

***Eldred v. Reno***  
***Appellants' Brief***  
***Draft 1.0***

**Preliminary Statement**

In the two hundred and ten years since the first Congress passed the first Copyright Act, copyright law in America has changed.

- It has changed in its scope — the first act gave authors an exclusive right “to publish” “maps, charts, and books”; current law gives authors an exclusive right to copying, public performance, display, and derivative works.
- It has changed in its duration — the first act provided an initial term of 14 years, renewable if the author survived; current law grants authors protection for their life plus 70 years —  $\text{\textcircled{A}}$ eg reaching 140 years.
- And it has changed in its impact — the first act restricted publishers, a class constituting  $\text{\textcircled{A}}$ , or  $\text{\textcircled{A}}\%$  of the American public; the current act regulates anyone who “copies”, including the  $\text{\textcircled{A}}$  million users of the Internet.

Appellants do not question Congress’ power to expand copyright’s scope, given the multiplication of forms of expression and technologies to exploit that expression. Nor in principle do we question Congress’ broad discretion to set the terms of copyrights prospectively.

Instead, Appellants challenge the particular mode by which Congress now modifies the duration of copyright. Increasingly, Congress has used its power to increase retrospectively the duration of an subsisting copyright. Copyrights initially set to expire, as the framers imagined true for all copyrights, are now routinely given a new

1 life, as Congress pushes back the date when the copyrighted material will fall into the  
2 public domain.

3         This too is a change: In the first one hundred years of the republic, Congress  
4 extended retrospectively the duration of copyright just once. In the next fifty years,  
5 Congress extended retrospectively the duration of copyright just once again. But in the  
6 last thirty-seven years, Congress has extended retrospectively the duration of copyright  
7 eleven times. Since 1962, every class of copyrights facing release to the public domain,  
8 with the exception of one, has been protected from falling into the public domain —  
9 contrary to the Framers’ plan that, as Justice Story put it, “after a short interval”  
10 copyright law would “admit the people at large ... to the full possession and enjoyment  
11 of all writings ... without restraint. J. Story, Commentaries on the Constitution of the  
12 United States § 502, p. 402 (R. Rotunda & J. Nowak eds. 1987) (emphasis added).

13         Appellants ask this Court to enforce the Framers’ plan against this modern  
14 copyright protectionism. We challenge this practice both under the Free Speech and  
15 Press Clause of the First Amendment, and under the plain language of the Copyright  
16 Clause. In light of the extraordinary increase of the impact of copyright legislation —  
17 now regulating millions of ordinary citizens where initially it regulated a fraction of the  
18 population — it is increasingly important for this Court to assure that the restrictions on  
19 speech that the copyright clause effects be in accord with the Framers’ design.  
20 Congress’s current practice, as evinced in the CTEA, is not.



1           But the *scope* of an individual copyright is not the only aspect of a copyright that  
2 might raise First Amendment concerns. If Congress denied copyright to “indecent”  
3 works, *Reno v. ACLU*, 521 U.S. 844, 850 (1997), or if it denied copyright to works written  
4 by convicted felons, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502  
5 U.S. 105 (1991), there would be no doubt that First Amendment interests would be  
6 implicated, even if the law at issue protected expression rather than ideas. These First  
7 Amendment interests would not be exhausted by the “idea/expression” distinction. A  
8 challenge to those statutes would not be the assertion of a “First Amendment right to  
9 use the copyrighted works of others.”

10           The same is true about a First Amendment challenge to the duration of  
11 copyright. The free speech interests raised by a change in copyright’s *duration* are  
12 distinct from the issues raised by a change in copyright’s *scope*. They are unrelated to  
13 the prophylactics that Congress has provided to assure free speech interests with  
14 respect to copyright’s scope. Thus to analyze changes in duration, this Court cannot  
15 apply the First Amendment analysis for copyright’s scope. It must instead apply  
16 ordinary First Amendment analysis to the changes of the CTEA. This analysis will show  
17 that the CTEA is beyond Congress’s power.

18           **A.     The CTEA is a Content-Neutral Regulation of Speech**

19           Copyright law is a regulation of speech. It is direct regulation of who can say  
20 what—not just who can reproduce the particular expression of someone else, but who  
21 may translate or make derivative works, and who may make public performances and  
22 displays of creative works. <sup>17</sup>106. Copyright law is also inherently a regulation of  
23 the press. “[I]t was the invention of ... the printing press,” the Supreme Court has

1 explained, “that gave rise to the original need for copyright protection.” 🍏Sony:430.  
2 Copyright law was a direct response to this need.

