No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief *Amicus Curiae* of the Free Software Foundation in Support of Petitioners

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Question Presented

1. Did the Court of Appeals err in holding that, under the Copyright Clause, Congress may indefinitely extend the term of existing copyrights by *seriatim* adoption of nominally "limited" extensions?

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INTEREST OF *Amicus Curiae*

This brief is filed on behalf of the Free Software Foundation, a charitable corporation with its main offices in Boston, Massachusetts.[1] The Foundation believes that

[1]Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this

people should be free to study, share and improve all the software they use, as they are free to share and improve all the recipes they cook with, and that this right is an essential aspect of the system of free expression in a technological society. The Foundation has been working to achieve this goal since 1985 by directly developing and distributing, and by helping others to develop and distribute, software that is licensed on terms that permit all users to copy, modify and redistribute the works, so long as they give others the same freedoms to use, modify and redistribute in turn. The Foundation is the largest single contributor to the GNU operating system (used widely today in its GNU/Linux variant for computers from PCs to supercomputer clusters). The Foundation's GNU General Public License is the most widely used "free software" license, covering major components of the GNU operating system and tens of thousands of other computer programs used on tens of millions of computers around the world. The Foundation is strongly interested in the use and development of copyright law to encourage sharing, and to protect the rights of users and the public domain.

Court. No counsel for either party had any role in authoring this brief, and no person other than the *amicus* and its counsel made any monetary contribution to its preparation and submission.

SUMMARY OF ARGUMENT

> "Actually, Sonny [Bono] wanted the term of copyright protection to last forever."
>
> —Rep. Mary Bono
> 144 Cong. Rec. H9951 (daily ed. Oct. 7, 1998)

If the late Representative Bono believed that was possible, he was mistaken. The Court of Appeals erred in holding that Congressmen sharing his object can achieve what the Constitution expressly forbids, simply because they do so in a series of enactments rather than a single statute.

No one seriously contends that Congress may achieve an expressly unauthorized end by dividing the means of its achievement into multiple statutes. Yet the Court of Appeals held that, so long as each individual statute states a precise numerical increment, Congress can extend the life of existing copyrights indefinitely. This conclusion is in direct conflict with the language of the Copyright Clause, Article I, §8, cl. 8, in its natural sense. The constitutional history of England and British North America, moreover, is unambiguous about the importance of "limited Times" in the control of all state-awarded monopolies, of which genus copyright and patent are species. The very evils that led English and British North American constitutional lawyers to insist on the strictly limited term of royal and statutory monopolies, and to embody that requirement in the Copyright Clause of Article I, are present in the retroactive extension of existing copyrights by the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, Title I, 112 Stat. 2827, at issue in this case.

In the sphere of copyright, the limited time requirement protects the public domain, by providing for its constant enrichment. The public domain is an essential resource of our constitutional system of free expression. As this Court has previously recognized, several aspects of the copyright system represent constitutionally-required limitations on the nature of the monopoly Congress is empowered to grant. The limited term is not only a particularly important constitutional limitation on Congressional power by virtue of its presence in the text itself—which goes beyond the textually-implicit limitations of fair use and the idea-expression dichotomy—but also in the function it serves: the protection of the common resource of the public domain.

The CTEA unconstitutionally imperils the commons of the public domain by flouting the clear intention of the limited term requirement. If Congress had acted unilaterally to reduce copyright terms, as the Solicitor General seems to believe it may, forcing some material into the public domain decades ahead of current schedule, no doubt the copyright industries would attack the legislation as a taking. If, on the other hand, Congress acted to extend every 50-year lease by the federal government for an additional 99 years at the government's current rent, there is no question that compensation would be required. Congress should not be permitted to take the public's reversionary interest in the public domain, any more than it can take a portion of the copyright holder's original term or of any leasehold interest in real property. The constitutional system of free expression, the language of the Copyright Clause, and the history of our tradition demand no less.

