

ELDRED V. ASHCROFT: JUST ANOTHER MICKEY MOUSE COPYRIGHT CASE?

By DAVID APPELEGATE, ESQ.*

Currently on the Supreme Court's docket is the case of *Eldred v. Ashcroft*, which challenges the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act¹ ("the CTEA"). In brief, the CTEA extends the duration of existing U.S. copyrights by twenty years, to a maximum length of the author's life plus seventy years for works created after January 1, 1978; to 95 years from publication or 120 years from creation in the case of anonymous works, pseudonymous works, and works made for hire created after 1978; and to a maximum 95 years total for works created before 1978.

Plaintiffs in *Eldred* contend that this Congressional extension of copyright terms, the eleventh in forty years, violates the Copyright Clause of the U.S. Constitution in at least three particulars and the First Amendment in at least two. (In the lower courts, plaintiffs have also contended that the CTEA violates the "public trust" doctrine.) The government maintains, on the other hand, that the copyright extension provisions of the CTEA represent a proper exercise of Congressional power, consistent with the Constitution and applicable legislative and judicial precedent.

Constitutional basis for copyright

To those of us who grew up with the cartoons of Walt Disney or those who write for a living, it may seem something akin to natural law that creators should have exclusive rights to their creations. Royalties, after all, are the fruits of an author's labors, and why should anyone else but Disney make money from the works of Mickey Mouse? If you build a business or a home, then it's yours until you sell it (or lose it through neglect or failure to pay your taxes); why shouldn't the same be true for creators of stories, songs, or characters? On the other hand, if you invent and patent the electric light bulb, then you lose exclusive rights to it once your patent expires. And, like patents, copyrights in the United States are creatures of statute, pursuant to a Constitutional grant of limited authority.

Article I, Section 8, clause 8, of the U. S. Constitution empowers Congress in pertinent part "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ."² The historical underpinning of this provision is England's Statute of Anne, enacted in 1710 to limit the previously perpetual rights of publishers of printed works (authors by common law had no rights). Out of concern that American publishers might otherwise obtain the same kind of monopoly previously known in England, the framers of the U. S. Constitution created a Copyright Clause to "prevent the formation of oppressive monopolies,"³ by giving authors the exclusive right to their respective writings only for "limited Times."

Congressional implementation

The history of Congressional action to implement the Copyright Clause has nonetheless included repeated extensions of the "limited Times" for which U.S. copyrights subsist. In 1790, just a year after the Constitution's ratification, Con-

gress determined that the appropriate "limited Time" for copyright protection should be 14 years, subject to renewal for another 14 years.⁴ In 1831, Congress extended the initial term of U.S. copyrights to 28 years, still renewable for only 14, for a total of 42 years⁵. But in 1909, Congress extended the renewal term to 28 years as well, for a maximum total of 56 years of U.S. copyright protection.⁶

For new material created in 1909, even a renewed copyright would have expired by the end of 1965. Between 1962 and 1974, however, Congress incrementally increased subsisting copyright terms nearly annually, reaching a maximum term of 70 years in 1974.⁷ In 1976, to conform more closely with international norms under the Berne Convention, Congress then completely changed the methodology for computing copyright terms.⁸ The 1976 revision increased the term of U. S. copyright for works created on or after January 1, 1978 (its effective date), to the life of individual authors plus 50 years, or in the case of nonidentifiable authors or works made for hire, to the earlier of 75 years from the year of publication or 100 years from the year of creation.⁹ For works created before 1978, Congress extended the renewal term from 28 to 47 years, thus allowing 75 years of total protection from the time the copyright was "secured."¹⁰

The CTEA

In passing the CTEA in 1998, Congress extended the terms of U. S. copyrights by yet another twenty years. Because of the pre- and post-1978 dichotomy of the 1976 Act in view of the 1909 Act, the mechanics are slightly complicated.¹¹ In essence, however, the CTEA increased copyright terms as follows: (1) for works created in or after 1978, to which an individual or individuals hold the copyright, to the life of the last surviving author plus 70 years;¹² (2) for anonymous works, pseudonymous works, and works made for hire created in or after 1978, to the earlier of 95 years from publication or 120 years from creation;¹³ (3) for works created before 1978 and still in their first term on January 1, 1978, to an initial term of 28 years plus a renewal term of 67 years, for a maximum of 95 years;¹⁴ (4) for works created before 1978 and already in their renewal term on January 1, 1978, to a fixed term of 95 years.¹⁵

In the sense that it extends the terms of subsisting copyrights as well, the CTEA applies both prospectively and retroactively.

