrights.

Congress’ consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 Act: “Justice, policy, and equity alike forbid” that an “author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act.” 7 Cong. Deb. 424 (1831); accord Symposium, *The Constitutionality of Copyright Term Extension*, 18 *Cardozo Arts & Ent. L. J.* 651, 694 (2000) (Prof. Miller) (“Since 1790, it has indeed been Congress’s policy that the author of yesterday’s work should not get a lesser reward than the author of tomorrow’s work just because Congress passed a statute lengthening the term today.”). The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them. Guided by text, history, and precedent, we cannot agree with petitioners’ submission that extending the duration of existing copyrights is categorically beyond Congress’ authority under the Copyright Clause.

Satisfied that the CTEA complies with the “limited Times” prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.~

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain. {A} key factor in the CTEA’s passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years⁷ to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term.[#] By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States. See Perlmutter, Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts, 36 Loyola (LA) L. Rev. 323, 330 (2002) (“Matching the level of [copyright] protection in the United States [to that in the EU] can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages façade foreign rightholders.”); see also *id.*, at 332 (the United States could not “play a leadership role” in the give-and-take evolution of the international copyright system, indeed it would “lose all flexibility,” “if the only way to promote the progress of science were to provide incentives to create new works”).¹²

¹²The author of the law review article cited in text, Shira Perlmutter, currently a vice president of AOL Time Warner, was at the time of the CTEA’s enactment Associate Register for Policy and International Affairs, United States Copyright Office.

In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works[#]; see H. R. Rep. No. 105-452, p. 4 (1998) (term extension “provides copyright owners generally with the incentive to restore older works and further disseminate them to the public”).¹⁵

¹⁵JUSTICE BREYER urges that the economic incentives accompanying copyright term extension are too insignificant

to “move” any author with a “rational economic perspective.” Calibrating rational economic incentives, however, like “fashioning ... new rules [in light of] new technology,” *Sony*, 464 U.S., at 431, is a task primarily for Congress, not the courts. Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive to create. See, e.g., House Hearings 233-239 (statement of Quincy Jones); Copyright Term Extension Act of 1995: Hearings before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 55-56 (1995) (statement of Bob Dylan); *id.*, at 56-57 (statement of Don Henley); *id.*, at 57 (statement of Carlos Santana). We would not take Congress to task for crediting this evidence which, as JUSTICE BREYER acknowledges, reflects general “propositions about the value of incentives” that are “undeniably true.”

In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA – which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes – is an impermissible exercise of Congress’ power under the Copyright Clause.

B

Petitioners’ Copyright Clause arguments rely on several novel readings of the Clause. We next address these arguments and explain why we find them unpersuasive.

1

Petitioners contend that even if the CTEA’s 20-year term extension is literally a “limited Time,” permitting Congress to extend existing copyrights allows it to evade the “limited Times” constraint by creating effectively perpetual copyrights through repeated extensions. We disagree.~ Nothing before this Court warrants construction of the CTEA’s 20-year term

extension as a congressional attempt to evade or override the “limited Times” constraint. Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to “limited Times” that the 1831, 1909, and 1976 Acts did not.~ Those earlier Acts did not create perpetual copyrights, and neither does the CTEA.¹⁷

¹⁷Respondent notes that the CTEA’s life-plus-70-years baseline term is expected to produce an average copyright duration of 95 years, and that this term “resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities.” Brief for Respondent 27, n. 18. Whether such referents mark the outer boundary of “limited Times” is not before us today. JUSTICE BREYER suggests that the CTEA’s baseline term extends beyond that typically permitted by the traditional rule against perpetuities. *Post*, at 15-16. The traditional common-law rule looks to lives in being plus 21 years. Under that rule, the period before a bequest vests could easily equal or exceed the anticipated average copyright term under the CTEA. If, for example, the vesting period on a deed were defined with reference to the life of an infant, the sum of the measuring life plus 21 years could commonly add up to 95 years.

Petitioners dominantly advance a series of arguments all premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author. They pursue this main theme under three headings. Petitioners contend that the CTEA’s extension of existing copyrights (1) overlooks the requirement of “originality,” (2) fails to “promote the Progress of Science,” and (3) ignores copyright’s *quid pro quo*.

Petitioners’ “originality” argument draws on *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340d 358(1991). In *Feist*, we observed that “the *sine qua non* of copyright is originality,” *id.*, at 345, and held that copyright protection is unavailable to “a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent,” *id.*, at 359. Relying on *Feist*, petitioners urge that even if a work is sufficiently “original” to qualify for copyright protection in the first instance, any

extension of the copyright's duration is impermissible because, once published, a work is no longer original.

Feist, however, did not touch on the duration of copyright protection. Explaining the originality requirement, *Feist* trained on the Copyright Clause words "Authors" and "Writings." The decision did not construe the "limited Times" for which a work may be protected, and the originality requirement has no bearing on that prescription.

More forcibly, petitioners contend that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause. Art. I, § 8, cl. 8. To sustain this objection, petitioners do not argue that the Clause's preamble is an independently enforceable limit on Congress' power. See 239 F.3d at 378 (Petitioners acknowledge that "the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power." (internal quotation marks omitted)). Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of "limited Times" must be "determined in light of that specified end." Brief for Petitioners 19. The CTEA's extension of existing copyrights categorically fails to "promote the Progress of Science," petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.

As petitioners point out, we have described the Copyright Clause as "both a grant of power and a limitation," *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5d 545 (1966), and have said that "the primary objective of copyright" is "to promote the Progress of Science," *Feist*, 499 U.S., at 349. The "constitutional command," we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a "system" that "promotes the Progress of Science." *Graham*, 383 U.S., at 6.¹⁸

¹⁸JUSTICE STEVENS' characterization of reward to the author as "a secondary consideration" of copyright law, *post*, at 6, n. 4 (internal quotation marks omitted), understates the relationship between such rewards and the "Progress of Science." As we have explained, "the economic philosophy behind the [Copyright] Clause ... 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.” *Mazer v. Stein*, 347 U.S. 201, 219, 1954 Dec. Comm’r Pat. 308 (1954). Accordingly, “copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge The profit motive is the engine that ensures the progress of science.” *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff’d, 60 F.3d 913 (CA2 1994). Rewarding authors for their creative labor and “promoting ... Progress” are thus complementary; as James Madison observed, in copyright “the public good fully coincides ... with the claims of individuals.” *The Federalist No. 43*, p. 272 (C. Rossiter ed. 1961). JUSTICE BREYER’s assertion that “copyright statutes must serve public, not private, ends” *post*, at 6, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives. The justifications we earlier set out for Congress’ enactment of the CTEA, *supra*, at 14-17, provide a rational basis for the conclusion that the CTEA “promotes the Progress of Science.”

On the issue of copyright duration, Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain. Such consistent congressional practice is entitled to “very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centuries, it is almost conclusive.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57, 1884 Dec. Comm’r Pat. 186. Indeed, “this Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the

construction to be given [the Constitution's] provisions." *Myers v. United States*, 272 U.S. 52, 175, 62 Ct. cl. 773 (1926). Congress' unbroken practice since the founding generation thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails *per se* to "promote the Progress of Science."

Closely related to petitioners' preambular argument, or a variant of it, is their assertion that the Copyright Clause "imbeds a quid pro quo." They contend, in this regard, that Congress may grant to an "Author" an "exclusive Right" for a "limited Time," but only in exchange for a "Writing." Congress' power to confer copyright protection, petitioners argue, is thus contingent upon an exchange: The author of an original work receives an "exclusive Right" for a "limited Time" in exchange for a dedication to the public thereafter. Extending an existing copyright without demanding additional consideration, petitioners maintain, bestows an unpaid-for benefit on copyright holders and their heirs, in violation of the *quid pro quo* requirement.

We can demur to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress "to secure a [1239] bargain – this for that."~ But the legislative evolution earlier recalled demonstrates what the bargain entails. Given the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend, as the "this" offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time. Congress could rationally seek to "promote ... Progress" by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term. Nothing in the Copyright Clause bars Congress from creating the same incentive by adopting the same position as a matter of unbroken practice.~ Accordingly, we reject the proposition that a *quid pro quo* requirement stops Congress from expanding copyright's term in a manner that puts existing and future copyrights in parity.~

III

Petitioners separately argue that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment. We reject petitioners’ plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression. As *Harper & Row* observed: “The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies [1241] the economic incentive to create and disseminate ideas.” 471 U.S., at 558.

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. See *id.*, at 560. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, 17 U.S.C. § 102(b) provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” As we said in *Harper & Row*, this “idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” 471 U.S., at 556 (internal quotation marks omitted). Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication. See *Feist*, 499 U.S., at 349-350.

Second, the “fair use” defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. Codified at 17 U.S.C. § 107, the defense provides: “The fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is

not an infringement of copyright.” The fair use defense affords considerable “latitude for scholarship and comment,” *Harper & Row*, 471 U.S., at 560, and even for parody, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569d 500 (1994) (rap group’s musical parody of Roy Orbison’s “Oh, Pretty Woman” may be fair use).

The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to “reproduce” and “distribute, display, or perform in facsimile or digital form” copies of certain published works “during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research” if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. 17 U.S.C. § 108(h); see Brief for Respondent 36. Second, Title II of the CTEA, known as the Fairness in Music Licensing Act of 1998, exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities. 17 U.S.C. § 110(5)(B).