3 “Laws that single out the press,” the Supreme Court has instructed, “or certain  
4 elements thereof ... are always subject to at least some degree of heightened First  
5 Amendment scrutiny.” 🍏TurnerI:640-41 (citations omitted). It follows that copyright  
6 law should be entitled to “at least some degree of heightened First Amendment  
7 scrutiny.”

8 The degree of scrutiny depends upon whether copyright regulation is content-  
9 based or content-neutral. While some have argued that copyright regulation is content-  
10 based,<sup>2</sup> there is no need for this Court to decide between these levels of scrutiny in this  
11 case. Even under the lesser standard of content-neutrality, the regulations of the CTEA  
12 cannot stand.

13 Content neutral regulation is governed by *United States v. O’Brien*. As articulated  
14 most recently by the Supreme Court in *Turner Broadcasting*, a content neutral regulation  
15 of speech can be upheld only “[1] if it advances important governmental interests  
16 unrelated to the suppression of free speech and [2] [if it] does not burden substantially  
17 more speech than necessary to further [those] interests.” 🍏189.

18 The Supreme Court has identified the “important governmental interest” that  
19 justifies speech regulation in the context of copyright law. That interest is the incentive  
20 to produce more speech. Copyright regulation, as the Supreme Court explained in  
21 *Harper*, is to be the “engine of free expression.” Its “primary objective ... is not to

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<sup>2</sup> Maybe content based, but we need not reach that. 🍏

1 reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts."

2 ¶349

3 Copyright law creates this incentive by giving authors a temporary exclusive  
4 right to their "writings." While an exclusive right is plainly a restriction on speech, its  
5 effect is to produce more speech. Without the exclusive right, publishers would be  
6 unlikely to compensate authors for their work, and authors would in turn be less able to  
7 produce original work. Thus this temporary monopoly aims "to afford greater  
8 encouragement to the production of literary works," ¶Washington:36, than would exist  
9 in an unregulated market. It is therefore a restriction on speech that advances the  
10 "important governmental interest" of incenting more creative speech.

11 The incentive to create is just the first part of the *O'Brien* analysis. Speech  
12 restrictions under the Monopolies Clause must also be no more restrictive than  
13 necessary. Thus a copyright regulation that protected "ideas" rather than "expression"  
14 would be more restrictive than necessary to achieve the government's interest. ¶ No  
15 doubt providing protection for ideas would "advance" the government's interest—this,  
16 after all, in effect is what patent law does. But the restriction imposed by copyrighting  
17 ideas would be greater than necessary to achieve the government's interest. It would  
18 therefore conflict with the second requirement of *O'Brien*.

19 Appellants ask this Court to apply the ordinary First Amendment standard of  
20 *O'Brien* to the changes of the CTEA. These changes we submit — more clearly than a  
21 change protecting "ideas" as well as "expression" — violate the *O'Brien* test.  
22 Specifically, the retrospective aspect of the CTEA cannot be shown to advance any  
23 "important governmental interest" and that the prospective aspect of the CTEA, though  
24 in principle advancing an "important governmental interest," burdens substantially

1 more speech than is necessary to advance that interest. Both aspects must therefore fall  
2 under the rules of intermediate scrutiny.

3 **B. The Government Has Not Shown that the CTEA Advances “Important**  
4 **Governmental Interests” without Burdening “Substantially More**  
5 **Speech than is Necessary.”**

6 The government’s has the burden to demonstrate that the restriction on speech  
7 effected by the CTEA will actually achieve the “important governmental interest”  
8 without burdening “substantially more speech than is necessary.” 🍏TurnerI:512. This  
9 inquiry is not speculative. While Congress in the first instance must make this judgment  
10 about the relationship between the benefits of term extension and its free speech costs,  
11 deference to Congress in First Amendment cases “does not foreclose ... independent  
12 judgment of the facts bearing on an issue of constitutional law.” 🍏TurnerI:666. This  
13 Court must assure itself that “Congress has drawn reasonable inferences based on  
14 substantial evidence.” 🍏TurnerI:666.

15 The government has not met this burden, and the District Court has failed to  
16 perform its proper review function.

17 1. *The Retrospective Aspect of the CTEA*

18 The CTEA increases the term of subsisting copyrights — copyrights already  
19 granted an in effect for up to three quarters of a century — by 20 years. These  
20 copyrights are for work created in the past — the earliest, in 1923. The law therefore  
21 increases the restrictions on speech relative to the restrictions that would have existed  
22 but for the law. The question under *Turner* is whether this regulation “advances” the  
23 governments “important interest.” Does it even arguably create an incentive to produce  
24 more speech than it restricts?