ARGUMENT

I. The Framers Intended Copyright to Be a Statutory Monopoly Awarded to Works of Authorship For A Strictly Limited Time

The words "for limited Times" appear in the Copyright Clause, Article I, §8, cl. 8 as the result of long and bitter experience with the constitutional evil of state-awarded monopolies. From the seventeenth century, the requirement of limitation in time was a basic constitutional mechanism for dealing with the potential for abuse of power inherent in the royal or statutory monopoly. The use by Queen Elizabeth of letters patent monopolizing certain trades as a means of raising money from bidders for monopoly profits gave rise to the case of *Darcy* v. *Allen*, (*The Case of Monopolies*), 11 Co. Rep. 84 (1603), in which a royal patent monopoly on the making and distribution of playing cards was held void. Parliament followed in 1624 with the Statute of Monopolies, 21 Jac. I, c. 3, which declared that only Parliament might grant statutory monopolies, limited to new inventions, for a period not to exceed fourteen years. *See* 4 William Blackstone, *Commentaries on the Laws of England* *159 (1769). This constitutional limitation was evaded by Charles I during his period of despotic personal rule; the resulting royal monopolies formed a significant grievance in the years leading up to the English Civil War. *See* Cecily Violet Wedgwood, *The King's Peace* 156-62 (1955).

American colonists at odds with the government of Charles I perceived the evil of governmental monopolies; in the Massachusetts Bay Colony as early as 1641, the Colony's General Court decreed that "there shall be no monopolies granted or allowed amongst us, but of such new inventions that are profitable to the country, and that for a short time." *The Charter and General Laws of the Colony and Province of Massachusetts Bay* 170 (Boston, 1814); see also George Lee Haskins, *Law and Authority in Early Massachusetts* 130 (1960).

When the Copyright Act of 1709, the famous "Statute of Anne," was framed, the drafters insisted on a limited term far more stringent than authors, including John Locke, had proposed; they adopted the fourteen-year limit from the Statute of Monopolies. *See* Mark Rose, *Authors and Owners: The Invention of Copyright* 44-47 (1993). The term provided by the Statute of Anne, fourteen years with a renewal of fourteen years if the author survived the first term, was adopted by First Congress in the Copyright Act of 1790. *See* Copyright Act of 1709, 8 Anne, c. 19; Act of May 31, 1790, 1 Stat. 124-25.

The Framers of the Constitution unanimously accepted the idea of the limited term for copyrights in the drafting of Article I, without substantial discussion. *See* 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 321-325, 505-510, 570, 595 (1937).[2] In doing so, as the subsequent employment in the Copyright Act of 1790 of the term of years from the Statute of Monopolies shows, the Framers and the First Congress acted in full awareness of the long history of attempts to control the harm done by statutory monopolies by limiting their term.

The constitutional importance of the "limited Times" restriction cannot be vitiated, as the Court of Appeals' reasoning would do, by affording Congress the opportunity to create perpetuities on the installment plan, any

[2]The only amendment made was in the replacement of the phrase originally suggested by Charles Pinckney of South Carolina, that monopolies be granted for a "certain" time. *See* 3 *id.*, at 122.

more than Congress can eliminate the constitutional requirement of originality. *Feist Publications, Inc.* v. *Rural Telephone Service, Co., Inc.*, 499 U.S. 340, 346-347 (1991). The Court of Appeals erred fundamentally in its conclusion that there is "nothing in text or in history that suggests that a term of years for a copyright is not a 'limited Time' if it may later be extended for another 'limited Time.' " *Eldred* v. *Reno*, 239 F.3d 372, 379 (CADC 2001). In this regard, the CTEA should not be judged in isolation. The question is whether there is anything in text or history rendering constitutionally objectionable the eleven extensions of the monopoly term in the last forty years, resulting in a virtual cessation of enlargements to the public domain, capped by the statute before the Court, which postpones the reversion on every single existing copyright for decades.