IV

As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause. See *Graham*, 383 U.S., at 6 (Congress may “implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim.” (emphasis added)). Beneath the façade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms. The wisdom of Congress’ action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.

It is so ordered.

E.5. Eldred v. Ashcroft, Part Three: Hindsight

E.5.a. Pre-reading notes

Below continues lawyer Lawrence Lessig's narrative regarding his representation of Eric Eldred in challenging the constitutionality of the Copyright Term Extension Act. Here, we have his recollection following his and his client's loss at the Supreme Court.

E.5.b. Attribution and editing notes

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 following is the copyright notice in the book:

Copyright © Lawrence Lessig, 2004

This abridgement by Eric E. Johnson, originally published separately in 2010. All endnotes have been removed without notation. Omissions are marked with ~. The unabridged text, which includes many citations, was available via <http://www.free-culture.cc/index.html>. This abridgement – insofar as it involves separately copyrightable expression by Eric E. Johnson – is © 2010 Eric E. Johnson and licensed under the Creative Commons Attribution-Noncommercial 1.0 Generic License, available at <http://creativecommons.org/licenses/by-nc/1.0/>.

E.5.c. Recollection by plaintiff's lawyer

Eldred v. Ashcroft

Supreme Court of the United States
(2003)

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

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.

E.6. International Treaties and the Public Domain

E.6.a. The Berne Convention and the United States

In 1989, the United States joined the international copyright treaty known as the Berne Convention for the Protection of Literary and Artistic Works. But the Berne Convention itself is much older – originating in Europe more than a hundred years earlier.

Since its founding in 1886, Berne has been characterized by three main concerns: (1) that member states will give foreign works copyright protection at least as advantageous as they give domestic works (what's known as “national treatment”), (2) that a lack of formalities (such as registration or notice) will not undo copyright protection, and (3) that member states will provide copyright protection at least to certain minimum standards.

Leading international intellectual property scholar Peter K. Yu observed that the Berne Convention “began with a focus on setting up only ‘size S’ minimum international standards.” Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 9 (2009). Those minimum standards, however, moved progressively higher as Berne was variously amended and expanded over the years.

Today, Professor Yu says, “there is no denying that the Berne Convention has become the predominant international treaty in the copyright field.” But that wasn’t always the case. The United States was a key, long-term holdout.

Prior to its accession to Berne, the U.S. was a party to the Universal Copyright Convention, which Yu calls “a middle-of-the-road treaty” that was adopted at the international level in 1952 “to ease the United States and other Latin American countries into the international copyright family.” Peter K. Yu, *Marshalling Copyright Knowledge to Understand Four Decades of Berne*, 12 IP THEORY 59 (2022).

A number of things had to change about U.S. copyright law before the United States could join Berne. For one, the U.S. would have to drop the formalities requirement of publishing a work with a copyright notice in order for copyright to apply. The transition to that started with the Copyright Act of 1976, which applied copyright before publication, at the moment of fixation. And though the ’76 Act still required notice on published copies, it created means of curing innocent failures in that regard. The ’76 Act also brought copyright terms up to the Berne minimum of the life of the author plus 50 years.

E.6.b. The WTO, GATT, and the Uruguay Round

{The following text was adapted, with minor changes, from *The World Trade Organization: Background and Issues*, a Congressional Research Service report by Lenore Sek, updated March 5, 2003.}

The World Trade Organization (WTO) was established on January 1, 1995, under an agreement reached during the Uruguay Round of multilateral trade negotiations. The Uruguay Round was the last of a series of periodic trade negotiations held under the auspices of the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT).

The WTO is the most important international organization that governs world trade. In 2003, its members represented over 95% of world trade. Agreements administered by the WTO cover a broad range of goods and services trade and apply to virtually all government practices that directly relate to trade, for example tariffs, subsidies, government procurement, and trade-related intellectual property rights.

Several bodies in the WTO administer the agreements reached during the Uruguay Round. The highest-level body is the Ministerial Conference, which is the group of trade ministers from member countries. The Ministerial

Conference meets at least every two years. The General Council is the body that oversees the day-to-day operations of the WTO. Each member country has a representative on the General Council. The Council also meets in two other capacities: it reviews national trade policies, and it oversees the dispute settlement process. Three major bodies under the General Council administer rules on (1) trade in goods, (2) trade in services, and (3) trade-related aspects of intellectual property rights (copyrights, trademarks, and patents).

E.6.c. Berne, TRIPS, and the Uruguay Round

{The following text was adapted, with minor changes, from *Congress's Power to Restore Copyright Protection to Works That Have Entered the Public Domain: Golan v. Holder*, Congressional Research Service report by an unnamed legislative attorney, dated August 30, 2011. Footnotes omitted.}

Intellectual Property Treaties: Berne Convention and TRIPS

A widely cited author of a copyright treatise, David Nimmer, has explained that “[f]or decades, the outstanding feature distinguishing United States copyright law from that of the rest of the world has been its emphasis on formalities.” Historically, federal copyright law required creators of works to satisfy certain statutory formalities in order to obtain and maintain copyright protection, including providing notice on the published work (affixing to the work the © symbol, the word “Copyright,” and the name of the owner of the copyright and the first year of the work’s publication), depositing copies of the work with the U.S. Copyright Office (thus expanding the collection of the Library of Congress), and filing a registration form with the Copyright Office. If a creator of a work failed to meet the formalities, it could result in either a loss of copyright (the work thus falling into the public domain), preclude copyright protection, or restrict certain remedies under the copyright.

In 1989, the United States became a signatory to the Berne Convention for the Protection of Literary and Artistic Works of 1886. The Berne Convention sets certain minimum standards for copyright protection in member countries and requires each signatory country to afford the same copyright protections to authors in other member countries that it provides to its own authors. Article 5(2) of the Convention prohibits signatory countries from subjecting the “enjoyment and exercise” of copyright rights “to any formality.” In order to satisfy this requirement, the United States eliminated all the formalities in the Copyright Act that acted as conditions to copyright

protection by enacting the Berne Convention Implementation Act (BCIA) of 1988.

In addition, article 18 of the Berne Convention specifies that “[t]his Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” Thus, the United States appeared to be obliged by Berne to provide copyright protection for works authored by nationals of signatory countries that were in the U.S. public domain not on account of their expired copyright term, but because they had not satisfied the procedural formalities to secure copyright protection that the Copyright Act had required at that time. However, the BCIA did not extend copyrights to any of these foreign works.

In April 1994, the United States and 123 other countries negotiated various agreements in the Uruguay Round of Multilateral Trade Negotiations, that concluded with the signing of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). One of the agreements included in the Uruguay Round was the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), which establishes minimum standards of protection for patents, copyrights, trademarks, and trade secrets that each WTO signatory state must give to the intellectual property of fellow WTO members. Article 9(1) of TRIPS specifies that “Members shall comply with Articles 1 through 21 of the Berne Convention” which includes article 18, the requirement to restore copyright protection for certain foreign works. Unlike the Berne Convention, the TRIPS Agreement provides for dispute resolution proceedings before the WTO, meaning that a WTO member found not to be in compliance with the TRIPS Agreement could be subject to trade sanctions.

Section 514 of the Uruguay Round Agreements Act of 1994

To implement the agreements that the United States signed in the Uruguay Round, Congress enacted the Uruguay Round Agreements Act (URAA) in 1994. Section 514 of URAA satisfies the United States’ treaty obligations under article 18 of Berne and article 9(1) of TRIPS by granting copyright protection to foreign works that were formerly in the U.S. public domain because, among other things, their creators never obtained copyright protection in the United States or they lost such protection due to a failure to comply with statutory formalities. However, § 514 of URAA did not restore copyrights in foreign works that entered the public domain due to an

expiration of their term of protection. The restored copyrights “subsist for the remainder of the term of copyright that the work would have otherwise been granted ... if the work never entered the public domain.” According to the former Register of Copyrights Marybeth Peters, the effect of § 514 of the URAA was to remove millions of foreign works from the public domain.

E.7. Golan v. Holder, Part One: Anacrusis

E.7.a. Pre-reading notes

The path from *Eldred* to *Golan*

{The following text was adapted, with minor changes, from *Congress’s Power to Restore Copyright Protection to Works That Have Entered the Public Domain: Golan v. Holder*, a Congressional Research Service report by an unnamed legislative attorney, dated August 30, 2011. Footnotes omitted.}

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA) that added 20 years to the term of copyright for both subsisting and future copyrights, in order to bring U.S. copyright terms more closely into conformance with those governed by the European Union.

Justice Ginsburg wrote the majority opinion in *Eldred v. Ashcroft*, in which the Court upheld the CTEA by a vote of 7-2. She rejected the plaintiffs’ argument that the “limited Times” requirement requires a forever “fixed” or “inalterable” copyright term. However, the *Eldred* Court appeared to leave open the door to a future First Amendment challenge brought against an act of Congress that “alter[s] the traditional contours of copyright protection”:

We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.