History of the Eldred litigation

Eldred's complaint

In 1999, Eric Eldred, a "noncommercial publisher of existing works and a creator of new derivative ones,"¹⁶ and others¹⁷ brought suit in United States District Court for the District of Columbia, claiming that the CTEA was unconstitutional on a number of grounds.¹⁸ In brief, Eldred asserted that the CTEA violates the Copyright Clause of the Constitution itself; that it is inconsistent with the First Amendment; and that it violates the "public trust" doctrine, which holds in part that a principal purpose of government is to promote the interests of

the general public rather than to redistribute public goods from broad public uses to restricted private benefit.¹⁹

Judgment on the pleadings against Eldred

After Eldred amended the complaint twice, in part to add new plaintiffs, the government moved for judgment on the pleadings, and Eldred cross-moved for summary judgment. On October 28, 1999, Judge June Green of the District of Columbia denied Eldred's motion and granted judgment on the pleadings for the government.

In a brief opinion, Judge Green rejected each of Eldred's arguments, ruling (1) that the First Amendment gives no right to use the copyrighted works of others; (2) that the "limited Times" provision of the Copyright Clause is subject to the discretion of Congress; and (3) that the public trust doctrine applies only to the context in which it originally arose, that of navigable waters. Accordingly, Judge Green found the CTEA constitutional, denied Eldred's motion for summary judgment, and granted judgment on the pleadings to the government.

The D. C. Circuit affirms

Eldred then appealed to the D. C. Circuit, joined by L. Ray Patterson, Laura N. Gasaway, Marcia Hamilton, Edward Walterscheid, and the Eagle Forum Education and Legal Defense Fund as *amici curiae*. Weighing in as *amici* on behalf of the government were the Sherwood Anderson Literary Estate Trust; The Sherwood Anderson Foundation; the American Society of Composers, Authors, and Publishers; AmSong, Inc.; the Association of American Publishers, Inc.; Broadcast Music, Inc.; the Motion Picture Association of America, Inc.; the National Music Publishers Association, Inc.; the Recording Industry Association of America, Inc.; and The Songwriters Guild of America.

Eldred and *amici* argued before the Court of Appeals that the CTEA is unconstitutional for three main reasons. First, they argued, it fails the intermediate scrutiny test required to protect freedom of expression under the First Amendment. Second, they argued, the retroactive term extension violates the originality requirement of copyright by granting new monopolies to what are by then "unoriginal" works. Third, they argued, the CTEA violates both the preamble and the "limited Times" requirement of the Copyright Clause because retroactive extensions do not promote the creation of new works and because a perpetual increase in terms is by definition not "limited."

Judge Ginsburg's majority opinion

In a 2-1 decision by Judge Ginsburg, with Judge Sentelle dissenting, the D. C. Circuit upheld the District Court in its entirety.²⁰ Relying on the Supreme Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), and its own decision in *United Video, Inc. v. FCC*, 890 F.2d 1173 (Fed. Cir. 1989),²¹ the D.C. Circuit held, first, that plaintiffs lack any First Amendment right to exploit the copyrighted works of others.

Second, the Court of Appeals held that the originality requirement for copyright explained in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (holding that telephone directory listings compiled in white

pages directories are uncopyrightable facts), applies only to the initial eligibility of subject matter for copyright, rather than more broadly to congressional authority over that subject matter. Thus, if a work is sufficiently "original" to merit copyright protection in the first place, then it remains "original" for purposes of renewal, even though in retrospect it is no longer "original" in a literal sense.

