

WILL MICKEY BE PROPERTY OF DISNEY FOREVER?
DIVERGENT ATTITUDES TOWARD PATENT AND
COPYRIGHT EXTENSIONS IN LIGHT OF *ELDRED* v.
ASHCROFT

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I. INTRODUCTION

When the Framers crafted the Patent and Copyright Clauses of the United States Constitution, similar presumptions flowed through both. Since the Copyright Act of 1976, however, congressional and judicial approaches toward patent and copyright extensions have diverged. Whenever Congress discussed a patent extension of even a few years, a tremendous outcry ensued; in contrast, whenever there was a similar discussion for copyrights, the response was more tempered. Accordingly, patent holders are forced to resort to more creative, non-legislative means to extend the life of their patents, whereas copyright holders may simply approach Congress and receive extensions. Some copyrights are now protected for over 170 years due to extensions, but the Nostradamus-like cries on behalf of the opponents to copyright extensions are overinflated. There is much merit in the most recent congressional copyright extension, the Copyright Term Extension Act (“the CTEA” or “the Act”) and the most recent U.S. Supreme Court decision upholding the Act’s constitutionality—*Eldred v. Ashcroft*.¹

In Section II, this Note highlights the methods and lengths to which patent holders, particularly drug companies, have gone in order to get additional “life” out of their patents. In Section III, the discussion shifts toward an analysis of the arguments involved in *Eldred*. Section IV concludes the examination with an investigation of the reasoning for the disparate treatment given to patents and copyrights and what this holds for the near future, including whether patent extensions will be the next wave and what Congress will do in 2018 when the newly-extended copyrights are set to expire. Finally, this Note proposes that the differing treatment of patent versus copyright extensions is a result of the

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1. 537 U.S. 186 (2003).

government's differing treatment of the public domain for the technological and scientific arts versus the public domain for the creative arts.

II. PATENT EXTENSIONS

Patent laws create a carefully balanced bargain between two entities—the innovator and the government—with inherent tension between the promotion of innovation and the understanding that imitation is the “very lifeblood of a competitive economy.”² Accordingly, in exchange for the disclosure of scientific advancement and innovation, the government does not allow copying of an inventor's work until the end of a twenty-year period.³ The basis for this reward of patent protection is the likelihood that imitators could easily reproduce products and inhibit inventors from recouping their investment costs and profiting; thus, innovators would be reluctant to spend the capital necessary to develop their ideas.⁴ Furthermore, absent barriers to production in the public domain, a competitor could copy and distribute an inventor's ideas at a far lower cost than it took to develop such ideas.⁵

Congress may not create patent monopolies for unlimited duration or facilitate the removal of existent knowledge from the public domain.⁶ Thus, the requirements for patent protection foster ideas remaining in the public domain after the expiration of the patent for the public's free use. For example, case law supports that when the patent expires, companies need not pay royalties to the patent holder to use the product because this would unduly disrupt the competition that characterizes a free market.⁸ As the Supreme Court held in *Singer*:

It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. . . . It follows, as a matter of course, that on the termination of the patent

2. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

3. 35 U.S.C. § 154 (2000); see Alison Marcotte, *Concurrent Protection of Products by Patent and Trade Dress: Use of the Functionality Doctrine in Marketing Displays*, *Inc. v. Traffix Devices, Inc.*, 36 NEW ENG. L. REV. 327, 327 (2001).

4. See Lara J. Glasgow, *Stretching the Limits of Intellectual Property Rights: Has the Pharmaceutical Industry Gone Too Far?*, 41 IDEA 227, 229 (2001).

5. See *id.*

6. See *Bonito Boats*, 489 U.S. at 146; *Leonard Storch Enters., Inc. v. Mergenthaler Linotype Co.*, No. 78-C238, 1979 U.S. Dist. LEXIS 14582, at *2, 16 (E.D.N.Y. Apr. 5, 1979) (adopting memorandum and order of magistrate, recognizing an objective of federal patent law as ensuring that matters in the public domain remain in the public domain).

7. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

8. *Brulotte v. Thys Co.*, 379 U.S. 29, 33–34 (1964) (invalidating patent licensing agreements that extend royalty payments beyond the life of the patent because they create a monopoly over works in the public domain); see *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1017 (7th Cir. 2002); *Codata Corp. v. Thermotech Serv. Co.*, No. 92 CIV 5533, 1996 U.S. Dist. LEXIS 3952, at *3–4 (S.D.N.Y. Apr. 1, 1996) (denying infringement and injunctive relief because, once the patent expires, the patent holder no longer possesses exclusive rights over the invention).

there passes to the public the right to make the machine in the form in which it was constructed during the patent.⁹

A. Pharmaceutical Companies' Attempts to Extend Patents

As a symbolic representation of actions taken by pharmaceutical companies in order to artificially extend the life of their patents, this Note focuses on Prilosec. Beginning in fall 2001, Prilosec, a pharmaceutical developed by AstraZeneca to combat heartburn, was about to have its twenty-year patent expire.¹⁰ This expiration would have allowed generic versions of the drug to enter the market; however, through exploitation of its legal remedies, trading especially on the loopholes in federal statutes, the company kept its competition at bay.¹¹ As a result, large companies with employee health plans, such as General Motors, must pay an additional \$1.3 million per month for their employees' use of the original medication instead of the generic.¹² AstraZeneca, enjoying a windfall, collects \$5.6 million in additional revenue every day.¹³

That company is not alone. As reports indicate, at least twelve pharmaceutical companies use similar strategies, invoking federal laws which grant "an automatic 30-month extension each time a manufacturer simply claims generic approval would infringe on its patent," as well as a six-month extension if the company conducts safety trials for children.¹⁴ This undermines the 30-month extension's purpose, which originally was to protect brand-name companies from frivolous lawsuits.¹⁵ Specifically, the Federal Trade Commission found that eight such extensions were granted, delaying the arrival of generics on the market between four and forty months.¹⁶ In one case, the patent on Claritin, an allergy medication, was extended as a result of favorable pediatric testing, resulting in increased earnings of nearly \$1 billion.¹⁷

Additionally, pharmaceutical companies engage in the "layering" of patents and combining of drugs, which lead to the grant of new patents

9. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 1002, 1008 (1896); see also *In re Hall*, 781 F.2d 897, 898 (Fed. Cir. 1986) (constructing the public domain narrowly, deeming that "once an invention is in the public domain, it is no longer patentable by anyone"); *Automatic Paper Mach. Co. v. Marcalus Mfg. Co.*, 147 F.2d 608, 613 (3d Cir. 1945) (recognizing as a fundamental principle of the patent system that once a patent term has expired, it falls into the public domain).

10. Ceci Connolly, *Coalition Seeks to Curb Drug Patent Extensions*, WASH. POST, Mar. 25, 2002, at A01.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; see also Vicki Kemper, *Senate OKs Bill to Ease Way for Generic Drugs*, L.A. TIMES, Aug. 1, 2002, at A24; Glasgow, *supra* note 4, at 236.

15. See Robert Langreth & Victoria Murphy, *Perennial Patents*, FORBES, Apr. 2, 2001, at 52.

16. John A. MacDonald, *Patent Law Changes Urged to Give Generic Prescriptions Better Chance*, HARTFORD COURANT, July 31, 2002, at A3.

