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The Dead Poets Society: The Copyright Term and the Public Domain

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by Matthew Rimmer

Abstract

The dead poets society: The copyright term and the public domain by Matthew Rimmer In a victory for corporate control of cultural heritage, the Supreme Court of the United States has rejected a constitutional challenge to the Sonny Bono Copyright Term Extension Act 1998 (U.S.) by a majority of seven to two. This paper evaluates the litigation in terms of policy debate in a number of discourses — history, intellectual property law, constitutional law and freedom of speech, cultural heritage, economics and competition policy, and international trade. It argues that the extension of the copyright term will inhibit the dissemination of cultural works through the use of new technologies — such as Eric Eldred's Eldritch Press and Project Gutenberg. It concludes that there is a need to resist the attempts of copyright owners to establish the Sonny Bono Copyright Term Extension Act 1998 (U.S.) as an international model for other jurisdictions — such as Australia.

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Introduction

> "The words of a dead man/are modified in the guts of the living"
> —W.H. Auden, *In Memory of W.B. Yeats*

The Sonny Bono Copyright Term Extension Act 1998 (U.S.) was literally a "Mickey Mouse Bill". The 1998 statute was the result of intense lobbying by a group of powerful

corporate copyright holders, most visibly the Walt Disney Company, which faced the imminent expiration of copyrights on Mickey Mouse and its other famous cartoon characters [1]. The legislation extended the term of copyright protection for copyright works from the life of the author plus 50 years to the life of the author plus 70 years, in line with the European Union. It also extended the term of copyright protection for works made for hire, and existing works, to at least 95 years. Thus Mickey Mouse, a work for hire first copyrighted in 1928, will now pass into the public domain in 2023 — instead of 2003 under the previous law.

Sonny Bono, from the 1970s pop group and variety show Sonny and Cher, believed that copyright should be extended, if not made perpetual. As a California Congressman he introduced the legislation. However, the politician died in a skiing accident before the legislation came to pass. The tragic irony is that the legislation he sponsored was intended to provide a longer term of copyright protection to benefit the estate of deceased copyright owners. In the consideration of the bill, Sonny's widow, Mary Bono, provided this elegy, which was in part a memorial and in part a polemic:

> "Copyright term extension is a very fitting memorial for Sonny. This is not only because of his experience as a pioneer in the music and television industries. The most important reason for me was that he was a legislator who understood the delicate balance of the constitutional interests at stake. Last year he sponsored the term extension bill, H.R. 1621, in conjunction with Sen. Hatch. He was active on intellectual property issues because he truly understood the goals of the Framers of the Constitution: that by maximizing the incentives for original creation, we help expand the public store-house of art, films, music, books and now also, software. It is said that 'it all starts with a song,' and these works have defined our culture to audiences world-wide.
>
> Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress." [2]

In life and even in death, Sonny Bono served as an ideal figurehead for a number of copyright industries. He was able to lend credence to the pretence that the main beneficiaries of the legislation were artists and musicians, rather than the multinational media companies who distributed and transmitted copyright works.

An electronic publisher, Eric Eldred, was concerned that the Sonny Bono Copyright Term Extension Act would prevent him from publishing books that had been previously in the public domain. Eldred started Eldritch Press — a free site devoted to publishing HTML versions of public domain works. With the help of a relatively cheap computer and an inexpensive scanner, Eldred took books that had fallen into the public domain and made them available for others on the Internet. Soon his Web site had pulled together an extraordinary collection of work including Hawthorne's *The Scarlet Letter,* English translations of the work of Anton Chekhov, scientific papers by T.H. Huxley, and a large collection of the works of Oliver Wendell Holmes Sr. Eldred was concerned that the legislation would delay the entry of literary works into the public domain. He was particularly aggrieved that the poems of Robert Frost would remain in copyright. Like W.H. Auden, the publisher believed that "the words of a dead man/are modified in

the guts of the living" [3]. Eldred became the standard-bearer for a range of copyright user interests. His conservative mission to promote education and learning by bringing public domain texts to a wider readership was likely to go well with the courts and the media. Interestingly, Michael Hart, the founder of the electronic library Project Gutenberg, might have been the original choice of lead plaintiff. However he was rejected as a candidate because of his desire to publish manifestos attacking the greed of copyright holders [4]. It was feared that such civil disobedience would undermine the constitutional arguments in the case.

Eric Eldred decided to launch a legal action against the constitutional validity of the Sonny Bono Copyright Term Extension Act. First of all, he argued that the extension of the copyright term went beyond the scope of copyright power under the United States Constitution. That clause provides that Congress has the power to "promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective writings". Second, the electronic publisher maintained that the legislation violated the freedom of speech guaranteed under the First Amendment.

The petitioner Eric Eldred was supported by nine additional plaintiffs - organisations which provided public access to songs, books, and films [5]. He was also bolstered by a number of *amicus curiae* submissions by historians, intellectual property academics, economists, cultural institutions, various copyright users, and members of the new economy [6]. For the respondents, there were a number of *amicus curiae* — including members of Congress, copyright owners and professional organisations, as well as intellectual property lawyers and academics [7]. Academic critic John Frow has observed of the role of *amicus curiae* in Supreme Court battles over copyright law:

> "Each of these is a heterogenous alliance. What they represent is the peculiarly political phenomenon of formations of interest — that is, alliances of quite diverse social groups into a general (but transient) structure of interest. Each side thus represents a massive social pressure, and together they exemplify the social contradictions — the 'calculus of interests' — that the Court must try to reconcile. Part of the juridical ideology within which the Court works, however, is the claim that questions of law are decided on the basis of purely legal criteria." [8]

He adds: "The massing of *amici* on each side does, however, allegorize the industrial and commercial interests at play in the case, and it would seems that the presentation of *amicus curiae* briefs works in part as a kind of judicial lobbying" [9]. The friends of court play an important role in amplifying the policy concerns of a case [10].

The legal challenge by Eric Eldred was pursued all the way up to the Supreme Court of the United States. In the United States District Court of Columbia, Justice Green brusquely dismissed the argument that the Act was unconstitutional [11]. In the Court of Appeals, the majority of the circuit judges were more circumspect in finding the Act constitutional [12]. However, Justice Sentelle dissented. The Supreme Court of the United States in *Eldred v Ashcroft* [13] rejected a constitutional challenge to the validity of the Sonny Bono Act by a majority of seven to two [14]. In the leading judgment, Justice Ginsburg opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection [15]. She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable. Justice Breyer and Stevens strongly dissented against the ruling.

This paper extends the approach of analysing the cultural politics of copyright disputes elaborated in an earlier article [16]. It looks at the intersection of power, culture, and technology. As James Boyle observes, there is a need to focus upon the politics of intellectual property:

> "Like most property regimes, our intellectual property regime will be contentious, in distributional, ideological and efficiency terms. It will have effects on market power, economic concentration and social structure. Yet, right now, we have no politics of intellectual property - in the way that we have a politics of the environment or of tax reform. We lack a conceptual map of issues, a rough working model of costs and benefits and a functioning coalition-politics of groups unified by common interest perceived in apparently diverse situations." [17]

The methodology is one of looking at the law creatively, that is to try and identify the social, economic and legal relations that copyright law produces. It seeks to bring to life the real complexity and messiness of the law, as it negotiates the battle over the copyright term and engages with conflicting views and cultures. The spirit of the inquiry is to uncover the disciplinary power of the court and the jurisprudential mechanisms for its exercise. It seeks to analyse what arguments are explicitly acknowledged by the court, and what policy matters are overlooked and ignored. This investigation also highlights the role of *amicus curiae* in bringing policy concerns to the attention of the judiciary. The motivation is that of understanding how copyright law has managed its "representativeness" and the practical implications of the mismanagement of social diversity. In addition to the formal legal process, a number of academics, lobbyists, journalists, and commentators have been kibitzing and barracking from the sidelines. This inquiry evaluates the role of public intellectuals in the debate over the extension of the copyright term [18].