Finally, the D. C. Circuit rejected Eldred's argument that the introductory language of the Copyright Clause — "to promote the Progress of Science and useful Arts" — constitutes a limit on congressional power. The Court of Appeals therefore affirmed the CTEA as a rational exercise of what Eldred has characterized as nearly unlimited congressional authority to define the terms of copyright.

Judge Sentelle's dissent

In dissent, Judge Sentelle agreed with Eldred that the CTEA exceeds the Constitutional authority of Congress. Urging that the court adopt the rationale of the Supreme Court's recent Commerce Clause decision in *United States v. Lopez*, 514 U.S. 549, 556-7 (1995), which held that Congressional power under the Commerce Clause is subject to "outer limits," Judge Sentelle emphasized his understanding of the limited nature of the Copyright Clause as "not an open grant of power to secure exclusive rights" but rather "a grant of power to promote progress"; "not an elastic and open-ended use of that means, but only a securing for limited times."²² According to Judge Sentelle, the CTEA exceeds the outer limits of Congressional authority under the Copyright Clause because there is "no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection."²³ Therefore, said Judge Sentelle, the retroactive term extensions of the CTEA exceed the enumerated powers of Congress and are not Constitutional.

Petition for Certiorari

Following denial of rehearing and denial of rehearing *en banc*, from which two judges (Sentelle and Tatel) dissented, Eldred petitioned the U. S. Supreme Court for *certiorari* on October 11, 2001. Numerous copyright law professors,²⁴ constitutional law professors,²⁵ library associations,²⁶ and others²⁷ supported the petition as *amici curiae*.

On February 19, 2002, the U. S. Supreme Court granted *certiorari*. Briefing for petitioner is now complete, supported in whole or in part by numerous *amici*.²⁸

Issues Raised Before the Supreme Court

Eldred's Brief

Eldred's brief before the Supreme Court makes three main arguments. First, Eldred argues that the CTEA's blanket retroactive extension of existing copyrights violates both the purpose ("to promote the Progress of Science and the useful Arts") and the means ("by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries") set forth in the Copyright Clause. Second, Eldred argues that both the CTEA's blanket retroactive and its prospective extensions of copyrights violate the First Amendment. Third, Eldred argues that the pro-

spective and retroactive extensions of the CTEA are inseparable, so that the Court should invalidate the CTEA in its entirety.

Constitutionally - Copyright Clause

With respect to the language of the Copyright Clause itself, Eldred argues that retroactively extended copyright terms are not "limited," that they do not promote the progress of science, and that they violate the explicit *quid pro quo* of the Copyright Clause: that an author produce a "writing" in exchange for an "exclusive right" for a "limited time," all as confirmed by the clause's historical context. In addition, Eldred argues, the CTEA's retroactive aspect violates the "originality" requirement of *Feist*, because a previously existing copyrighted work is no longer "original" at the time its term is extended.

Constitutionally - First Amendment

With respect to freedom of speech, Eldred argues that the Court of Appeals erred in finding that *Harper & Row* is an "insuperable bar" to First Amendment scrutiny of the CTEA. To the contrary, Eldred argues, the CTEA should be seen instead as content-neutral regulation of speech subject to the intermediate scrutiny standard of *Turner Broadcasting Systems, Inc., v. Federal Communications Commission*, 512 U.S. 622 (1994) and 520 U.S. 180 (1997). Eldred argues that the CTEA's retroactive extension provisions do not satisfy *Turner* because they do not advance an important governmental interest and because they burden substantially more speech than necessary. At the very least, Eldred argues, the Court should reverse and remand the case for an evidentiary hearing on this issue.

