

**ELDRED, GOLAN AND THEIR AFTERMATH**

by HOWARD B. ABRAMS\*

**ABSTRACT**

*Two fundamental issues arising from the language of the Copyright-Patent Clause of the Constitution are (1) the limits, if any, the stated purpose of copyright in the Constitution — “To promote the Progress of Science” — places on the statutes Congress may enact, and (2) when is the Constitution’s “limited Times” restriction on the duration of copyright protection exceeded. As copyright protection prevents some duplications, transmissions and performances of copyrighted works, and deriving new works from existing copyrighted works, the constitutional intersection of the Copyright Clause and the First Amendment likewise cannot be avoided. In the past decade, the Supreme Court has decided two cases that arose at the confluence of these issues: Eldred v. Ashcroft in 2003 upholding a twenty-year increase in the term of existing copyrights, and Golan v. Holder in 2012 upholding copyright protection for many foreign works previously in the public domain in the United States.*

*This article examines the opinions and dissents in these cases and then discusses some problems, concerns, and alternatives that these decisions leave in their wake. The increased copyright duration and the removal of many foreign works from the public domain were sold to Congress on the grounds they would enhance the United States’ balance of trade and increase income from abroad for United States copyright owners although*

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\*Howard B. Abrams is Professor of Law at the University of Detroit Mercy School of Law. This article is © 2013 by Howard B. Abrams. The author was an expert witness for the United States in the *Golan* case. The issue the author was consulted about was whether works were protected by copyright at common law prior to the enactment of the first United States Copyright Act, Act of May 31, 1790, 1 Stat. 124., or the various state statutes enacted by twelve of the original thirteen states under the Articles of Confederation. The author’s long-held opinion that copyright — an exclusive right to publish beyond the first publication — was not part of the common law is based on the holding of the House of Lords in 1774 in *Donaldson v. Becket*, 17 PARL. HIST. ENG. 953 (H.L. 1774). See also Howard B. Abrams, *The Historic Foundations of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983); accord RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (2004); RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 13-25 (2006). Sincere thanks are due to Professor Robert Brauneis for his comments on an earlier draft of this article and to Nina Dodge Abrams for her comments and questions throughout the entire drafting process.

*more cosmetic reasons were articulated. It is clear the Court chose broader grounds than were needed to uphold the statutes in question. In upholding these enactments, the Court stressed its great deference to Congress. The level of deference given to Congress, however, quite arguably seems overly deferential and incorporates a very passive approach to judicial scrutiny of copyright legislation. This article concludes that we may be seeing a basic change in the focus of copyright in both Congress and the judiciary from enhancing and increasing knowledge to benefit the public to a model that favors the copyright owners and their monopolies.*

## I. INTRODUCTION

*Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings*

—The Copyright-Patent Clause<sup>1</sup>

*Congress shall make no law . . . abridging the freedom of speech, or of the press*

—The First Amendment<sup>2</sup>

Thus saith the Constitution.

The Copyright-Patent Clause's statement of purpose — "To promote the Progress of Science,"<sup>3</sup> — together with its designated methodology — "securing for limited Times to Authors . . . the exclusive Right to their respective Writings" — inevitably raises the question of what limits, if any, it imposes on the power of Congress to shape copyright legislation. Laws affecting the duration of copyright protection or the scope of the public domain raise the arguably narrower but related issue of the scope of the "limited Times" language as a restriction on congressional power.

Taking copyright together with the First Amendment raises yet other issues. The potential for conflict between these two provisions can be ameliorated but never totally eliminated as copyright is based on the ability of the author or the author's successors to prevent various levels of copying, performing, speaking, printing or otherwise duplicating the copyrighted work. If there are limits imposed by the First Amendment, what are they? The nature and purpose of the copyright monopoly, long the subject of academic debate and diatribes, came before the Supreme Court,

<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> U.S. CONST. amend. I.

<sup>3</sup> Interestingly, other than the Preamble, the Constitution contains only two instances which state the purpose of any powers granted to or restrictions placed on Congress, the President, the judiciary, or the states: the Copyright-Patent Clause and the Second Amendment.

first in *Eldred v. Ashcroft*,<sup>4</sup> and more recently in *Golan v. Holder*.<sup>5</sup> At stake was the constitutionality of section 514 of the Uruguay Round Agreements Act<sup>6</sup> in *Golan* and the Copyright Term Extension Act<sup>7</sup> in *Eldred*.

Although the specific questions generated by the two statutes differ, they both involved the underlying issue of what restraints, if any, are imposed on Congress's power to enact copyright laws by (1) the "limited Times" restriction on the duration of copyrights, (2) the stated purpose of copyright "To promote the Progress of Science," and (3) the prohibition on any law abridging "freedom of speech, or of the press" in the First Amendment. At another, and perhaps more basic level, the issue is the extent to which these cases document a shift in the focus of Copyright Clause jurisprudence and, more problematic, in First Amendment doctrine.

## II. ELDRED AND THE COPYRIGHT TERM EXTENSION ACT

### A. Background

*Eldred* presented the simpler set of facts. The challenged statute, the Sonny Bono Copyright Term Extension Act,<sup>8</sup> added twenty years to the duration of protection for all copyrights whose term of protection had not yet expired, as well as for those created in the future. Although nothing was removed from the public domain, a consequence of the longer term was nothing currently protected by copyright would enter the public domain in the next twenty years.

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<sup>4</sup> *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (7–2), *reh'g denied*, 538 U.S. 916 (2003). Justice Ginsburg wrote for the majority, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas. Justices Stevens and Breyer each dissented separately.

For an intriguing discussion of *Eldred*, see Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v. Ashcroft*, 2003 SUP. CT. REV. 143 (highly recommended).

<sup>5</sup> *Golan v. Holder*, 132 S. Ct. 873 (2012). Justice Ginsburg wrote for the majority, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Sotomayer. Justice Breyer dissented, joined by Justice Alito. Justice Kagan did not participate in the decision.

<sup>6</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. V – Intellectual Property, subtit. A – Copyright Protections, § 514, 108 Stat. 4809, 4976-81 (Dec. 8, 1994) [hereinafter URAA § 514] (codified as amended at 17 U.S.C. § 104A (2006)).

<sup>7</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat 2827 (1998) [hereinafter CTEA or Copyright Term Extension Act] (codified at various sections of 17 U.S.C.).

<sup>8</sup> CTEA, *supra* note 7, § 102(b), (d) (codified at 17 U.S.C. §§ 302, 304 (2006)).

Plaintiffs, users of materials in the public domain, sought a declaratory judgment holding the CTEA unconstitutional. After the constitutional challenges were rejected by the lower courts,<sup>9</sup> the Supreme Court granted certiorari on two issues: “1. Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retroactively the term of existing copyrights?” and “2. Is a law that extends the term of existing and future copyrights ‘categorically immune from challenge[ ] under the First Amendment?’”<sup>10</sup> The Supreme Court’s answers were, respectively, no and, for the most part, yes.

Plaintiffs presented three central arguments based on the Copyright-Patent Clause. First, the additional twenty years violated the “limited Times” provision of the Copyright-Patent Clause.<sup>11</sup> Second, the CTEA lacked a rational basis.<sup>12</sup> Third, the CTEA violated the requirement that copyright “promote the Progress of Science” because, as applied to preexisting copyrights,<sup>13</sup> it did nothing to encourage the creation of the works whose term was being extended.<sup>14</sup> The interrelationship of the Copyright Clause and the First Amendment issue was addressed separately.<sup>15</sup>

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<sup>9</sup> *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999), *aff’d*, 239 F.3d 372 (D.C. Cir. 2001), *reh’g and reh’g en banc denied sub nom.*, *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *aff’d*, 537 U.S. 186 (2003), *reh’g denied*, 538 U.S. 916 (2003). *Accord* *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005), *aff’g* *Luck’s Music Library v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004). *See* *Eldred v. Ashcroft*, 537 U.S. 186, 196-198 (2003) (summarizing the lower court decisions).

<sup>10</sup> Petition for a Writ of Certiorari, at i, *Eldred v. Ashcroft*, 537 U.S. 186 (2002), 2001 WL 34092017. The Court chose not to hear a third issue raised by the Petition for Certiorari: “May a circuit court consider arguments raised by amici, different from arguments raised by a party, on a claim properly raised by a party?” *Id.*; *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (mem.), *amending order granting cert.* 534 U.S. 1126 (2001), *granting cert. to* *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

<sup>11</sup> *See* text accompanying notes 16–29, *infra*.

<sup>12</sup> *See* text accompanying notes 30–38, *infra*.

<sup>13</sup> The plaintiffs limited their arguments to the impact of the CTEA on copyrights existing at the time of the CTEA’s adoption, conceding that the Act was constitutional when applied to works created after the effective date of the statute. Brief for Petitioners at 14, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 2002 WL 1041928. This appears to have been a tactical move by plaintiffs to avoid the argument that the extra twenty years of protection would incentivize the creation of works that would not be created without that increased term of protection. Whether, as a practical matter, copyright protection for the life of the author plus seventy years provides any greater incentive for creation of a work of authorship than protection for the life of the author plus fifty years is discussed below. *See infra* text accompanying notes 39-51.

<sup>14</sup> *See* text accompanying notes 39–51, *infra*.

<sup>15</sup> *See* text accompanying notes 52–61, *infra*.

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B. “[L]imited Times”

Petitioners advanced two arguments for holding the CTEA unconstitutional as a violation of the Copyright-Patent Clause’s textual restriction of protection to “limited Times.” First, because copyrights could be protected only for “limited Times,” the term of protection was unalterably fixed at the moment it attached.<sup>16</sup> Second, if the first argument should fail, permitting Congress to increase copyright terms incrementally would allow Congress to evade the “limited Times” restraint of the Constitution,<sup>17</sup> effectively creating perpetual copyrights by an unending series of term extensions.

Writing for the *Eldred* majority, Justice Ginsburg began with two central themes that were to be reiterated throughout her Copyright Clause analysis: (1) previous congressional extensions of copyright protection for existing works were never challenged, and (2) the Court must show great deference to Congress in its exercise of power under the Copyright-Patent Clause.

After observing that every previous change in the duration of copyright protection lengthened the term of protection for both existing and future copyrights,<sup>18</sup> the opinion asserted “[t]ext, history and precedent”<sup>19</sup>

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<sup>16</sup> Petitioners’ arguments addressed only copyrights in existence prior to the CTEA, *Eldred*, 537 U.S. at 193, probably to avoid the question of whether a term of life of the author plus seventy years was for a “limited Time” when applied to future works. As to copyrights for works created after the CTEA was enacted, the petitioners conceded the issue was “not a judgment meet for this Court.” Brief for Petitioners at 14, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 2002 WL 32135676. In addition, arguing the applicable limit was the term in effect at the time the copyright was obtained, let petitioners propose a bright-line rule that precisely determined the “limited Time” at the moment that copyright protection attached. An author would know in advance the duration of the author’s monopoly. This also allowed petitioners to avoid the issue of whether the longer term would incentivize future works that otherwise might not be created. This approach, however, implied that all increases of the term for existing works under the prior acts were unconstitutional other than the 1790 Act. Act of May 31, 1790, 1st Cong., 2d Sess., ch. XV, 1 Stat. 124. Justice Stevens took this position. *Eldred*, 537 U.S. at 237-39. He distinguished the first Copyright Act on the ground that it created a new set of rights rather than extending existing rights. *Id.* at 227-33.