This paper is largely sympathetic to the valiant attempt of Eric Eldred to overturn the extension of the copyright term. However, it expresses a number of reservations about the conservative reliance on the first principles of constitutional law and First Amendment concerns to secure the information commons [19]. Historically, the evidence is mixed as to whether the tradition of copyright law has been wholly supportive of the freedom and liberty of copyright users. There has also been a strong counter-tendency towards using copyright law for the purposes of private censorship. The relationship between copyright law and freedom of speech has been quite a contentious one. The development of the internal doctrines of copyright law has largely been forged in remedying specific allegations of infringement. Concern for encroachment on private rights has muddled an elaboration of the precise place of copyright law in the more publicly centred doctrines of constitutional law and freedom of speech. Moreover, there is a strong thread in the freedom of speech discourse in the United States about the marketplace for ideas, which is deeply grounded in the commodification of cultural works. In philosophical terms freedom of speech arguments could be said to be as much about reconciling the conditions for speech with economic concerns about monopolies and competition policy, as about the political priority of free speech trumping private economic interests *per se.* Furthermore, the abstract arguments about freedom of speech have held little sway in recent negotiations directing the future global development of copyright law. In these circumstances too much dependence upon constitutional law as chief protector of the public domain is troublesome.

This paper instead advocates a critical theory of copyright law, which highlights the gap between the symbolic significance of legislation, and its instrumental effects in terms of economic impact and cultural costs. It demands a greater scrutiny of the politics and the rhetoric of Congress, the judiciary, and the public domain. This paper claims that the case of *Eldred v Ashcroft* offers a lens through which a disciplinary pattern can be discerned. It is interested in how copyright lawyers have analysed the dispute and certain kinds of assumptions. This paper evaluates the relative influence of the various intellectual disciplines at play on the decision of the Supreme Court. Part One considers the historical debate about the extension of the copyright term. It explores the constitutional challenge to the Sonny Bono Copyright Term Extension Act. Part Two examines First Amendment issues relating to freedom of speech. It considers the interaction between copyright doctrine and constitutional law. Part Three investigates the idea that copyright law serves to protect the public domain and preserve cultural heritage. Part Four analyses the debate over the economic effects of the extension of the copyright term. Part Five focuses upon the discussion of the copyright term in light of harmonisation and international trade. Part Six focuses upon concerns about the impact of the decision upon the validity of the 1976 legislation and the debate over "perpetual copyright". The conclusion evaluates the implications of the decision for legislatures, courts, and the public.

Part One — "A Bounty To Genius and Learning": A History of the Copyright Clause

There was much historical debate over the meaning of the Copyright Clause in the United States constitution, which provides: "Congress shall have Power ... To promote the Progress of Science and Useful Arts by securing for Limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."

Historically, the copyright term has been a perennial subject of contention between copyright owners, and copyright users. Three distinguished historians made submissions in the Supreme Court case of *Eldred v Ashcroft.* Mark Rose is an expert on literary property in England [20]. Tyler Ochoa is interested in the history of intellectual property in the United States [21]. Edward Walterscheid has focused upon term limits and the intellectual property clause [22]. The historians consider the English antecedents — such as the Statute of Monopolies, the Statute of Anne, and *Donaldson v Beckett.* They cite an anonymous pamphleteer protesting against the legislative push by booksellers to extend the copyright term for literary property in 1735:

> "I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers." [23]

The historians also investigate the meaning of the Patent and Copyright Clause of the United States and also consider statutory and judicial interpretation of the Clause. The

historians submitted that the Framers feared that publishers in America would achieve the same power over learning that they held in England. They therefore crafted the Copyright Clause so as to "prevent the formation of oppressive monopolies." The historians expanded upon the *amicus* brief in an article published in a professional journal [24].

In the majority judgment, Justice Ginsburg maintains that the approach of the United States to the Copyright Clause departed from the tradition of the United Kingdom [25]. Her Honour draws upon the work of Thomas Nachbar, arguing that the histories in the *amicus* brief are mythologies, modern projections back onto the past decisions of the Framers:

> "As an initial matter, there was not even a rough analog to the Stationers' Company on the horizon at the time of framing. Rather, in 1798 the fledging republic had more than 200 publishers, printers, and booksellers spread through New York, Boston, Philadelphia, Baltimore, and Charleston, and they were intensely competitive. The few efforts actually undertaken to form trade organizations among publishers in the early 19th century failed almost as soon as they began ... Contrary to the *Eldred* petitioners' claims, the Framers did not write the Copyright Clause in order to prevent publishers from exercising control over speech." [26]

This article is a polemic which argues that the historians are mistaken in their condemnation of modern congresses as they are in their romanticization of past ones. Justice Ginsburg is ambivalent towards the contested historical sources — on the one hand, she cites the accounts of Mark Rose and Patterson with approval; and on the other, she departs from their conclusions that were put forward in the *amicus curiae.*

Justice Ginsburg emphasizes that "[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors" [27]. Accordingly, "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge ... . The profit motive is the engine that ensures the progress of science" [28]. Rewarding authors for their creative labor and "promot[ing] ... Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides ... with the claims of individuals" [29]. Her Honour argues that Justice Stevens' characterization of reward to the author as "a secondary consideration" of copyright law understates the relationship between such rewards and the "Progress of Science" [30]. She argues that Justice Breyer's assertion that "copyright statutes must serve public, not private, ends" misses the mark [31]. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.

Justice Ginsburg envisions the history of copyright law in the United States as a process of gentle evolution and progress:

> "To comprehend the scope of Congress' power under the Copyright Clause, "a page of history is worth a volume of logic." History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same

> regime. As earlier recounted, the First Congress accorded the protections of the Nation's first federal copyright statute to existing and future works alike. Since then, Congress has regularly applied duration extensions to both existing and future copyrights." [32]

Justice Ginsburg also considers congressional practice with respect to the extension of patents. Her Honour found it significant that early Congresses extended the duration of numerous individual patents as well as copyrights. As early as *McClurg v. Kingsland* [33], the Court made it plain that the Intellectual Property clause permits Congress to amplify an existing patent's terms. Justice Ginsburg concludes: "The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them. Guided by text, history, and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause" [34].

In his dissenting judgment, Justice Breyer draws together a number of historical arguments to argue that the Copyright Clause serves the primary purpose of promoting the public good:

> "This view of the Clause finds strong support in the writings of Madison [35], in the antimonopoly environment in which the Framers wrote the Clause, and in the history of the Clause's English antecedent, the Statute of Anne [36] — a statute which sought to break up a publishers' monopoly by offering, as an alternative, an author's monopoly of limited duration." [37]

Justice Breyer essentially upholds the contention of the petitioners: "Against the background of these concerns over corruption, and over the concentration of power in the hands of publishers, this Court should apply a meaning of 'limited Times' that would achieve the Framers' purpose. The Copyright Clause would achieve that end if read to prohibit an indefinite and endless power to extend existing terms" [38].

Justice Breyer alludes to Lord Macaulay's famous parliamentary discussion of the copyright extension under the Talfourd act in 1841, in which he said that "copyright is a tax on readers for the purpose of giving a bounty to writers" [39]. He analyses the constitutional objectives that are served by the intellectual property clause. Justice Breyer stresses that the Constitution itself describes the basic Clause objective as one of "promot[ing] the Progress of Science," to promote knowledge and learning. He observes that the clause exists "to stimulate artistic creativity for the general public good" [40]. It does so by "motivat[ing] the creative activity of authors" through "the provision of a special reward" [41]. The "reward" is a means, not an end. And that is why the copyright term is limited. It is limited so that its beneficiaries — the public — "will not be permanently deprived of the fruits of an artist's labors" [42]. Justice Breyer notes that "[C]opyright law ... makes reward to the owner a secondary consideration" [43]. He emphasizes that copyright is "intended to increase and not to impede the harvest of knowledge" [44].