17. Glasgow, *supra* note 4, at 236.

by securing protection based on different aspects of the drug.¹⁸ Findings even indicate that brand-name pharmaceutical companies patent “the process of manufacturing the raw material, the medical indications to which the drug can be applied, the formulation of the medicine, and the metabolites resulting from the enzymatic degradation of the parent drug by the body.”¹⁹ Moreover, these “layered” patents are applied over a staggered period of time, so as the older ones near expiration, the new ones take effect.²⁰ For example, Pfizer filed for and received an additional patent for Neurontin, an epilepsy drug, based on a way to formulate the drug to prevent degradation; although generic firms claim this was already known, the addition resulted in another \$1.5 billion in annual revenue for Pfizer.²¹ A nearly identical pattern characterizes Augmentin, an antibiotic produced by GlaxoSmithKline, which obtained a patent extension of fifteen years.²² This strategy provides many opportunities for large pharmaceutical companies to take advantage of legal loopholes in order to squeeze more money from their patents and out of consumers’ pockets.²³

The pharmaceutical companies strongly respond that the basis for these extensions is that the typical drug only enjoys approximately eleven years of patent protection as a result of the lengthy approval process.²⁴ Specifically, the Hatch-Waxman Act provides for patent extensions for up to five years to mitigate the effects of the long-term process characterized by delays in U.S. Food and Drug Administration (“FDA”) approval.²⁵ Pragmatically, the Hatch-Waxman Act compensates companies for this delay because such a reduction in patent terms diminishes the incentive to invest in research and development of new pharmaceuticals.²⁶

B. Trade Dress Protections

A second way patent holders take advantage of federal law is by trying to achieve secondary protection through trademark status. Specifically, they claim a product’s appearance alone justifies trade dress protection.²⁷ The original intent of trade dress protection under the Lanham Act was to protect consumers from confusion stemming from

18. *Id.* at 248.

19. *Id.*

20. *Id.*

21. Langreth & Murphy, *supra* note 15.

22. Glasgow, *supra* note 4, at 234.

23. *See* Connolly, *supra* note 10.

24. Kemper, *supra* note 14.

25. Drug Price Competition and Patent Term Restoration Act of 1984, 35 U.S.C. § 156 (2000).

26. *See* Matthew Hinsch, *Hoechst-Roussel Pharms. Inc. v. Lehman*, 13 BERKELEY TECH. L.J. 163, 163 (1998).

27. *See* Michael S. Perez, *Reconciling the Patent Act and the Lanham Act: Should Product Configurations Be Entitled to Trade Dress Protection After the Expiration of a Utility or Design Patent?*, 4 TEX. INTELL. PROP. L.J. 383, 400 (1996).

the different packaging of products.²⁸ In these cases, the patent holders asserted under the Lanham Act that distinct features of their patented inventions, whose patent protections had expired or were about to expire, fell under the umbrella of trade dress protection, thereby giving the inventors protection for a nearly unlimited amount of time.²⁹

Nevertheless, courts became wise to these tricks and rejected them. Primarily, the courts ruled that this attempt to get a “back-door patent,” in tandem with the exclusive rights of unlimited duration provided by trademark protection, would be incompatible with the underlying policy and constitutional justifications for patent law because it would threaten to extend the patent monopoly into perpetuity.³⁰ Specifically, the courts ruled that trade dress protection is unlikely to be bestowed for functional products, such as patented inventions, where their functional features will be evaluated in terms of a rebuttable presumption and weighed against the granting of trade dress protection.³¹

Patent holders repeatedly attempted to circumvent the patent bargain into which they entered with the hope of squeezing out more profits from their original investment. Accordingly, the Supreme Court reacted with a staunch rejection of these methods, such as limiting patent royalties and eliminating trade dress protections, in favor of free market competition. On the other hand, in the realm of copyright protections, there is an overarching acceptance of the continuous extensions of limited monopolies, with the enactment of the CTEA and the *Eldred* decision being the most recent examples of such a tendency.

III. COPYRIGHT EXTENSIONS

In 1998, Congress overwhelmingly voted to adopt legislation sponsored by Representative Sonny Bono that would extend copyright protections for a period of twenty years. *The Great Gatsby*, *Winnie the Pooh*, *Showboat*, several works by Irving Berlin and Virginia Woolf, and the character Mickey Mouse were just a few of the well-known works whose copyrights were near expiration at the time.³² Overall, the Act covered an estimated 400,000 books, movies, and songs.³³ Yet this was not a historically unprecedented move—since the first Congress there

28. See Kerry S. Taylor, *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 17 BERKELEY TECH. L.J. 205, 206–07 (2002).

29. See Todd R. Geremia, Comment, *Protecting the Right to Copy: Trade Dress Claims for Configurations in Expired Utility Patents*, 92 NW. U. L. REV. 779, 781 (1998).

30. Ethan Andelman, *Thomas & Betts Corp. v. Panduit Corp.*, 14 BERKELEY TECH. L.J. 229, 240 (1999); Taylor, *supra* note 28, at 214; see Geremia, *supra* note 29, at 816.

31. *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29, 35 (2001).

32. David Streitfeld, *Larry Lessig vs. Hollywood: He's One Supreme Court Decision Away from Changing the Rules of Pop Culture*, CHI. TRIB., Oct. 9, 2002, § 5, at 5.

33. David Streitfeld, *Copyright Warrior Takes on Hollywood; Companies Are Hanging on to Old Movies and Books That Should Be Public Property, He Said*, ORLANDO SENTINEL TRIB., Sept. 29, 2002, at H1.

have been approximately eleven extensions, though not all equal in force.

A. History

In 1790, the first Congress enacted the Copyright Act, which granted protection for fourteen years from the date of the filing, with the opportunity to renew for another fourteen years.³⁴ In 1831, Congress lengthened the term of original protection to twenty-eight years with an equal term of renewal.³⁵ Another change in 1909 allowed the term to run from the date of publication, as opposed to the date of filing.³⁶ Congress later created the Copyright Act of 1976, which adopted the Berne Convention for the Protection of Literary and Artistic Works' standard of a copyright term for the span of the author's life plus fifty years.³⁷ Nearly twenty years later, in 1993, the European Union ("EU") issued a directive based on providing protection to two generations after the author's death and the accommodation of longer lifespans, which extended the copyright laws to a term of the author's life plus seventy years.³⁸

B. Rationality and Purpose of the Act

The purpose of the CTEA is easily ascertainable, as both testimony and Congressional reports simply state that the legislature's intent in creating such a bill was "to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the . . . copyrighted works."³⁹ To protect American works abroad in relation to the balance of trade, Congress targeted harmonization of U.S. and EU copyright laws.⁴⁰ Additionally, members of Congress believed that an extension would encourage the production of new works by providing financial incentives for the preservation of existing works.⁴¹

34. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124; see *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

35. Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436.

36. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1080.

37. 17 U.S.C. §§ 101-118 (2000) (referring to Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988)).

38. Council Directive 93/98/EEC, art. 11, 1993 O.J. (L 290) 9, 10 [hereinafter Council Directive 93/98/EEC]; Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 257 (2002).