<sup>17</sup> *Eldred*, 537 U.S. at 208-10.

<sup>18</sup> *Id.* at 194-95. The first United States Copyright Act provided a term of protection of 14 years for published works which could be renewed for an additional fourteen years “if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or a resident therein.” Act of May 31, 1790, 1st Cong., 2d Sess., ch. XV, § 1, 1 Stat. 124 (This imitated the then current English Copyright Act, 8 Anne c. 19 (1710), which granted a term of twenty-one years for works published before April 10, 1710, that could not be extended. *Id.* §§ I, XI. Works published on or after April 10, 1710, were granted a term of fourteen years and, if the authors were living at the end of

led to the conclusion that Congress could increase the term of protection for a copyright after it had come into existence. Beginning with the text, or at least the word “limited,” the majority opinion first laid out the following dictionary definitions: “confine[d] within certain bounds;”<sup>20</sup> “restrain[ed]” or “circumscribed;”<sup>21</sup> and “confine[d] within certain bounds.”<sup>22</sup> The opinion then reasoned that if a term was “limited” with respect to prospective

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that fourteen year period, the authors were granted an additional fourteen years of protection. *Id.* In 1831, Congress extended the original term of protection for published works to twenty-eight years while the renewal term remained at fourteen years. Act of Feb. 3, 1831, 21st Cong., 2d Sess., ch. XVI, §§ 1–2, 16, 4 Stat. 436–37, 439 [hereinafter 1831 Copyright Act]. The renewal term was increased from fourteen years to twenty-eight years in 1909. Act of March 4, 1909, 60th Cong., 2d Sess., ch. 320, § 23, 35 Stat. 1075, 1080 (1909) (codified as amended at 17 U.S.C. § 24), Act of July 30, 1947, 80th Cong., 1st Sess., ch. 391, Pub L. No. 281, 61 Stat. 652, 659 (1947)) (as amended) [hereinafter 1909 Copyright Act]. The General Revision of Copyright Law of 1976, Pub. L. 94-553, tit. I, SEC. 101, §§ 101–810, 90 Stat. 2541 (1976) (codified at 17 U.S.C. Title 17 – Appendix §§ 101–810, at 965–1002 (1976)) [hereinafter 1976 Copyright Act], replaced the two-term approach of the previous acts with a single term of protection for the life of the author plus fifty years for works first published or existing as unpublished and uncopyrighted works on or after January 1, 1978. For works copyrighted prior to 1978, the original term remained fourteen years but the renewal term was increased to forty-seven years. *Id.* §§ 302–305. The Copyright Term Extension Act, *supra* note 7, the statute challenged in *Eldred*, extended the term of protection by an additional twenty years for all copyrights whose terms had not previously expired.

A number of consecutive short term extensions of the renewal term of existing copyrights were passed anticipating the 1976 Copyright Act’s adoption of a term of life of the author plus fifty years. *See* Pub. L. No. 87-688, 76 Stat. 555 (Sept. 19, 1962) (existing renewal terms extended until December 31, 1965); Pub. L. No. 89-142, 79 Stat. 581 (1965) (existing renewal terms extended until December 31, 1967); Pub. L. No. 90-141, 81 Stat. 464 (1967) (existing renewal terms extended until December 31, 1968); Pub. L. No. 90-416, 82 Stat. 397 (1968) (existing renewal terms extended until December 31, 1969); Pub. L. No. 91-147, 83 Stat. 360 (1969) (existing renewal terms extended until December 31, 1970); Pub. L. No. 91-555, 84 Stat. 1441 (1970) (existing renewal terms extended until December 31, 1971); Pub. L. No. 92-170, 85 Stat. 490 (1971) (existing renewal terms extended until December 31, 1972); Pub. L. No. 92-566, 86 Stat. 1181 (1972) (existing renewal terms extended until December 31, 1974); Pub. L. No. 93-573, tit. I, § 104, 88 Stat. 1873 (Dec. 31, 1974) (existing renewal terms extended through December 31, 1976). The impact of these statutes was that the renewal term of any work that had not expired as of September 19, 1962, was continued until the 1976 Copyright Act took effect.

<sup>19</sup> *Eldred*, 537 U.S. at 199.

<sup>20</sup> *Id.* (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785)).

<sup>21</sup> *Id.* (quoting THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)).

<sup>22</sup> *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1312 (1976)).

copyrights, changing the term of existing copyrights to the same duration did not make them unlimited.<sup>23</sup>

The opinion observed “[h]istory reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions.”<sup>24</sup> Citing statutes which extended the duration of individual patents and copyrights, Justice Ginsburg “counted it significant that early Congresses extended the duration of numerous individual patents as well as copyrights.”<sup>25</sup>

Having discussed text and history, the opinion cited several early patent cases as precedent in support of its position that Congress could extend the duration of an existing patent, including the Supreme Court’s 1843 decision in *McClurg v. Kingsland*.<sup>26</sup> Justice Ginsburg then concluded that “[n]either is it a sound objection to the validity of a copyright term extension, enacted pursuant to the same constitutional grant of authority, that the enlarged term covers existing copyrights.”<sup>27</sup> Ending her examina-

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<sup>23</sup> *Id.* at 199 (“[A] time span appropriately ‘limited’ as applied to future copyrights does not automatically cease to be ‘limited’ when applied to existing copyrights.”).

<sup>24</sup> *Id.* at 200; see also *supra* note 18 and accompanying text.

<sup>25</sup> *Id.* at 201 (citing Priv. Act of Jan. 7, 1808, entitled An Act to extend certain privileges as therein mentioned to Anthony Boucherie, 10th Cong., 1st Sess., ch. VI, 6 Stat. 70; Priv. Act of Mar. 3, 1809, entitled An Act to extend to Ann Whittemore and William Whittemore, junior, the patent right to a machine for manufacturing cotton and wool cards, 10th Cong., 2d Sess., ch. 35, 6 Stat. 80 (patent); Priv. Act of Feb. 7, 1815, entitled An Act to extend the time of Oliver Evans’s patent for improvement of steam engines. 13th Cong., 3d Sess., ch. 36, 6 Stat. 147 (patent); Priv. Act of May 24, 1828, entitled An Act to continue a copy-right to John Rowlett, 20th Cong., 1st Sess., ch. 145, 6 Stat. 389 (patent) (copyright); Priv. Act of Feb. 11, 1830, entitled An Act, to amend “An act to continue a copyright of John Rowlett,” 21st Cong., 1st Sess., ch. XIII, 6 Stat. 403 (copyright)). Justice Stevens in dissent also cited and discussed Private Acts which had extended the terms of patents and copyrights, many of which had already expired, *Eldred*, 537 U.S. at 233-35, arguing “[t]he fact that this repeated practice was patently unconstitutional completely undermines the majority’s reliance on this history as ‘significant.’” *Id.* at 235.

<sup>26</sup> 42 U.S. (1 How.) 202 (1843). Whether *McClurg* is accurately read as extending the term or reviving the term of an existing patent is discussed in the text accompanying notes 141–142 *infra*. The Court also discussed and cited *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813 (No. 4,564) (Marshall, Cir. J.), *aff’d*, 13 U.S. (9 Cranch) 199 (1815); *Blanchard v. Sprague*, 3 F. Cas. 648 C.C.D. Mass. 1839) (No. 1,516) (Story, Cir. J.); and *Evans v. Robinson*, 8 F. Cas. 886 (C.C. D. Md. 1813) (No. 4,571). *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003).

<sup>27</sup> *Eldred*, 537 U.S. at 203-04. The Court also discussed and cited *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Cir. J.), *aff’d*, 13 U.S. (9 Cranch) 199 (1815); *Blanchard v. Sprague*, 3 F. Cas. 648 (C.C.D. Mass. 1839) (No. 1,518) (Story, Cir. J.); and *Evans v. Robinson*, 8 F. Cas. 886 (C.C.D. Md. 1813) (no. 4,571). *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003).

tion of the “limited Times” language, Justice Ginsburg suggested fairness between present and future authors was a valid policy reason for extending the term of existing copyrights when granting future copyrights a longer term.<sup>28</sup>

Petitioner’s second “limited Times” argument, that permitting Congress to increase the term for existing copyrights was a slippery slope toward perpetual or at least indefinite copyright protection, was quickly rejected because “petitioners fail[ed] to show how the CTEA crosses a constitutionally significant threshold with respect to ‘limited Times’ that the 1831, 1909 and 1976 Acts did not.”<sup>29</sup>

### C. *Rational Basis*

Stating this was an area where “we defer substantially to Congress,”<sup>30</sup> Justice Ginsburg held the twenty-year term extension was a rational exercise of Congress’s constitutional power. She referenced, *inter alia*, the European Union Directive harmonizing the copyright terms for EU member nations at life of the author plus seventy years,<sup>31</sup> a desire for the United States to “‘play a leadership role’ in the give-and-take evolution of the international copyright system,”<sup>32</sup> “demographic, economic and technological changes,”<sup>33</sup> and congressional concern for “ensur[ing] that American authors would receive the same copyright protection in Europe as their European counterparts.”<sup>34</sup>

Examining legislative history, however, it seems more realistic to say that the extra twenty years appealed to Congress because United States copyrights were a plus in the United States’ consistently negative balance

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<sup>28</sup> *Eldred*, 537 U.S. at 204. Perhaps unintentionally, Judge Posner foreshadowed the issue that would arise in *Golan* with the skeptical observation that if this were the case then it was equally unfair to an author whose copyright expired the day before the new act took effect. Posner, *supra* note 4, at 149-50.

<sup>29</sup> *Eldred*, 537 U.S. at 209-10.

<sup>30</sup> *Id.* at 204-05 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (“It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”).

<sup>31</sup> *Id.* at 205 (citing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights). The Court pointed to a statement by Senator Orrin Hatch, 144 Cong. Rec. S12377-78 (daily ed. Oct. 12, 1998), to demonstrate Congress’s awareness of the European Union action as part of their deliberations on the issue.

<sup>32</sup> *Id.* at 206 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 *LOYOLA L.A. L. REV.* 323, 332 (2002)).

<sup>33</sup> *Id.* at 206-07.

