

the First Amendment bounds on the copyright power would have been far more compelling and useful than a simple endorsement of historical congressional practice. Although such an approach would not necessarily have changed the outcome of the case, it would have provided a more cogent jurisprudence and valuable guidance for those concerned with both copyright and the First Amendment.

Background

In 1998, Congress extended by 20 years the term for most copyrights, including those already in existence under the prior law, so that they would run until 70 years after the death of the author.⁵ For works published before 1978 and still under copyright, Congress extended the terms of those copyrights from 75 years to 95 years from publication.⁶ Because numerous copyrighted works from the 1920s and beyond were nearing the end of their terms and were about to enter the public domain, the immediate effect of the CTEA was to prevent those works from becoming freely available to the public and to extend the monopoly on those works for another 20 years. Notable examples of works that soon would have entered the public domain, but which now will remain under copyright, include *The Prophet* by Kahlil Gibran, sheet music by Bartok, Ravel, and Strauss, and early poetry by Robert Frost.

The CTEA promptly was challenged by individuals and businesses that make use of public domain materials and that eagerly had been awaiting public access to tremendous volumes of early 20th-century music, literature, and film classics. The challengers sued in the U.S. District Court for the District of Columbia, claiming that the CTEA violated the Copyright Clause of the United States Constitution, which, along with the Patent Clause, reads:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to

⁵17 U.S.C. § 302(a). For works whose statutory “authors” were not identifiable natural persons—that is, works for hire, anonymous works, and pseudonymous works—the CTEA extended the copyright term alternatively from 75 years to 95 years from publication or from 100 years to 120 years from creation, whichever expires first. *Id.* § 302(c). As under the previous law, the new terms apply to all works not published by January 1, 1978. *Id.* §§ 302(a), 303(a).

⁶*Id.* § 304(a) & (b).

Eldred v. Ashcroft *and the Logic of a Written Constitution*

Authors and Inventors the exclusive Right to their respective
Writings and Discoveries . . . ⁷

Extending the previously fixed terms of existing copyrights, they argued, violated the “limited Times” requirement both because such extension could be repeated indefinitely and because, when interpreted in light of the initial language of the Copyright Clause, the extended term was not limited to that necessary to “promote the Progress of Science.” The challengers also argued that the extension of both existing and future copyright terms abridged the freedom of speech of persons who would make use of copyrighted material that would otherwise more quickly enter the public domain. The district court rejected all of the challenges and upheld the CTEA.⁸

On appeal before the U.S. Court of Appeals for the D.C. Circuit, the challengers raised the same arguments and met a similar fate. Regarding the Copyright Clause challenge, a panel of the D.C. Circuit held 2 to 1 that the retroactive extension of existing copyright terms did not violate the Copyright Clause.⁹ Judge Sentelle, dissenting in part, would have held that Congress’s claimed authority to extend existing copyrights lacked any stopping point and neither promoted the progress of science nor secured exclusive rights for a limited time.¹⁰ Regarding the First Amendment challenge, the panel unanimously held that copyrights are “categorically immune from challenges under the First Amendment.”¹¹ The full D.C. Circuit subsequently denied rehearing *en banc* over the dissent of Judge Sentelle, this time joined by Judge Tatel.¹² The original panel majority simultaneously issued a supplemental opinion denying rehearing and rejecting arguments claiming that the retroactive extension of copyright terms failed to promote the progress of science.

The Supreme Court thereafter agreed to hear the case and, despite expressing considerable skepticism during oral argument as to the wisdom of the law, nonetheless reached the same result as the lower

⁷U.S. CONST. Art. I, § 8, cl. 8.

⁸Eldred v. Reno, 74 F. Supp.2d 1 (D.D.C. 1999).

⁹Eldred v. Reno, 239 F.3d 372, 377–80 (D.C. Cir. 2001).

¹⁰*Id.* at 380-84 (Sentelle, J., dissenting in part).

¹¹239 F.3d at 375.