39. S. REP. NO. 104-315, at 3 (1996).

40. Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 659-60 (2002).

41. S. REP. NO. 104-315, at 3.

1. United States Harmonizes Its Copyright Laws with Those of the EU

There are several reasons not to attempt to harmonize the United States' copyright laws with those of the EU after a thorough examination of their respective underlying policies. First, the basis for the EU's directive was the need to protect the author for the span of his lifetime and two generations of his heirs.⁴² This is without a basis in the United States, as there is no historical, structural, or textual foundation for such a goal.⁴³

Second, the EU based its directive on the assumption that longer life spans justify a twenty-year extension.⁴⁴ As the previous standard of "life plus fifty" still accommodated the life span of any author, regardless of whether the author lives sixty or eighty years on average, this reason is patently frivolous.⁴⁵

Third, critics of the CTEA argue that despite the Act's goal of harmonizing the copyright laws of the United States and the EU, the legislation fails to do so because the only works that the CTEA was able to harmonize were those created after 1977 by individual authors.⁴⁶ In addition, critics assert that the U.S. term for "works made for hire" can never be harmonized with the EU because the United States authorizes a copyright of a fixed number of years, and the EU maintains a "life plus" system for those works as well.⁴⁷ There are no uniform standards amongst the members of the EU—some nations recognize "life plus seventy," some recognize the older Berne Convention standard of "life plus fifty," while others, such as Spain, adhere to "life plus sixty."⁴⁸ Proponents of the CTEA respond convincingly that harmonization is not duplication, and laws that vary by twenty years in the terms of protection are not harmonized, whereas laws that have minor variations in their details are harmonious.⁴⁹

Fourth, proponents of the Act claim that if American authors receive twenty fewer years of protection than their European counterparts, they would lose an immense amount of revenue because of the competitive disadvantage.⁵⁰ The Act's proponents state that the U.S. copyright industry is an essential cog in the U.S. economy because it contributes more than any other manufacturing industry and comprises

42. Haggerty, *supra* note 40, at 660.

43. *See id.* at 662.

44. Council Directive 93/98/EEC, *supra* note 38, at 9.

45. *See Sue Ann Mota, Eldred v. Reno—Is the Copyright Term Extension Act Constitutional?*, 12 ALB. L.J. SCI. & TECH. 167, 174 (2001).

46. Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 211–12 (2002).

47. *Id.* at 212; Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 333–36 (1996).

48. Lavigne, *supra* note 47, at 333.

49. Martin, *supra* note 38, at 290.

50. *See* 141 CONG. REC. S3390–92 (daily ed. Mar. 2, 1995) (statement of Sen. Orrin Hatch); 141 CONG. REC. E379 (daily ed. Feb. 16, 1995) (statement of Rep. Carlos J. Moorhead).

almost four percent of the nation's gross domestic product.⁵¹ Not only would authors lose money, but the United States would also most likely lose jobs and production studios because the incentive of another twenty years of protection would entice movie studios to hire foreign directors.⁵²

On the other hand, critics maintain several compelling responses to this claim. Primarily, the CTEA is not reciprocal and is not harmonized with countries outside of the EU; thus, an American author would enjoy a term of "life plus fifty" in Japan, whereas a Japanese author would receive "life plus seventy" in the United States.⁵³ Such unevenness has been characterized as "economic suicide."⁵⁴ To supplement their argument, proponents imagine that these other nations would model the United States' reform, but that is highly unlikely in light of the rampant piracy throughout Asia, thereby indicating those nations' lack of commitment to intellectual property protections.⁵⁵ Some even characterize such a proposition of international uniformity and harmonization of copyright protections as "chimerical."⁵⁶ In response to the contention that the public domain deserves the most absolute protection, proponents of the Act instead look to the commercial benefits that copyright protections ensure. For example, the Act's proponents are quite concerned that works will fall into the public domain while they are still commercially viable, causing a substantial loss in revenue.⁵⁷ To validate this claim, advocates of the CTEA point to U.S. songwriters losing up to \$50 million per year and filmmakers losing up to \$200 million by 2020.⁵⁸

Proponents of the Act argue that harmonization of the length of protection was necessary to protect the U.S. trade balance of intellectual property.⁵⁹ The United States currently holds the title of world's largest exporter of copyrighted material because the intellectual property industries (particularly the entertainment industry) represent the nation's third largest export, bringing approximately \$40 billion into the

51. Brief of Amici Curiae American Society of Composers, Authors and Publishers, et al. at 21, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Brief of Amici Curiae]; *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 26 (1995) (statement of Bruce A. Lehman, Assistant Sec'y of Commerce and Comm'r of Patents and Trademarks) [hereinafter *Sen. Comm. Hearing*].

52. Martin, *supra* note 38, at 311.

53. Haggerty, *supra* note 40, at 661-62.

54. Lavigne, *supra* note 47, at 342.

55. See generally *id.* at 334.

56. *Id.*

57. *Sen. Comm. Hearing, supra* note 51, at 59 (statement of Ellen Donaldson, Vice President, AmSong, Inc.).

58. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 207 (1995) (statement of Ambassador Charlene Barshefsky, former Deputy U.S. Trade Rep., Office of the U.S. Trade Rep.) [hereinafter *House Subcomm. Hearing*]; *Sen. Comm. Hearing, supra* note 51, at 52 (statement of Alan Menken, songwriter and member of AmSong, Inc.).

59. Haggerty, *supra* note 40, at 660.

United States each year.⁶⁰ Furthermore, job growth in these industries is approximately three times the annual rate of the economy.⁶¹

Critics have several arguments to rebut the proponents' trade balance contention. First, the United States, not the EU, is the biggest market for works since the 1920s and 1930s, the works retroactively protected under the CTEA.⁶² Second, the trade surplus the United States maintains with the EU is a result of newer works, not the older ones.⁶³ Third, if the goal of Congress is a favorable trade balance, there is no reason why it would involve itself in a copyright "international 'race to the top'" with the EU, where additional protections will continue to mount until there is no free trade whatsoever.⁶⁴ If the United States is the global leader in intellectual property exports, it should set the standard for copyright protection instead of trying to conform to European competitors' standards. Hence, the proponents' justifications seem to be only hollow rhetoric.⁶⁵ Fourth, the EU is not the market with the largest total trade surplus with the United States—in fact, the EU is second behind China, with Japan and South Korea not far behind.⁶⁶ With efforts to harmonize the U.S. and EU copyright laws to facilitate a more favorable balance of trade, where are the U.S. efforts for harmonizing trade with the three Asian nations that comprise approximately \$186 billion in trade deficits?⁶⁷

In addition to the nonreciprocal nature of the CTEA negatively impacting the trade balance, the final argument by critics of the Act is that current U.S. dominance in the global intellectual property market is a result of its authors' use of a rich public domain.⁶⁸ This notion presumes that free trade best serves American interests. As U.S. Trade Representative Robert Zoellick stated, "Our goal is total free trade . . . [and] [w]e will promote free trade globally, regionally and bilaterally . . . and create a fresh political dynamic by putting free trade on to the offensive."⁶⁹ The United States is contradictorily pressuring the EU to

60. *Sen. Comm. Hearing, supra* note 51, at 25 (statement of Bruce A. Lehman); *House Subcomm. Hearing, supra* note 58, at 207 (statement of Ambassador Charlene Barshefsky).