<sup>34</sup> *Id.* at 205-06.

of trade.<sup>35</sup> The individual and business motives of those seeking and directly benefitting from copyright term extension were unabashedly concerned with prolonging the existing sources of income.<sup>36</sup> Disney, in particular, was extremely aggressive in lobbying for the enactment of the CTEA to prevent the iconic and highly profitable Mickey Mouse from entering the public domain in 2004.<sup>37</sup> The extensive involvement and im-

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<sup>35</sup> This theme was continually referenced throughout the legislative process leading up to the CTEA. See, e.g., H.R. REP. NO. 105-452, at 4 (1998) (“European Union countries, which are huge markets for U.S. intellectual property, would not have to provide twenty years of copyright protection to U.S. works and the U.S. would lose millions of dollars in export revenues. Extending copyright term to life of the author plus seventy years means that U.S. works will generally be protected for the same amount of time as works created by European Union authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States.”); *The Copyright Term Extension Act of 1995: Hearing Before the S. Comm. on the Judiciary on S. 483*, 104th Cong. 2 (1995) [hereinafter 1995 Senate Hearing] (statement of Orrin G. Hatch, Chairman, S. Comm. on the Judiciary) (“America exports more copyrights intellectual property [sic] than any country in the world, a huge percentage of it to the nations of the European Union. Intellectual property is, in fact, our second-largest export; it is an area in which we possess a large trade surplus. At a time when we face trade deficits in many other areas, we cannot afford to abandon 20 years’ worth of valuable overseas protection. So in my opinion, we must adopt a life-plus-70-year term of copyright if we wish to improve our international balance.”); *Copyright Term, Film Labeling, and Film Preservation Legislation, Hearings before the H. Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary on H.R. 989, H.R. 1248, and H.R.1734*, 104th Cong. 53 (1995) [hereinafter 1995 House Hearings] (testimony of Jack Valenti, President and CEO of the Motion Picture Association of America) (“I think copyright term extension has a very simple, but compelling enticement and that it is very much in the economic interests of the United States at a time when the words, ‘surplus balance of trade,’ is seldom heard in the corridors of Congress, when we are bleeding from trade deficits, and at a time when our ability to compete in the international marketplace is under assault.”); *id.* at 205-11 (testimony and statement of Charlene Barshefsky, Deputy U.S. Trade Representative, Office of U.S. Trade Representative).

<sup>36</sup> See, e.g., 1995 Senate Hearing, *supra* note 35, at 2; 1995 House Hearings, *supra* note 35, at 133-34, 139-40 (testimony and statement of Michael Weller); *id.* at 233-39, 274-80 (testimony and statement of Quincy Jones); *id.* at 240-73 (prepared statements of Bob Dylan, Don Henley, Alan Menken, Stephen Sondheim, Mrs. Henry Mancini, Mrs. Ellen Donaldson (daughter of Walter Donaldson), E. Randol Schoenberg (grandson of Arnold Schoenberg), Marsha Durham (daughter of Eddie Durham), Betty Kern Miller (daughter of Jerome Kern), and Mary Ellin Barrett (daughter of Irving Berlin)).

<sup>37</sup> Posner, *supra* note 4, at 145-47 and text accompanying notes 6-9; Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act*, and *Eldred v. Ashcroft*, FINDLAW (Mar. 5, 2002), [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html); Chris Sprigman, *The Supreme Court’s Copyright Extension Decision: A Mickey Mouse Ruling*, FINDLAW (Jan. 20, 2003), [http://writ.news.findlaw.com/commentary/20030120\\_sprigman.html](http://writ.news.findlaw.com/commentary/20030120_sprigman.html);

fact of special interest groups such as motion picture studios and music publishers on the CTEA and other copyright legislation was described by a former counsel to the House Subcommittee on Intellectual Property & Judicial Administration, who stated that “[w]ith the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.”<sup>38</sup>

D. “To [P]romote the Progress of Science”

The majority opinion next addressed “a series of arguments . . . premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author.”<sup>39</sup> Petitioner’s core argument was that copyright protection was a reward for creating an original work but inapplicable to works already created. The Court addressed three variations of the argument that copyright term extension for existing copyrights “(1) overlooks the requirement of ‘originality,’ (2) fails to ‘promote the Progress of Science,’ and (3) ignores copyright’s quid pro quo.”<sup>40</sup>

The originality argument followed from the Supreme Court’s holding that a work must be original to qualify for copyright protection,<sup>41</sup> but with the added corollary that once published it was no longer original. This argument was quickly dismissed as confusing the requirement for protection with the duration of that protection.<sup>42</sup>

Petitioners next contended the constitutional purpose of copyright, “To promote the Progress of Science,” was served when the work was first created, thus the CTEA was invalid as it did not stimulate the creation of new works but merely added value to works already created. The petitioners conceded, perhaps unwisely, that the preambular language of the Copyright Clause — to promote the Progress of Science — was not an

David Christopher Baker, “*How Long Will My Copyright Last?*”, 50 ORANGE COUNTY LAW. 18, 19 (Dec. 2008) (As Baker reported, a popular nickname for the CTEA in the entertainment industry was the Mickey Mouse Protection Act. *Id.*). See also Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2235 n.218 (2000); Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 523-24 (1999).

<sup>38</sup> William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).

<sup>39</sup> *Eldred*, 537 U.S. at 210.

<sup>40</sup> *Id.*

<sup>41</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding originality was a constitutionally mandated prerequisite for copyright protection); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). See also 17 U.S.C. § 102(a) (2006) (limiting copyright to “original works of authorship” (emphasis added)).

<sup>42</sup> *Eldred*, 537 U.S. at 211.

independently enforceable limit on Congress' power, but maintained it identified the sole end to which Congress may legislate. From this, petitioners argued the CTEA's extension of existing copyrights categorically failed to "promote the Progress of Science," because it did not stimulate the creation of new works but merely added value to works already created.

Stressing that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives,"<sup>43</sup> the Court took the position that the question was whether the overall system encouraged the creation of new original works, not whether every provision necessarily contributed to that goal in all cases.<sup>44</sup> The Court again relied on past practice observing that "Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain,"<sup>45</sup> and concluding "Congress' unbroken practice since the founding generation thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails *per se* to 'promote the Progress of Science.'"<sup>46</sup>

Finally, petitioners drew upon the preambular language of the Copyright Clause to argue that it "imbeds a quid pro quo"<sup>47</sup> bargain in which the grant of copyright protection requires some additional contribution beyond the existence of a previously created initial work. The Court rejected this argument, stating that it did not view the Copyright Clause as exacting a specific this-for-that bargain, but rather embodying a general policy of providing an incentive to encourage creative effort. Again invoking history, the Court opined that "[g]iven the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend as the 'this' offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time."<sup>48</sup> Noting that the references to a quid pro quo involved patent cases, the Court argued "immediate disclosure is not the objective of, but is *exacted from*, the patentee," whereas "[f]or the author seeking copyright protection, in contrast, disclosure is the desired objective, not something exacted from the author in exchange for the copyright."<sup>49</sup>

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<sup>43</sup> *Id.* at 211.

<sup>44</sup> *Id.* at 212-14.

<sup>45</sup> *Id.* at 213.

<sup>46</sup> *Id.* at 213-14.

<sup>47</sup> *Id.* at 214 (quoting Brief for Petitioners at 23, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 2002 WL 1041928 (May 20, 2002)).

<sup>48</sup> *Id.* at 214-15.

<sup>49</sup> *Id.* at 216. The Court further distinguished copyrights from patents by pointing out that copyright left others free to use the ideas contained in a copyrighted

In addition to their other Copyright Clause arguments, the petitioners urged the Court to “apply the ‘congruence and proportionality’ standard described in cases evaluating exercises of Congress’ power under Section 5 of the Fourteenth Amendment.”<sup>50</sup> The court quickly dismissed this argument by pointing out that it had never applied that standard to any Congressional actions outside of Section 5 of the Fourteenth Amendment.<sup>51</sup>

### E. *The First Amendment*

The petitioners argued the Copyright Term Extension Act was a content-neutral regulation of speech that failed heightened judicial review under the First Amendment. Justice Ginsburg’s principal reason for rejecting this argument was that the Copyright Act “incorporates its own speech-protective purposes and safeguards.”<sup>52</sup> Regarding the closeness in time of the adoption of the Copyright Clause and the First Amendment as indicating “that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles,”<sup>53</sup> she continued “copyright’s purpose is to *promote* the creation and publication of free expression,”<sup>54</sup> concluding “[t]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>55</sup>

Justice Ginsburg saw the distinction copyright makes between ideas and their expression and the doctrine of fair use as the “built-in First Amendment accommodations”<sup>56</sup> of copyright. Under the idea/expression dichotomy, as it is called, “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”<sup>57</sup> Complementing the idea/expression dichotomy, the fair

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work, 17 U.S.C. § 102(b) (2006), while a patent prevents use by others of the patentee’s knowledge. 35 U.S.C. § 271 (2006).

<sup>50</sup> *Id.* at 218.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 219.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). The argument is that if authors can find audiences, then copyright enables the authors to profit from their writings and thus have an independent ability to bring their voices to the public without sponsors or government support. This argument is given a more detailed exposition in an article by David Ladd during his tenure as Register of Copyrights. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J COPYRIGHT SOC’Y 421 (1983).

<sup>56</sup> *Id.*

<sup>57</sup> *Eldred*, 537 U.S. at 219. The idea/expression dichotomy is embodied in section 102(b) of the Copyright Act. 17 U.S.C. § 102(b) (2006) (“In no case does copy-

use doctrine “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances,”<sup>58</sup> and “affords considerable ‘latitude for scholarship and comment,’ and even for parody.”<sup>59</sup>

Finally, the Court rejected the argument that the CTEA was a content-neutral regulation of speech which required heightened constitutional scrutiny.<sup>60</sup> In a phrase which was to reappear as a major component of the constitutional challenges in *Golan*, the majority opinion stated that “when, as in this case, Congress has not altered *the traditional contours of copyright protection*, further First Amendment scrutiny is unnecessary.”<sup>61</sup>

#### F. *The Dissents*

Justice Stevens grounded his dissent on the proposition that a state could not “‘extend the life of a patent beyond its expiration date,’”<sup>62</sup> arguing this stricture extended to Congress as well as the states, and to copyrights as well as patents. To Stevens, the grant of a patent or copyright monopoly was to be strictly construed in light of the “limited Times” language of the Constitution. He saw the issuance of a patent as a quid pro

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right protection for an original work of authorship extend to any idea, procedure, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). The Court also stated this “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while protecting an author’s expression.” *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (internal quotation marks omitted in original)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 220 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985), and citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). Justice Ginsburg also pointed out the CTEA permitted libraries and archives to reproduce, distribute, display or perform certain works for purposes of preservation, scholarship, or research if the work was not currently being published and was not available at a reasonable price. 17 U.S.C. § 108(h) (2006).

<sup>60</sup> The argument was based on *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994), which involved a constitutional challenge to requiring cable television systems to carry the signals of the over-the-air broadcast stations in their localities.