Constitutionality - Inseparability

Finally, with respect to severability, Eldred argues that although the CTEA purports to be silent on the issue, the relevant portion of the statute that applies prospectively to "works created on or after January 1, 1978"²⁹ is also the section that applies retroactively, without distinguishing between works created on, before, or after the CTEA's effective date. Likewise, the relevant section of the Copyright Act amended by the CTEA suffers from the same fatal flaw; it contains no words that can limit the CTEA's application to works created on or after its effective date.³⁰ Because inserting such words in the statute now is a legislative, not a judicial function, Eldred argues, the Court can not save the CTEA by inserting those words itself, but must instead find the CTEA unconstitutional in its entirety.

Amicus Briefs

The *amicus* briefs in *Eldred* are well-coordinated, each dealing primarily with issues particular to that *amicus*.³¹ The primary arguments of Eldred's *amici* are set forth below.

The College Arts Association, *et al.*, whose members "use, preserve, study, teach, publicly display, publicly perform and create derivative works from works affected by" the CTEA³², argue first that the CTEA's retroactive term extension severely inhibits a wide range of expression in ways that Congress failed to consider and that are not sufficiently protected by "fair use," thereby resulting in extensive self-censorship in violation of the First Amendment. Second, they argue, these harms are unjustified under the intermediate scrutiny standard of

Turner, which collectively established the analytic framework under which cable providers must carry the signals of "free" broadcast television stations and networks.

Constitutional law and First Amendment scholars Jack M. Balkin, *et al.*, argue that copyright law, like all laws, is subject to First Amendment scrutiny; that the categorical exclusion of copyright law from First Amendment scrutiny proposed by the Court of Appeals misconstrues *Harper & Row*; and that the CTEA is not likely to survive the close First Amendment scrutiny that it deserves.

In turn, the Eagle Forum Educational & Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. argue that the Copyright Clause expressly limits Congressional power concerning government-conferred monopolies, that the CTEA is not "categorically immune" from First Amendment challenge, and that alleged harmonization with foreign law is neither a legitimate Constitutional basis nor a factual one.³³

For their part, seventeen economists weigh in by arguing that it is highly unlikely that the economic benefits from the CTEA's copyright extension will outweigh its costs. This is so, they argue, because the CTEA provides at most a very small benefit to innovation and at the same time increases the social cost of monopoly.³⁴ In addition, they argue that the CTEA reduces innovation by restricting the production of new creative works that make use of existing materials.

The Free Software Foundation hews more closely to the arguments of Eldred, arguing that the Framers intended copyrights to be strictly limited in time, that this historical policy is absolutely essential to reconciling the Constitution's twin values of copyright monopoly and free expression, and that the particular dangers of abuse and corruption justify strict Constitutional scrutiny when the term of statutory monopolies is extended.

Film restorer Hal Roach Studios and its chairman, Michael Agee, argue from their perspective that the CTEA actually impedes public access to America's film heritage and hurts film preservation, restoration, and digitization by reducing the incentives to preservationists and by limiting public access to films. They further argue that it impedes access to "orphan" works (documentaries, newsreels, independent productions, and the like, which constitute the majority of films); that it fails effectively to spur restoration or digitization of the remaining minority of films; and that it effectively undermines the deposit requirements of the Copyright Act with respect to motion picture works (because the volatile cellular nitrate base used on most pre-1950 films will cause their self-destruction or decomposition before they pass into the newly-extended public domain).

Intel Corporation, in only partial support of Eldred, "offers no view on the appropriateness of the specific copyright term extension" at issue, but instead argues that the Supreme Court should use the case to provide guidance on how far Congress can incrementally extend of the Copyright Act, which, if unchecked, will at some point undermine the delicate balance between copyright protection and the preservation of public domain contemplated by the Framers.³⁵

Amici intellectual property law professors weigh in by essentially reiterating Eldred's arguments. The Internet Archive and other digital and on-line archives emphasize the historical importance of the public domain to the development of intellectual property, the effect of the CTEA in preventing works from entering the public domain, and the important role of digital archives in reinvigorating the public domain that the CTEA will ultimately impede.

Amici library associations support the Copyright Clause arguments of Eldred and emphasize the substantial burden that the CTEA places on efforts to preserve works, to make them available to the public, and to use them to create new works, while at the same time it diminishes the purported benefits for preservation of, and access to, works.