¹²Eldred v. Reno, 255 F.3d 849 (D.C. Cir. 2001).

courts and upheld the CTEA.¹³ The decision was 7 to 2, with Justice Ginsburg writing the majority opinion and Justices Stevens and Breyer each writing individual dissents.

From the outset, the Court adopted a decidedly historical approach to the case, evaluating the constitutional challenges to the CTEA “against the backdrop of Congress’ previous exercises of its authority under the Copyright Clause.”¹⁴ In particular, the Court looked to the nation’s first copyright statute, enacted in 1790, which created the first federal copyrights and applied to future works and to certain existing works already protected by state copyrights.¹⁵ The Court then looked to three subsequent copyright statutes from 1831, 1909, and 1976, each of which extended the terms of existing and future copyrights.¹⁶ The Court also looked to early examples of Congress’s extending various individual patents and copyrights and lower court decisions written by individual circuit justices upholding several patent extensions.¹⁷ And while recognizing that it had not previously had “occasion to decide whether extending the duration of existing copyrights complies with the ‘limited Times’ prescription,” the Court looked to its decision in the patent case of *McClurg v. Kingsland*,¹⁸ which upheld the retroactive application of more lenient requirements for obtaining a patent, thus sustaining a patent that would otherwise have been invalid under the previous statute.¹⁹

Regarding the textual issue of whether retroactive extension of copyright terms violated the “limited Times” constraint in the Copyright Clause, the Court rejected the argument that a copyright term, “once set, becomes forever ‘fixed’ or ‘inalterable,’” and held that

[t]he word “limited,” however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: “confine[d] within certain bounds,”

¹³*Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

¹⁴*Id.* at 775.

¹⁵*Id.* (citing Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act)).

¹⁶123 S. Ct. at 775 (citing Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Act); Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1080–1081 (1909 Act); Pub.L. 94–553, § 302(a), 90 Stat. 2572 (1976 Act)).

¹⁷123 S. Ct. at 779 (citing Acts from 1808, 1809, 1815, 1828, and 1830 and opinions by Chief Justice Marshall and Justice Story sitting as circuit justices).

¹⁸42 U.S. (1 How.) 202 (1843).

¹⁹123 S. Ct. at 779–80.

“restrain[ed],” or “circumscribe[d].” S. Johnson, A Dictionary of the English Language (7th ed. 1785); see T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (“confine[d] within certain bounds”); Webster’s Third New International Dictionary 1312 (1976) (“confined within limits”; “restricted in extent, number, or duration”). Thus understood, a time span appropriately “limited” as applied to future copyrights does not automatically cease to be “limited” when applied to existing copyrights.²⁰

As for the related argument that repeated extensions vitiate the limited times requirement, the Court responded that “a regime of perpetual copyrights ‘clearly is not the situation before us’” and there was no reason to view the CTEA “as a congressional attempt to evade or override the ‘limited Times’ constraint.”²¹ The Court acknowledged the government’s position that the average copyright term under the CTEA “resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities,” but went no further, stating that “[w]hether such referents mark the outer boundary of ‘limited Times’ is not before us today.”²²

The Court also held that the CTEA was a rational exercise of congressional authority and adequately promoted the progress of science, noting that on such matters it “defer[s] substantially to Congress.”²³ Citing the life-plus-70 years copyright term adopted by the European Union (EU), and the EU’s denial of such an extended term to works from countries without a similar copyright term, the Court credited as rational Congress’s desire “to ensure that American authors would receive the same copyright protection in Europe as their European counterparts,[]” as well as Congress’ potential view that longer terms would provide a greater incentive for creation and dissemination of works in the United States.²⁴ The Court also accepted Congress’s view that extending copyright terms “provide[s] copyright owners generally with the incentive to restore

²⁰*Id.* at 778.

²¹*Id.* at 783 (citation and footnote omitted).

²²*Id.* at 784 n. 17 (citation omitted).

²³*Id.* at 781; *id.* at 785 (“it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”).

²⁴*Id.* at 781 (footnote omitted).