<sup>61</sup> *Eldred*, 537 U.S. at 221 (emphasis added). This was a response to the District of Columbia Circuit’s statement that “copyrights are categorically immune from challenges under the First Amendment.” *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001), *aff’d sub nom.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

<sup>62</sup> *Eldred*, 537 U.S. at 222 (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964)). In *Sears*, the Supreme Court held that Illinois unfair competition law could not protect a lamp design because it was preempted by the federal Patent Act. The majority reasoned that a restriction on the states did not automatically place the same restriction on Congress.

quo, exchanging a temporary economic monopoly for ultimate free and permanent public access to the invention. For copyright, he saw the quid pro quo for the exclusive rights granted a copyright owner as “advancing progress by adding knowledge to the public domain.”<sup>63</sup> He equated the expiration of a copyright with the expiration of a patent, both of which gave the public unlimited access to the previously protected rights of the copyright or patent holder. The core of his argument was stated in the following passage:

*Ex post facto* extensions of copyrights result in a gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest. Such retroactive extensions do not even arguably serve either of the purposes of the Copyright/Patent Clause. The reasons why such extensions of the patent monopoly are unconstitutional apply to copyrights as well.<sup>64</sup>

Disputing the majority opinion, Justice Stevens saw the initial Copyright Act of 1790 as creating new federal rights which extinguished the rights granted by the states under the Articles of Confederation rather than amplifying or extending pre-existing rights.<sup>65</sup> Second, the majority’s reliance on the fact that Congress had retroactively extended the term of copyright duration on previous occasions was mistaken because the previous legislation had never been constitutionally challenged.<sup>66</sup> Third, he rejected the argument that providing incentives for restoring older works, particularly motion pictures, validated the CTEA on the ground that this argument could also be made to reviving expired copyrights, yet that would not make such legislation constitutional.<sup>67</sup> Fourth, members of the public were entitled to rely on the expiration of the initial term.<sup>68</sup>

From the undisputed proposition that a perpetual copyright was clearly unconstitutional, Justice Stevens argued that it was necessary to have “a categorical rule prohibiting retroactive extensions [to] effectively preclude perpetual copyrights.”<sup>69</sup> He concluded:

By failing to protect the public interest in free access to the products of inventive and artistic genius — indeed by virtually ignoring the central purpose of the Copyright/Patent Clause — the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.<sup>70</sup>

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<sup>63</sup> *Id.* at 226.

<sup>64</sup> *Id.* at 227.

<sup>65</sup> *Id.* at 228-33.

<sup>66</sup> *Id.* at 233-39.

<sup>67</sup> *Id.* at 239-40.

<sup>68</sup> *Id.* at 240-41.

<sup>69</sup> *Id.* at 242.

<sup>70</sup> *Id.*

Justice Breyer's dissent took a different tack, relying significantly on an economic analysis of the CTEA to buttress his conclusions. To Justice Breyer, "[t]he economic effect of this 20-year extension . . . is to make the copyright term not limited but virtually perpetual," and "most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science' — by which word the Framers meant learning or knowledge."<sup>71</sup>

The core of Justice Breyer's position was that a copyright statute would lack "the constitutionally necessary rational support (1) if the significant benefits that it [the CTEA] bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."<sup>72</sup> Considering the first of his proposed criteria, he saw the CTEA as primarily providing benefits to existing copyright holders, and imposing costs on the public in the form of higher prices or royalty payments and the cost of obtaining permissions.<sup>73</sup>

Turning to the constitutional purpose to "promote the Progress of Science," Justice Breyer asked what benefits would flow from the statute in question. Declaring "no one could reasonably conclude that copyright's traditional economic rationale applies,"<sup>74</sup> he reasoned that the extension would not act as a greater economic motivation to authors to create works than those that already existed for two reasons. First, the scarcity of the number of works that remained commercially valuable after the length of time it took before the twenty-year extension came into effect made the likelihood of any given work benefitting from the term extension remote. Second, the present value and incentive power of rewards of lengthening copyright protection by twenty years that would not begin to be realized, if at all, until seventy years after an author's death would be no greater motivation for authors to create and publishers to disseminate than that already extant. In short, the additional twenty years were no incentive even for future works.<sup>75</sup>

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<sup>71</sup> *Id.* at 243. He also observed that the CTEA's "primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors." *Id.*

<sup>72</sup> *Id.* at 245. He essentially reiterated this proposed test in a subsequent footnote, stating "that copyright statutes must serve public, not private, ends; that they must seek 'to promote the Progress' of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright's 'limited Tim[e].'" *Id.* at 247-248.

<sup>73</sup> *Id.* at 248-54.

<sup>74</sup> *Id.* at 254.

<sup>75</sup> *Id.* at 254-57. Justice Breyer based his economic conclusions on a report by the Congressional Research Service. EDWARD B. RAPPAPORT, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: COPYRIGHT TERM EXTENSION: ESTI-

Even allowing for the normal respect of the Court to Congress in the area of copyright legislation, Justice Breyer found the majority opinion to be unduly and inappropriately deferential by avoiding the necessary constitutional examination of the statute in the case at bar.<sup>76</sup> Summarizing his arguments, he concluded that the statute so lacked public benefit and was so likely to cause expression-related harm rather than good to the public interest as to require that it be held unconstitutional.<sup>77</sup>

### III. GOLAN AND SECTION 514 OF THE URUGUAY ROUND AGREEMENTS ACT

#### A. Background

*Golan v. Holder*<sup>78</sup> challenged the constitutionality of section 514 of the Uruguay Round Agreements Act,<sup>79</sup> which removed numerous works from the public domain, thus preventing the public from making free use of these works.

Like many legal problems, *Golan* is best understood in historical context. The United States first protected copyrights in 1790,<sup>80</sup> but no protec-

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MATING THE ECONOMIC VALUES (1998). Justice Breyer set out the basis for some of his economic analysis in an Appendix to his opinion. *Eldred*, 537 U.S. at 267-69. Justice Breyer also was quite skeptical about the need for the United States to be congruent with Europe as a policy rationale for the CTEA. *Id.* at 257-60. In addition, Justice Breyer rejected the arguments that the CTEA provided incentives to publishers to republish and disseminate older works as being unjustified because it was in basic conflict with the purpose of the Copyright Clause. *Id.* at 260-62. He also noted that the legislative history of the statute stated it would financially assist the entertainment industry through the promotion of exports, which he found to be of concern only to issues arising under the Commerce Clause but not the Copyright Clause. *Id.* at 262-63. He also argued, contrary to the majority opinion, that the fact that we are living in an age of technological advances — better communications, longer lives, adults having children later in life — should militate against extending the term of copyright duration rather than supporting it. *Id.* at 263. The amicus brief submitted by a number of prominent economists, including five Nobel Prize winners, made an even more persuasive case that the addition of twenty years to the term of copyright protection did nothing to incentivize the creation of copyrightable works. Brief of George A. Akerlof, et al., as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 2002 WL 1041846 [hereinafter *Economist's Brief*].

<sup>76</sup> *Eldred*, 537 U.S. at 263-66.

<sup>77</sup> *Id.* at 266-67.

<sup>78</sup> 132 S. Ct. 873 (2012). For a fuller list of sources of the *Golan* opinion, see *supra* note 5.

<sup>79</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. V, subtit. A, § 514, 108 Stat. 4809, 4976-81 (Dec. 8, 1994) [hereinafter *URAA*] (codified as amended at 17 U.S.C. §§ 104A, 109(a) (2006 & Supp. IV 2010)).

<sup>80</sup> Act of May 31, 1790, 1st Cong., 2d Sess., ch. XV, 1 Stat. 124.

tion was granted to the works of foreign authors until 1891.<sup>81</sup> Unsurprisingly, the extension of copyright protection to foreign works was conditioned on their nations extending to United States works the same protections they granted to works of their own nationals, a condition known in international intellectual property law as the principle of national treatment. Only a few years earlier, the major European nations had created the Berne Convention,<sup>82</sup> a multilateral treaty that created a “Union for the protection of the rights of authors in their literary and artistic works.” The Berne Convention became the dominant international copyright treaty.

As the United States evolved into the world’s major exporter of copyrighted works during the twentieth century, the desire for strong international protection grew apace. To nobody’s surprise, the United States in 1989 finally adhered to the Berne Convention, which was widely seen at the time as the best available mechanism for protecting United States

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<sup>81</sup> Act of Mar. 3, 1891, §§ 3, 13, 26 Stat. 1107, 1110.

<sup>82</sup> Berne Convention for the Protection of Literary and Artistic Works, Paris Revision of July 24, 1971 (effective October 10, 1974), entered into force for the United States March 1, 1989, 25 U.S.T. 1341, 828 U.N.T.S. 221, S. TREATY DOC. 99-27, reprinted in 1 Copyright L. Rep. (CCH) ¶¶ 11,400–479, [hereinafter Berne Convention or Berne]. The Berne Convention creates “a Union for the protection of the rights of authors in their literary and artistic works.” Berne Convention, *supra*, art. 1. The original text of the Berne Convention was concluded on September 9, 1886, with an effective date of December 5, 1887. The subsequent amendments and revisions are:

- (1) the Additional Act of Paris, May 4, 1896 (effective December 9, 1897);
- (2) the Berlin Revision, November 13, 1908 (effective September 9, 1910);
- (3) the Additional Protocol of Berne, March 20, 1914 (effective April 20, 1915);
- (4) the Rome Revision, June 2, 1928 (effective August 1, 1931);
- (5) the Brussels Revision, June 26, 1948 (effective August 1, 1951), reprinted in 1 Copyright L. Rep. (CCH) ¶¶ 11,512–11,549;
- (6) the Stockholm Revision, July 14, 1967 (effective date for the administrative provisions, January 1, 1970; the substantive provisions were incorporated into the later Paris Revision), U.N.T.S. No. I-11850, 828 U.N.T.S. 221, reprinted in 1 Copyright L. Rep. (CCH) ¶¶ 11,483–11,507;
- (7) the Paris Revision, July 24, 1971 (effective October 10, 1974), U.N.T.S. No. I-18338, 1161 U.N.T.S. 3.
- (8) the Amendment of September 28, 1979.

The United States adhered to the text of the Paris Revision of July 24, 1971, and the Amendment of September 28, 1979. Unless otherwise indicated, all references to the Berne Convention in this treatise will be to the Paris Revision of 1971 as amended.

copyrights abroad.<sup>83</sup> The problem that led to the *Golan* case was the Berne Convention imposed several substantive conditions on any state seeking to adhere to it, some of which would require significant changes in the United States Copyright Act. In particular, Article 18 of the Berne Convention obligated the United States to protect copyrights of other members of the Berne Union until the expiration of the term of protection in the country of origin or the United States, whichever came first.<sup>84</sup> Many of these works, however, had entered the public domain in the United States because the work had been published without proper notice or a renewal registration was not filed,<sup>85</sup> the work was from a state the United States had no copyright relations with,<sup>86</sup> or the work was a sound recording fixed prior to February 15, 1972.<sup>87</sup> This problem arose in large part from the conflict between the Berne Convention and the United States Copyright Act over formalities. Works published in the United States

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<sup>83</sup> S. REP. NO. 100-352, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3076 [hereinafter 1998 BCIA REPORT] (“The Berne Convention for the Protection of Literary and Artistic Works, better known as the Berne Convention, is the highest internationally recognized standard for the protection of works of authorship of all kinds. U.S. membership in the Berne Convention will secure the highest available level of multilateral copyright protection for U.S. artists, authors and other creators. Adherence will also ensure effective U.S. participation in the formulation and management of international copyright policy”); *id.* (“Adherence by the United States to the Berne Convention is a significant opportunity to reduce the impact of copyright piracy on our world trade position.”).