The friends of Eldred are fond of invoking the public domain and the intellectual commons as a rallying point. They draw parallels between the current expansion of copyright law in the new millennium and the enclosure of common lands in England that took place between the 15th and 19th centuries [45]. A number of writers — Lawrence Lessig, David Bollier and James Boyle — have proposed reforming copyright law to recover the commons [46]. The language of the "commons" has had

some success in mobilising the public into activism in copyright law. It has been particularly attractive to libraries, cultural institutions, and copyright users. However, the discourse of the "commons" has not translated into substantial law reform, partly because the terminology suffers from vagueness and uncertainty. It has been open to attack and ridicule from copyright owners. For instance, Scott Martin, vice-president of intellectual property at Paramount Pictures, is scathing of the mythology of the public domain [47]. He complains: "Among the opponents of term extension there has been a tendency to misstate the impact of term extension on the public domain and to rely on slogans and myths in attempting to elevate the value of the public domain over the value of copyrights" [48]. More importantly, the judiciary has been hostile to such imagery. The correspondent from the American Open Technology Consortium considers the metaphorical dimensions of the debate over the copyright term: "'The Commons' and 'the public domain' might be legitimate concepts with deep and relevant histories, but they're too arcane for most of us" [49]. This comment reflects an anxiety about the place of history in contemporary law and an insecurity in reading and applying jurisprudence. These fears feed the conservatism of the law, and encourage a minimal positive elaboration of its ends and purposes. However, not all judges embrace such timidity. A notable exception is Justice Stevens, a dissenting judge in the case of *Eldred v Ashcroft.*

In his judgment Justice Stevens focuses extensively on statutory and judicial interpretation of the intellectual property term. His Honour considers the history of the Patent Act and the Copyright Act, and extensions of both the patent term and the copyright term. Justice Stevens questions the adequacy of the historical analysis, as provided in the majority judgment: "A more complete and comprehensive look at the history of congressional action under the Copyright/Patent Clause demonstrates that history, in this case, does not provide the 'volume of logic,' necessary to sustain the Sonny Bono Act's constitutionality" [50]. Justice Stevens observes:

> "To be sure, Congress, at many times in its history, has retroactively extended the terms of existing copyrights and patents. This history, however, reveals a much more heterogenous practice than respondent contends. It is replete with actions that were unquestionably unconstitutional ... The history of retroactive extensions of existing and expired copyrights and patents, though relevant, is not conclusive of the constitutionality of the Sonny Bono Act. 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." [51]

Justice Stevens maintains: "Judicial opinions relied upon by the majority interpreting legislative enactments have either been implicitly overruled or do not support the proposition claimed" [52]. His Honour concludes: "If Congress may not expand the scope of a patent monopoly, it also may not extend the life of copyright beyond its expiration date" [53]. The judgment is interesting — it provides both an understanding of the diversity and significance of history, and an awareness of its limits.

So to what extent are historical arguments influential? There was little consensus amongst judges about the history of copyright law. The accounts provided of the development of copyright law were largely self-serving. As Kathy Bowrey has observed elsewhere:

> "In reading about copyright's history it soon becomes apparent that various writers are so engrossed in their own experiences that they can only meaningfully engage with others who come to the subject from a similar point of view. Writers from different disciplines are ignored, discounted, 'corrected' or ridiculed." [54]

The majority judgment dismiss the *amicus curiae* judgment of leading historians of intellectual property. They instead prefer a highly selective and politicised reading of the past. Justice Breyer is willing to draw together a range of historical arguments to support his argument that "limited places" did confine the copyright term. However, it might be difficult to recast such enlightenment ideals in modern terms of digital access. For his part, Justice Stevens harbours doubts the relative significance of such matters. Such partial responses might give rise to pessimism about whether a consideration of history is worthwhile in such debates at all.

Nonetheless, it is arguable that history does have an important role to play in understanding copyright law reform. As Paul Edward Geller comments, there is a need to draw hypotheses from history to frame the future development of copyright law: "Facing both backward and forward, we are tempted to interpret history to anticipate or to influence the future. This temptation is now strong in the field of copyright where rapid media changes seem to be compounding uncertainties. For this very reason, it would be foolhardy to indulge in prophecy" [55]. What is needed, though, is a better appreciation of the history of copyright law in all its complexity and confusion.

Part Two — "Goodbye To All That": Constitutional Law and the First Amendment

Peter Jaszi has made the interesting point that he felt as though his testimony to Congress opposing the implementation of the Sonny Bono Act was not heard [56]. He observed:

> "In the current climate, it is no longer sufficient to derive indirect arguments for the preservation of the public domain from constitutional first principles, as it were. It is not enough to insist that because copyrights are constitutionally limited in duration, or constitutionally restricted only to original works of authorship, it follows that the Patent and Copyright Clause necessarily reflects pro-public-domain values on the part of the framers. A characteristic of recent expansionist arguments in the field of copyright has been to minimize or trivialize the public domain. Too often, defenders of the public domain have been overcomplacent in shaping their arguments, imagining that they do not have to make the case for the importance of the informational commons because it is somehow constitutionally secured. Today, however, defenders of the public domain can no longer rely on arguments cast in an essentially negative form: That some proposed piece of legislation, which will impoverish the public domain in order to contribute to the economic well-being of the U.S. information and entertainment industries, does not measure up to an abstract standard of constitutional

> justification because it fails to motivate the creation (or distribution) of particular new works." [57]

Jaszi believed that his constitutionally grounded discourse fell on deaf ears, because he felt Congress has become accustomed to listening to copyright discussions with an ear for international trade considerations rather than constitutional considerations. He deduces from his experience that discourse about the public good may have been eclipsed by the focus on industry and trade.

Nonetheless, Eric Eldred and Lawrence Lessig went ahead and brought a constitutional challenge against the validity of the Sonny Bono Act. They maintained first of all that the extension of the copyright term was beyond the constitutional power of Congress, because the protection of copyright was not for "limited times" as required by the Copyright Clause. Second, it argued that the legislation amounted to a violation of freedom of speech interests guaranteed under the First Amendment. Such arguments caused a ruckus in the Supreme Court of the United States. For the majority, Justice Ginsburg argued that Congress had the authority under the Copyright Clause to extend the term of copyright protection. She maintained that the monopolies granted by copyright law were compatible with the freedom of speech interests guarded by the First Amendment. In a strong dissent, Justice Breyer and Justice Stevens maintained that Congress had gone beyond the scope of its constitutional power under the Copyright Clause. They argued that the practical impact of the legislation would jeopardise the freedom of speech interests protected under the First Amendment.

In the leading majority judgment, Justice Ginsburg engaged in a defence of judicial quietism: "Rather than subjecting Congress' legislative choices in the copyright area to heightened judicial scrutiny, we have stressed that 'it is not our role to alter the delicate balance Congress has labored to achieve'" [58]. Elaborating upon academic arguments about the role of the judiciary [59], Justice Ginsburg concludes:

> "As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals." [60]

Justice Ginsburg is critical of the decision of Justice Breyer to import policy arguments: "Moving beyond the bounds of the parties' presentations, and with abundant policy arguments but precious little support from precedent, he would condemn Congress' entire product as irrational " [61]. However, the conservative members of the Supreme Court of the United States were accused of being inconsistent in their interpretation of constitutional powers, taking a strong role in determining the ambit of its commerce power, but deferring to Congress in respect of the Copyright Clause [62].

In any case, Justice Ginsburg claims that the limited monopolies provided by copyright law are compatible with the free speech principles protected under the First Amendment:

> "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. As was noted in *Harper & Row, Publishers, Inc v Nation Enterprises:* "[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"." [63]

Her Honour maintains that a number of judicial doctrines in copyright law contain accommodations of free speech interests protected by the First Amendment. In particular, she mentions the idea/expression distinction, the defence of fair use, the exceptions for cultural institutions, and the fairness in music licensing legislation.

First, Justice Ginsburg argues that copyright law contains built-in First Amendment accommodations — most notably the distinction between ideas and expression, under which only the latter is eligible for copyright protection. She recalled that in *Harper & Row, Publishers, Inc v Nation Enterprises* the Supreme Court of the United States observed that this "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" [64]. She maintains that the idea/expression dichotomy facilitates marketplace competition so that new works are not restrained by rights to old ones. Justice Ginsburg also reiterates the decision on originality in *Feist,* in which the Supreme Court stressed that facts in a copyrighted work become instantly available for public exploitation at the moment of publication [65]. This argument is a classic restatement of Melville Nimmer's case that copyright law and free speech are compatible [66]. The jurist argued that the distinction struck the right definitional balance between copyright and free speech. However, this shibboleth has becoming increasingly dated and questioned.