61. *House Subcomm. Hearing, supra* note 58, at 207 (statement of Ambassador Charlene Barshefsky).

62. Christine Quintos, *Congress' Green Monster: Copyright Extension and the Concern for Cash over the Propagation of Art*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 109, 135 (2002).

63. *Id.*

64. See Irene Segal Ayers, *The Future of Global Copyright Protection: Has Copyright Law Gone Too Far?*, 62 U. PITT. L. REV. 49, 85 (2000).

65. Lavigne, *supra* note 47, at 343–44.

66. See Robert J. Samuelson, *Earning Americans' Resentment*, WASH. POST, Feb. 26, 2003, at A23; Jeffrey Sparshott, *U.S. Trade Deficit for 2002 Largest in History*, WASH. TIMES, Feb. 21, 2003, at C8.

67. See Samuelson, *supra* note 66 (specifying deficits of \$103 billion with China, \$70 billion with Japan, and \$13 billion with South Korea).

68. Haggerty, *supra* note 40, at 662.

69. Robert Zoellick, *Unleashing the Trade Winds*, THE ECONOMIST, Dec. 7, 2002, at 27; *U.S. Unveils Plan for Global Tariff Elimination on Products by 2015*, CHANNEL NEWSASIA, Nov. 27, 2002, LEXIS, News Library, Channel NewsAsia File [hereinafter *U.S. Unveils Plan*].

liberalize trade in agriculture, goods, and services, while rebuilding similar barriers for copyrights.⁷⁰ In that case, while the United States dismantles trade barriers in the manufacturing and farm sectors, it should not simultaneously be increasing protectionism in the intellectual property sector.⁷¹ These policies are entirely counterproductive and highly troubling when considering that free trade fosters economic growth, expanded employment opportunities, higher incomes, and competition—“the hallmark of successful economies.”⁷² Therefore, the United States should lead the EU toward shortening copyright protections, as opposed to lengthening them, pushing the works toward market competition.

2. *The CTEA's Effect on the Public Domain*

The CTEA extends protection for works that are already in existence, based on the view that a longer term of protection serves as a greater incentive to produce a higher quantity and quality of works.⁷³ Opponents first answer that there is no evidence to support the belief that an additional twenty years will make the difference between an author producing a work and not producing one.⁷⁴ Second, they find that the majority of a work's financial return comes in the first few years after publication with a decrease in profits over time.⁷⁵ Third, when considering a term greater than an author's lifetime, one must consider that the author will not personally feel the effect of the term extension; thus, such a term has little present value in its ability to stimulate the creation of new work.⁷⁶

According to proponents, these arguments are not as applicable in certain artistic fields because a longer copyright term is essential for songwriters and other musicians due to the industry's high degree of failure, low probability of success, and little remuneration.⁷⁷ On many occasions, success comes to songwriters posthumously, thus making the increased term an important incentive for their profession.⁷⁸ In fact, authors do benefit indirectly from such an extension because companies interested in purchasing the rights to an original work are more willing to pay for it if they believe that they could exploit it for a longer period of

70. See *U.S. Unveils Plan*, *supra* note 69.

71. See *id.*

72. *President Bush's Trade Agenda: Hearing Before the House Comm. on Ways and Means*, 108th Cong. 30 (2003) (statement of Ambassador Robert B. Zoellick, U.S. Trade Rep.).

73. S. REP. NO. 104-315, at 12 (1996); Haggerty, *supra* note 40, at 661.

74. Haggerty, *supra* note 40, at 663; Lavigne, *supra* note 47, at 323–25.

75. Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159, 180 (2002).

76. See Lavigne, *supra* note 47, at 323–24.

77. Brief of Amici Curiae, *supra* note 51, at 26.

78. *Id.*

time.⁷⁹ The unique relationship between authors and publishing companies provides additional support for this contention. The financial status of publishers directly affects authors, and if publishing companies continue to profit from other works, they will be more likely to make higher-risk investments in providing grants to less popular or newly aspiring authors.⁸⁰ There are many examples in the music industry of altruistic individual composers bequeathing their royalties to support emerging artists. The Aaron Copland Fund for Music, which gives financial grants “to encourage and improve public knowledge of contemporary American concert music and jazz,” is just one example.⁸¹ Hence, an extension of copyrights does not necessarily result in “gratuitous transfer[s] of wealth.”⁸²

In addition, the CTEA provides an extension for existing works because it will encourage the restoration and distribution of older works, particularly films.⁸³ Until 1950, filmmakers in the United States produced their works on nitrocellulose, which is subject to relatively rapid chemical deterioration at room temperature; consequently, more than half of the feature films produced in the United States before 1950 have been lost.⁸⁴ Beginning in 1950, the process switched to acetate-based film, but this type of film also suffers from deterioration and fading.⁸⁵ Today, with the emergence of home video and cable television, the potential to re-release old movies provides the impetus for studios to invest millions of dollars annually for the preservation and restoration of such films.⁸⁶ Unfortunately, this restoration tends to be very time- and capital-consuming, involving several technologically complex steps, with some films costing upwards of \$1 million to restore.⁸⁷ Jack Valenti, president of the Motion Picture Association of America, supported this claim when he testified in his well-known “Little Orphan Annie” speech:

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

79. Shauna C. Bryce, *Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States*, 37 HARV. INT'L L.J. 525, 533, 534 (1996).

80. See *Copyright Term Extension Act of 1996: Hearing Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 104th Cong. 207 (1995) (statement of Marybeth Peters); S. REP. NO. 104-315, at 12–13 (1996).

81. Brief of Amici Curiae Symphonic and Concert Composers Jack Beeson et al. at 19, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

82. *Contra* *Eldred v. Ashcroft*, 537 U.S. 186, 227 (2003) (Stevens, J., dissenting).

83. Bryce, *supra* note 79, at 537.

84. Brief of Amicus Curiae Motion Picture Association of America, Inc. at 15, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

85. *Id.*

86. *Id.*

87. *Id.* at 16 (noting Universal Studios spent close to \$500,000 to restore the Hitchcock film *Rear Window*, and Warner Brothers spent \$1 million to restore *Gone With the Wind*).

anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life.⁸⁸

To apply this argument to the context of the restoration of older films, it is unlikely investors or studios will spend the financial and human capital to create a high-quality restored or preserved version of a film without the assurance that they will be able to recover their investment—that is, a copyright protection.⁸⁹

Opponents of the CTEA counter that such a theory is not applicable to information: “While the tragedy of the commons theory may be applicable to shared land, it is not applicable to the public domain because information is not a limited resource. As literature scholar John Frow notes, ‘Rather than being exhausted by use, knowledge actually increases when it is shared.’”⁹⁰ In response to the government’s argument that extending the length of protection of already existing works would spur additional innovation, critics state that the argument is without basis, since conferring a benefit upon someone who already created the work in question, or upon someone to whom the rights of the work were transferred or sold, cannot be considered an incentive for future creativity.⁹¹

Proponents of the CTEA insinuate that the copyright protections are not a significant obstacle to innovation. In response, there are three compelling reasons why this is untrue. First, an individual would have to pay whatever royalty a copyright holder requested, and that cost could very likely be prohibitive.⁹² There is no way to determine how many works are not created or performed due to such a problem.⁹³ Second, simply tracking down all of the people with a partial interest in a copyright from whom an author needs permission has very high transaction costs and can itself be prohibitive.⁹⁴ Third, the copyright holder would be able to control the use of the work, which inhibits the

88. J. Michael Keyes, *Whatever Happens to Works Deferred?: Reflections on the Ill-Given Deferments of the Copyright Term Extension Act*, 26 SEATTLE U. L. REV. 97, 105 (2002).