E.6.b. Interview with Golan

The interview text is from Lawrence Golan Speaks about Golan v. Holder, http://questioncopyright.org/golan_on_golan_v_holder. The text was released with a broad permission stating, “content is released to the public and can be considered to be in the public domain.” This abridgement is by Eric E. Johnson. The order of the question/answer pairs has been altered, and one has been omitted; typography has been altered and standardized;

typo “into affect” corrected to “into effect”; the superscript tilde (~) indicates omitted text; curly brackets indicate edits for this abridgement. No copyright is claimed in this abridgement.

Golan v. Holder

(et sub nom.: Golan v. Ashcroft, Golan v. Gonzales)

U.S. District Court for the District of Colorado

U.S. Court of Appeals for the Tenth Circuit

Supreme Court of the United States

(2001–2012)

Filed as LAWRENCE GOLAN, RICHARD KAPP, S.A. PUBLISHING CO., INC., d/b/a/ ESS.A.Y RECORDINGS, SYMPHONY OF THE CANYONS, RON HALL, d/b/a FESTIVAL FILMS, JOHN MCDONOUGH, d/b/a TIMELESS VIDEO ALTERNATIVES INTERNATIONAL, Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, defendant, U.S. District Court for the District of Colorado. On appeal: U.S. Court of Appeals for the Tenth Circuit. On certiorari: LAWRENCE GOLAN, et al., PETITIONERS v. ERIC H. HOLDER, JR., ATTORNEY GENERAL. No. 10 – 545, argued October 5, 2011. Decided January 18, 2012. Opinion reported at 565 U.S. 302 (2012).

Interview of PLAINTIFF LAWRENCE GOLAN by Rich Bailey, October 5, 2011:

Bailey: {I}n a nutshell, what is the damage caused by taking {musical compositions} out of the public domain?

Golan: It prevents many smaller organizations from performing a large body of work and prevents many smaller communities from having the opportunity to hear such works.

Bailey: How did you get involved in the case originally? I think there was another plaintiff who later died. {W}ere you a part of the original case?

Golan: I was part of the original. That’s an important point. This is not about me. This is about the entire industry – classical music, orchestral music as an entire industry – and there are many conductors and other people that are named plaintiffs on case and I just happened to be the lead plaintiff, but I’m by no means the only conductor or person in the industry who’s involved in this.

Bailey: Can you explain what’s involved in this case?

Golan: Back in '94 the GATT treaty was passed, also known as the Uruguay Roundtable Agreement. And essentially what it did was it took out of the public domain thousands and thousands if not millions of pieces of music that were in the public domain. To give you some examples of things that you would know: music by Shostakovich and Prokofiev and Stravinsky and some specific examples like Peter and the Wolf. That's probably the most recognized piece that was taken out of public domain, although there were hundreds of thousands if not millions of others.

And how that affects people in this country is as follows.

First of all let me tell you how it works in general with procuring music for performance. Any symphony orchestra that wants to play a piece of music has to obtain the sheet music, the actual physical pieces of paper to be played on the music stands for all the members of the orchestra so that they can play the music, and of course there's a score for the conductor who has all the parts. And for any given piece of music, there are essentially two possibilities. Either the piece is available for purchase or it's not available for purchase and only available as a rental.

Now the difference between the two is like this. If something's available for purchase, an orchestra can buy the music. They buy all the parts, the score and the price varies but for a 10 to 15 minute piece the price might be \$150 let's say. And for a longer more substantial piece, an hour-long symphony maybe, the price would be up to \$300 or so. And then the orchestra purchases the music, and it owns the music and can keep it in its library and perform it as frequently as it would like to without having to re-buy the music every time. It keeps the music and stores it in its library.

In addition to not having to buy it each time, there's also a question of all the performance markings that go into playing any piece of music. Even before the orchestra musicians get the parts, the conductor and the librarian and the principle players have worked to create a series of markings that the librarian then transfers into all the parts. For example strings bowings. And this is like hours and hours and hours of preparation even before the musicians get the parts. Then once they get them, during the rehearsal process more markings are put in. The conductor might say play that softer, play that louder or whatever the case may be, and all those markings go into

the part. And again, with a piece that the orchestra was able to purchase, those markings stay in the parts and then the next time they do the piece two years later, four years later, whatever it is, all those markings are there. And it's infinitely easier and less time consuming to do it the second, third and fourth times once those markings are there.

Now the other side of the equation is when a piece is not available for purchase and it's only rented by the publisher. Now in cases like that, again the price varies but in average pricing it could definitely be way more and it sometimes could be a little less but average prices to rent a symphony is around \$600-700 to rent it to perform the piece one time. And in fact even if you perform it in three concerts on the same weekend, they charge you for each concert, although usually the second and third performances are at a reduced rate. So let's say you have three concerts in one weekend: \$600 for the first performance, maybe \$500 for the second and \$300 for the third. It could be \$1,500 to play the piece on one weekend. And then you go through that same process of all the markings that I talked about, and then you have to erase the markings and return them mark-clean to the publisher.

And so if you wanted to play the piece again in two years or four years or whenever, the orchestra has to again pay \$500, \$600, \$1,500, whatever it is depending on the piece or depending on the number of performances to rent the same piece again that they just played two years ago, go through all the bowing and marking process and everything. And so as you can see it's just so incredibly more advantageous to be able to purchase music and keep it in the library and just reuse it at will. That's the general procedure.

Now specifically in regard to this law, there were hundreds of thousands of pieces of music that were in the public domain. Orchestras were able to purchase the music for a reasonable price and then just kept it in their library and had the markings in it and so on. Those pieces got taken out of the public domain, which means that since 1996 when the law went into effect, orchestras can no longer buy those pieces that they used to be able to buy. Instead they have to rent it.

There was one other thing I forgot to mention, which is a licensing fee. When something's in the public domain, not only can you buy the music but you don't have to pay anyone a licensing fee each time you play it. But when

something is rental only and under copyright, not only do you have to rent the music. On top of that, you have to pay a licensing fee to the publisher every time you want to play the piece. And that even goes for pieces that you purchased before that law came out. You actually have to pay a licensing fee on something you already own every time you want to play it.

Now here's where the size of the organization comes into play. The larger organizations – just a couple examples would be the New York Philharmonic, the Boston Symphony, Chicago Symphony – those orchestras first of all have very large budgets and although they're not happy about it, they can afford to rent whatever pieces they need to rent. And in terms of the licensing fee, those larger organizations pay a blanket licensing fee every year that covers all their [copyrighted] music.

So it doesn't really affect the big, larger organizations that much. They have to pay more for rentals than they used to, but it's not debilitating. On the other hand, here's how it works with smaller orchestras whether they be professional orchestras in smaller towns or university orchestras or high school orchestras or youth orchestras. They too have a budget, like the larger orchestras for renting and/or purchasing music but it's obviously much, much smaller.

Depending on the orchestra, their annual budget for all music procurement could be \$300, \$500, maybe \$1,000, maybe \$2,000. It all depends on the organization and what kind of money they have. But for an organization whose annual budget for music procurement is \$300, then by definition to rent a piece that costs \$500 for one performance literally is impossible. That's more than they have for the entire year. On the other hand let's say an orchestra that has a budget of \$1,000 for the year for music, a rental piece of \$500 for one piece would take up half their annual budget. You know maybe they have to rent and perform 20 or 30 pieces in a year. That one piece is going to take up half their budget.

So as you can see, it makes it cost prohibitive for those orchestras to play the music. And on top of that, by the way, they also have to pay those licensing fees, which they didn't have to pay before. So in effect what the law did was this: because of the costs involved, it currently prevents many, many smaller orchestras and educational institutions from physically performing

these pieces. It's not a question of well, they just have to pay more. If they don't have more they can't play the piece. So they're simply not playing those pieces.

That affects other people in the community, too, anybody else who would go to concerts, for example, Peter and the Wolf. In the old days before 1994, almost every orchestra in the country, when they played a youth concert for children, they would play Peter and the Wolf because it's one of the greatest pieces of all time specifically designed and written for teaching children about the instruments in the orchestra. So we all as kids undoubtedly had heard and/or played live performances of Peter and the Wolf. Well that doesn't happen anymore in smaller communities. Many smaller communities where they would love to play Peter and the Wolf for their children's concert can't because they are not allowed to purchase the music and to rent it is more than they have in their budget. So all the children in these smaller communities are being deprived of an opportunity to hear a live performance of Peter and the Wolf.

Again that's just one example. It's literally hundreds of thousands of pieces that are not getting played in many, many smaller communities and at schools, educational institutions.

And who is this bill supposedly protecting? I made it pretty clear who it's affecting negatively. Well who is it affecting positively? Well in theory it's supposed to protect the heirs, the great grandchildren or the great, great grandchildren of many of these composers who have been dead for decades because they would now get all these royalties that they didn't used to get. And again with the large orchestras, the New York Philharmonic, sure, the heirs of these composers are getting a very small royalty check from the couple of orchestras that play these pieces. But by and large, the pieces are simply not being played.

So it's not even really helping the great, great grandchildren of the composers because their music just isn't being played. And I think any composer would tell you that what they strive for – their goal in life, or at least their professional goal within life – is to have their music heard. That's why they write the music. And sure, they want some payment for it during their lifetime and for several years after they write the piece. That's what they

do for a living, and that's why copyright law was invented to give creators some financial income for their work and to give them incentive them to create these works. But several generations down the line, I think if a composer were given the option of having their music played versus not having their music played and their great, great grandchildren getting a tiny little royalty check every now and then, they would much prefer to have their music played.