<sup>84</sup> Berne Convention, *supra* note 82, art. 18(1)–(2), (4).

<sup>85</sup> See *infra* note 88.

<sup>86</sup> For a list of the current United States treaties and Presidential Proclamations concerning copyright protection of United States works abroad, see COPYRIGHT OFFICE CIRCULAR 38A, INTERNATIONAL COPYRIGHT RELATIONS OF THE U.S.A. (2010), available at <http://www.copyright.gov/circs/circ38a.pdf>.

<sup>87</sup> Sound recordings were not eligible for copyright in the United States until February 15, 1972, when the 1971 Sound Recording Amendment became effective. Pub. L. No.92-140, 85 Stat. 381 (1971) (codified at various sections of the 1909 Copyright Act, *supra* note 18, and at 17 U.S.C. § 102(a)(7) (2006)). Sound recordings fixed before February 15, 1972, are protected by state law.

without proper copyright notice were injected into the public domain.<sup>88</sup> This was anathema to Berne.<sup>89</sup>

United States adherence to the Berne Convention in 1989<sup>90</sup> was something of a shell game; now you see it, now you don't. The Berne Convention Implementation Act<sup>91</sup> eliminated the provisions that forfeited a copyright to the public domain if copies were published without notice.<sup>92</sup> This prevented future works from entering the public domain for failure to affix notice or register but did not comply with the Convention's requirement to protect existing foreign works in the public domain whose terms had not yet expired.<sup>93</sup> To the contrary, the Berne Convention Implementation Act expressly denied protection to such works, stating "Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States,"<sup>94</sup> a direct contravention of Article 18 of the Convention.<sup>95</sup> Moreover, to insure the Berne Convention itself could not be a source of rights to be litigated in United States Courts, the Act provided "[t]he provisions

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<sup>88</sup> Under the 1909 Copyright Act, *supra* note 18, § 10, copyright protection was obtained by publishing a work with proper copyright notice. *Id.* § 10. Failure to place copyright notice on published copies usually injected the work into the public domain. *See generally* HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* §§ 9.63–9.69 (2012). For certain classes of unpublished works copyright protection could be obtained by registering the work in the Copyright Office. 1909 Copyright Act, *supra*, note 18, § 12. Under the 1909 Copyright Act, the initial term of protection was twenty-eight years but could be extended for an additional twenty-eight years by the filing of a notice of renewal in the Copyright Office during the twenty-eighth year of the original term. *Id.* § 24. Any work, published or unpublished, for which the rightsholder failed to file the renewal notice was also injected into the public domain at the end of the original term. *Id.*; *see generally* ABRAMS, *supra*, §§ 7.4–7.6. Similarly, under the 1976 Copyright Act, copyrights in published works could be forfeited if the works did not bear proper notice, 17 U.S.C. Appendix §§ 401–406, at 987–88 (1976), until the adoption of the Berne Convention Implementation Act. *Infra*, note 91.

<sup>89</sup> Berne Convention, *supra* note 82, art. 5(2).

<sup>90</sup> The Berne Convention was ratified by the Senate in 1988. The instrument of accession deposited with the World Intellectual Property Organization set the effective date for the Berne Convention in the United States of March 1, 1989. 53 Fed. Reg. 48,748 (1988).

<sup>91</sup> Pub. L. No. 100-568, 102 Stat. 2853 (1988) (effective Mar. 1, 1989) (codified as amended in scattered sections of 17 U.S.C.) [hereinafter Berne Convention Implementation Act or BCIA].

<sup>92</sup> BCIA, *supra* note 91, § 7. Unpublished works were then and are now protected regardless of the national origin or domicile of the author whether or not they bear notice. 17 U.S.C. § 104(a) (2006).

<sup>93</sup> Berne Convention, *supra* note 82, art. 18(1)–(2), (4).

<sup>94</sup> BCIA, *supra* note 91, § 12.

<sup>95</sup> Berne Convention, *supra* note 82, art. 18(1)–(2). *See also supra* text accompanying note 84.

of the Berne Convention . . . shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.”<sup>96</sup> Realistically, there was nothing of substance an aggrieved member state of the Berne Union could do about it. The Berne Convention did provide disputes “between two or more countries of the Union . . . may . . . be brought before the International Court of Justice,”<sup>97</sup> but this had no real effect as the Court had no real power.<sup>98</sup>

Why was the United States permitted to join the Berne Union when it rather obviously failed to comply with the requirements of the Berne Convention? Although speculative, an obvious line of thought is that the World Intellectual Property Organization,<sup>99</sup> the international agency that administers the Berne Convention and many other international intellectual property treaties, was extremely anxious for the United States to join

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<sup>96</sup> BCIA, *supra* note 91, § 12. The BCIA also declared:

- (1) The [provisions of the Berne] Convention . . . are not self-executing under the Constitution and laws of the United States.
- (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.
- (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

*Id.* § 2.

A conflict exists between the Berne Convention and United States Copyright Act over the moral rights of authors, but it is not relevant to this article. *Compare* Berne Convention, *supra* note 82, art. 6*bis* with Berne Convention Implementation Act, *supra* note 91, § 3(b) and with 17 U.S.C. § 106A (2006).

<sup>97</sup> Berne Convention, *supra* note 82, art. 33(1).

<sup>98</sup> For Berne Convention disputes, the International Court of Justice could declare the law but could not enforce it. WORLD INTELL. PROP. ORG., GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act 1971), cmt. 33.5 to Article 33, at 138 (1978) (“In any case, an adverse decision of the International Court carries no condemnation: the Court merely makes a finding as to the law and it is then a matter for the countries in question to solve by diplomatic or legislative means, as they wish.”).

<sup>99</sup> The World Intellectual Property Organization [hereinafter WIPO], an outgrowth of several earlier multinational intellectual property organizations, was officially formed by the Convention Establishing the World Intellectual Property Organization (1967, as amended Sept. 28, 1978), available at [http://www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html). WIPO became an agency of the United Nations in 1974. The United States signed the Convention on July 14, 1967, it was ratified by the Senate on May 25, 1970, and it entered into force in the United States on August 25, 1970. See *WIPO-Administered Treaties*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=ALL&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=1](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=1) (last visited July 11, 2013). The author has been told several times, and in no uncertain terms, that it is permissible to refer to the organization as “W”-“I”-“P”-“O,” pronouncing each letter individually but pronouncing it as an acronym, “WIPO,” is definitely *déclassé*. Oh well.

the Berne Union. In 1985, appearing at a Senate Hearing on United States accession to the Berne Convention, Arpad Bogsch, the Director-General of WIPO, testified “[t]he only real difference—and that has nothing to do with the level of protection — that makes U.S. law incompatible with the Berne Convention consists in the notice and registration requirements.”<sup>100</sup> He made no mention of retroactive protection of foreign works in the public domain in the United States. It is beyond naïve to believe that WIPO, and more particularly its Director-General, was unaware of the issue. Nonetheless, WIPO was willing to overlook the obvious failure to comply in order to obtain United States membership in the Berne Union.<sup>101</sup> Nor was Congress unaware of the conflict,<sup>102</sup> but it could and did choose to ignore it. In Justice Ginsburg’s apt description, Congress “punted.”<sup>103</sup>

Creation of the World Trade Organization<sup>104</sup> in 1994 changed the rules of the game. The Agreement on Trade Related Aspects of Intellectual Property,<sup>105</sup> a component of the WTO Agreement, required all members of the WTO to implement Articles 1 through 21 and the Appendices of the Berne Convention except for Article 6*bis*.<sup>106</sup> Unlike Berne, TRIPS could be enforced through the WTO’s dispute resolution mechanism<sup>107</sup> and violations could result in sanctions. Against a background of growing threats of actions and retaliatory nonenforcement of United States copyrights,<sup>108</sup> Congress enacted section 514 of the Uruguay Round Agreements Act,<sup>109</sup> which granted copyright protection to certain works of other Berne members in the public domain in the United States.

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<sup>100</sup> *U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 99th Cong. 10 (1985, 1986).

<sup>101</sup> In 1985, the United States, China, and the U.S.S.R., three-fifths of the United Nations Security Council’s permanent members and quite arguably the three most powerful nations in the world at that time, were not members of the Berne Union. This may have influenced Dr. Bogsch’s seeming blindness.

<sup>102</sup> H.R. REP. NO. 100-609, at 51-52 (1998)

<sup>103</sup> *Golan v. Holder*, 132 S. Ct. 873, 879 (2012).

<sup>104</sup> Agreement Establishing the World Trade Organization (Apr. 15, 1994), 33 I.L.M. 1125, 1143 (1994) [hereinafter WTO Agreement], also available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>105</sup> WTO Agreement, *supra* note 104, Annex 1C, Trade Related Aspects of Intellectual Property, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs or TRIPs Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>106</sup> TRIPs, *supra* note 105, art. 9(1).

<sup>107</sup> WTO Agreement, *supra* note 104, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1125, 1226 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf).

<sup>108</sup> *Golan*, 132 S. Ct. at 880.

<sup>109</sup> URAA, *supra* note 6, § 514 (codified at 17 U.S.C. § 104A (2006)).

### B. *The Litigation*

A constitutional challenge inevitably followed the granting of copyright protection to works in the public domain by the URAA. After bouncing through the lower courts,<sup>110</sup> the Supreme Court granted certiorari on the issues of whether section 514 violated either the Copyright-Patent Clause or the First Amendment.<sup>111</sup> Justice Ginsburg, again writing for the majority, took a familiar path, emphasizing past removals of copyrights and patents from the public domain<sup>112</sup> and the free speech protections embodied in the Copyright Act.