89. See Martin, *supra* note 38, at 294, 297.

90. Ashley Packard, *Copyright Term Extensions, the Public Domain and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 19 (2002) (citing John Frow, *Public Domain and the New World Order*, 10 SOC. SEMIOTICS 173, 182 (2000)).

91. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 528 (1999); Haggerty, *supra* note 40, at 663; Quintos, *supra* note 62, at 126–27.

92. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 295 (1996); Quintos, *supra* note 62, at 138; MARJORIE HEINS, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 4 (2003), at <http://www.fepproject.org/policyreports/copyright2d.pdf> (offering examples of the American Society of Composers, Authors, and Publishers demanding fees from summer camps for songs the kids sang around the campfire, and Disney threatening daycare centers which had the likeness of Mickey Mouse or Minnie Mouse painted on their walls).

93. See Karjala, *supra* note 46, at 233 (citing Brief of Amici Curiae Jack M. Balkin et al. at 20, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)).

94. *Eldred*, 537 U.S. at 250 (Breyer, J., dissenting); Lavigne, *supra* note 47, at 327–28; HEINS, *supra* note 92, at 4 (noting that authors lack the time and financial resources to track down copyright permissions).

use of old works.⁹⁵ An example that best describes this argument is how the Gershwin Family Trust manages George Gershwin's opera *Porgy and Bess*.⁹⁶ So far, it has only allowed all-African American casts to perform the work, and to further demonstrate his stubbornness and unwillingness to promote the "progress of the arts," Marc G. Gershwin, a co-trustee of the trust, stated in an interview, "If works of art are in the public domain, you can take them and do whatever you want with them . . . [or] someone could turn [*Porgy and Bess*] into rap music."⁹⁷ Mr. Gershwin, the author's heir, either does not understand the basis for the endowment of a copyright or just simply has too much to lose, as two other Gershwin compositions—*Rhapsody in Blue* and "Fascinating Rhythm"—were about to lose their exclusive protection at the time of the CTEA's enactment.⁹⁸ This plays right into the hands of critics of the CTEA's extensions who argue that the Act's protections suppress political, social, and personal criticism, thereby chilling discourse and cultural advancement.⁹⁹ Therefore, even if the descendants of the original author of a work receive royalties, they should not have a right to control the usage of the work when all too often they have no qualifications deeming them worthy to exercise such power.¹⁰⁰

Opponents of the Act rely heavily on the concept of the public domain as a "warehouse of ideas" for authors to "reproduce[], sample[], alter[], or incorporate[] into other works."¹⁰¹ Peter Jaszi, a professor at the American University's Washington College of Law, characterized the public domain as "an informational commons which is free . . . to all users and all uses . . . [and] the source to which creators of each generation turn for the materials which they refashion into new—and newly valuable—works of imagination."¹⁰² To follow up on the benefits of the public domain, Professor Jaszi espoused an economic argument that rebuts the contention that a work passing into the public domain will suddenly lose its profitability:

95. Eldred, 537 U.S. at 250 (Breyer, J., dissenting); Quintos, *supra* note 62, at 138.

96. Quintos, *supra* note 62, at 130.

97. *Id.* at 130–31 (quoting Dinita Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at A13).

98. See Ayers, *supra* note 64, at 73.

99. Netanel, *supra* note 92, at 294.

100. See Karjala, *supra* note 46, at 223; HEINS, *supra* note 92, at 20 (hypothesizing that cultural icons, such as Dr. Seuss and *Charlotte's Web*, could be immune from criticism and new interpretations).

101. Haggerty, *supra* note 40, at 677.

102. *Sen. Comm. Hearing, supra* note 51, at 73 (statement of Professor Peter A. Jaszi, American University, Washington College of Law).

No rational economic actor will cease distributing a still-popular work when it ceases to be protected by copyright, merely because it may now face competition in the marketplace; if anything, such a firm is more likely to respond by [sic] improving the version of the work it offers in order to compete more effectively—and to be able to claim a derivative work copyright.¹⁰³

These critics of the CTEA advocate that a “rich and vibrant public domain” is the best way for new and creative works to emerge.¹⁰⁴ Lawrence Lessig, a professor at Stanford Law School and general counsel for the plaintiff in *Eldred*, stated that a vibrant public domain could result in a “cultural windfall” because the more available material for authors to draw from, the greater the abundance of new art that could result.¹⁰⁵ This has proven true historically. Creative expression tends to borrow from earlier works, as witnessed in the form of the literal or near-literal quotations in T.S. Eliot’s *The Waste Land*; plot reformulation in Leonard Bernstein’s *West Side Story*, which was modeled after Shakespeare’s *Romeo and Juliet*, which in turn was taken from Arthur Brooke’s poem “Romeus and Juliet”; or the influence of style, such as the genre of Impressionist painting.¹⁰⁶ Instead, copyright extensions severely limit creators to what is currently in the public domain—works already drawn upon to the point of exhaustion by other creators.¹⁰⁷ As the famous saying goes, “A dwarf standing on the shoulders of a giant can see farther than the giant himself.”¹⁰⁸

If an author created a musical in 1900 and died in 1950, the U.S. copyright on the work would not expire until 2020. Assuming no more extensions, during the time of protection the United States will have experienced the Civil Rights Movement, two World Wars, the Cold War, Vietnam, the onslaught of AIDS, a sexual revolution, several terrorist attacks, a plethora of musical developments such as the emergence of rock and roll, and other things to come.¹⁰⁹ This unbreakable monopoly serves to prevent numerous generations from adapting the original work to reflect the culture of the time.¹¹⁰ Opponents would respond that these events can still influence works after the copyright expires, but this would not have the same effect as when an artist is in the midst of such radical changes. Trying to remember those past events allows for distortions of

103. *Id.* at 75.

104. Haggerty, *supra* note 40, at 677.

105. Quintos, *supra* note 62, at 138.

106. Netanel, *supra* note 92, at 296; Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW’S WRIT, Mar. 5, 2002, at http://www.writ.corporate.findlaw.com/commentary/20020305_sprigman.html.