So it's hurting the composers, it's hurting the orchestras, it's hurting the communities that this orchestra serves and really in my opinion it's really not benefitting anyone.

Bailey: What kind of reaction do you hear from your orchestra conductor colleagues?

Golan: The reaction has been nothing but absolute and unequivocal support from everyone in the industry. I mean I get e-mails, just dozens of e-mails of people thanking me for doing this and how much they support it, is there anything I could do and how horrible that copyright law is when they took all those pieces out of the public domain and how horrible it is for their orchestras and our communities and their students. It's been nothing but 100 percent support.

Bailey: What about composers? Is there any difference in their reaction? Do you hear from them?

Golan: I do hear from them actually, and again I've got nothing but support. There are composers who often do what's called arranging. For example they might take a piece of music by Prokofiev let's say, which is professional-level difficult music, and they would arrange it and make it easier so that a junior high orchestra or a high school orchestra could play it. They make a simplified version of it and that's what they do for a living, they arrange pieces. Well once those pieces got taken out of the public domain it's not legal to make the arrangements of them.

So those composers and arrangers are not able to use those pieces, and of course the junior high orchestras and high school orchestras are not able to play those pieces, because the arrangements just aren't even being made. They can't play the original because it's too expensive. They can't play a

simplified version because it's illegal to make a simplified version. They just can't play the piece.

Bailey: Do all contemporary composers do arrangements like that?

Golan: No, not all composers. But I don't know of any composers that are complaining about what we're doing with the case because nobody – nobody – is saying that a composer writing a piece today should not have copyright protection and should not earn royalties from their music or be able to rent it or do whatever they want. Nobody's saying that. What we're talking about are pieces that were written decades ago and were in the public domain and have now been taken out of the public domain.

Bailey: Can you say what proportion of contemporary composers would fall into those two categories, those who only write original music and those who do their own work and do arrangements?

Golan: I really can't. What I would be more comfortable saying is that in terms of people that are making a living at some form of composition, it seems to me that a large percentage would be doing arranging and probably a smaller percentage of people are making a full-time living strictly as an original composer.

Bailey: How do the issues at stake in this case compare to the retroactive term extensions that were challenged in the *Eldred* case?

Golan: Well they're definitely related, but they are different. What the copyright extension did, well I guess it's self-explanatory. They just keep extending the length of copyright protection. Some people call it the Mickey Mouse Law because every time Mickey Mouse is about to become public domain Disney lobbies Congress to extend the copyright, and because they have so much money and power, they succeed. So every 20 years it gets extended. So you can expect that 20 years from now when Mickey Mouse is about to enter the public domain, Disney will lobby for it not to enter the public domain and they'll extend copyright again.

I guess they're similar in that we're talking about pieces of music and works of art that were created decades and decades ago, and in both cases the laws have completely lost sight of the original intent of our founding fathers in terms of what copyright protection is for.

Copyright protection – and it's stated right in the constitution – was created to promote creative work from authors by giving them financial incentive that if they create a work, for the next 28 years they will be able to reap financial rewards from it. But how does extending copyrights – or in the case of *Golan vs. Holder*, taking things out of the public domain and reinstating copyrights of people who have been dead for decades – how does that provide incentive for those people to create more great works?

They're dead already. They're not going to be creating much more.-

Bailey: If copyright extensions are driven by Disney's interests, who was pushing for these re-restrictions?

Golan: We're going a little bit out of my realm of expertise, and you might want to ask that question to someone else. But my understanding was that the U.S. government did it with the hopes that if they did this, then other countries would be more respectful of U.S. works that were under copyright.-

Bailey: So it's not like there was some hidden lobby of heirs who were starving and looking for their royalty checks.

Golan: No, not that I know of. And again, I mean maybe you could find this out from a composer or you could try to find an heir of Shostakovich. There are three composers who have famous names that were affected like this: Shostakovich, Prokofiev and Stravinsky. Beyond that there are literally thousands of other composers that you've never heard of that are affected by this. And those people absolutely are not having their music played. Most audiences want to hear famous things. They want to hear famous pieces, things they've heard before.

Now we in the industry, we like to play things beyond the famous ones. From an artistic standpoint we think it's healthy not only for the performers but also for the audiences to hear things they haven't ever heard before and combine the relatively unknown pieces with pieces they do know and love. And you know often times we try to do that, but once this treaty was passed... I mean now you're saying okay, here's an unknown piece of music by an unknown composer and your audience has never heard of it. So they're not

really that keen on you programming it anyway. Oh and on top of that, you have to rent it for \$600 instead of purchase it for \$50.

That treaty was a nail in the coffin guaranteeing that thousands of pieces will not be performed. And going back to your question about how much heirs get from this, the heirs of the vast majority of the composers involved are getting nothing. They're just not getting played.

And then in the case of the three famous ones – Shostakovich, Prokofiev and Stravinsky – you know they have many heirs probably for each one. If the New York Philharmonic plays a Shostakovich symphony, let's just estimate that all the heirs will get a 10 percent cut, and then that's split among them. We're talking about royalty checks of pennies, depending on how many times it's split. Even if it's only one person, oh it's \$20.00 – ah great! I got a royalty check.

We're talking about classical music here. We're not talking about the Beatles or Michael Jackson. Nobody is going to make a living off royalties from a couple pieces they're going to play.

Bailey: What is the core issue here for you? What's motivated you to be involved with this and to continue with it for so long.

Golan: The core issue is wanting to have the ability to perform this great body of literature that we used to be able to perform but no longer can. What we used to do was absolutely legal and in concert with the Constitution, and right now what we're being told is that what we used to do is now illegal, you can't do it anymore.

E.8. Golan v. Holder, Part Two: Ictus

E.8.a. Pre-reading notes

In *Golan v. Holder*, musician and orchestra conductor Lawrence Golan served as the plaintiff to challenge legislation that removed old works from the public domain and placed them newly under copyright status in the United States. The U.S. Supreme Court held that Congress had the power under the U.S. Constitution to shrink the public domain in this way. The outcome mirrored the preceding *Eldred v. Ashcroft* (U.S. 2003) case, which also

challenged the constitutionality of public-domain constraining changes to copyright. *Golan* was, like *Eldred*, a 7-2 decision rejecting the challenge with an opinion authored by Justice Ruth Bader Ginsburg.

E.8.b. Opinion of the Court

Golan v. Holder

Supreme Court of the United States
565 U.S. 302 (2012)

Lawrence GOLAN, et al., Petitioners v. Eric H. HOLDER, Jr., Attorney General, et al.
No. 10 – 545. Argued October 5, 2011. Decided January 18, 2012..

JUSTICE GINSBURG delivered the opinion of the Court.

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, Convention, or Berne), which took effect in 1886, is the principal accord governing international copyright relations. Latecomer to the international copyright regime launched by Berne, the United States joined the Convention in 1989. To perfect U.S. implementation of Berne, and as part of our response to the Uruguay round of multilateral trade negotiations, Congress, in 1994, gave works enjoying copyright protection abroad the same full term of protection available to U.S. works. Congress did so in § 514 of the Uruguay Round Agreements Act (URAA), which grants copyright protection to pre-existing works of Berne member countries, protected in their country of origin, but lacking protection in the United States for any of three reasons: The United States did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had failed to comply with U.S. statutory formalities (formalities Congress no longer requires as prerequisites to copyright protection).

The URAA accords no protection to a foreign work after its full copyright term has expired, causing it to fall into the public domain, whether under the laws of the country of origin or of this country. Works encompassed by § 514 are granted the protection they would have enjoyed had the United States maintained copyright relations with the author's country or removed formalities incompatible with Berne. Foreign authors,

however, gain no credit for the protection they lacked in years prior to § 514's enactment. They therefore enjoy fewer total years of exclusivity than do their U.S. counterparts. As a consequence of the barriers to U.S. copyright protection prior to the enactment of § 514, foreign works "restored" to protection by the measure had entered the public domain in this country. To cushion the impact of their placement in protected status, Congress included in § 514 ameliorating accommodations for parties who had exploited affected works before the URAA was enacted.

Petitioners include orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works § 514 removed from the public domain. They maintain that the Constitution's Copyright and Patent Clause, Art. I, § 8, cl. 8, and First Amendment both decree the invalidity of § 514. Under those prescriptions of our highest law, petitioners assert, a work that has entered the public domain, for whatever reason, must forever remain there.

In accord with the judgment of the Tenth Circuit, we conclude that § 514 does not transgress constitutional limitations on Congress' authority. Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.

I

A

Members of the Berne Union agree to treat authors from other member countries as well as they treat their own. Nationals of a member country, as well as any author who publishes in one of Berne's 164 member states, thus enjoy copyright protection in nations across the globe. Each country, moreover, must afford at least the minimum level of protection specified by Berne. The copyright term must span the author's lifetime, plus at least 50 additional years, whether or not the author has complied with a member state's legal formalities. And, as relevant here, a work must be protected abroad unless its copyright term has expired in either the country where protection is claimed or the country of origin.

A different system of transnational copyright protection long prevailed in this country. Until 1891, foreign works were categorically excluded from Copyright Act protection. Throughout most of the 20th century, the only eligible foreign authors were those whose countries granted reciprocal rights to U.S. authors and whose works were printed in the United States. For domestic and foreign authors alike, protection hinged on compliance with notice, registration, and renewal formalities.