The National Writers Union, *et al.*, argue that the "CTEA violates the Constitution by failing to promote the progress of science and useful arts."³⁶ In particular, they argue that Congress failed in its obligation fully to consider the CTEA's effects with respect to European Union harmonization, its purported benefit to authors, its impact on film preservation, its incentives and disincentives for individual creators, and its effects on the economics of corporate cultural production.

Tyler Ochoa and other scholars of the history and development of copyright and patent law in England and the U.S. take a strictly historical approach, providing "a summary of their understanding of that history and development" from the 1500's antecedents of England's 1624 Statute of Monopolies through and including the 1834 case of *Wheaton v. Peters*,³⁷ in an effort to aid the Supreme Court in its consideration of the case.³⁸

Law professor Malla Pollack of the Northern Illinois University College of Law, "an expert in the history of . . . the Copyright and Patent Clause, . . . hopes to bring to the Court's attention information not clearly presented by any other brief."³⁹ In a succinct argument, he argues that both textual choices and the Framers' fear of the twin evils of monopoly and corruption support a narrow construction of the Copyright Clause, and that the Supreme Court's "usual reticence on constitutional issues" is therefore unsuitable in this case.⁴⁰

Finally, the Progressive Intellectual Property Law Association and the Union for the Public Domain, in partial support of Eldred, argue that the only portion of the CTEA that demands review is its retroactive term extension. They further argue that without retroactive term extension, Congress would have shown no interest in copyright term extension at all and that the retroactive and prospective term extension aspects of the CTEA are inseparable. They therefore urge the Supreme Court to overturn the CTEA as well.

Summary and Conclusions

Eldred's challenge to the CTEA's constitutionality, his *amici* support, and the government's response raise a number of debatable issues: Do such periodic extensions merely represent perpetual copyright on the instalment plan? In what way can a retroactive extension be said to "promote the progress of science and useful arts?" Doesn't preventing works from falling into the public domain restrict the public's First Amend-

ment rights to freedom of expression? Don't such extensions represent an unconstitutional taking (from the public) without just compensation? And don't both the real-world and theoretical costs of the CTEA outweigh its benefits?

Or, on the other hand, has Congress acted Constitutionally by merely re-determining, in light of economic practicalities, the definition of "limited Times," thus acting reasonably to put the United States on equal footing with the European Union? Does the public really have a First Amendment right to exploit the copyrighted works of others? And how can securing to individuals (or their heirs) the fruits of their labors be considered a "taking" at all, much less an unconstitutional one? Is it really true, to quote Pete Seeger, that "the grandchildren should be able to find some other way to make a living, even if their grandfather did write 'How Much Is That Doggie in the Window?'"⁴¹

As evidenced in particular by the briefs of *amici*, one can challenge the CTEA's recent extension of U. S. copyrights on any number of policy grounds. From a Federalist Society perspective, of course, the only proper focus of the Supreme Court's inquiry is whether, in enacting the CTEA, Congress exceeded the authority that the Constitution grants it.

As the summary above suggests, the arguments for and against the constitutionality of the CTEA will have been more than thoroughly briefed by the time the Supreme Court hears oral argument in *Eldred v. Ashcroft*. In the end, in a case sometimes described as "Mickey Mouse v. the People,"⁴² will Mickey Mouse or the people prevail?

Only time — perhaps an extended time — will tell.