107. Quintos, *supra* note 62, at 138.

108. Lavigne, *supra* note 47, at 326 (citations omitted).

109. See Quintos, *supra* note 62, at 131–32.

110. *Id.* at 132.

memory and fails to capture the emotions and impressions that were an integral part of the original experience.¹¹¹

In response, proponents of copyright extensions advocate that copyrights should foster creativity, not free-riding:

The fact that creators of new works cannot merely re-use the expression contained in copyrighted work of others without permission forces them to be creative. Composers cannot rehash the melodies created by earlier composers, they must create their own new original melodies Animators and motion picture studios cannot freeloader on Mickey Mouse; copyright protection forces them to create their own original cartoon characters.¹¹²

Congress did create an exception for scholarship, allowing libraries, archives, and not-for-profit educational institutions to reproduce and distribute copies of works for preservation, scholarship, and research during the last twenty years of copyright, as long as the works are not being commercially exploited and cannot be obtained at a reasonable price.¹¹³ The First Amendment further allows the fair use creation of works of criticism, parody, and satire, without the need for permission or the payment of royalties.¹¹⁴ However, fair use exceptions are not sufficient substitutes for the public domain because judge and jury findings concerning whether a work meets such a standard are unpredictable. This uncertainty serves as a deterrent to publishers, who are highly reluctant to publish copyright-protected documents without express permission.¹¹⁵

3. Interest Groups' Role in the CTEA's Protections

Through conspiratorial accusations, skeptics of the CTEA's benefits point to interest groups, contending that these groups' fundraisers and invitations to members of Congress for private movie screenings allowed them to inordinately influence the legislature's behavior.¹¹⁶ In the case of the CTEA, interest groups like Disney played a significant role and donated over \$342,000.¹¹⁷ These groups had a major stake in the outcome of the legislation due to Steamboat Willie (the predecessor to Mickey Mouse), Winnie the Pooh, Donald Duck, Goofy, and Dumbo all being

111. *See id.*

112. Martin, *supra* note 38, at 272.

113. 17 U.S.C. § 108(h) (2000).

114. *See* Martin, *supra* note 38, at 293.

115. *See* HEINS, *supra* note 92, at 11.

116. Haggerty, *supra* note 40, at 678; HEINS, *supra* note 92, at 15 (stating that media companies and their PACs (political action committees) gave more than \$6.5 million in campaign contributions to members of Congress in the three years it took to pass the CTEA, including Representative Howard Coble, a co-sponsor of the law; Senator Orrin Hatch, the Senate co-sponsor; Senator Patrick Leahy, the ranking minority member of the Senate Judiciary Committee that passed the bill; and Senator Trent Lott, the Senate Majority Leader who co-sponsored the bill).

117. *Special Interests Gave Millions in Legislative Crunch*, CHI. TRIB., Nov. 1, 1998, at M14.

on the verge of losing their copyright protections.¹¹⁸ Yet, this influence does not differ from that wielded by any other powerful interest group lobby, such as defense, firearms, or tort reform.

Disney's stance on the issue of copyright protection is quite ironic because the public domain is the foundation for many of the company's greatest successes. Its most recent animated feature film, *Treasure Planet*, is based on Robert Louis Stevenson's *Treasure Island*, on which the copyrights long ago expired.¹¹⁹ The same applies to Walt Disney's animated creations of such classics as *Snow White and the Seven Dwarfs*, *Cinderella*, *Pinocchio*, *The Hunchback of Notre Dame*, *Alice in Wonderland*, and *The Jungle Book*, all originating from within the public domain.¹²⁰ It is duly noted that the estimated value of the Disney characters whose copyrights were about to expire amounted to more than \$1 billion.¹²¹ However, Disney was never really at risk of losing the "poster-mouse" of this copyright extension campaign, Mickey Mouse, due to it being a trademarked character.¹²² It was only the old cartoons with Steamboat Willie that were on the verge of falling into the public domain.¹²³

C. Eldred v. Ashcroft

1. The District Court's Opinion

The plaintiffs in *Eldred*, users of works of art, film, or literature in the public domain, filed suit in the U.S. District Court for the District of Columbia, claiming that 17 U.S.C. § 102(d)(1)(B) of the CTEA is unconstitutional in that it violates the First Amendment.¹²⁴ Plaintiffs also argued that the Act is a retroactive extension of copyright protections that violates both the "limited times" provision of the Copyright Clause and the public trust doctrine.¹²⁵ Plaintiffs argued that, but for the CTEA, they would be able to legally copy, distribute, and perform certain works created before 1923.¹²⁶ The court found for Defendant on all counts and granted its motion for judgment on the pleadings.¹²⁷

118. Greg Stohr, *Disney Wins Big, and Toto, Too: Supreme Court Adds Another 20 Years of Copyright Protection to Creative Works*, THE SEATTLE TIMES, Jan. 16, 2003, at C1; see Ayers, *supra* note 64, at 73.

119. LAWRENCE LESSIG, FREE CULTURE 214 (2004).

120. Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 59 (2000); Sprigman, *supra* note 106.

121. Stohr, *supra* note 118.

122. See Martin, *supra* note 38, at 317.

123. *Id.*

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

125. *Id.*

126. *Id.* at 2.

127. *Id.* at 4.

2. *The Appellate Court's Opinion*

After their claim was dismissed by the district court, Plaintiffs turned to the U.S. Circuit Court of Appeals for the District of Columbia for relief, again pursuing their Copyright Clause and First Amendment arguments.¹²⁸ This time, Plaintiffs separated their arguments about the Copyright Clause into two separate claims—that the CTEA violates both the originality and the “limited times” requirements prescribed by the Constitution.¹²⁹ The court again denied Plaintiffs’ claims.¹³⁰ Specifically, in answering the originality issue, the court relied on historical precedent in the renewal provisions of the Copyright Act of 1790 and the lack of case law distinguishing between originality for a new grant of copyright and the extension of an existing grant.¹³¹ In response to the “limited times” issue, the court established that there is no constitutional basis for restricting Congress’s ability to issue extensions when the extension has an end date and a rational basis.¹³² Finally, the court proclaimed that there is strong indication that the CTEA is a “necessary and proper” measure to harmonize the copyright laws of both the United States and the EU and not a step toward the creation of perpetual copyrights; thus, the Act is a rational exercise of congressional power.¹³³ Having found no reversible error, the appellate court affirmed the district court’s ruling.¹³⁴

3. *The Supreme Court's Opinion*

Plaintiffs appealed the appellate court’s decision for Defendant and the U.S. Supreme Court granted certiorari.¹³⁵ The Supreme Court’s review covered three claims: first, whether the CTEA violates the Copyright Clause’s originality requirement due to its extension of the limited monopoly for existing works; second, whether the CTEA violates the Copyright Clause’s limited times requirement, again due to the extension of subsisting copyrights; and third, whether the CTEA violates the First Amendment’s intermediate scrutiny standard.¹³⁶ This discussion will only cover the first two issues.

128. *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001).

129. *Id.* at 374, 376–78 (arguing that an extension of a copyright is not original in itself and that there is no limit or cap on how many times a copyright may be extended).

130. *Id.* at 380.

131. *Id.* at 377.

132. *Id.* at 377–78.

133. *Id.* at 379–80.

134. *Id.* at 380.

135. *See Eldred v. Ashcroft*, 537 U.S. 186, 196–98 (2003).