The United States became party to Berne's multilateral, formality-free copyright regime in 1989. Initially, Congress adopted a "minimalist approach" to compliance with the Convention.

The minimalist approach essayed by the United States did not sit well with other Berne members. Berne, however, did not provide a potent enforcement mechanism. The landscape changed in 1994. The Uruguay round of multilateral trade negotiations produced the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The United States joined both. TRIPS mandates, on pain of WTO enforcement, implementation of Berne's first 21 articles.

Congress' response to the Uruguay agreements put to rest any questions concerning U.S. compliance with Article 18. Section 514 of the URAA, 108 Stat. 4976 (codified at 17 U.S.C. § 104A, 109(a)), extended copyright to works that garnered protection in their countries of origin, but had no right to exclusivity in the United States for any of three reasons: lack of copyright relations between the country of origin and the United States at the time of publication; lack of subject-matter protection for sound recordings fixed before 1972; and failure to comply with U.S. statutory formalities (e.g., failure to provide notice of copyright status, or to register and renew a copyright).

Works that have fallen into the public domain after the expiration of a full copyright term – either in the United States or the country of origin – receive no further protection under § 514. Prospectively, restoration places foreign works on an equal footing with their U.S. counterparts; assuming a foreign and domestic author died the same day, their works will enter the

public domain simultaneously. See § 302(a) (copyrights generally expire 70 years after the author’s death). Restored works, however, receive no compensatory time for the period of exclusivity they would have enjoyed before § 514’s enactment, had they been protected at the outset in the United States. Their total term, therefore, falls short of that available to similarly situated U.S. works.

The URAA’s disturbance of the public domain hardly escaped Congress’ attention. Section 514 imposed no liability for any use of foreign works occurring before restoration. In addition, anyone remained free to copy and use restored works for one year following § 514’s enactment.] Reliance parties may continue to exploit a restored work until the owner of the restored copyright gives notice of intent to enforce – either by filing with the U.S. Copyright Office within two years of restoration, or by actually notifying the reliance party. After that, reliance parties may continue to exploit existing copies for a grace period of one year. Finally, anyone who, before the URAA’s enactment, created a “derivative work” based on a restored work may indefinitely exploit the derivation upon payment to the copyright holder of “reasonable compensation,” to be set by a district judge if the parties cannot agree.

B

In 2001, petitioners filed this lawsuit challenging § 514. They maintain that Congress, when it passed the URAA, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations.

We granted certiorari to consider petitioners’ challenge to § 514 under both the Copyright Clause and the First Amendment, 562 U.S. 1270 (2011), and now affirm.

II

We first address petitioners’ argument that Congress lacked authority, under the Copyright Clause, to enact § 514. The Constitution states that “Congress shall have Power ... [t]o promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their ... Writings.” Art. I, § 8, cl. 8. Petitioners find in this grant of authority an impenetrable barrier to the extension of copyright protection to authors

whose writings, for whatever reason, are in the public domain. We see no such barrier in the text of the Copyright Clause, historical practice, or our precedents.

A

The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain. Petitioners' contrary argument relies primarily on the Constitution's confinement of a copyright's lifespan to a "limited Tim[e]." "Removing works from the public domain," they contend, "violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires."

Our decision in *Eldred* is largely dispositive of petitioners' limited-time argument. There we addressed the question whether Congress violated the Copyright Clause when it extended, by 20 years, the terms of existing copyrights. 537 U.S., at 192-193 (upholding Copyright Term Extension Act (CTEA)). Ruling that Congress acted within constitutional bounds, we declined to infer from the text of the Copyright Clause "the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.*, at 199 "The word 'limited,'" we observed, "does not convey a meaning so constricted." Rather, the term is best understood to mean "confine[d] within certain bounds," "restrain[ed]," or "circumscribed." *Ibid.* (internal quotation marks omitted). The construction petitioners tender closely resembles the definition rejected in *Eldred* and is similarly infirm.

The terms afforded works restored by § 514 are no less "limited" than those the CTEA lengthened.~ In light of *Eldred*, petitioners do not here contend that the term Congress has granted U.S. authors – their lifetimes, plus 70 years – is unlimited.~ The difference, petitioners say, is that the limited time had already passed for works in the public domain. What was that limited term for foreign works once excluded from U.S. copyright protection? Exactly "zero," petitioners respond. Brief for Petitioners 22 (works in question "received a specific term of protection ... sometimes expressly set to zero"; "at the end of that period," they "entered the public domain"); Tr. of Oral Arg. 52 (by "refusing to provide any protection for a work," Congress "set[s] the term at zero," and thereby "tell[s] us when the

end has come”). We find scant sense in this argument, for surely a “limited time” of exclusivity must begin before it may end.~

Historical practice corroborates our reading of the Copyright Clause to permit full U.S. compliance with Berne. Undoubtedly, federal copyright legislation generally has not affected works in the public domain. Section 514’s disturbance of that domain, petitioners argue, distinguishes their suit from Eldred’s. In adopting the CTEA, petitioners note, Congress acted in accord with “an unbroken congressional practice” of granting preexpiration term extensions, 537 U.S., at 200. No comparable practice, they maintain, supports § 514.

On occasion, however, Congress has seen fit to protect works once freely available. Notably, the Copyright Act of 1790 granted protection to many works previously in the public domain. Act of May 31, 1790 (1790 Act), § 1, 1 Stat. 124 (covering “any map, chart, book, or books already printed within these United States”). Before the Act launched a uniform national system, three States provided no statutory copyright protection at all. Of those that did afford some protection, seven failed to protect maps; eight did not cover previously published books;[19] and all ten denied protection to works that failed to comply with formalities. The First Congress, it thus appears, did not view the public domain as inviolate. As we have recognized, the “construction placed upon the Constitution by [the drafters of] the first [copyright] act of 1790, and the act of 1802 ... men who were contemporary with [the Constitution’s] formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).~

Subsequent actions confirm that Congress has not understood the Copyright Clause to preclude protection for existing works. Several private bills restored the copyrights of works that previously had been in the public domain. See Act of Feb. 19, 1849 (Corson Act), ch. 57, 9 Stat. 763; Act of June 23, 1874 (Helmuth Act), ch. 534, 18 Stat. 618; Act of Feb. 17, 1898 (Jones Act), ch. 29, 30 Stat. 1396. These bills were unchallenged in court.

Analogous patent statutes, however, were upheld in litigation. In 1808, Congress passed a private bill restoring patent protection to Oliver Evans’ flour mill. When Evans sued for infringement, first Chief Justice Marshall in

the Circuit Court, *Evans v. Jordan*, 8 F.Cas. 872 (No. 4,564) (Va.1813), and then Justice Bushrod Washington for this Court, *Evans v. Jordan*, 9 Cranch 199, 3 L.Ed. 704 (1815), upheld the restored patent's validity. After the patent's expiration, the Court said, "a general right to use [Evans'] discovery was not so vested in the public" as to allow the defendant to continue using the machinery, which he had constructed between the patent's expiration and the bill's passage. *Id.*, at 202. See also *Blanchard v. Sprague*, 3 F.Cas. 648, 650 (No. 1,518) (C.C.D.Mass.1839) (Story, J.) ("I never have entertained any doubt of the constitutional authority of congress" to "give a patent for an invention, which ... was in public use and enjoyed by the community at the time of the passage of the act.")~

Congress has also passed generally applicable legislation granting patents and copyrights to inventions and works that had lost protection. An 1832 statute authorized a new patent for any inventor whose failure, "by inadvertence, accident, or mistake," to comply with statutory formalities rendered the original patent "invalid or inoperative." An 1893 measure similarly allowed authors who had not timely deposited their work to receive "all the rights and privileges" the Copyright Act affords, if they made the required deposit by March 1, 1893. And in 1919 and 1941, Congress authorized the President to issue proclamations granting protection to foreign works that had fallen into the public domain during World Wars I and II.~

Installing a federal copyright system and ameliorating the interruptions of global war, it is true, presented Congress with extraordinary situations. Yet the TRIPS accord, leading the United States to comply in full measure with Berne, was also a signal event. Given the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly.

C

Petitioners' ultimate argument as to the Copyright and Patent Clause concerns its initial words. Congress is empowered to "promote the Progress of Science and useful Arts" by enacting systems of copyright and patent protection. U.S. Const., Art. I, § 8, cl. 8. Perhaps counterintuitively for the

contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.

The "Progress of Science," petitioners acknowledge, refers broadly to "the creation and spread of knowledge and learning." They nevertheless argue that federal legislation cannot serve the Clause's aim unless the legislation "spur[s] the creation of ... new works." Because § 514 deals solely with works already created, petitioners urge, it "provides no plausible incentive to create new works" and is therefore invalid.

The creation of at least one new work, however, is not the sole way Congress may promote knowledge and learning. In *Eldred*, we rejected an argument nearly identical to the one petitioners rehearse. We held that the Copyright Clause does not demand that each copyright provision, examined discretely, operate to induce new works. Rather, we explained, the Clause "empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." *Id.*, at 222. And those permissible ends, we held, extended beyond the creation of new works.