II. The Historical Policy Embodied in the Copyright Clause is Absolutely Essential to Reconcile the Copyright Monopoly with the System of Free Expression

As important as the principle of limited time is in the general restraint of the harms that flow from statutory monopolies, in the area of copyright it has an even more crucial purpose to serve. The limited term of copyright ensures the steady replenishment of the public domain, the vast repository of the common culture of humankind. The public domain is the springboard of societal creativity, the zone of free reproduction and exchange that makes innovation possible. As Yochai Benkler has elegantly shown, the existence of a vital and expanding public domain reconciles the exclusive rights of the copyright system with the underlying goals of the system of free expression protected by the First Amendment. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L. Rev. 354, 386-394 (1999). The Court below erred in its facile dismissal of petitioners' First Amendment concerns. That Court first held in its opinion that the First Amendment's requirements are "categorically" satisfied by the distinction between expression and idea, and then that any material covered by copyright but subject to the defense of fair use is therefore so copiously protected for purposes of free expression that no First Amendment claim can possibly lie. 239 F.3d, at 375-376.

This position simply cannot be right. The Court below conceded that an attempt by Congress to make copyright perpetual *in haec verba* would be prohibited by the language of the Copyright Clause. *Id.*, at 377. But even if the subterfuge of achieving perpetuity piecemeal, by repeated retroactive extensions, somehow evades the plain command of the Copyright Clause, it does not thus render impotent the First Amendment. As the great copyright scholar Melville Nimmer asked:

> If I may own Blackacre in perpetuity, why not also *Black Beauty*? The answer lies in the first amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest, with respect to literary property, or copyright.

Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. Rev. 1180, 1193 (1970).

Nor has the Court of Appeals' position any support in the holdings of this Court. On the contrary, as this Court's cases make clear, copyright and related statutory monopolies in expression must conform like any other regulation of speech to the requirements of the First Amendment. In *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), this Court rejected what it characterized as "a public figure exception to copyright," because it found sufficient "the First Amendment protections already embodied in the Copyright Act's distinction between ... facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.*, at 560. Thus, the Court said, it found "no warrant" for a further expansion of the doctrine of fair use. *Id.* This by no means implies, as the Court of Appeals somehow concluded, that *Harper & Row* stands as an "insuperable" bar to all First Amendment challenges to all subsequent copyright statutes. *See* 239 F.3d, at 375. In *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court applied standard First Amendment analysis to a statute conveying special quasi-trademark protection to the word "Olympic," asking "whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial government interest." *Id.*, at 537 (citation omitted).

The First Amendment abhors the vacuum of limited expression. The making of new works by the criticism, imitation, revision, and rearrangement of existing material is the hallmark of literate culture in all the arts and sciences. The First Amendment establishes not merely a series of independent doctrines, but a "system of free expression." *See* Thomas I. Emerson, *The System of Freedom of Expression* (1970). Our constitutional commitments to an "uninhibited, robust, and wide-open" public debate, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), a "marketplace of ideas," *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 885 (1997); *cf. Abrams* v. *United States*, 250 U.S. 616, 630 (1919), where there shall be no power to "prescribe what shall be orthodox" *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943), require us to view with great skepticism all restrictions on the formation and expression of ideas. Laws tending to establish monopolies in the expression of ideas must pass the exacting scrutiny that protects our most fundamental freedoms. The Copyright Clause does not exempt the legislation enacted under it from such scrutiny, but rather establishes principles that enable statutory monopolies and freedom of expression to coexist. Of these, the principle of limitation in time is far from the least important. By refusing to consider the effect of the instant legislation in the broader context of a Congressional policy of piecemeal, indefinite, wholesale extension of copyrights, and in relation to the purposes established by the Copyright Clause itself, the Court of Appeals failed in its duty to protect the invaluable interests of the system of free expression.