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Footnotes

1. S. Res. 505, 105th Cong. (codified at 17 U.S.C. § 101, *et seq.*).
 2. U. S. CONST., art. I, § 8, cl. 8. Contrary to modern usage, the reference to "science" is actually the predicate for the copyright authority; "useful Arts" is the underpinning of the patent laws.
 3. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); see Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L. J. 655, 659 (1996).
 4. Act of May 31, 1790 § 1, 1 Stat. 124, 124.
 5. Act of Feb. 3, 1831 § 1, 4 Stat. 436, 436.
 6. Act of March 4, 1909 § 23, 35 Stat. 1075, 1080.
 7. The precise term extension of each of these laws is summarized below, extracted from a table in the Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at & 62 (U.S. Dist. D.C. 1999):
- | Year | Law | Subsisting Copyrights Extended to | Maximum Copyright Term |
|------|----------------|-----------------------------------|------------------------|
| 1962 | Pub. L. 87-668 | 12/31/65 | 59 years |
| 1965 | Pub. L. 89-142 | 12/31/67 | 61 years |
| 1967 | Pub. L. 90-141 | 12/31/68 | 62 years |
| 1968 | Pub. L. 90-416 | 12/31/69 | 63 years |
| 1969 | Pub. L. 91-147 | 12/31/70 | 64 years |
| 1970 | Pub. L. 91-555 | 12/31/71 | 65 years |
| 1971 | Pub. L. 92-170 | 12/31/72 | 66 years |
| 1972 | Pub. L. 92-566 | 12/31/74 | 68 years |
| 1974 | Pub. L. 93-573 | 12/31/76 | 70 years |
8. See H.R. Rep. No. 94-1476 at 135 (1976).
 9. See Pub. L. No. 94-553 § 302-05, 90 Stat. 2541, 2572-76 (1976).
 10. Typically, this means from the date the work was first published with notice

in the proper form, assuming compliance with all other relevant statutory conditions, or by registration in the case of certain unpublished and other works. See Circular No. 1, U.S. Copyright Office, at www.copyright.gov/circs/circ1.html#note. In all cases, copyrights run to and including December 31 of the year in which they would otherwise expire. 17 U.S.C. § 304 (2000).

11. See 17 U.S.C. §§ 302-304, inclusive, especially § 304 (a)-(d).
12. See Pub. L. No. 105-298 § 102(b)(1), 112 Stat. 2827; 17 U.S.C. § 302(a).
13. See Pub. L. No. 105-298 § 102(b)(3), 112 Stat. 2827; 17 U.S.C. § 302(c).
14. See Pub. L. No. 105-298 § 102(d), 112 Stat. 2827; 17 U.S.C. § 304(a).
15. See Pub. L. No. 105-298 § 102(d), 112 Stat. 2827; 17 U.S.C. § 304(b).
16. *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 5.
17. Petitioners are "various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood." *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 3. Besides Eldred personally, they include Eldritch Press, a not-for-profit association that posts literary works on the Internet to make them available to the world, of which Eldred is director; Higginson Book Company, a sole proprietorship that reprints books on demand; Jill Crandall, a choir director in Athens, Georgia; Tri-Iom International, which publishes products involving the history and traditions of golf; Luck's Music Library, Inc. and Edwin F. Kalmus & Co., Inc., which sell, rent, and publish classical orchestral sheet music; American Film Heritage Association, a not-for-profit film preservation group; Moviecrat, Inc., a commercial film archive; Dover Publications, a large-scale commercial paperback book publisher; and Copyright's Commons, a not-for-profit coalition in Cambridge, Massachusetts dedicated to supporting the public domain. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at §§ 2-11 (U.S. Dist. D.C. 1999); see *id.*, ¶ 27-55.