Justice Ginsburg fails to allude to the widespread scepticism about the adequacy of the doctrine. The problem is that the distinction between ideas and expression is difficult if not impossible to draw. This problem has only been compounded in the digital era, in which copyright works can be easily reduced to a digital form. As Peter Drahos observes:

> "An American realist-inspired approach might conclude that the distinction is used by individual judges to mask highly personal value judgments that are themselves influenced by a host of non-legal factors. This might be a theoretical explanation for the inevitable ad hocery that Judge Learned Hand suggested inevitably accompanies the judicial application of the distinction." [67]

Peter Jaszi suggests that "courts tend to downplay the fundamental contradiction in the goals of the copyright system by emphasizing the so-called idea/ expression dichotomy" [68]. As a result of its uncertain and indeterminate nature, the judicial doctrine provides scant protection for freedom of speech interests.

Second, Justice Ginsburg argues that the defence of fair use allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. Quoting the decision in *Harper & Row, Publishers, Inc v Nation Enterprises* [69], her Honour observed that the fair use defence affords considerable

"latitude for scholarship and comment" [70]. Citing *Campbell v. Acuff-Rose Music, Inc.* [71], her Honour stresses that even parody is capable of fair use [72]. In dissent, Justice Breyer provides the rejoinder:

> "The majority also invokes the "fair use" exception, and it notes that copyright law itself is restricted to protection of a work's expression, not its substantive content. Neither the exception nor the restriction, however, would necessarily help those who wish to obtain from electronic databases material that is not there — say, teachers wishing their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Such harm, and more, will occur despite the 1998 Act's exemptions and despite the other "First Amendment safeguards" in which the majority places its trust." [73]

A number of reservations could be placed about the defence of fair use as a bulwark against private censorship. The defence of fair use has been frequently read down, so that it does not deal with free speech interests. Notably, the case of *Rogers v Koons* established that the defence of fair use did not extend beyond parody to political criticism or social commentary [74]. Furthermore, the defence of fair use has been undermined by the operation of private contracts, and provisions in the Digital Millennium Copyright Act, which provide for special protection for technological protection measures. As a result, it would be fair to say that the defence of fair use provides protection of free speech interests, only in quite limited speech contexts.

Third, Justice Ginsburg maintains that the legislation supplements these traditional First Amendment safeguards with special exceptions for cultural institutions. Notably, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research" — if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. In dissent, Justice Breyer argues that the special exemptions for libraries and archives are subject to a number of important restrictions. This exemption, however, applies only where the copy is made for the specially listed purposes; it simply permits a library to make "a copy" for those purposes; it covers only "published" works not "subject to normal commercial exploitation" and not obtainable, apparently not even as a used copy, at a "reasonable price"; and it insists that the library assure itself through "reasonable investigation" that these conditions have been met. Justice Breyer despairs: "What database proprietor can rely on so limited an exemption — particularly when the phrase "reasonable investigation" is so open-ended and particularly if the database has commercial, as well as non-commercial, aspects?" [75].

The case of *Eldred v Ashcroft* demonstrates that there is a need for the judiciary to be vigilant to ensure that copyright law reforms do not have deleterious effects upon the freedom of political expression and communication. In his dissent, Justice Breyer addressed the concern of his colleagues that "our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress" [76]. His Honour maintained that the Supreme Court of the United States was perfectly entitled to rule that the statute in question was unconstitutional:

> "We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright

> protection," for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance — at the far outer boundaries of the Clause — is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens." [77]

Justice Stevens also dissented that there is a need for greater judicial scrutiny of Congress in this field: "Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure" [78]. He recalled the trenchant words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is" [79]. It should not be taken for granted that copyright law is compatible with freedom of speech.

The Supreme Court of the United States was deeply divided by the constitutional challenge posed by the Sonny Bono Act. The judgments did not only differ in the readings of historical precedent, but also in terms of approaches to copyright law doctrine and constitutional law. Writing the leading judgment for the majority, Justice Ginsburg was wary of political and philosophical discussion about the extension of the copyright term. She maintained that the doctrines of copyright law respected freedom of speech interests, and achieved a fair balance between the competing interests of stakeholders. By contrast, the dissenting judgments of Justice Breyer and Justice Stevens had less qualms about reviewing the decision-making of Congress. They considered whether the practical application and outcome of the legislation was in the best interests of freedom of speech. There was a fundamental difference in the judicial methods of reasoning and logic in dealing with the facts of the case. The divergences in judicial approach are most apparent in arguments about cultural heritage, economic and competition policy, and international trade.

Part Three — "Intellectual Purgatory": The Copyright Term and Cultural Heritage

In addition to concerns about freedom of speech, there were a number of *amicus curie* which argued that the law would have a deleterious effect on cultural heritage and new technologies [80]. Strongly influenced by post-modern ideas about authorship and creativity [81], the history of the development of Internet technologies and the experience of the open source movement [82], it is commonly argued that creativity in the arts and technology as well is best served by a culture of sharing — drawing upon a common heritage in a spirit of generosity and loose legal controls [83].

Curiously, Justice Ginsburg prefers to remain above the fray of the policy debate over the cultural impact of the copyright term extension. She only deals with the possible cultural benefits of the copyright term extension in the abstract. Justice Ginsburg is chary about addressing the practical consequences of the copyright term extension. She

does not engage with the *amicus curiae* briefs of cultural, educational, and collecting institutions, which detail the impact of transaction costs and clearance fees. By implication, Justice Ginsburg presents copyright law as a neutral and disinterested mediator between competing interests. She maintains that the marketplace will resolve problems with respect to the dissemination of cultural works. Her Honour believes that copyright owners are well-informed entrepreneurs who are motivated by self-interest and free to contract with copyright users. If they fail to grant permission or charge excessive royalties, it is not a problem of the law's making. Indeed Justice Ginsburg does not believe that it is the role of the court to intervene in the event of such market failure. Her Honour insists that such matters of market regulation are the preserve of government, rather than judicial, discretion.

Justice Ginsburg maintained that the legislation would promote the dissemination of American cultural works. She noted that Congress heard testimony from a number of prominent artists who each expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create. Her Honour is blithely unconcerned by reports that Congress was heavily lobbied by multinational entertainment corporations — such as Disney, Time-Warner, and BMG. This judgment supports a particular vision of copyright law as an instrument for promoting trade in the cultural output that comes within its purview [84]. Her Honour agreed with the Court of Appeals that "in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits" [85]. Justice Ginsburg also maintained that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works. She cited discussion in Congress that term extension would "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public" [86]. This decision enables entertainment companies to engage in the commodification of cultural works — amassing large holdings of copyright works and exploiting them over a long duration [87]. It means that new technological means of disseminating old works are closed to competition.

In his dissenting judgment, Justice Breyer discusses the serious cultural costs of the copyright term extension. His Honour comments:

> "This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear." [88]

The judge emphasizes that the statute imposes two kinds of public expression-related costs, which relate to the capacity of the copyright owner to deny permission to use a copyright work, or else charge an impost of royalties upon a copyright user.

First of all, Justice Breyer argues that the present statute will primarily benefit the holders of existing copyrights, and impose higher royalties than may be necessary to evoke creation of the relevant work. He comments that the 20 extra years of copyright

protection will result in the transfer of a substantial sum of royalties to copyright owners. Second, Justice Breyer is concerned that copyright extension imposes an onerous requirement upon all potential users of copyrighted works to obtain permission from the copyright owners:

> "The potential users of such works include not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds — those who want to make the past accessible for their own use or for that of others. The permissions requirement can inhibit their ability to accomplish that task. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope." [89]

Justice Breyer elaborates that there are a number of costs associated with the requirement to obtain permission from the copyright owner. First of all, it may prove expensive to track down or contract with the copyright holder. Second, the holder may prove impossible to find. Third, the holder when found may deny permission either outright or through misinformed efforts to bargain. The Congressional Research Service has found that the cost of seeking permission "can be prohibitive" [90].