At the outset, Justice Ginsburg recited the provisions of § 514 that lessened the burden on users of the works that were removed from the public domain:<sup>113</sup> absolute immunity for any use of these works while they were in the public domain;<sup>114</sup> no liability for infringement on the part of a “reliance party”<sup>115</sup> unless a notice of intent to enforce a restored copyright has been filed with the Copyright Office or served on the reliance party;<sup>116</sup> after the notice is filed, the reliance party has one year to dispose of all otherwise infringing copies of the restored work;<sup>117</sup> if the reliance party prepared a derivative work while the restored work was in the public domain, the reliance party can continue to use the derivative work provided reasonable compensation is paid to the owner of the restored copyright,<sup>118</sup>

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<sup>110</sup> The district court granted summary judgment upholding 514 of the statute. *Golan v. Gonzales*, 74 U.S.P.Q.2d (BNA), 2005 WL 914754 (2005). The Tenth Circuit upheld the district court’s ruling that the § 514 did not violate the Copyright-Patent Clause but determined that removing works from the public domain “altered the traditional contours of copyright protection,” which required First Amendment scrutiny. *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). On remand, the district court held that § 514 was content-neutral but still unconstitutional because it was not sufficiently narrowly tailored to serve the government’s interest in complying with the Berne Convention. *Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009). The Tenth Circuit reversed, applying scrutiny appropriate for content-neutral restrictions on speech and holding that § 514 advanced an important government interest and was not substantially broader than necessary. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010).

<sup>111</sup> *Golan v. Holder*, 131 S. Ct. 1600 (2011).

<sup>112</sup> *Golan*, 132 S. Ct. at 885-87.

<sup>113</sup> *Id.* at 882-83.

<sup>114</sup> 17 U.S.C. § 104A(d)(1)–(2) (2006).

<sup>115</sup> In essence, a “reliance party” is someone who was using a restored work while it was in the public domain. *Id.* 104A(h)(4). The copyright in such a work is called a “restored copyright,” *Id.* § 104A(h)(5), while the underlying work is called a “restored work.” *Id.* § 104A(h)(6).

<sup>116</sup> *Id.* § 104A(d)(1)–(2).

<sup>117</sup> *Id.* § 104A(d)(2).

<sup>118</sup> *Id.* § 104A(d)(3)(A).

and if the parties do not agree on the compensation, the United States district courts can determine the amount.<sup>119</sup>

### C. “[L]imited Times”

Petitioners’ arguments in *Golan* paralleled if not echoed those in *Eldred*. Relying on the Constitution’s “limited Times” restriction, the petitioners contended that “[r]emoving works from the public domain,” “violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires.”<sup>120</sup> This was rejected largely on the basis of the Court’s decision in *Eldred*, i.e., that the term “limited,” while it implied some constraints on the “Times” a work was protected, was by no means unalterable or inelastic.<sup>121</sup> A key component in Justice Ginsburg’s reasoning was that the works at issue would only be protected for the life of the author plus seventy years, the same term of protection that had been held constitutional in *Eldred*.<sup>122</sup> As in *Eldred*, the majority opinion listed examples of Congress withdrawing copyrights and patents from the public domain.<sup>123</sup>

### D. “[T]o promote the Progress of Science”

Petitioners argued that § 514 did not “promote the Progress of Science” because removal of works from the public domain would stifle the creativity that their public availability made possible. This argument was rejected in *Golan* on the same basis it was rejected in *Eldred*:<sup>124</sup> the proper inquiry was whether the overall copyright regime served that purpose not whether an individual component, taken in isolation, led to the creation of a new work. Justice Ginsburg also stated that dissemination of

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<sup>119</sup> *Id.* § 104A(d)(3)(B).

<sup>120</sup> Brief for Petitioners at 22, *Golan v. Holder*, 132 S. Ct. 873 (2012), 2011 WL 2423674.

<sup>121</sup> *Golan*, 132 S. Ct. at 884-85.

<sup>122</sup> *Id.* at 885 (“The terms afforded works restored by § 514 are no less “limited” than those the CTEA lengthened.”). See also *id.* at 882, text accompanying notes 12–13.

The opinion also made the point that the term for the restored works was economically shorter than the full life plus seventy years because there was no right to compensation for the use of the work while it was in the public domain.

<sup>123</sup> *Golan*, 132 S. Ct. at 886-87. The statement in *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966), that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available,” was not only said to be dicta but was irrelevant because it “did not speak to the constitutional limits on Congress’ copyright and patent authority . . . [but instead] it ‘addressed an invention’s very eligibility for patent protection.’” *Id.* at 887 (quoting *Eldred*, 537 U.S. at 202, n.7).

<sup>124</sup> *Id.* at 887-89.

preexisting works as well as creation of new works served the preambular purpose of the Copyright Clause.

### E. *The First Amendment*

The First Amendment challenge to section 514 was likewise viewed through the prism of *Eldred*.<sup>125</sup> Much of the petitioners' argument rested on the premise that removing a work from the public domain "altered the traditional contours of copyright protection,"<sup>126</sup> quoting Justice Ginsburg's phrase from *Eldred*,<sup>127</sup> thus requiring First Amendment scrutiny. After mentioning the proximity of the Copyright-Patent Clause, the First Amendment and the first copyright act, Justice Ginsburg stated the idea/expression dichotomy and the fair use doctrine were copyright's "built-in First Amendment accommodations"<sup>128</sup> and were sufficient to resolve the free speech concerns. The majority opinion essentially defined the idea/expression dichotomy and the fair use doctrine as the only "traditional contours of copyright" that needed to be considered in adjudicating any claim that any copyright protection violated the First Amendment. Because the idea/expression and fair use doctrines were not changed or lessened by section 514, no further judicial scrutiny was necessary.<sup>129</sup>

### F. *The Dissent*

For the most part, Justice Breyer's dissent in *Golan* was a reiteration of his dissent in *Eldred*. The crux of it was that the statute "does not encourage anyone to produce a single new work."<sup>130</sup> He saw "eliciting new production is, always has been, an essential precondition for American copyright protection" as a necessary conclusion from the "exclusive Right," "limited Times," and "Progress of Science" language of the Constitution.<sup>131</sup> After a review of the history of copyright,<sup>132</sup> he asked rhetorically "does the Clause empower Congress to enact a statute that

<sup>125</sup> *Id.* at 889-91.

<sup>126</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>127</sup> *Id.* See *supra* note 61 and accompanying text.

<sup>128</sup> *Golan*, 132 S. Ct. 890 (quoting *Eldred*, 537 U.S. at 219).

<sup>129</sup> *Id.* at 891. Petitioners' claim that they had vested rights in works in the public domain was equally unsuccessful. The majority opinion saw this as a repeat of the previously rejected claim that nothing could ever leave the public domain. *Id.* at 893.

<sup>130</sup> *Id.* at 900. Compare with *Eldred*, 537 U.S. at 254-56 and *id.* at 258 ("In any event, the incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension's economic-incentive effect could justify the serious expression-related harms earlier described.").

<sup>131</sup> *Golan*, 132 S. Ct. at 900.

<sup>132</sup> *Id.* at 900-03.

withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes — all *without providing any additional incentive* for the production of new material?”<sup>133</sup>

Justice Breyer then turned to the downside of section 514’s copyright restoration, pointing out the problems created by the vast number of works eligible for restored copyright protection, the increased cost of restored works to users, the difficulty of obtaining permissions and the hampered or abandoned projects the statute caused.<sup>134</sup> He then segued into the First Amendment challenge, stating that he “need not decide whether the harms to that interest show a violation of the First Amendment” but “need only point to the importance of interpreting the Constitution as a single document — a document that we should not read as setting the Copyright Clause and the First Amendment at cross-purposes” so he would “need only find that the First Amendment interest is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act.”<sup>135</sup> Then considering the Copyright Clause and First Amendment issues as inexorably intertwined rather than separable, Justice Breyer concluded “that, by withdrawing material from the public domain, the statute inhibits an important preexisting flow of information is sufficient, when combined with the other features of the statute that I have discussed, to convince me that the Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.”<sup>136</sup>

#### IV. COMMENTARY

Like most Supreme Court decisions, *Golan* and *Eldred* invite conclusions, questions, criticisms, predictions, and speculations. All of these, of course, incorporate the perspectives, some would say prejudices, of the commentator, and any predictions are subject to the whims and vagaries of judicial minds and of future appointments to the bench.

##### A. *History and Precedent*

It is impossible to miss the fact that the two constantly recurring themes of Justice Ginsburg’s opinion are a reliance on past history and great deference to Congress. Clearly, Justice Ginsburg relied throughout on the lack of previous challenges to copyright term enlargement and

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<sup>133</sup> *Id.* at 903.

<sup>134</sup> *Id.* at 903-06.

<sup>135</sup> *Id.* at 907-08.

<sup>136</sup> *Id.* at 912.

grants of protection to works in the public domain to support her conclusion that the challenged acts were constitutional. She justified this approach in *Eldred* by invoking Justice Holmes's famous aphorism that "a page of history is worth a volume of logic,"<sup>137</sup> in order "[t]o comprehend the scope of Congress' power under the Copyright Clause."<sup>138</sup> Justice Stevens' counter was that the prior term extensions had never been challenged.<sup>139</sup> Judge Posner's more trenchant riposte, albeit in a later law review article, was another famous quote from Holmes: "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."<sup>140</sup>

It must also be noted that one of the principal cases Justice Ginsburg relies on as precedential history, *McClurg v. Kingsland*,<sup>141</sup> lends questionable support to her reading of it in *Eldred* and *Golan*. In *Golan*, she read *McClurg* as "enforc[ing] an 1839 amendment that recognized a patent on an invention despite its prior use by the inventor's employer,"<sup>142</sup> when it, in fact, upheld the invalidation of the patent. Quoting a passage from *McClurg*, Justice Ginsburg stated "the legal regime governing a particular patent 'depend[s] on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity.'"<sup>143</sup> In *McClurg*, plaintiff-appellants contended the jury was given improper instructions concerning acts of Congress amending the patent laws after the invention was made. The amendment could be read to add an additional period of protection to the duration of a patent that had expired under the law prior to the amendment. The Supreme Court held the jury was properly instructed about patent invalidity due to use of

<sup>137</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

<sup>138</sup> *Id.* at 200.

<sup>139</sup> *Id.* at 239 ("The fact that the Court has not previously passed upon the constitutionality of retroactive copyright extensions does not insulate the present extension from constitutional challenge."). Justice Stevens also engaged in a lengthy examination of the legislative and judicial precedents, concluding they did not support or even contradicted the majority opinion's argument that they supported the constitutionality of retroactive copyright term extensions. *Id.* at 233-39. Among many other examples, the Court's decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), where the Court held the requirement of registration to maintain a suit for copyright infringement was not jurisdictional despite decades of practice and a plethora of lower court opinions to the contrary, also provides support for Justice Stevens' position.

<sup>140</sup> Posner, *supra* note 4, at 149, n.10 and accompanying text (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>141</sup> 42 U.S. (1 How.) 202 (1843).

<sup>142</sup> *Golan v. Holder*, 132 S. Ct. 873, 887 (2012).

<sup>143</sup> *Eldred*, 537 U.S. at 203 (quoting *McClurg*, 42 U.S. (1 How.) at 206).

the invention prior to issuance of the patent under the amended laws, effectively avoiding any need to rule on the constitutionality of the amendment's retroactive effect and rendering the statement quoted by Justice Ginsburg dicta.