136. *Id.* at 186.

a. Whether the CTEA's Provisions Extending Copyright Protection for Existing Works Meet the Originality Requirement of the Copyright Clause

In response to the government's claim that originality need only apply to the first evaluation of whether a work is worthy of copyright protection, critics first answer with Supreme Court precedent. In *Feist*, the Court referred to originality as a constitutional mandate for all copyrighted works and the *sine qua non* of copyright.¹³⁷ In response to the government's emphasis on constitutional structure, opponents maintain that the originality requirement in the Copyright Clause states that the author's limited monopoly is only given in exchange for promoting the progress of science and the useful arts.¹³⁸ These opponents then point to Supreme Court precedent stating, "Where the monopoly will not 'add to the sum of useful knowledge,' or where the monopoly is simply 'the adoption of something already in existence,' the justification for a copyright disappears."¹³⁹ Additionally, in response to the government's argument that an extension for an existing work should still be considered progress because it creates incentives to preserve or distribute such a work, opponents offer a textualist argument that this is not the same sort of progress traditionally required in the context of the Copyright Clause.¹⁴⁰

The Supreme Court thoroughly answered all of the opponents' originality arguments, beginning with the *Feist* precedent. First, the Court distinguished the case based on the facts, explaining how the issue in *Feist* was determining the standards for copyright eligibility, as opposed to *Eldred's* issue of extending the protection of an already existing copyright.¹⁴¹ Next, in response to the bargain argument, Justice Ginsburg noted that it is the overall "system" that must "promote[] the Progress of Science," not each individual work.¹⁴² The Court also cited three precedents establishing that the federal courts must defer to Congress's judgment about how best to pursue the objectives of the Copyright Clause.¹⁴³

137. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

138. Jane Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 ARTS & ENT. L.J. 651, 661 (2000) (citing U.S. CONST. art. I, § 8).

139. *See id.* at 662 (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1880)).

140. *Id.*

141. *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003).

142. *Id.* at 211–12.

143. *Id.* at 212 (citing *Stewart v. Abend*, 495 U.S. 207, 230 (1990); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); and *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1996)).

b. Whether the CTEA Violates the “Limited Times” Provision of the Copyright Clause

The Supreme Court also answered the question of whether the “limited times” provision of the Copyright Clause bars Congress from lengthening the period of protection for existing copyrights.¹⁴⁴ Justice Ginsburg, writing for the majority, rejected Petitioners’ contention that the word “limited” meant “inalterable” or “fixed,” opting instead for a meaning of “restrained” or “circumscribed.”¹⁴⁵ Accordingly, there was no intent by Congress to avoid the provision, as the establishment of a twenty years term of extension was sufficiently “limited.”¹⁴⁶ Critics, including Justice Stevens, complained about the possibility of limitless future extensions, thereby allowing potentially indefinite protection of currently copyrighted works and rendering the “limited times” restriction meaningless.¹⁴⁷ In response, Justice Ginsburg noted that throughout history, including when the Framers enacted the first Copyright Act of 1790, Congress regularly applied extensions to both existing and future copyrights and the doomsday predictions never came true, as other safeguards prevented infinite extensions.¹⁴⁸

In the Court’s final determination in *Eldred*, it turned to the rationality test to evaluate whether the CTEA is a rational exercise of legislative authority as conferred by the Copyright Clause.¹⁴⁹ This issue is the crux of the Supreme Court’s discussion, where all of the preceding debate about whether the CTEA is an advantageous or disadvantageous policy comes to the forefront. The Court found that the intent to harmonize with the EU’s directive and the belief that longer terms would provide an incentive to invest in restoration and public distribution efforts of older works justify the legislation.¹⁵⁰ Since the arguments merely determine if Congress had a rational basis for its decision to pass the legislation, whether they are convincing is irrelevant in the Court’s calculus.¹⁵¹ Hence, as the depth of the arguments over the merits of the CTEA demonstrates, this finding is legitimate.

144. *See id.* at 199.

145. *Id.*

146. *Id.* at 208.

147. *Id.* at 242 (Stevens, J., dissenting); *Id.* at 255–56 (Breyer, J., dissenting); Petitioner’s Brief at 13, *Eldred* (No. 01-618); Haggerty, *supra* note 40, at 681.

148. *Eldred*, 537 U.S. at 200–01 (citations omitted); *see* Respondent’s Brief at 12, *Eldred* (No. 01-618).

149. *Eldred*, 537 U.S. at 204–05.

150. *Id.* at 205.

151. *See id.* at 208 (stating that the Court’s ability to “second-guess congressional determinations and policy judgments” is restricted regarding copyright issues); *see also* Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 275 (D.D.C. 2003).

IV. RESOLUTION—THE REASONING UNDERLYING THE DISPARATE TREATMENT OF COPYRIGHT AND PATENT EXTENSIONS

Considering that the Framers had very similar conceptions about patent protections and copyright protections, why have the two been treated so differently in modern times, particularly over the last two decades?¹⁵² A likely explanation is that the federal government sees copyright holders as being in greater need of financial protection than patent holders. Those who emphasize the political process's intricacies would instead argue that the reason is the lobbyists of copyright holders are more effective at persuading Congress to create legislation conducive to their interests. The most probable explanation for the disparate treatment, however, is that Congress and the Supreme Court are more interested in the protection of the public domain for science than for the fine arts.¹⁵³

A key reason for the divergent attitudes toward these two forms of intellectual property is economics. Until now, aside from a few isolated cases where extensions were granted for patents based on layering strategies, the main purpose of patent extensions was to give the holders an opportunity to regain the time they lost while being reviewed for FDA approval. As opposed to granting copyright protection for an additional twenty years, patent holders are given adequate time to compensate them for the time used for FDA testing. On the other hand, the deficiency of this financial motive argument is that the CTEA provides a windfall of nearly \$317 million for already existing works.¹⁵⁴ This seems to be comparable to what pharmaceutical companies generate in a three-month extension, which is not an abnormal practice for the federal government, as previously shown. Additionally, patent holders tend to recoup their original investment at a faster rate than copyright holders, as evidenced by many copyrighted works not gaining popularity until after an author's death or the emergence of some event that stirs an interest in the work. While the need for a longer period of protection for copyrights than patents seems necessary, it does not follow that a twenty-year extension from "life plus fifty" to "life plus seventy" makes a significant economic difference.

Another possibility for the disparate treatment is that the World Trade Organization might already harmonize the EU and U.S. patent systems. This would easily explain why a twenty-year extension for copyrights was necessary, despite the numerous reasons why such an extension does not truly help the intellectual property industries

152. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 975 (4th Cir. 1990) (determining that the philosophy behind both the Copyright and Patent Clauses of the Constitution is to promote the introduction of ideas and knowledge into the public domain).

153. See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989, 1024–25 (2000).

154. Petitioner's Brief at 7, *Eldred* (No. 01-618).

financially, including the extension's inherently protectionist nature, lack of reciprocity, and ineffectiveness in achieving its goal. Accordingly, this disparate treatment does not shed light on the reasoning underlying the prevention of copyrighted works from falling into the public domain for twenty more years, while simultaneously rejecting extensions of the length of the patent term, such as by terminating licensing agreements and taking the air out of trade dress claims.