The legislation will ensure that copyright estates — keepers of the flame — will have greater control over the economic exploitation and artistic integrity of a range of classic artistic and cultural works [91]. As one wit noted, the case creates a "dead poets society" [92]. The decision will mean that literary works such as Robert Frost's New Hampshire poems, Margaret Mitchell's *Gone With the Wind* [93], H.G. Well's *The Shape Of Things To Come* [94] and James Joyce's *Ulysses* [95] will remain in private hands for a longer time. The judgment will also harm the public performance of musical works. Music fees may prevent orchestras from performing early 20th-century music — such as George Gershwin and Aaron Copland, as well as works of great foreign composers such as Igor Stravinsky, Jean Sibelius, and Maurice Ravel. Copyright estates will be able to control the interpretation of dramatic works. For instance, the Beckett estate will be able to prolong its strict interpretation of *Waiting for Godot* [96].

The legislation will have a severe impact upon cultural institutions — such as libraries, galleries, orchestras. It will interfere with the activities of electronic publishers of public domain works — such as Eric Eldred's Eldritch Press, the Internet Archive, and Project Gutenberg. In his dissenting judgment, Justice Breyer observes:

> "Similarly, the costs of obtaining permission, now perhaps ranging in the millions of dollars, will multiply as the number of holders of affected copyrights increases from several hundred thousand to several million. The costs to the users of nonprofit databases, now numbering in the low millions, will multiply as the use of those computer-assisted databases becomes more prevalent. And the qualitative costs to education, learning, and research will multiply as our children become ever more dependent for the content of their knowledge upon computer-accessible databases — thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge." [97]

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South,

"consumed approximately a dozen man-hours" per work [98]. The College Art Association says that the costs of obtaining permission for use of single images, short excerpts, and other short works can become prohibitively high [99]. The National Writers Union provides similar examples [100]. Petitioners point to music fees that may prevent youth or community orchestras, or church choirs, from performing some 20th century music [101]. Copyright extension caused abandonment of plans to sell sheet music of Maurice Ravel's *Alborada Del Gracioso* [102]. Furthermore electronic libraries such as the Internet Archive, Prelinger Archives and Project Gutenberg will find it difficult to provide digital access to historical texts, audio-visual works, and literary works, which are subject to the control of copyright owners.

In the dissenting judgments, Justice Breyer and Justice Stevens doubt whether the copyright term extension will promote the useful arts by providing incentives to restore old movies. They are instead sympathetic to the claims of *amicus curiae* for the appellants that the legislation will result in a greater number of "orphaned" films. These are films that cannot be restored and distributed by the copyright owners because the owners cannot be identified. The American Film Heritage Association argued that film makers and new authors who produce historical film documentaries will lose a great deal of valuable public domain footage through copyright extension:

> "Films from the 1920's could contain as much as 75% of motion picture works no longer owned by anyone, with no traceable lineage, called Orphan works. The studios own a very small portion of films produced in this period. Orphan films comprise the bulk of this film era. Those Orphan films now owned by defunct companies and under copyright are ready for preservation by commercial archives. Commercial archives preserve orphan works at no cost to the public, in exchange for the right to market the works through public domain. Those non-studio Orphan films presently preserved by commercial archives will be abandoned because public domain allowed the economic incentive to preserve them." [103]

Similarly, Michael Agee and Hal Roach Studios, restorers of fragile and classic film and television productions, such as the entire Laurel and Hardy "talking" body of work, made a submission to the Court [104]. They complained that the Sonny Bono Act frustrates the process of film preservation and restoration, impedes commercial and non-commercial attempts to give access to the nation's film heritage.

In response to the decision, the defenders of the public domain have been forced to rely upon other strategies to preserve access to cultural heritage. Project Gutenberg is an organisation which is committed to making available the electronic version of public domain texts. Its civil disobedience is not just rhetoric, but practical. The founder of the electronic publisher, Michael Hart, observes:

> "In the U.S.A., no copyrights will expire from now to 2019! It is even much worse in many other countries, where they actually removed 20 years from the public domain. Books that had been legal to publish all of a sudden were not. Friends told me that in Italy, for example, all the great Italian operas that had entered the public domain are no longer there. Same goes for the United Kingdom. Germany increased its copyright term to more than 70 years back in the 1960s. It is a domino effect. Australia is the only country I know of that has officially stated

> they will not extend the copyright term by 20 years to more than 70." [105]

Project Gutenberg of Australia takes advantage of the short period of copyright protection in Australia, which is for the life of the author plus fifty years for most copyright works. It has put material online in Australia, which has fallen into the public domain in that jurisdiction, but would still be in copyright protection in Europe and the United States [106]. Consequently, Project Gutenberg of Australia is promoted as a "treasure-trove of literature" — "a treasure found hidden with no evidence of ownership" [107]. In this haven, the works of Fyodor Dostoevsky, George Orwell, Margaret Mitchell, and Virginia Woolf are made freely available online. It might be an infringement to download those texts in the United Kingdom or the United States. However, any potential litigator would need to overcome problems of jurisdiction. As a result, copyright owners are lobbying to ensure that the extension of the copyright term in Europe and the United States becomes the international norm.

Part Four — "Rhapsody In Blue": Economic Jazz and Competition Policy

It is extraordinary that the law and economics movement [108] had so little influence in the debate over the extension of the copyright term. Given the central economic role of intellectual property rights [109], one would have thought that economic analysis would be germane to the analysis of the duration of copyright law. Strangely, economic considerations did not come to the fore in the legislative debate over the Sonny Bono Act. There was little empirical work performed as to the relative economic costs and benefits of the legislation [110]. Nonetheless, Congress went ahead regardless and implemented the legislation. This is remarkable given that modern democracies are so commonly accused of being driven by the dictates of economic rationalism. There is a need to explain how Congress could decide to implement such a decision in light of the economic evidence. There was a greater emphasis upon economics in the constitutional challenge. The majority judgment written by Justice Ginsburg was largely scornful of the *amicus curiae* brief of the economists. The dissenting Justice Stevens briefly mentioned economic arguments. His colleague, Justice Breyer, was the only one to bring up economics to any great effect.

A group of seventeen economists — including five Nobel Laureates — made an *amicus curiae* submission [111]. In a keynote address, Lessig observed:

> "In our case, in *Eldred v. Ashcroft,* we have this brief filed by 17 economists, including Milton Freedman, James Buchanan, Ronald Kost, Ken Arrow, you know, lunatics, right? Left-wing liberals, right? Freedman said he'd only join if the word "no-brainer" existed in the brief somewhere, like this was a complete no-brainer for him. This is not about left and right. This is about right and wrong. That's what this battle is." [112]

The *amicus curiae* submission made a number of circumspect points about the economic effect of the legislation. First, the longer term for new works provides only a

marginal increase in anticipated compensation for an author. Second, the term extension for existing works makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made. Third, the legislation extends the period during which a copyright holder determines the quantity produced of a work, and thus increases the inefficiency from above-cost pricing that is by lengthening its duration. Finally, the legislation extends the period during which a copyright holder determines the production of derivative works, which affects the creation of new works that are built in part out of materials from existing works.

As a matter of constitutional interpretation, Justice Ginsburg thinks it unlikely that the Founding Fathers would conceive of the debate over copyright duration in terms of economic outcomes:

> "Justice Breyer several times places the Founding Fathers on his side. It is doubtful, however, that those architects of our Nation, in framing the "limited Times" prescription, thought in terms of the calculator rather than the calendar." [113]

As a part of wider discourse about judicial activism, Justice Ginsburg maintained that it was the proper role of Congress, rather than the courts, to be engaged in a discussion about the economic consequences of legislation: "Calibrating rational economic incentives, however, like 'fashion[ing] ... new rules [in light of] new technology', is a task primarily for Congress, not the courts" [114]. Her Honour noted that Congress heard testimony from a number of prominent and successful artists — such as Quincy Jones, Bob Dylan, Carlos Santana, and Don Henley. She observed that each expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create. It is striking that her Honour would prefer to accept anecdotal evidence — rather than systematic evidence — about the economic impact of the Sonny Bono Act.