18. *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999).
19. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999); see, e.g., Joseph L. Sax, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION*, 163-165 (1970).
20. *Eldred v. Reno*, 239 F.3d 372 (2001).
21. *Harper & Row* had held that "First Amendment protections are already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." 471 U.S. at 560 (1985). *United Video*, in the view of Judge Ginsburg, had held that "copyrights are categorically immune from challenges under the First Amendment." *Eldred v. Reno*, 239 F.3d 372 at ** (2001).
22. *Eldred v. Reno*, 239 F.3d 372 (2001) (Sentelle, J., dissenting), available online at <http://leyber.law.harvard.edu/cc/dcaopinion.html#sentelledissent>.
23. *Id.*
24. The copyright professors who lent support to Eldred's *cert. petition* are Jessica Litman, Wayne State University; Dennis Karjala, Arizona State University; Laura N. Gasaway, University of North Carolina; Keith Aoki, University of Oregon; Stephen R. Barnett, University of California at Berkeley; Ann Bartow, University of South Carolina; James Boyle, Duke University; Dan L. Burk, University of Minnesota; Julie E. Cohen, Georgetown University Law Center; Shubha Ghosh, University at Buffalo Law School, State University of New York; Paul Heald, University of Georgia; Lydia Pallas Loren, Northwestern School of Law, Lewis and Clark College; Michael J. Madison, University of Pittsburgh; Michael J. Meurer, Boston University School of Law; Tyler T. Ochoa, Whittier Law School; L. Ray Patterson, University of Georgia; Malla Pollack, Northern Illinois University; R. Anthony Reese, University of Texas at Austin; Pamela Samuelson, University of California at Berkeley; Alfred C. Yen, Boston College; and Diane L. Zimmerman, New York University.
25. The constitutional law professors who supported Eldred's *cert. petition* are Jack M. Balkin, Yale; Yochai Benkler, New York University; Burt Neuborne, New York University; and Jed Rubenfeld, Yale.
26. The supporting library associations are the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Digital Future Coalition, the Medical Library Association, and the Society of American Archivists.
27. Additional *amicus* include Phyllis Schlafly's Eagle Forum, the Cato Institute, and the Internet Archive, a public nonprofit founded to build an "Internet library" offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format.
28. Eldred's *amicus* include the College Art Association, the Visual Resources Association, the National Humanities Alliance, the Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage, Jeffrey P. Cunard, Bruce P. Keller, Christopher J. Robinson, and Rebecca Tushnet; constitutional law professors Jack M. Balkin, Yochai Benkler, Burt Neuborne, Robert Post, and Jed Rubenfeld; the Eagle Forum Education & Legal Defense Fund, the Association of American Physicians and Surgeons, Phyllis Schlafly, and Karen Tripp; economists Roy T. Engler, Jr., George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald J. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser; the Free Software Foundation; Hal Roach Studios; Intel Corporation (in partial support); 53 intellectual property law professors, including Jessica Litman, Jon Weinberg, Dennis S.