A. INDEFINITE EXTENSION OF THE TERM OF MONOPOLY ON EXISTING WORKS OF AUTHORSHIP IS INCOMPATIBLE WITH BOTH THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT

Precisely because the creation of exclusive rights in expressions inevitably involves some danger of the monopolization of ideas, it is crucial to the coexistence of copyright and the First Amendment that all exclusive rights over expressions are limited in time. At some specific moment, all exclusionary rights must end. Under our Constitution, the reversion of every work of authorship is irrevocably vested in the public.

This reversion is not constitutionally optional. In the context of patents, this Court has described the reversion as a "condition" that the work subject to temporary statutory monopoly will pass into the public domain upon the patent's expiration. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169, 185 (1896).

Notwithstanding this evident constitutional principle, the Court of Appeals held that Congress may create a perpetuity in copyrights so long as it does so sequentially, by repeatedly extending all existing copyrights for nominally "limited" terms. This holding contradicts the spirit of both the Copyright Clause and the First Amendment. The Court of Appeals erroneously held, following its own precedent, *see Schnapper* v. *Foley*, 667 F.2d 102, 112 (1981), that the single phrase comprising the Copyright Clause, empowering Congress "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," imposes no substantive limitation on Congress through its declaration of purpose. But the Court of Appeals acknowledged, as it must, that this Court's cases show clearly that Congressional power is indeed limited by the Copyright Clause, and so its effort is bent to the disintegration of a single phrase of twenty-seven words, directed at showing that the first nine are somehow constitutionally irrelevant.

This Court first held in the *Trademark Cases*, 100 U.S. 82 (1879), and reaffirmed in *Feist, supra*, 499 U.S., at 346-47, that Congress cannot constitutionally dilute the requirement of originality, by extending copyright coverage to works of authorship that make use of expressions already in existence, or in which the author's effort in collection and arrangement of existing information does not establish that "modicum of creativity" the Constitution requires. According to the Court of Appeals, however, the principle of originality emerges solely from the words "Writing" and "Author," taking not the slightest support from the declaration of purpose that begins the Copyright Clause.

The Copyright Clause is unique among the enumerations of legislative power in Article I, §8 in containing a declaration of purpose; it alone "describes both the objective which Congress may seek and the means to achieve it." *Goldstein* v. *California*, 412 U.S. 546, 555 (1973). Adopting a reading of the clause that denies legal effect to the words the drafters specifically and atypically included is an implausible style of constitutional construction.

Even without reference to the beginning of the clause, however, this Court's prior opinions show that the Court of Appeals has misperceived the task of construction. The Court of Appeals treats the words "limited Times" in purely formal terms, so that—after ten previous interlocking extensions beginning in 1962, holding substantially all works with otherwise-expiring copyrights out of the public domain for a generation—the CTEA's extension of existing terms for another twenty years raises no substantive constitutional question because the new twenty-year extension period is numerically definite. The same formal, anti-contextual approach to the words would result, however, in the result rejected by this Court in *Feist*: telephone directories are undeniably "writings" in the same crabbed sense that the term extension contained in the CTEA is "limited."

B. The Fifth Amendment Prohibits Legislative Action Such as This With Respect to Physical Property Rights, and There Is No Constitutional Justification for Permitting What Cannot Be Done with Mere Property to be Done with Free Expression

On the logic of the Court of Appeals' holding, which is apparently supported in this Court by the Solicitor General, Congress could pass a statute shortening the term of existing copyrights, reallocating a large body of currently-covered works to the public domain. If the statute simply provided that the term of copyright be reduced to fourteen years, according to the Court of Appeals, that would satisfy the requirement of "limited Times," and there would be no occasion for the Courts to inquire into whether such a change promoted the progress of science and the useful arts, though copyright holders could well be expected to contend that such an alteration of the duration of existing copyrights deprived them of the benefit that the "copyright bargain" supposedly "secures" them.