Justice Breyer argues that the statute's extension of copyright protection cannot be justified by the traditional economic rationale of copyright law. His Honour observes that the extension will not act as an economic spur encouraging authors to create new works. Drawing extensively upon the evidence of the *amicus curiae,* Justice Breyer argues that the commercial life of a copyright work will have been exhausted by that time:

> "No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term) must be far smaller. And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), it seems fair to say that, for example, a 1% likelihood of earning $100 annually for 20 years, starting 75 *years into the future,* is worth less than seven cents today." [115]

Justice Breyer asks the rhetorical question, "What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?" [116] His point is that the incentive theory of copyright law provides no support for the extension of the copyright term.

In the wake of the decision of the Supreme Court of the United States, Lawrence Lessig has put forward a fall-back position, which he has been developing in his books [117]. He maintains that copyright law should be transformed into a registration system, such as patent and trademark law, with renewable protection:

> "Patent holders have to pay a fee every few years to maintain their patents. The same principle could be applied to copyright. Imagine requiring copyright holders to pay a tax 50 years after a work was published. The tax should be very small, maybe $50 a work. And when the tax was paid, the government would record that fact, including the name of the copyright holder paying the tax. That way artists and others who want to use a work would continue to have an easy way to identify the current copyright owner. But if a copyright owner fails to pay the tax for three years in a row, then the work will enter the public domain. Anyone would then be free to build upon and cultivate that part of our culture as he sees fit." [118]

Such a model has been developed by members of the Chicago school of law and economics. Landes and Posner put forward the solution of perpetual protection of copyright through a registration system of renewable protection [119]. Posner observes: "The solution might be a system of indefinitely renewable copyrights. The initial grant might be for twenty-five years, renewable thereafter every five years. A stiff fee would assure that most works returned to the public domain. But those works requiring continuing investment or careful management to avoid consumer exhaustion would continue to be owned property" [120]. The authors engage in an economic analysis of the expected duration of copyrights and trademarks, using data on registrations and renewals over the past 90 years. They insist that a system of indefinite copyright renewals need not starve the public domain. Landes and Posner finish with the tongue-in-cheek conclusion that this system of copyright protection would be free of the costs associated with legislative lobbying by copyright owners and users alike.

Although it may seem to be an elegant conceit, this law and economics model of indefinite, renewable protection would be diabolical in practice. There are dangers in turning copyright into a registration system - such as trademark or patent law. There would need to be a large register because originality is pitched at such a low level. Such a regime would need to be administered by a bureaucracy, like the Patent and Trademark Office. This scheme would have invidious effects in terms of justice and equity. Artists and creators would risk being disenfranchised if they could not afford registration fees. By contrast, the main media conglomerates — the Disneys of the world — would be able to easily pay renewal fees to secure perpetual protection. Moreover, the trend in international copyright law is towards the removal of formalities in copyright law [121]. Most notably, the United States has been removing formal requirements for copyright subsistence, in line with the Berne Convention. Most importantly, the proposal concedes too much in its attempt to salvage public domain. It gives an unwarranted legitimacy to the indefinite protection of copyright works. A stronger rearguard action would seek to prevent the Sonny Bono Act from becoming a legislative model for other countries, a *de facto* international standard.

The law and economics movement has been more influential in other jurisdictions, which have given greater weight to concerns about economic efficiency and competition policy. In Australia, the Intellectual Property and Competition Review considered whether it was appropriate to extend the term of copyright extension to the same duration as the United States and the European Union [122]. A number of copyright owners argued in favour of extension of term, pursuing the general theme that Australia's competitiveness is linked to maintaining parity with our trading partners in an increasingly globalised market. However, other submissions were also put that such an extension would be 'anti-competitive and monopolistic' and that the additional period would impose unnecessary transactional costs for business and ultimately consumers — it would create significant barriers to access and innovation. During consultation, the Committee specifically sought from the Australian Copyright Council evidence that an extension would confer benefits in excess of the costs it would impose. No such evidence has been provided. Consequently, the Committee was not convinced of the merit in proposals to extend the term of copyright protection, and recommends that the current term should not be extended. It also recommended that no extension of the copyright term should be introduced in future without a prior thorough and independent review of the resulting costs and benefits.

There is a need for governments contemplating an alteration of the copyright term to be properly informed about the benefits and costs of such legislative changes. Independent committees like the Intellectual Property Competition Review Committee are best placed to undertake such research because of their expertise in the field of copyright law. Such organisations are also better insulated against the insidious influence of corporate lobbying. Sam Ricketson observed that policy development in this field needs to be based upon sound empirical evidence:

> "What is required, therefore, are national and international studies that seek to ascertain, on a factual basis, the appropriate term for copyright protection, a kind of cost/benefit approach that seeks to evaluate the public and private costs and benefits of different terms of protection. It is hardly likely that such inquiries will provide precise conclusions. However, what they should do is to indicate the broad bands within which protection should be fixed ... Far more factual information is required before proposals can be formulated, and, even then, these will only be crude approximations." [123]

Furthermore the scope of such studies should not be limited to the issue of the extension of copyright term. Thus, even if there are practical benefits that flow from the adoption of a general minimum term of protection, there should be some investigation as to whether the term of protection should be shortened.

Part Five — "A Compelling Enticement": International Trade and Harmonisation

In congressional hearings on the extension of the copyright term, committee members were of the consensus that the goal of copyright law is to improve the competitive

position of companies that have significant investments in inventories of copyright works [124]. Jack Valenti of the Motion Picture Association of America observed:

> "Copyright term extension has a simple but compelling enticement: It is very much in America's economic interests. At a time when our marketplace is besieged by an avalanche of imports, at a time when the phrase 'surplus balance of trade' is seldom heard in the corridors of Congress, at a time when our ability to compete in international markets is under assault, whatever can be done ought to be done to amplify America's export dexterity in the global arena." [125]

In 1995 the European Union extended the copyright term for its member states to the life of the author plus 70 years. The change was a consequence of a Directive of the European Commission in 1993, which required member states to increase their basic term of protection. Ostensibly, the purpose of the Directive was to harmonise the laws of European Union members, as national laws ranged from between life plus 50 years to life plus 70 years. However, as one commentator observes: "Rather than shifting down to the Berne standard, the Directive has gravitated to the term adopted under German law. It seems that this was done with limited substantive debate of the costs and benefits involved in adopting a longer term of protection" [126]. There is some academic comment that such a harmonisation of the copyright term was only accomplished in the European Union after intensive lobbying from copyright owners [127].

There was a lackadaisical attitude to the extension of the copyright term in the European Union. In light of the heated debates over the copyright term in the past, Sherman and Bently were puzzled that there was so little policy discussion about the adoption of the European Duration Directive in the United Kingdom [128]. They speculated upon the reasons for this lack of controversy, concluding: "It is rare, in the twentieth century, that we can debate issues and reach conclusions according only to our own perceptions of policy; usually the most pressing concern is whether our laws comply with international norms already reached by interest-group lobbying" [129]. An article from that period by Silke von Lewinski gives a sense of this blasé spirit [130]. She discusses the extension of the copyright term in the European Union in terms of being a technical amendment needed to produce harmonisation. Her dry and technocratic discussion of the copyright term extension is in marked contrast to her international counterparts. Ricketson, for instance, is trenchantly critical of the push for the extension of the copyright term in the very same journal issue [131]. The contrast is even greater between European commentators such as von Lewinski and engaged American intellectuals such as Lawrence Lessig, Peter Jaszi and David Bollier.