- Karjala, Keith Aoki, Stephen R. Barnett, Margreth Barrett, Ann Bartow, Tom W. Bell, Paul Schiff Berman, Dan L. Burk, Margaret Chon, Richard Chused, Julie E. Cohen, Kenneth D. Crews, Robert Denicola, F. Jay Dougherty, Rochelle C. Dreyfuss, Christine Haight Farley, Eric M. Freedman, Laura N. Gasaway, Shubha Ghosh, Llewellyn Joseph Gibbons, Paul J. Heald, Steven D. Jamar, John Kidwell, Robert A. Kreiss, Lew Kurlantzick, Marshall A. Leaffer, Joseph P. Liu, Lydia Pallas Loren, Michael J. Madison, Peter W. Martin, Willajeanne McLean, Charles R. McManis, Robert P. Merges, Michael J. Meurer, Neil Weinstock Netanel, Francis M. Nevins, Dawn C. Nunziato, Robert L. Oakley, Ruth Gana Okediji, Maureen A. O'Rourke, David G. Post, Margaret Jane Radin, R. Anthony Reese, John Rothchild, Pamela Samuelson, David J. Seipp, David E. Shipley, David E. Sorkin, J. Russell VerSteeg, Eugene Volokh, Sarah K. Wiant, and Diane L. Zimmerman; the Internet Archive, Prelinger Archives, a commercial, for-profit archive that licenses footage of historical images and sounds to commercial and not-for-profit organizations; Project Gutenberg Literary Archive Foundation, a public non-profit publisher of public domain literary works on the Internet; Deirdre K. Mulligan, Jason M. Schultz, Mark Lemley, Jennifer M. Urban, and Steven M. Harris; the American Association of Law Libraries, the American Historical Association, the American Library Association, the Art Libraries Society of North America, the Association for Recorded Sound Collections, the Association of Research Libraries, the Council on Library and Information Resources, the International Association of Jazz Record Collectors, the Medical Library Association, the Midwest Archives Conference, the Music Library Association, the National Council on Public History, the Society for American Music, the Society of American Archivists, and the Special Libraries Association; Arnold P. Lutzker and Carl H. Settlement III; National Writers Union, Peter Jaszi, Charles Baxter, Wendell Berry, Guy Davenport, William Gass, Patricia Hampl, Eva Hoffman, Ursula K. LeGuin, Barry Lopez, Peter Matthiessen, Jack Miles, David Foster Wallace, Lawrence Golan, Ronald Hall, Richard Kapp, John McDonough, The United States Public Policy Committee for the Association of Computing Machinery, Computer Professionals for Social Responsibility, The Apache Software Foundation, The Domain Name Rights Coalition, The Center for The Public Domain, Public Knowledge, The Digital Future Coalition, The Public Domain Research Corporation, The Center for Book Culture, Litnet, The Computer and Communications Industry Association, and The Consumer Electronics Association; professors Tyler T. Ochoa and Mark Rose, historian Edward C. Walterscheid, The Organization of American Historians, and II-Net: Humanities and Social Sciences OnLine, an international scholarly society; professor Malla Pollack, an expert in the history of the Copyright Clause; and the Progressive Intellectual Property Law Association and the Union for the Public Domain (in partial support).
29. Pub. L. No. 105-298, § 102(b); 17 U.S.C. § 302 (1998).
 30. Br. for Petitioner at 48.
 31. See letter dated March 5, 2002, from Daniel H. Bromberg, Jones, Day, Reavis & Pogue, to Jonathan L. Zittrain, Esq., The Berkman Center for Internet & Society, re: *Amicus Briefs in Eldred v. Ashcroft*, available online at <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supt/amicus-letter.pdf>.
 32. Brief of College Arts Association, *et al.*, as *Amicus Curiae* in Support of Petitioners at 2.
 33. In fact, the CTEA arguably increases the disparity between U.S. copyright law and that of the European Union in a number of ways, as in the case of anonymous and pseudonymous works. See Brief of *Amici Curiae* Eagle Forum Educational & Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. in Support of Petitioners at 26. And because the EU is not subject to the U.S. Constitution in the first place, the length of copyrights in the EU is Constitutionally irrelevant. *Id.* at 27.
 34. The economics are interesting; assuming a constant revenue stream at a 7% interest rate, these economists calculate that the CTEA would yield a mere one-third of one percent increase in present-value payments as additional compensation to authors or their heirs. See Brief of George E. Akerlof, *et al.*, as *Amici Curiae* in Support of Petitioners at 5-7 and Appendix B. See also, Affidavit of Hal R. Varian, Plaintiff's Response to the Government's Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C.), July 23, 1999.
 35. See Brief of *Amicus Curiae* Intel Corporation in Partial Support of Petitioners at 2-3.
 36. See Brief of *Amici Curiae* National Writers Union, *et al.*, in Support of Petitioners at 5.
 37. Ironically, a dispute between two early reporters of U. S. Supreme Court reports. See *Wheaton v. Peters*, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), *rev'd*, 33 U.S. (8 Pet.) 591 (1834).
 38. Brief *Amicus Curiae* of Tyler Ochoa, *et al.*, in Support of Petitioners at 1.
 39. Brief of Malla Pollack, *Amicus Curiae* Supporting Petitioners, at 1 (page 8 of 21 of printout at <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supt/amicus/pollack.html>).
 40. *Id.* at 21 (page 12 of 21 of printout at <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supt/amicus/pollack.html>).
 41. See Steve Zeitlin, "Strangling Culture with a Copyright Law," *The New York Times*, April 25, 1998, available online at <http://www.law.asu.edu/1homePages/Karjala/OpposingCopyrightExtension/commentary/zeitlin.html>.
 42. See Damien Cave, *Mickey Mouse vs. The People*, www.salon.com/tech/feature/2002/02/12/web_copyright/index.html, Feb. 21, 2002.