### B. Deference to Congress

An extremely high level of deference to Congress over copyright legislation is the other theme pervading the majority opinions. But where does it end if at all? Certainly *Golan* and *Eldred* articulate almost no restrictions. We are left with the feeling that some boundary ought to exist but there is little in the opinions that would define it.<sup>144</sup>

In *Eldred*, Justice Ginsburg made an explicit finding that there was a rational basis for the CTEA listing the following reasons: equalizing the duration of copyright protection in the United States with that of Europe; enhancing the status of the United States in the international copyright milieu and providing United States' authors with the same term of protection in Europe as their European counterparts.<sup>145</sup> This clearly implies that Congress should have a rational basis for any future copyright term extensions or removal of works from the public domain. In *Golan*, the rational basis is even more obvious, the need to comply with treaty obligations flowing from treaties — the Berne Convention and the TRIPs Agreement — that are important to the United States.

What is provocative are the reasons the Court provided as the rational basis for a congressional action in contrast to those of Congress. Congress fundamentally premised its action on the perception that twenty years of additional protection for United States' copyrights in Europe would improve our balance of trade.<sup>146</sup> The *Eldred* opinion did not mention this issue.<sup>147</sup> Although the Court is free to use any "rational basis" it chooses to uphold a statute, whether a concern for the balance of trade is an appropriate basis for congressional action under the Copyright-Patent Clause is a legitimate question open to genuine debate. What is unaccept-

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<sup>144</sup> Professor Lessig, who argued for the petitioners in *Eldred*, thought his most powerful argument was that Congress needed to be reined in from overabusing the Copyright-Patent Clause as the Court had limited the scope of congressional power under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995). Lawrence Lessig, *How I Lost the Big One*, 2004 LEGAL AFFAIRS 57 (Mar./Apr. 2004).

<sup>145</sup> See *supra* notes 31–34 and accompanying text.

<sup>146</sup> See *supra* notes 35–38 and accompanying text.

<sup>147</sup> The closest the opinion came to the balance of trade concerns was the statement that "[b]y extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure American authors would receive the same copyright protection in Europe as their European counterparts." *Eldred*, 537 U.S. at 205-06.

able, however, is the Court's apparent willingness to find the necessary rational basis for the CTEA in what seem to be unexamined cosmetic rationalizations rather than analytically confronting the question of whether improving the balance of trade is a proper justification for an enactment under the Copyright Clause.<sup>148</sup> The Court's ruling can be seen as stretching to accept any possible reason articulated for copyright legislation as sufficient to be a rational basis without further judicial examination. In sum, the Court's deference to Congress seems overstated to the point where it suggests that future judicial review of copyright legislation will be a rubber stamp for whatever Congress may choose to enact.

At the same time, the reluctance of the Court can be understood as an unwillingness to use *Eldred* and *Golan* as vehicles to explore the limits of Congress's power under the Copyright-Patent Clause, particularly if it is taken in conjunction with the Commerce Clause and the sharp divide on the Court over the limits of congressional power under that Clause. There certainly is no evidence of any desire by the majority to use *Eldred* or *Golan* as the Copyright-Patent Clause's equivalent of *United States v. Lopez*.<sup>149</sup> Justice Breyer's dissent, on the other hand, would limit the scope of congressional power under the Copyright-Patent Clause to those enactments which would incentivize creation.<sup>150</sup>

### C. *The Scope of the Opinions*

One of the more troubling aspects of the majority opinions is that they are far broader and more absolutist than necessary to justify their holdings. *Golan* gives us the most obvious example. Justice Ginsburg could easily have said section 514 of the URAA was only undoing forfeitures caused by now repealed technical formalities in the Copyright Act.

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<sup>148</sup> In giving its reason for holding the CTEA was a rational exercise of congressional power, the Court never mentions the balance of payments issue. *Id.* at 204-08. In addition to providing American authors with the same term of protection in Europe as European authors, *supra* note 147, the Court mentions the CTEA "may provide greater incentive for American and other authors to create and disseminate their work in the United States," *id.* at 206, and that it would "ensure stronger protection for U.S. works abroad," *id.*, and would enable the United States to be a leading player in the international copyright system which it would not be "if the only way to promote the progress of science were to provide incentives to create new works." *Id.* (quoting Perlmutter, *supra* note 32, at 332.

<sup>149</sup> 514 U.S. 549 (1995). Justice Stevens' dissent in *Eldred* would deny Congress the power to extend the term of existing copyrights. Also in *Eldred*, Justice Breyer, viewing the copyright as an incentive system for the creation of knowledge, argues that term extensions provide no incentive for creation and are thus constitutionally void. Although the majority rejected these challenges, they did not join debate on the limits of judicial deference to Congress under the Copyright-Patent Clause.

<sup>150</sup> See *supra* notes 71-77 and accompanying text

This would have limited the scope of the opinion with respect to future removals of works from the public domain without changing the outcome of the case. Further, it would give the Court more freedom to determine potential future cases of such removals with greater concern for the facts of each case. This would also fit well with the historical examples of copyright terms forfeited during wartimes but restored when the wars ended.<sup>151</sup> Further, it would leave the way open for Congress to grant copyright protection to sound recordings fixed before February 15, 1972,<sup>152</sup> or to reinstate copyrights for United States authors whose copyrights had been lost to formalities. Instead the majority opinion suggests the boundary between copyright protection and the public domain is one Congress can transgress at will.

Justice Ginsburg's approach in *Eldred* is more nuanced, but still arguably too broad. Justice Ginsburg stated a concern that United States copyrights receive the same term of protection in the European Union as did European copyrights, and used this observation to declare the CTEA had a rational basis.<sup>153</sup> To the extent this requires any future term extension attempt to demonstrate that it has a rational basis, it is desirable. For reasons previously stated,<sup>154</sup> *Eldred* leaves the impression that the Court went out of its way to camouflage the underlying reasons for the CTEA with more attractive rationalizations. A more thoroughly considered analysis of Congress's actual reasons would be far more useful than the Court's apparent willingness to accept or even stretch to find statements made by Congress or congressional witnesses, however contrived, as a "rational basis" for the legislation.

Justice Ginsburg appropriately and explicitly warned that *Eldred* did not involve a succession of term extensions that could be challenged as seeking perpetual protection in twenty year increments.<sup>155</sup> Nonetheless, the broad brush approach taken to defining the adjective "limited" in the Copyright Clause<sup>156</sup> provides little or no guidance to how many times, what length of times, and for what justification can Congress extend the term of copyright protection. Given these definitions of "limited," a term

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<sup>151</sup> *Golan v. Holder*, 132 S. Ct. 873, 887 (2012).

<sup>152</sup> Arguably providing copyright protection for sound recordings fixed prior to February 15, 1972, does not remove anything from the public domain because such recordings have consistently been protected by state courts under a common law claim of misappropriation or by state criminal statutes. See ABRAMS, *supra* note 88, § 8:38 nn. 3-4. Nonetheless, providing retroactive copyright protection to these sound recordings would give protection that did not exist for four or more decades after their creation.

<sup>153</sup> See *supra* notes 30-34 and 144-146 and accompanying text.

<sup>154</sup> See *supra* notes 30-34 and 144-146 and accompanying text.

<sup>155</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003).

<sup>156</sup> See *supra* notes 20-23 and accompanying text.

of a thousand years is clearly limited. For that matter, so is a term of a million years. Although instinctively we believe these violate the Copyright Clause, yet they fit within the Court's definitions of "limited."

#### D. *What Next?*

So we come to the question of what happens when Congress passes the next copyright term extension act? Justice Ginsburg pooh-poohed the question of whether the CTEA was the beginning of perpetual copyright protection accomplished by increments.<sup>157</sup> Some might like to think the dissents in *Eldred* would give Congress some pause before a further extension of the copyright term, but the majority opinion does not. Certainly nothing in *Eldred* will stop copyright owners from seeking further term extensions. In 2018, the same copyrights that were extended in 1998 will be approaching expiration. It is not going out on a limb to predict that copyright term extension legislation will again be introduced. Since Mexico has lengthened its term of copyright protection to life plus 100 years,<sup>158</sup> this provides a basis for urging such legislation as that used to promote the CTEA.<sup>159</sup> Disney is salivating.<sup>160</sup>

Similarly, *Golan* does almost nothing to suggest a basis for determining when the removal of a work or works from the public domain might be unconstitutional. The instances cited in the opinion seem to suggest that the whim of Congress is sufficient.<sup>161</sup>

One line of thought is that the majority wanted to prevent, or at least minimize future litigation over legislation to remove other works from the public domain in situations analogous to those addressed by section 514 of the URAA. The most obvious category is sound recordings fixed prior to February 15, 1972, the first date on which they could obtain protection under the United States Copyright Act.<sup>162</sup> Given that these uncopyrighted sound recordings include many hugely popular works, both

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<sup>157</sup> *Eldred*, 537 U.S. at 209.

<sup>158</sup> Ley Federal Del Derecho de Autor, tit. II, cap. III, art. 29 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/122.pdf>. A term of protection of the life of the author plus seventy-five years was amended in 2003 to increase the term to the life of the author plus 100 years. English translations of the 1996 law and the 2003 amendment are available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128791](http://www.wipo.int/wipolex/en/text.jsp?file_id=128791) and [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=178394](http://www.wipo.int/wipolex/en/text.jsp?file_id=178394) respectively. Thanks go to Professor H. Tomás Gómez-Arostegui of Lewis and Clark Law School for helping the author locate the Mexican citation.

<sup>159</sup> See *supra* note 35 and 36 and accompanying text.

<sup>160</sup> See *supra* note 37.

<sup>161</sup> *Golan v. Holder*, 132 S. Ct. 873, 886-87 (2012).

<sup>162</sup> See *supra* note 87.

American and foreign,<sup>163</sup> the question is when, not if, such legislation will be introduced.<sup>164</sup> They are currently protected by state law, but that is not perceived as very satisfactory by the copyright-based industries. Moreover, if foreign works can be rescued from slipping into the public domain for lack of notice or failure to register or renew, why not American works? When such legislation is enacted and then challenged, *Golan* may prevent such questions from reaching the Supreme Court.

E. “[L]imited Times:” Is There a Viable Constitutional Boundary?

Although the petitioners in *Eldred* limited their challenge to the retroactive application of the CTEA, this position may have to be, and perhaps should be, abandoned if there is a further term extension. If you take *Eldred*’s interpretation of “limited Times” at face value,<sup>165</sup> it doesn’t seem feasible to argue that a term of life of the author plus 100 years is not for “limited Times.”<sup>166</sup> For that matter, any finite term, however large, comes with *Eldred*’s reading of “limited Times.” The constitutional command that protection may not exceed “limited Times” can only be read as imposing a boundary, but *Eldred* gives us no clue where that boundary is located other than it comes before perpetuity. How much is too much?