Justice Ginsburg of the Supreme Court emphasized that the legislation was a rational exercise of the legislative authority conferred by the Copyright Clause:

> "As respondent describes, a key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years. Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for

> American and other authors to create and disseminate their work in the United States." [132]

Justice Ginsburg quotes with approval an article by Shirla Perlmutter [133] which argued that many benefits to knowledge and culture that can be gained through active participation in the international copyright system — including the ability to ensure adequate protection for U.S. works abroad, to enhance dissemination both within the United States and online, to encourage cross-border advances in knowledge and culture, and to assist in shaping appropriate international norms [134]. Her Honour also relies upon a piece by Graeme Austin, which maintains that appeals in the Eldred briefs to history and theory are insular and provincial because of a failure to acknowledge the reality of copyright law's international context [135]. However, this vision of international copyright is hardly very cosmopolitan. The overriding interest of the writers cited was with boosting the economic position of United States. There was little concern about the impact of the copyright term extension on other countries — in particular, from an antipodean point of view there is no regard about Australia.

In his dissent, Justice Breyer challenged the legislative justification of the bill as a means to ensure American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade. He commented:

> "I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant's monopoly power, likely leading to higher prices both at home and abroad, *solely* in order to produce higher foreign earnings. That objective is not a *copyright* objective. Nor, standing alone, is it related to any other objective more closely tied to the Clause itself. Neither can higher corporate profits alone justify the grant's enhancement. The Clause seeks public, not private, benefits." [136]

This complaint that the legislation is a form of corporate welfare is echoed elsewhere. David Bollier considers the dispute in the context of the information commons: "The law is a clear case of corporate welfare for major corporations and amounts to a tax on the public and authors who want to use the public domain to create new works" [137].

Justice Breyer comments that the U.S. Congress was not compelled to pass the Sonny Bono Act because of international treaty-making obligations. He observes that, notwithstanding important institutional and philosophical differences, the common law system of the United States and the civil tradition of European countries have been able to peacefully co-exist in the past — for instance, in relation to Europe's traditional respect for moral rights. Justice Breyer dissented that the extension of the copyright term was not justified by the need for international uniformity of terms: "Although it can be helpful to look to international norms and legal experience in understanding American law, in this case the justification based upon foreign rules is surprisingly weak" [138]. His Honour identifies a number of discrepancies between the United States model and the European standard. With respect to those works the American statute produces an extended term of 95 years while comparable European rights in "for hire" works last for periods that vary from 50 years to 70 years to life plus 70 years. Neither does the statute create uniformity with respect to anonymous or pseudonymous works. The statute does produce uniformity with respect to copyrights in new, post-1977 works attributed to natural persons. However, these works constitute only a minority of works that retain commercial value after 75 years. Justice Breyer questions

what, if any, benefit this partial future uniformity might achieve. He doubts whether the legislation would produce any incentive for American authors to create new work.

In addition to international concerns, there was also some discussion of demographical, economic and technological changes. Justice Ginsburg maintained: "In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works" [139]. Justice Breyer derides such justifications: "The weakness of these final rationales simply underscores the conclusion that emerges from consideration of earlier attempts at justification: There is no legitimate, serious copyright-related justification for this statute" [140]. In the end, such miscellaneous matters were not decisive in the debate.

In the aftermath of the *Eldred* decision, there is much fear that the United States will use a range of forums to push the extension of the copyright term at an international level. As Peter Drahos and John Braithwaite observe: "U.S. bilateralism on intellectual property rights remains relentless" [141]. United States trade representatives have already raised the matter of the copyright term in bilateral negotiations with a number of countries. Article 16.4.4 of the United States-Singapore Free Trade Agreement [142] establishes that the term of copyright protection shall be at least the life of the author plus 70 years, or at least 70 years from first publication of the work. Article 17.5.4 of the United States-Chile Free Trade Agreement [143] provides for similar terms. There are concerns that the United States will push for an extension of the copyright term in a Free Trade agreement with Australia [144]. Speaking about the *Eldred* case, economist John Quiggan observed:

> "Far from removing trade barriers that harm us anyway, the U.S. wants us to replace economically and socially sound policies with those dictated by the lobbying power of American interest groups ... These groups have promoted their interests, with much vigour and few scruples, through their Australian hired guns, but have so far had limited success. Under the kind of agreement that is being contemplated at present, the U.S. lobby groups would have as many second chances as they need. Far from promoting free trade, they want to turn Australia into a monopolists' playground." [145]

Some countries are even contemplating further extensions of the copyright term beyond the standards set by the United States. The Mexican Congress is considering a revision of the copyright law well beyond its obligations under the NAFTA agreement. Among other changes the law will extend the term of copyright from life-plus-70 to life-plus-100, and at the end of that term, the Mexican government has the right to charge royalties for works in the "public domain" [146]. The United States will also push for the extension of the copyright term to be included in multilateral agreements. They will engage in forum-shopping across a range of fora — such as the Berne Convention, the TRIPs agreement under the World Trade Organisation, and the World Intellectual Property Organisation treaties.

Part Six — "If I Could Turn Back Time": Perpetual Copyright

In Congressional hearings in 1995, Peter Jaszi first raised the spectre of a constitutional challenge to legislation extending the copyright term:

> "A cynical observer might be forgiven the suspicion that it represents a down payment on perpetual copyright on the installment plan, thus raising obvious and substantial constitutional issues. Nor does the legislation in its present form appear to satisfy the constitutional mandate to promote science and the useful arts. But even if these constitutional concerns are put to one side, the legislation, as it stands, cannot be justified within the framework of the sound approach to evaluating copyright reform proposals, which have served Congress so well for more than two centuries." [147]

The Supreme Court of the United States was concerned about the wider significance of the decision. The majority feared that the invalidation of the 1998 Act would in turn jeopardize the 1976 Act. In other words, they were concerned about the retrospective impact of the decision on past legislation. By contrast, the minority were concerned that the validation of the 1998 Act would create a "perpetual copyright". They suggested that a failure to act would mean that the government would be able to extend the copyright term on future occasions, without judicial restraint.

The majority of the Supreme Court was alarmed by the spectre of a successful challenge throwing doubt upon the validity of the 1976 statute [148]. Justice Ginsburg argued that, if the calculations of the *amicus curiae* brief of the economists were correct, then the U.S. Copyright Act 1976 would be invalid as well as the Sonny Bono Act, because it would secure 99.4% of the value of a perpetual term [149]. Her Honour concluded with the nightmarish vision:

> "If petitioners' vision of the Copyright Clause held sway, it would do more than render the CTEA's duration extensions unconstitutional as to existing works. Indeed, petitioners' assertion that the provisions of the CTEA are not severable would make the CTEA's enlarged terms invalid even as to tomorrow's work. The 1976 Act's time extensions, which set the pattern that the CTEA followed, would be vulnerable as well." [150]

There was considerable argument in the Supreme Court of the United States as to whether the 1976 act would be affected by invalidating the 1998 Act. In the oral proceedings, a number of judges expressed reservations about the impact of invalidating the 1998 Act. Chief Justice Rehnquist emphasized that the absence of past constitutional challenges was significant: "Well, doesn't that itself mean something, Mr. Lessig? The fact that they were never challenged, perhaps most people, and perhaps everybody felt there was no basis for challenging them" [151]. Justice O'Connor and Justice Kennedy also cast doubts upon the petitioners' arguments [152]. It is curious that the majority of the Supreme Court are only willing to consider the practical impact of the legislation in this limited context, and not in relation to the economic consequences of the extension of the copyright term. Perhaps the judges are concerned that invalidating the statute will generate additional legal work — whereas the economic realities will not necessarily burden the Court.

In his dissenting judgment, Justice Breyer rebutted such scaremongering by the majority of the court: "I do not share the Court's concern that my view of the 1998 Act could automatically doom the 1976 Act" [153]. His Honour observed that unlike the 1998 statute, the 1976 Act thoroughly revised copyright law and enabled the United States to join the Berne Convention. Consequently, the balance of copyright-related harms and benefits is far less one-sided [154]. Justice Breyer notes that the same is true of the 1909 and 1831 Acts, which, in any event, provided for maximum terms of 56 years or 42 years while requiring renewal after 28 years, with most copyrighted works falling into the public domain after that 28-year period, well before the putative maximum terms had elapsed. In any event, his Honour observes that the case focuses only on the 1998 Act and it is therefore unnecessary to consider the constitutionality of other copyright statutes [155].