But the copyright bargain faces two ways: "securing" authors their limited monopoly in return for the reversion to the public. Increasing the reversionary interest at the expense of the first estate is conceptually no different than increasing the copyright holder's monopoly at the expense of the reversionary interest, which is that of the whole society and the system of free expression. Shrinking or eliminating the public domain in order to increase the benefit to the monopolists, whose works have already been created in reliance on the previous allocation of rights, neither promotes the progress of knowledge nor respects the critically-important free speech interest in the health of the public domain.[3]

Nor would the Takings Clause of the Fifth Amendment permit such uncompensated legislative adjustment of the terms of interest in real property. Copyright—not surprisingly in view of its common law origins—adopts an essentially familiar structure of "estates" in works of authorship, beginning with a conveyance for term of years or a life interest plus a term of years, with a reversion to the public domain. This Court has held that legislative alteration of such estates that destroys or limits the reversionary interest in real property in order to achieve redistribution between private parties is "public use" within the meaning of the Takings Clause, and is constitutional if compensated. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984). But it has never been suggested that Congress or a state legislature could achieve a similarly vast wealth transfer to present lessees through the extension of the terms of all existing leases, extinguishing or indefinitely postponing the reversionary interest, without paying compensation.

What the Fifth Amendment prohibits with respect to interference with existing rights in real property should not be permissible where the rights being destroyed by

[3]The Court of Appeals minimized the importance of the impoverishment of the public domain when it maintained that "[p]reserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." 239 F.3d, at 379. This is an apparent reference to claims made by copyright holders in the legislative process that certain classes of works, particularly films, would not be physically preserved unless the copyright monopoly were extended. It is sufficient to point out that such a principle for the award of copyright monopolies conflicts with the constitutionally mandated requirement of originality: Congress cannot elect to preserve books, films, or music by conveying to the conservator a statutory monopoly of copying and distribution lasting decades.

legislative changes in property rules are rights to the freedom of speech and publication. The Court of Appeals dismissively viewed petitioners as seeking to enforce rights to use the copyrighted works of others. 239 F.3d, at 376. On the contrary, petitioners claim only their constitutional entitlement to use the works that would have entered the public domain, as required by the law in effect at the time the particular statutory monopolies at issue were granted, had it not been for unconstitutional Congressional interference.

III. Particular Dangers of Abuse and Corruption Justify Strict Constitutional Scrutiny When the Term of Statutory Monopolies is Extended

During the first century of our Republic, the term of copyright was extended once. During the next seventy years, it was extended once more. Since 1962, copyright terms have been extended regularly, in increments ranging from one year to twenty years, and the flow of US-copyrighted works into the public domain has nearly ceased. The statute before this Court postpones rights in material protected by the First Amendment to any but the holders of statutory monopolies for an additional generation.

No pattern of legislation could more clearly indicate the presence of the very evils against which the Framers of the Constitution and their forebears contended, and which gave rise to the Copyright Clause and its requirement for "limited Times." When our predecessors in the struggle for constitutional liberty perceived a danger from corruption in the grant of monopolies, the danger they apprehended was from the executive, which might use its power to grant such monopolies to raise money independent of the legislature. In our time the risk is that the legislature, which is granted the power to create such monopolies by Article I, §8, will use that power to benefit copyright holders at the expense of the public domain. Such a purpose—to turn the system of free expression into a series of private fiefdoms for the benefit of monopolists, who may choose to rebate a small portion of the monopoly rents thus extracted from the population in the form of campaign contributions—is forbidden to Congress by the plain wording of the Copyright Clause and by the First Amendment. The use of repeated interim extensions to achieve the effect of a perpetuity is not less dangerous than the single enactment that all parties concede would be unconstitutional. On the contrary, such a legislative practice increases the dangers of corruption without reducing the harm to the public domain.

Conclusion

Perhaps the late Representative Bono did indeed believe that copyright should last forever. That any legislator could hold that view suggests the degree of danger to a fundamental part of the system of free expression into which we have drifted. This Court should hold that the extension of existing copyright terms in the CTEA violates the requirements of the Copyright Clause and the First Amendment. The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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