Even were we writing on a clean slate, petitioners' argument would be unavailing. Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to "incentives for creation." Evidence from the founding, moreover, suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Our decisions correspondingly recognize that "copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (emphasis added). See also *Eldred*, 537 U.S., at 206.

Considered against this backdrop, § 514 falls comfortably within Congress' authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne "promotes the diffusion of knowledge," Brief for Petitioners 4. A well-functioning international copyright system would likely encourage the dissemination of existing and future works.

III

A

We next explain why the First Amendment does not inhibit the restoration authorized by § 514. To do so, we first recapitulate the relevant part of our pathmarking decision in *Eldred*. The petitioners in *Eldred*, like those here, argued that Congress had violated not only the “limited Times” prescription of the Copyright Clause. In addition, and independently, the *Eldred* petitioners charged, Congress had offended the First Amendment’s freedom of expression guarantee. The CTEA’s 20-year enlargement of a copyright’s duration, we held in *Eldred*, offended neither provision.

Concerning the First Amendment, we recognized that some restriction on expression is the inherent and intended effect of every grant of copyright. Noting that the “Copyright Clause and the First Amendment were adopted close in time,” 537 U.S., at 219, we observed that the Framers regarded copyright protection not simply as a limit on the manner in which expressive works may be used. They also saw copyright as an “engine of free expression[.] By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Ibid.* (quoting *Harper & Row*, 471 U.S., at 558 (internal quotation marks omitted)); see *id.*, at 546 (“rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors”).

We then described the “traditional contours” of copyright protection, i.e., the “idea/expression dichotomy” and the “fair use” defense. Both are recognized in our jurisprudence as “built-in First Amendment accommodations.” *Eldred*, 537 U.S., at 219; see *Harper & Row*, 471 U.S., at 560 (First Amendment protections are “embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas,” and in the “latitude for scholarship and comment” safeguarded by the fair use defense).~

The second “traditional contour,” the fair use defense, is codified at 17 U.S.C. § 107: “[T]he fair use of a copyrighted work, including such use by reproduction in copies ..., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use),

scholarship, or research, is not an infringement of copyright.” This limitation on exclusivity “allows the public to use not only facts and ideas contained in a copyrighted work, but also [the author’s] expression itself in certain circumstances.” *Eldred*, 537 U.S., at 219; see *id.*, at 220 (“fair use defense affords considerable latitude for scholarship and comment, ... even for parody” (internal quotation marks omitted)).

Given the “speech-protective purposes and safeguards” embraced by copyright law, we concluded in *Eldred* that there was no call for the heightened review petitioners sought. We reach the same conclusion here.

Section 514 leaves undisturbed the “idea/expression” distinction and the “fair use” defense. Moreover, Congress adopted measures to ease the transition from a national scheme to an international copyright regime: It deferred the date from which enforcement runs, and it cushioned the impact of restoration on “reliance parties” who exploited foreign works denied protection before § 514 took effect. See *supra*, at 882-883 (describing 17 U.S.C. § 104A(c), (d), and (h)). See also *Eldred*, 537 U.S., at 220 (describing supplemental allowances and exemptions available to certain users to mitigate the CTEA’s impact).

B

Petitioners attempt to distinguish their challenge from the one turned away in *Eldred*. First Amendment interests of a higher order are at stake here, petitioners say, because they – unlike their counterparts in *Eldred* – enjoyed “vested rights” in works that had already entered the public domain. Nor, petitioners urge, does § 514’s “unprecedented” foray into the public domain possess the historical pedigree that supported the term extension at issue in *Eldred*.

However spun, these contentions depend on an argument we considered and rejected above, namely, that the Constitution renders the public domain largely untouchable by Congress. Petitioners here attempt to achieve under the banner of the First Amendment what they could not win under the Copyright Clause: On their view of the Copyright Clause, the public domain is inviolable; as they read the First Amendment, the public domain is policed through heightened judicial scrutiny of Congress’ means

and ends. As we have already shown, the text of the Copyright Clause and the historical record scarcely establish that “once a work enters the public domain,” Congress cannot permit anyone – “not even the creator – [to] copyright it,” 501 F.3d, at 1184. And nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain. Neither this challenge nor that raised in *Eldred*, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author’s viewpoint.~

Section 514, we add, does not impose a blanket prohibition on public access. Petitioners protest that fair use and the idea/expression dichotomy “are plainly inadequate to protect the speech and expression rights that Section 514 took from petitioners, or ... the public” – that is, “the unrestricted right to perform, copy, teach and distribute the entire work, for any reason.” “Playing a few bars of a Shostakovich symphony,” petitioners observe, “is no substitute for performing the entire work.”

But Congress has not put petitioners in this bind. The question here, as in *Eldred*, is whether would-be users must pay for their desired use of the author’s expression, or else limit their exploitation to “fair use” of that work. Prokofiev’s *Peter and the Wolf* could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev’s U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.~

IV

Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors. The judgment § 514 expresses lies well within the ken of the political branches.~

Affirmed

F. Federal works' exclusion from copyright

F.1. Exposition

One of the most significant sources of public domain works is the statutory exclusion of federal government works from copyright.

The federal government, in the course of its varied pursuits, writes a lot of words and takes an enormous amount of photos. That makes for a mammoth outflow of copyright-free material. For instance, the words of the Congressional Research Service and U.S. Copyright Office have supplied much of the expository text for this casebook. And for photographs? Wowzers! The federal government has produced still photographs and motion picture footage representing not only colossal value but also stupendous expense and breathtaking peril in their production.

NASA's Apollo moon missions produced images of Earth – including the iconic “Blue Marble” and “Earthrise” photos – that had a transformative effect on how humanity sees itself. Indeed, those images are credited with helping launch the environmental movement. Then there's the collection of Solar System portraiture produced by NASA's Voyager, Cassini, New Horizons, and other probes.

If those images get you lost in empyrean reverie over the wonders of creation, fear not. The public domain holds the cure thanks to the cinematic contributions of the Atomic Energy Commission by way of its lens work at the Nevada Test Site. And it's not all nuclear fireballs and mushroom clouds. Unforgettable classics include the sudden smoking of the paint on a two-story suburban family home moments before it is blasted to matchsticks by the shockwave – whereupon the sickening parabolic reversal seizes the whole of the neighborhood's obliterated and begins sucking it toward ground zero's sudden vacuum.

The U.S. government's choice to legislatively exclude itself from copyright-creating authorship is not a recent development. The Copyright Act of 1909 provided, in § 7 (later moved to § 8): “no copyright shall subsist ... in any publication of the United States Government.” And the 1976 Act followed suit with § 105.

F.2. Statutory law

Section 105 text and corresponding definitions

§ 105 · Subject matter of copyright:

United States Government works

(as amended in 2024)

(a) In General.—Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights **transferred** to it by assignment, bequest, or otherwise.

(b) Copyright Protection of Certain Works.—Subject to subsection (c), the covered author of a covered work owns the copyright to that covered work.

(c) Use by Federal Government.—

(1) Secretary of defense authority.—With respect to a covered author who produces a covered work in the course of employment at a covered institution described in subparagraphs (A) through (K) of subsection (d)(2) and subparagraph (L) of such subsection when the Coast Guard is operating as a service in the Navy, the Secretary of Defense may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, worldwide, nonexclusive license to reproduce, distribute, **perform**, or **display** such covered work for purposes of the United States Government.

(2) Secretary of the department in which the coast guard is operating when it is not operating as a service in the navy authority.—With respect to a covered author who produces a covered work in the course of employment at the covered institution described in subsection (d)(2)(L), the Secretary of the Department in which the Coast Guard is operating when it is not operating as a service in the Navy may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, worldwide, nonexclusive license to reproduce, distribute, **perform**, or **display** such covered work for purposes of the United States Government.

(3) Director of national intelligence authority.—With respect to a covered author who produces a covered work in the course of employment at the covered institution described in subsection (d)(2)(M), the Director of National Intelligence may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, worldwide, nonexclusive license to reproduce, distribute, **perform**, or **display** such covered work for purposes of the United States Government.

(4) Secretary of transportation authority.—With respect to a covered author who produces a covered work in the course of employment at the covered institution described in subsection (d)(2)(N), the Secretary of Transportation may direct the covered author to provide the Federal Government with an irrevocable, royalty-free, worldwide, nonexclusive license to reproduce, distribute, **perform**, or **display** such covered work for purposes of the United States Government.

(d) Definitions.—In this section:

(1) Covered author.—The term “covered author” means a civilian member of the faculty of a covered institution.

(2) Covered institution.—The term “covered institution” means the following:

- (A) National Defense University.
- (B) United States Military Academy.
- (C) Army War College.
- (D) United States Army Command and General Staff College.
- (E) United States Naval Academy.
- (F) Naval War College.
- (G) Naval Postgraduate School.
- (H) Marine Corps University.
- (I) United States Air Force Academy.
- (J) Air University.
- (K) Defense Language Institute.
- (L) United States Coast Guard Academy.

(M) National Intelligence University.

(N) United States Merchant Marine Academy.

(3) Covered work.—The term “covered work” means a **literary work** produced by a covered author in the course of employment at a covered institution for **publication** by a scholarly press or journal.