One response is that the constitutional boundary is violated when the term extension is irrelevant to the incentives to create and distribute new works provided by copyright protection. The critical question is whether new works would be created and distributed under the new term that would not be created and distributed under the prior term.<sup>167</sup> The argument runs as follows. The copyright device should not only facilitate crea-

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<sup>163</sup> To name only a few recording artists whose pre-1972 records are still selling in significant numbers: Elvis Presley (*Heartbreak Hotel* 1956, *Don’t Be Cruel* 1956, *Hound Dog* 1956, *Jailhouse Rock* 1957, *In the Ghetto* 1969), The Beatles (*Revolver* 1966, *Sgt. Pepper’s Lonely Hearts Club Band* 1967, *Abbey Road* 1969), Carole King (*Tapestry* 1971), The Rolling Stones (*I Can’t Get No Satisfaction* 1965, *19th Nervous Breakdown* 1966, *Ruby Tuesday* 1967, *Sympathy for the Devil* 1968), Chuck Berry (*School Days* 1957, *Johnny B. Goode* 1958, *Sweet Little Sixteen* 1958), etc.

<sup>164</sup> In the author’s view it is close to certain this will happen, the only question is when.

<sup>165</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003); see also *Golan*, 132 S. Ct. at 884-85.

<sup>166</sup> *Eldred*, 537 U.S. at 199-200.

<sup>167</sup> Justice Breyer articulates this argument in terms of the projected residual value of a copyright after the term of protection in effect prior to the CTEA, *id.* at 254-56, however this still left a very small marginal increment to the value of a copyright ab initio. A stronger statement of this position was made by Judge Posner, Posner, *supra* note 4, at 147-48, who concluded the CTEA “flunks a cost-benefit test.” *Id.* at 149.

tion, but must encourage the work to reach the public as well.<sup>168</sup> There is not much good to society, if any, from the manuscript, music, script, or other work that is never communicated to an audience. Because the dissemination of a work from its author to its reader, viewer or listener is necessary to achieve “the Progress of Science,” a necessary corollary is that copyright must incentivize dissemination as well as creation. Thus the incentives must apply not only to authors and readers but also to the parties who will pay for the replication and dissemination which connects the author to the reader.

This is where the CTEA and any future term extension fail abysmally. Put crudely, there is not a motion picture studio, book publisher, record company, television producer, theatrical producer, or for that matter an author, who would create or disseminate a work because the copyright term was life of the author plus seventy years rather than life of the author plus fifty years. Even the motion picture industry, where major theatrical films can take years and many millions of dollars to create, will not undertake a project unless they believe it will show a profit in relatively few years after the films’ release. In short, the copyright-based industries’ calculation of risks for any project would not change whether the CTEA was struck down or not. The same applies to authors. As the financial returns on any new work are more or less unpredictable, the motivation from the financial incentive to create<sup>169</sup> is not dependent on the difference between protection for life plus fifty years and life plus seventy years.<sup>170</sup>

The amicus brief submitted by a group of renowned economists demonstrated that “the CTEA’s term extension for new works provides only a very small economic incentive to create new works, namely much less than one percent.”<sup>171</sup> Their calculations were based on two assumptions: “a constant stream of revenues and a 7% interest rate.”<sup>172</sup> The as-

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<sup>168</sup> Although this seems a truism, at least to this author, it readily fits the majority opinion’s reading of “the Progress of Science.” Jessica Litman in her *Readers’ Copyright* article makes the case for the need of audience access to creative works to fulfill the purpose of copyright quite eloquently. Jessica Litman, *Readers’ Copyright*, 58 J. COPYRIGHT SOC’Y 323 (2011).

<sup>169</sup> There are other incentives for creation and dissemination such as fame and personal desire, however, it is clear that the financial incentives definitely have a role.

<sup>170</sup> The one counter-argument suggested to the author is that although the CTEA will not change the decision making, it will give the copyright owners additional income and therefore more works will be brought into circulation in the long run. This future speculation is unable to be proven or disproven at present by any economic methods. Nonetheless, the author is of the opinion that having either additional or fewer resources would not change the decision making of the copyright-based industries.

<sup>171</sup> Economist’s Brief, *supra* note 75, at 8.

<sup>172</sup> *Id.* at 7.

sumption of a constant stream of revenues is open to serious question, as the revenue streams from the vast majority of copyrights are not constant but peak at or within a short period of time after their initial dissemination. If this is taken into account, the case for the CTEA's term extension being a needed incentive is even weaker if that is possible where the greater incentive is "less than one percent."

*F. "[L]imited Times:" Removal of Works from the Public Domain*

*Golan* leaves unanswered the question of when and under what circumstances Congress can or cannot remove works from the public domain after their statutory term of copyright expires. While the Supreme Court, at least as currently constituted, rarely seems to let precedent tie its hands, the majority opinion strongly suggests Congress has a nearly unlimited right to remove works from the public domain. While it is extremely doubtful the majority would accept wholesale or unprincipled removal of works from the public domain, the language of *Golan* seems to invite it. These concerns could have been lessened had Justice Ginsburg tied the approval of taking the subject works out of the public domain more closely to the fact these copyrights were forfeited due to now obsolete technical formalities, the treaty obligations under the Berne Convention, and the TRIPs Agreement and the Treaty Power of the Constitution.

While both decisions leave uncertainty over future copyright legislation, *Golan* may be the easier to accept notwithstanding the direct economic harm to its plaintiffs. Like it or not, we are in an increasingly global copyright system and it is well within the purposes of the Copyright Clause to seek protection for United States works abroad. The URAA, in combination with TRIPs, prevents foreign countries from freely exploiting American works still in copyright that were created prior to United States protection of the works of that country. That we have to reciprocate by protecting their copyrights is unavoidable.

*G. The First Amendment and Copyright*

Turning to the First Amendment, after *Golan* the obvious conclusion is that any copyright statute that does not lessen the reach of the idea/expression distinction or the fair use doctrine is not subject to any other form of First Amendment scrutiny. In *Golan*, Justice Ginsburg clearly laid to rest the argument that "the traditional contours of copyright" she invoked in *Eldred* included anything more than the idea/expression dichotomy and fair use. It is now clear that First Amendment challenges to copyright legislation will not receive either heightened or intermediate scrutiny unless Congress weakens or bypasses these limits on copyright's monopoly powers.

Is this for better or for worse?<sup>173</sup> It clearly defines what the judicial inquiry will be in future cases when copyright and the First Amendment are in conflict. One inverse consequence of limiting First Amendment inquiries concerning copyright legislation to the idea/expression distinction and the fair use doctrine might be to increase the scope of these doctrines. It is too early to do more than speculate, but it would be no surprise if these doctrines were to expand.

#### H. “To [P]romote the Progress of Science” and the Soul of Copyright

The majority opinion in *Eldred* decided the incentives for further distribution of existing works during the extra twenty years of the CTEA were sufficient to satisfy any requirement that a copyright “promote the Progress of Science.” This is incomplete. The downside of copyright’s monopoly is the costs imposed on the public. The public will pay higher prices for access to the copyrighted works and subsequent creators will be unable to build on copyrighted works without permission until the copyright expires. Without delving into detail, it must be observed that the dissents emphasize these issues while the majority essentially ignores them.

Finally, and perhaps most importantly, *Golan* and *Eldred* can be read as establishing a definite shift in the Court’s attitude towards copyright and the Copyright-Patent Clause. For most of its history the legislative and judicial readings of the Copyright Clause showed a consensus on the rationale embodied in the clause: rights granted to authors are to encourage the creation of intellectual works for the benefit of the public. Rhetorically, at least, the public interest in “the Progress of Science” is given precedence. Over the years the Supreme Court has said rather bluntly that the purpose of copyright is not to protect the investment of time and money or the financial returns of authors and publishers even if the works were produced at considerable effort and expense. A review of the cases finds many statements to this effect:

The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.”<sup>174</sup>

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims on the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve

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<sup>173</sup> Judge Posner argues that this spared the judiciary yet another plunge into a quagmire of future litigation. Posner, *supra* note 4, at 202-03.

<sup>174</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (citations omitted).

the cause of promoting broad public availability of literature, music, and the other arts.<sup>175</sup>

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.<sup>176</sup>

The copyright law . . . makes reward to the owner a secondary consideration.<sup>177</sup>

The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.<sup>178</sup>

[Copyright] is a right which could not be recognized or endured for more than a limited time.<sup>179</sup>

Earlier Congresses evinced the same attitude. The Report accompanying the 1909 Copyright Act stated:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . .

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.<sup>180</sup>

<sup>175</sup> Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (footnotes omitted).

<sup>176</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

<sup>177</sup> United States v. Paramount Pictures, 334 U.S. 131, 158 (1948).

<sup>178</sup> Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

<sup>179</sup> White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

In an earlier letter to Sir Frederick Pollock, Justice Holmes stated:

I have often thought of writing about a page on copyright. The notion that such a right could exist at Common Law or be worked out by it seems to me imbecility. It would be intolerable if not limited in time and I think it would be hard to state a basis for the notion which would not lead one far afield. *Non obstant* the long-winded judgments in the old cases.

<sup>1</sup> HOLMES-POLLOCK LETTERS 53 (Mark DeWolf Howe ed., 1941).

<sup>180</sup> H.R. REP. NO. 60-2222, at 7 (1909). Similarly, the 1961 Report of the Register of Copyrights which laid the groundwork for drafting that ultimately led to the 1976 Copyright Act, declared "[a]s reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a

This history is in stark contrast to the approach of *Golan* and even more so of *Eldred*. These opinions downplay the importance of creating new works, essentially render the Copyright Clause's preambular statement of purpose irrelevant,<sup>181</sup> and require only that the copyright system as a whole arguably be perceived as providing incentives for creation. The ancillary justifications given by the Court are doubtful. The majority does not acknowledge, let alone balance, the extension of future income streams for copyright owners against the costs to the public.<sup>182</sup>

Whether this is a permanent shift in copyright jurisprudence or is merely a convenient rationalization of two statutes that will not affect future directions remains to be seen. Nonetheless, taking the opinions in *Eldred* and *Golan* together with the role of special interests in shaping copyright legislation,<sup>183</sup> the trend seems marked: copyright owners rather than the public are now the primary beneficiaries of the copyright system. The battle over the soul of copyright will be continued.

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means to that end." REGISTER OF COPYRIGHTS, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961), reprinted in HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION PART 1—REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3–6 (Comm. Print 1961) [hereinafter *Register's Report*].

<sup>181</sup> There is also the textual argument that every other clause in Article 1, Section 8 of the Constitution, which are clearly grants of power, begin with the word "To." U.S. CONST. art. I, § 8. See generally EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 2-3, (2002).

<sup>182</sup> There are two costs that copyright imposes on the public. First, copying, performing, or other uses of copyrighted works can be restricted by the copyright owner. Second, the creation of new works based on copyrighted works may require the permission of the copyright owner, thus preventing their creation.

<sup>183</sup> See *supra* notes 36–38 and accompanying text.