An important basis for the difference in attitudes toward patent and copyright term extensions is the effectiveness of interest groups at influencing the political process. Even though Disney seemed to have quite a role in the passage of the CTEA, such thinking is illusory because the economic arguments, compelling testimony, and bipartisan support surely were more decisive than the small contributions that Disney made. Moreover, the pharmaceutical lobby, as well as other technologically oriented lobbies such as those representing Silicon Valley, are very powerful and are equally, if not more, persuasive in getting their agendas considered on Capitol Hill.

The final reason for the disparate treatment of patents and copyrights in the context of term extensions is that Congress and the Supreme Court are highly skeptical of the limited monopoly of patent holders and value the public domain for fine arts less than that for scientific inventions. The incentive theory for both categories of intellectual property reflects this belief if one considers that a copyright, like a patent, is bestowed upon the author or innovator as a reward for the genius and skill of individuals based on providing for the public utility.¹⁵⁵

If Congress believes that a longer term of protection is a greater incentive to create, then why not have a similar policy for patents? Why do copyright holders get a better proverbial carrot? Additionally, if a copyright extension encourages the preservation and redistribution of old films, why not create an extension for the redistribution of older drugs and product designs? Clearly, the reason is the distinction between "science" and the "useful arts." As copyrights and patents both encourage "progress," one must ask what that means in the context of the protection. In terms of scientific and technological progress—the notions underlying patent protection—advancement is characterized by cutting-edge developments, the creation of which are spurred by a constant stream of new ideas, many stemming from other recent product and design developments. If all that was in the public domain were nineteenth-century medicines and technological schematics, scientific and technological progress would grind to a screeching halt, since all of the developments over the past century would be lost as building blocks for the new developments of today. Consequently, a limited monopoly is warranted for inventors who can recoup their investments quickly, as

155. See Davis, *supra* note 153, at 1003.

they earn enough capital to continue to develop new ideas. Therefore, patent protections are thought of as properly balanced, allowing between fourteen and twenty years of exclusive use by their owners until the expressions are free to be copied, thereby reinforcing the need for competition in the market.

In contrast, copyrights promote progress of the fine arts, a goal radically different from that of patents. For advancement, one must create new works of song, writing, film, drawing, etc.; however, one's basis for creation or building blocks does not necessarily have to originate in the public domain in the same way as ideas for patents. For example, an author can observe his surroundings and develop stories, emotions, and expressions. Generally, Congress and the courts seem to acknowledge that the distinction between the public domain for technology and scientific inventions and the public domain for the fine arts lies in the innovative process. For a scientist to create a new drug or machine, he must rely on what has been created before so as to not to limit patent protections for only those inventions which are entirely unique, because this would wholly stifle the process of innovation. On the other hand, for an artist to create a new story or song, he need not rely on what has been created by his predecessors because the author can develop a brand new idea without any link to the past. Responding to the issue of spontaneous creation by authors, the CTEA's critics argue that the essence of authorship is embodied where new works are based in some way on the works that preceded them, such as when composers recombine sounds they once heard, novelists draw plots from their experiences, and actors and directors draw on other films.¹⁵⁶ Yet under the guise of the pro-CTEA arguments, an author is free to be "influenced" by works in the public domain, but he should not have to copy a song or re-tell a story in order to contribute to the creative arts. On the other hand, genius can be in the unearthing of new meanings in well-trodden themes, as older works of art are still useful as a foundation for new creations, such as Disney's animated movie *Treasure Planet* or the highly successful musical *Rent*, based on the classic opera *La Bohème*.¹⁵⁷ Therefore, the nature of the public domain, in the way that it contributes to the arts and to science, is the primary reason for the divergent attitudes toward patent and copyright extensions in the federal government.

156. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-68 (1990) (proposing that the public domain be thought of as permitting innovation while leaving the raw materials of authorship free to use).

157. Sprigman, *supra* note 106.

V. CONCLUSION—THE COMING OF THE STORM: AWAITING THE END
OF THE CTEA’S TWENTY-YEAR EXTENSION

In the aftermath of the Supreme Court’s affirmation of the constitutionality of the controversial provisions of the CTEA, the issue of legitimacy of this round of copyright extensions should be laid to rest for the next fifteen years. The Court’s decision affirmed both lower courts’ decisions and seems to be in step with other lower court decisions interpreting the CTEA. The harmonization of U.S. and EU copyright laws in terms of the length of exclusive protection must be monitored. Accordingly, the public must wait and see if this legislation shores up the trade deficit and provides financial incentives for creation, restoration, and distribution.

Since the handing down of *Eldred* in January 2003, members of Congress have introduced the Public Domain Enhancement Act, which would require owners of copyrighted works to pay a nominal fee to maintain their copyrights once fifty years have passed since the work’s original publication.¹⁵⁸ However, the bill has not gained any momentum and seems unlikely to garner passage, thus making it only a symbolic piece of legislation.

Where the federal government will go from here is unclear. At this point, the next move should be in the year 2018, when the first of the CTEA’s protections expires. For patents, there does not seem to be any imminent event that will trigger a change in procedure, leading to the conclusion that the patent term will remain the same. With regard to copyrights, if the EU issues another directive that extends its copyright protections or if one of the Asian countries that maintains a large surplus with the United States desires to harmonize its longer length of protection with that of the United States, how will Congress respond? Most likely, if the EU extends its length of protection again, the United States will not extend its term until closer to the time the CTEA expires. On the other hand, if Japan, South Korea, or China offers to harmonize its copyright laws with those of the United States, it seems more likely that Congress would be willing to do so, as the trade deficit seems to be a high priority in its members’ decision calculus.

In 2018, two different scenarios could present themselves. First, Congress could decide not to further extend the copyright term of protection and the issue would wither away, with the creations from pre-1950 falling into the public domain. Second, Congress could once again feel intense pressure from interest groups such as Disney, the Gershwin Family Trust, and the Motion Picture Association of America, and consequently pass legislation to give existing works more time for

158. Brian Krebs, *Bill Seeks to Loosen Copyright Law’s Grip*, NEWSBYTES, June 25, 2003, LEXIS, News Library, Technology (mandating a one-dollar fee be paid to avoid creative works such as songs, books, and software from entering the public domain).

exclusive ownership. In the latter case, the pleas for the Supreme Court to revisit its decision in *Eldred* would become louder, more frequent, and more intense. The argument for originality and First Amendment protection would be the same, although the “limited times” provision could again be at issue. Cutting against the precedent that a prescribed number of years is sufficient to meet the meaning of the provision, an extension similar to the one offered in 1998 would seem to validate the dissent’s skepticism regarding the lack of an “end point” for the copyright, making the legislation look like “[a] perpetual copyright ‘on the installment plan.’”¹⁵⁹

Thus, despite Congress’s and the Supreme Court’s respective affirmations of copyright term extensions, there must be vigilance in overseeing the federal government’s actions in the near future. The potential for infinite extensions remains a possibility, with the public domain suffering indescribable losses and the consumer being on the losing end of the opportunity to experience great movies, books, and songs that will never be seen or heard. The progress of the fine and creative arts should be considered as important as the progress of science, and as a result, the copyright term should not be given disparate treatment from the patent term. Each should give the public the opportunity to learn and build from those works of art and science which constitute the twentieth century’s contribution to modern civilization.

159. HEINS, *supra* note 92, at 13 (quoting Peter Jaszi).