Definitions from § 101 of terms in § 105

A “**transfer of copyright ownership**” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

To “**perform**” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

To “**display**” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

“**Literary works**” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

“**Publication**” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

G. Government Edicts Doctrine

G.1. Lead-in

This section concerns the government edicts doctrine, which keeps the law by which the public is governed within the public domain. The background and the current state of the doctrine is explained in the recent case of *Georgia v. Public.Resource.Org* (U.S. 2020).

G.2. Case: Georgia v. Public.Resource.Org

G.2.a. Pre-reading notes

The “government edicts” doctrine, recognized in the 1800s, holds that government officials in the course of speaking with the force of law are not “authors” of such speech, and thus they cannot have a copyright to such works. This doctrine has long been recognized ensuring that legislative statutes and judicial opinions – including state as well as federal ones– are in the public domain.

While it has long been well understood that the government edicts doctrine applies to the text of judicial opinions and acts of the legislature, it similarly was well understood that where a legal publisher such as West or Lexis adds annotations to such works, then copyright can attach to those annotations. Many state governments, however, in recent decades did exclusive deals with legal publishers that created fact patterns somewhere between these two well-understood scenarios of public enactments and private commentaries.

Thus it was that Georgia ended up with one official code of statutory law – the Official Code of Georgia Annotated (OCGA) – that mixed work done by legislators, state government employees, and persons working for Matthew Bender & Co., a division of LexisNexis. The OCGA was marked as copyrighted and copies were marketed at high prices.

Author and public-domain champion Carl Malamud was convinced works such as the OCGA were not the legitimate subject of copyright. He pushed the issue and invited a confrontation by making the materials freely available online and even mailing flashdrives to state legislatures.

The organization he founded, Public.Resource.Org, and the State of Georgia wound up before the U.S. Supreme Court over the question. In a 5-4

decision, the court sided with Malamud and held that the official code – notwithstanding its inclusion of privately authored annotations – was copyright-free under the government edicts doctrine.

G.2.b. Opinion of the Court

Georgia v. Public.Resource.Org, Inc.

Supreme Court of the United States
590 U.S. 255^[prelim.] (2020)

On writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *For Georgia and petitioners*: Anthony B. Askew, Lisa C. Pavento, Warren J. Thomas, Meunier Carlin & Curfman LLC, Atlanta, GA, Daniel R. Ortiz, University of Virginia School of Law, Supreme Court, Litigation Clinic, Charlottesville, VA, Jeremy C. Marwell, Joshua S. Johnson, Matthew X. Etchemendy, Vinson & Elkins LLP, Washington, DC, John P. Elwood, Arnold & Porter Kaye Scholer LLP, Washington, DC. *For respondent Public.Resource.Org, Inc.*: Elizabeth H. Rader, Calliope Legal, Washington, DC, Eric F. Citron, Thomas C. Goldstein, Erica Oleszczuk Evans, Goldstein & Russell, P.C., Bethesda, MD.

Argued December 2, 2019. Decided April 27, 2020. ROBERTS, C.J., delivered the opinion of the Court, in which SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which BREYER, J., joined in part. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

[Note: Footnotes omitted without indication. Parallel citations, citations to the record and dissents, and citations for fact, subsidiary citations (e.g., “citing to”), omitted without indication. The superscript tilde (~) indicates omitted matter. Italicization was omitted and then re-applied, and thus could differ from the original. –EE]

Chief Justice ROBERTS delivered the opinion of the Court.

The Copyright Act grants potent, decades-long monopoly protection for “original works of authorship.” 17 U.S.C. § 102(a). The question in this case is whether that protection extends to the annotations contained in Georgia’s official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act’s “authorship” requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force

of law cannot be the authors of – and therefore cannot copyright – the works they create in the course of their official duties.

We have previously applied that doctrine to hold that non-binding, explanatory legal materials are not copyrightable when created by judges who possess the authority to make and interpret the law. See *Banks v. Manchester*, 128 U.S. 244 (1888). We now recognize that the same logic applies to non-binding, explanatory legal materials created by a legislative body vested with the authority to make law. Because Georgia’s annotations are authored by an arm of the legislature in the course of its legislative duties, the government edicts doctrine puts them outside the reach of copyright protection.

I

A

The State of Georgia has one official code – the “Official Code of Georgia Annotated,” or OCGA. The first page of each volume of the OCGA boasts the State’s official seal and announces to readers that it is “Published Under Authority of the State.”

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor’s notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts. See, e.g., OCGA §§ 51–1–1, 53–4–2 (2019).

The OCGA is assembled by a state entity called the Code Revision Commission. In 1977, the Georgia Legislature established the Commission to recodify Georgia law for the first time in decades. The Commission was (and remains) tasked with consolidating disparate bills into a single Code for reenactment by the legislature and contracting with a third party to produce the annotations. A majority of the Commission’s 15 members must be

members of the Georgia Senate or House of Representatives. The Commission receives funding through appropriations “provided for the legislative branch of state government.” OCGA § 28–9–2(c) (2018). And it is staffed by the Office of Legislative Counsel, which is obligated by statute to provide services “for the legislative branch of government.” §§ 28–4–3(c)(4), 28–9–4. Under the Georgia Constitution, the Commission’s role in compiling the statutory text and accompanying annotations falls “within the sphere of legislative authority.” *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 330 (1979).

Each year, the Commission submits its proposed statutory text and accompanying annotations to the legislature for approval. The legislature then votes to do three things: (1) “enact[]” the “statutory portion of the codification of Georgia laws”; (2) “merge[]” the statutory portion “with [the] annotations”; and (3) “publish[]” the final merged product “by authority of the state” as “the ‘Official Code of Georgia Annotated.’ ” OCGA § 1–1–1 (2019); see *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1245, 1255 (CA11 2018).

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in “the State of Georgia, acting through the Commission.” Lexis and its army of researchers perform the lion’s share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated version of the statutory text available to the public online for free. A hard copy of the complete OCGA currently retails for \$412.00.

B

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites,

where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

In response, the Commission sent PRO several cease-and-desist letters asserting that PRO's actions constituted unlawful copyright infringement. When PRO refused to halt its distribution activities, the Commission sued PRO on behalf of the Georgia Legislature and the State of Georgia for copyright infringement. The Commission limited its assertion of copyright to the annotations described above; it did not claim copyright in the statutory text or numbering. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain.

The District Court sided with the Commission. The Court acknowledged that the annotations in the OCGA presented "an unusual case because most official codes are not annotated and most annotated codes are not official." *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F.Supp.3d 1350, 1356 (ND Ga. 2017). But, ultimately, the Court concluded that the annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law." *Ibid.* In light of that conclusion, the Court granted partial summary judgment to the Commission and entered a permanent injunction requiring PRO to cease its distribution activities and to remove the digital copies of the OCGA from the internet.

The Eleventh Circuit reversed. 906 F.3d 1229. The Court began by reviewing the three 19th-century cases in which we articulated the government edicts doctrine. See *Wheaton v. Peters*, 8 Pet. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888). The Court understood those cases to establish a "rule" based on an interpretation of the statutory term "author" that "works created by courts in the performance of their official duties did not belong to the judges" but instead fell "in the public domain." 906 F.3d at 1239. In the Court's view, that rule "derive[s] from first principles about the nature of law in our democracy." *Ibid.* In a democracy, the Court reasoned, "the People" are "the constructive authors" of the law, and judges and legislators are merely

“draftsmen ... exercising delegated authority.” *Ibid.* The Court therefore deemed the “ultimate inquiry” to be whether a work is “attributable to the constructive authorship of the People.” *Id.*, at 1242. The Court identified three factors to guide that inquiry: “the identity of the public official who created the work; the nature of the work; and the process by which the work was produced.” *Id.*, at 1254. The Court found that each of those factors cut in favor of treating the OCGA annotations as government edicts authored by the People. It therefore rejected the Commission’s assertion of copyright, vacated the injunction against PRO, and directed that judgment be entered for PRO.

We granted certiorari. 588 U.S. ----, 139 S.Ct. 2746 (2019).

II

We hold that the annotations in Georgia’s Official Code are ineligible for copyright protection, though for reasons distinct from those relied on by the Court of Appeals. A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges – and, we now confirm, legislators – may not be considered the “authors” of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

A

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th century. In this Court’s first copyright case, *Wheaton v. Peters*, 8 Pet. 591 (1834), the Court’s third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices’ opinions. *Id.*, at 617 (argument). In Wheaton’s view, the opinions “must have belonged to some one” because “they were new, original,” and much more “elaborate” than law or custom required. *Id.*, at 615. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit “gift.” *Id.*, at 614. The Court unanimously rejected that argument, concluding that “no

reporter has or can have any copyright in the written opinions delivered by this court” and that “the judges thereof cannot confer on any reporter any such right.” *Id.*, at 668 (opinion).

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks v. Manchester*, 128 U.S. 244 (1888). That case concerned whether Wheaton’s state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges’ opinions and several non-binding explanatory materials prepared by the judges. *Id.*, at 249–251. The Court concluded that he did not, explaining that “the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note” cannot “be regarded as their author or their proprietor, in the sense of [the Copyright Act].” *Id.*, at 253. Pursuant to “a judicial consensus” dating back to *Wheaton*, judges could not assert copyright in “whatever work they perform in their capacity as judges.” *Banks*, 128 U.S. at 253 (emphasis in original). Rather, “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.” *Ibid.*

In a companion case decided later that Term, *Callaghan v. Myers*, 128 U.S. 617 (1888), the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court rejected the claim that an official reporter held a copyright interest in the judges’ opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter’s copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. *Callaghan*, 128 U.S. at 645, 647. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to “obtain[] a copyright” for the materials that were “the result of his [own] intellectual labor.” 128 U.S. at 647.