In the footnotes, Justice Ginsburg stresses that there is nothing in the statutory text that installs a perpetual copyright [156]. She observes that the House and Senate Reports accompanying the Sonny Bono Act reflect no purpose to create perpetual copyright. Responding to an inquiry whether copyrights could be extended "forever," Register of Copyrights Marybeth Peters emphasized the dominant reason for the legislation:

> "There certainly are proponents of perpetual copyright: We heard that in our proceeding on term extension. The Songwriters Guild suggested a perpetual term. However, our Constitution says limited times, but there really isn't a very good indication on what limited times is. The reason why you're going to life-plus-70 today is because Europe has gone that way." [157]

Notably, the Senate Report expressly acknowledged that the Constitution "clearly precludes Congress from granting unlimited protection for copyrighted works" [158], and disclaimed any intent to contravene that prohibition. Members of Congress instrumental in the passage of the Sonny Bono Act spoke to similar effect. Representative Howard Coble (R-North Carolina, 6th District) observed that "copyright protection should be for a limited time only" and that "[p]erpetual protection does not benefit society" [159]. Furthermore, Congressional witnesses disavowed any intention of implementing a perpetual copyright term. However, Justice Ginsburg conveniently ignores that the statute was named after a member of Congress, who, the legislative history records, "wanted the term of copyright protection to last forever" [160].

Justice Breyer nevertheless insists that the "economic effect" of the Copyright Extension Act is to make the copyright term "virtually perpetual" [161]. He observes that the legislation creates a copyright term worth 99.8% of the value of a perpetual copyright:

> "The economic effect of this 20-year extension — the longest blanket extension since the Nation's founding — is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. 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." [162]

His Honour Justice Stevens also dissented on similar grounds: "It is important to note, however, that a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights. More importantly, as the House of Lords recognized

when it refused to amend the Statute of Anne in 1735, unless the Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges ad infinitum under the majority's analysis" [163]. It is a strange regression that the law should lapse back into providing virtually perpetual protection of copyright works — when the Statute of Anne was supposed to guard against such a fate.

Despite judicial prevarication, the *New York Times* spoke of the public domain in the past tense: "In effect, the Supreme Court's decision makes it likely that we are seeing the beginning of the end of public domain and the birth of copyright perpetuity. Public domain has been a grand experiment, one that should not be allowed to die. The ability to draw freely on the entire creative output of humanity is one of the reasons we live in a time of such fruitful creative ferment" [164].

Conclusion

The failure of the *Eldred* case highlights the need to address the problematic politics of Congress in the field of copyright law. In the United States, the Sonny Bono Act was passed with minimal debate. The legislation was undemocratic in spirit. Heavily lobbied by copyright owners, Congress was the captive of corporate interests, and acceded to demands for legislative reforms. The politicians largely ignored the voices of copyright users who protested against such changes. There was little debate about the long term impact of the legislation upon economic, cultural and technological changes. The judgment in the *Eldred* case will have an important impact in terms of educating the public about the role of the Congress in copyright law-making. The spokesman for the Electronic Frontier Foundation, Cory Doctorow, said:

> "I hope this case becomes a rallying point for people who care about the public domain, and this issue, which has been so obscure and hard to understand for most people, creates a more mainstream dialogue in which creators and audiences come to realize how important the public domain is." [165].

In the future, there must be a much more wide-ranging pragmatic debate about the benefits and costs, and the broader implications of copyright law reform. It would wise to place greater reliance and trust upon independent expert committees to fully explore the policy issues. To ensure that governments do not become the captive of corporate interests, there needs to be greater political representation of the interests of copyright users in the law reform process.

The *Eldred* case also highlights the role of the courts in gatekeeping the economic agenda, and reaffirming its ideological merits and silences. The majority of the Supreme Court of the United States subscribed to a philosophy of political quietism, and acted with abject deference towards the decisions of Congress. They were shy about making judgments on policy matters. The majority merely reiterated the main symbolic policy objectives of Congress. They were reluctant to consider the practical, instrumental effects of the legislation. The dominant discourse was one of economic investment and trade, and international harmonisation and uniformity. Matters of history, culture and freedom of speech were marginalised. Jack Valenti of the Motion Picture Association of America was positive about the decision:

> "We are pleased that the Court has reaffirmed the absolute authority of Congress to set copyright terms. We have always maintained and the law has long-recognized that copyright, whose aim it is to provide incentive for the creation and preservation of creative works, is in the public interest. That is why this ruling is a victory not solely for rights holders but also for consumers everywhere." [166].

However, there are a number of possible antidotes to this pallid jurisprudence. There is a need for cause lawyering to bring forward public test cases in the field of copyright law. Lawrence Lessig and his fellow lawyers played an important role in litigating the *Eldred* case. The role of *amicus curiae* is certainly an important one, too, in highlighting the implications of disputes. Unfortunately, in the *Eldred* case, the judges only paid limited attention to the submissions made on the extension of the copyright term. The judiciary would be more socially and culturally authoritative if it was willing to freely engage in a robust debate about the policy consequences of copyright legislation. The judgment of Justice Breyer shows the way forward for such an engaged jurisprudence. Furthermore, there is a need, now more than ever, for a critical reading of judicial decisions in this field.

The supporters of the commons claimed the decision of the Supreme Court was a significant moral victory. This may in part be wishful thinking, a desire to believe that the long litigation was not in vain. In the wake of the verdict, Lawrence Lessig commented:

> "It has often been said that movements gain by losing in the Supreme Court. Some feminists say it would have been better to lose Roe, because that would have built a movement in response. I have often wondered whether it would ever be possible to lose a case and yet smell victory in the defeat. I'm not yet convinced it's possible. But if there is any good that might come from my loss, let it be the anger and passion that now gets to swell against the unchecked power that the Supreme Court has said Congress has ... I will always be grateful to Eric Eldred, and our other plaintiffs, for putting his faith in this case. I will always regret not being able to meet that faith with the success it deserves. What the Framers of our Constitution did is not enough. We must do more." [167].

However, the copyright users have experienced difficulties in mounting a rearguard defence. The so-called Eric Eldred Act proposed by Lawrence Lessig is a poor compromise [168]. Indeed, the indefinite renewal of copyright protection might create further complications. The Creative Commons project seeks to build upon the language of the commons [169]. It hopes to use contract law and licensing to enable widespread public access to intellectual works while safeguarding against exploitative uses. As imaginative as such initiatives are, it is arguable that more radical action is needed to defend the intellectual commons from incursions by private owners. In particular, there is a need to learn from the mistakes of the United States and the European Union, and prevent the Sonny Bono Act from becoming an international norm in other jurisdictions.

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5. The other nine plaintiffs were Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., and Dover Publications, Inc.

6. Fourteen *amici* supported Eric Eldred in the Supreme Court, including: College Art Association, Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage; five constitutional law professors; Eagle Forum Education & Legal Defense Fund and Association of American Physicians and Surgeons; seventeen economists; Free Software Foundation; Hal Roach Studios and Michael Agee; Intel Corporation; fifty-three intellectual property law professors; Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation; fifteen library associations; National Writers Union et al.; Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, Organization of American Historians, H-Net; Malla Pollack; and, Progressive Intellectual Property Law Association and Union for the Public Domain.

7. Twenty *amici* supported the government in the Supreme Court, including: American Intellectual Property Law Association; ASCAP, BMI et al.; Amsong, Inc; AOL Time Warner, Inc; Association of American Publishers et al.; The Bureau of National Affairs,

Inc.; Symphonic and Concert Composers; Directors Guild of America et al.; Dr. Seuss Enterprises, L.P. et al.; Senator Orrin G. Hatch; Intellectual Property Owners Association; International Coalition for Copyright Protection; Motion Picture Association of America; The Nashville Songwriters Association International; New York Intellectual Property Law Association; Recording Artists Coalition; Recording Industry Association of America; New York Law School professor Edward Samuels; House Judiciary Committee Members; and the Songwriters Guild of America.

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75. *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

76. *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 812.

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