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the “author” of the works they prepare “in the discharge of their judicial duties.” *Banks*, 128 U.S. at 253. This rule applies both to binding works (such as opinions)

and to non-binding works (such as headnotes and syllabi). *Ibid.* It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters. Compare *ibid.* with *Callaghan*, 128 U.S. at 647.

The animating principle behind this rule is that no one can own the law. “Every citizen is presumed to know the law,” and “it needs no argument to show ... that all should have free access” to its contents. *Nash*, 142 Mass. at 35 (cited by *Banks*, 128 U.S. at 253–254). Our cases give effect to that principle in the copyright context through construction of the statutory term “author.” *Id.*, at 253. Rather than attempting to catalog the materials that constitute “the law,” the doctrine bars the officials responsible for creating the law from being considered the “author[s]” of “whatever work they perform in their capacity” as lawmakers. *Ibid.* (emphasis added). Because these officials are generally empowered to make and interpret law, their “whole work” is deemed part of the “authentic exposition and interpretation of the law” and must be “free for publication to all.” *Ibid.*

If judges, acting as judges, cannot be “authors” because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials. See, e.g., *Nash*, 142 Mass. at 35, 6 N.E. at 560 (judicial opinions and statutes stand “on substantially the same footing” for purposes of the government edicts doctrine); *Howell v. Miller*, 91 F. 129, 130–131, 137–138 (CA6 1898) (Harlan, J., Circuit Justice, joined by then-Circuit Judge Taft) (analyzing statutes and supplementary materials under *Banks* and *Callaghan* and concluding that the materials were copyrightable because they were prepared by a private compiler).

Moreover, just as the doctrine applies to “whatever work [judges] perform in their capacity as judges,” *Banks*, 128 U.S., at 253, it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor

statements, committee reports, and proposed bills. These materials are part of the “whole work done by [legislators],” so they must be “free for publication to all.” *Ibid.*

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

B

1

Applying that framework, Georgia’s annotations are not copyrightable. The first step is to examine whether their purported author qualifies as a legislator.

As we have explained, the annotations were prepared in the first instance by a private company (Lexis) pursuant to a work-for-hire agreement with Georgia’s Code Revision Commission. The Copyright Act therefore deems the Commission the sole “author” of the work. 17 U.S.C. § 201(b). Although Lexis expends considerable effort preparing the annotations, for purposes of copyright that labor redounds to the Commission as the statutory author. Georgia agrees that the author is the Commission. Brief for Petitioners 25.

The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being “merged” with the statutory text and published in the official code alongside that text at the legislature’s direction. OCGA § 1–1–1; see 906 F.3d at 1245.

If there were any doubt about the link between the Commission and the legislature, the Georgia Supreme Court has dispelled it by holding that, under the Georgia Constitution, “the work of the Commission; i.e., selecting a publisher and contracting for and supervising the codification of the laws enacted by the General Assembly, including court interpretations thereof, is within the sphere of legislative authority.” *Harrison Co.*, 244 Ga. at 330

(emphasis added). That holding is not limited to the Commission's role in codifying the statutory text. The Commission's "legislative authority" specifically includes its "codification of ... court interpretations" of the State's laws. *Ibid.* Thus, as a matter of state law, the Commission wields the legislature's authority when it works with Lexis to produce the annotations. All of this shows that the Commission serves as an extension of the Georgia Legislature in preparing and publishing the annotations. And it helps explain why the Commission brought this suit asserting copyright in the annotations "on behalf of and for the benefit of" the Georgia Legislature and the State of Georgia.

2

The second step is to determine whether the Commission creates the annotations in the "discharge" of its legislative "duties." *Banks*, 128 U.S. at 253. It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the annotations is under Georgia law an act of "legislative authority," *Harrison Co.*, 244 Ga. at 330, and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and Justice GINSBURG emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the "statement of the case and the syllabus or head note" prepared by judges fall within the "work they perform in their capacity as judges," *Banks*, 128 U.S. at 253, so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission's role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia's Official Code fall within the government edicts doctrine and are not copyrightable.

III

Georgia resists this conclusion on several grounds. At the outset, Georgia advances two arguments for why, in its view, excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. Both are unavailing.

First, Georgia notes that § 101 of the Act specifically lists “annotations” among the kinds of works eligible for copyright protection.~ While the reference to “annotations” in § 101 may help explain why supplemental, explanatory materials are copyrightable when prepared by a private party, or a non-lawmaking official like the reporter in *Callaghan*, it does not speak to whether those same materials are copyrightable when prepared by a judge or a legislator. In the same way that judicial materials are ineligible for protection even though they plainly qualify as “[l]iterary works ... expressed in words,” *ibid.*, legislative materials are ineligible for protection even if they happen to fit the description of otherwise copyrightable “annotations.”

Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection “work[s] prepared by an officer or employee of the United States Government as part of that person’s official duties” and does not establish a similar rule for the States. § 101; see also § 105. But the bar on copyright protection for federal works sweeps much more broadly than the government edicts doctrine does. That bar applies to works created by all federal “officer[s] or employee[s],” without regard for the nature of their position or scope of their authority. Whatever policy reasons might justify the Federal Government’s decision to forfeit copyright protection for its own proprietary works, that federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States. That doctrine does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on.

More generally, Georgia suggests that we should resist applying our government edicts precedents to the OCGA annotations because our 19th-century forebears interpreted the statutory term author by reference to “public policy” – an approach that Georgia believes is incongruous with the

“modern era” of statutory interpretation. But we are particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted. As we explained last Term in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 586 U.S. ----, 139 S.Ct. 628 (2019), when Congress “adopt[s] the language used in [an] earlier act,” we presume that Congress “adopted also the construction given by this Court to such language, and made it a part of the enactment.” *Id.*, at ----, 139 S.Ct., at 634. A century of cases have rooted the government edicts doctrine in the word “author,” and Congress has repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning, and “critics of our ruling can take their objections across the street, [where] Congress can correct any mistake it sees.” *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015).

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U.S. Copyright Office Practices (Compendium). But, as Georgia concedes, the Compendium is a non-binding administrative manual that at most merits deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That means we must follow it only to the extent it has the “power to persuade.” *Id.*, at 140. Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive.

In any event, the Compendium is largely consistent with our decision.~

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). And that principle requires adherence to precedent when, as here, we have construed the statutory text and “tossed [the ball] into Congress’s court, for acceptance or not as that branch elects.” *Kimble*, 576 U.S. at 456.

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has “the force of law.” Justice THOMAS appears to endorse the same view. But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases – especially *Banks*. *Banks*, following *Wheaton* and the “judicial consensus” it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. 128 U.S. at 253 (emphasis deleted). As every judge learns the hard way, “comments in [a] dissenting opinion” about legal principles and precedents “are just that: comments in a dissenting opinion.” *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177, n. 10 (1980). Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law.

Indeed, *Banks* went even further and withheld copyright protection from headnotes and syllabi produced by judges. 128 U.S. at 253. Surely these supplementary materials do not have the force of law, yet they are covered by the doctrine. The simplest explanation is the one *Banks* provided: These non-binding works are not copyrightable because of who creates them – judges acting in their judicial capacity. See *ibid*.

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee reports. Under the logic of Georgia’s “force of law” test, States would own such materials and could charge the public for access to them.

Furthermore, despite Georgia’s and Justice THOMAS’s purported concern for the text of the Copyright Act, their conception of the government edicts doctrine has less of a textual footing than the traditional formulation. The textual basis for the doctrine is the Act’s “authorship” requirement, which unsurprisingly focuses on – the author. Justice THOMAS urges us to dig deeper to “the root” of our government edicts precedents. But, in our view, the text is the root. The Court long ago interpreted the word “author” to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple

iterations of the Copyright Act. This textual foundation explains why the doctrine distinguishes between some authors (who are empowered to speak with the force of law) and others (who are not). Compare *Callaghan*, 128 U.S. at 647, with *Banks*, 128 U.S. at 253. But the Act's reference to "authorship" provides no basis for Georgia's rule distinguishing between different categories of content with different effects.

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations – with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. See OCGA §§ 21-2-131, 16-6-2, 16-6-18, 16-15-9 (available at www.legis.ga.gov). Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal. See §§ 21-2-131, 16-6-2, 16-6-18, 16-15-9 (available at <https://store.lexisnexis.com/products/official-code-of-georgia-annotated> - skuSKU6647 for \$412.00).

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today's digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century. 17 U.S.C. §§ 102, 106, 302. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges' and legislators' non-binding legal works

would be copyrighted. And citizens, attorneys, nonprofits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. §§ 501–506. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. Cf. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552, 560–561 (1985). The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns – the one we are already on. Instead of examining whether given material carries “the force of law,” we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

* * *

For the foregoing reasons, we affirm the judgment of the Eleventh Circuit.

It is so ordered.

{Dissenting opinions are omitted.}

{
END OF PART 4
(“Story Arc 4”)
}