1 Plainly it does not. By extending the term for copyrights granted in 1923,  
2 Congress *cannot* increase the incentive to produce work *in 1923*. As this Court noted in  
3 *Christian Scientists*, “a grant of copyright protection after the author’s death ... provides  
4 scant incentive for future creative endeavors,” 829 F.2d 1152, 1169 n.84 (D.C. Cir.  
5 1987). Even if the authors were alive, *no present incentive can increase incentives in the past*.  
6 Causation is prospective. Not even Congress can change this law of nature. As  
7 copyright scholar Melville Nimmer put it,

8 Neither of the reasons ... justifying first amendment  
9 subordination to copyright can justify [an] extension of an  
10 existing copyright term. It can hardly be argued that an  
11 author’s creativity is encouraged by such an extension, since  
12 the work for which the term is extended has already been  
13 created.

14 ☛Does:1195. Accord ☛.

15 This combination of effects — no increase in the incentive to produce, and a  
16 reduction in the speech available for others to use — is fatal to the government’s  
17 argument about the retrospective aspect of the CTEA. The CTEA imposes a speech cost  
18 without any plausible speech benefit. The government did not offer, nor could it offer,  
19 any speech related benefit that the retrospective aspect of the CTEA could be said to  
20 provide.

21 As a matter of law, then, this Court should find that the government cannot meet  
22 its burden under *Turner* for a retrospective increase in a copyright term.

23 2. *The Prospective Aspect of the CTEA*

24 The CTEA also extends the terms of future copyrights. “Writings” after the  
25 CTEA will receive a copyright term of life plus 70 years, rather than life plus 50, or in  
26 the case of a work for hire, a term of 95 years rather than 75 years. In principle,

1 Appellants agree that increasing the term of copyright prospectively can increase  
2 incentives. But as a matter of fact, Appellants argue, the government cannot show that  
3 this increase will advance “important governmental interests” without “burden[ing]  
4 substantially more speech than [is] necessary to further [those] interests.” 189.

5 To sustain its burden, the government must show that Congress could  
6 reasonably believe that an increase in a copyright term at least 50 years in the future  
7 will have an effect on present incentives sufficient to outweigh the restriction on speech.  
8 Yet the government has made no effort to sustain this burden. As common sense  
9 suggests, and as simple economics confirms, this future benefit will have no meaningful  
10 effect on present incentives.

11 Appellants presented the affidavit of Dean Hal Varian in the District Court,  
12 demonstrating that even under the strongest case for the government, the increase in  
13 present economic value is tiny. Because the term of protection for copyright has already  
14 become so extended, any additional term will have almost no effect on present  
15 incentives. While the copyright term set by the framers was a mere 14 years, renewable  
16 for 14 years only if the author survived, the term under the CTEA can extend over 140  
17 years. The present value of any change in incentives 140 years into the future is, as Dean  
18 Varian demonstrated, invisible.

19 The government did not contest Appellants claim about incentives. Nor did it  
20 offer any evidence of its own that prospective aspect of the CTEA would increase  
21 incentives. The government’s claim was simply that the CTEA advances other interests

1 beyond increasing speech incentives—such as “harmonization” with European law and  
2 film restoration — and that those other interests should suffice to justify the statute.<sup>3</sup>

3 No doubt these other interests are important. Appellants do not doubt that  
4 Congress would be entitled to advance them under some other enumerated power. But  
5 the question in this case is whether these interests can be pursued through speech  
6 restrictions. Congress can grant tax benefits to promote film restoration; it can give  
7 funding to the arts if it believes there is insufficient support for public domain works;  
8 and it can fund a delegation to Europe to argue for copyright laws that conform to our  
9 constitution. But it cannot restrict speech under the Copyright Power unless the  
10 restriction survives *O’Brien*. Neither this Court nor the Supreme Court has recognized  
11 the preservation of old films as “an important governmental interest.” The only interest  
12 the Courts have recognized as “important” is the interest in promoting creative speech.  
13 Appellants maintain that the government has not sustained its burden to demonstrate  
14 that the prospective aspect of the CTEA advances that interest without burdening more  
15 speech than necessary.

16 **C. First Amendment Review of Copyright Law is not Limited to the**  
17 **Question Whether Congress has Protected Ideas Rather Than**  
18 **Expression**

19 In the Court below, the government argued that any First Amendment review of  
20 copyright legislation was limited to the question whether Congress has granted  
21 protection to ideas rather than expression. The government based this abridgement of  
22 the First Amendment upon two cases—*Harper* and *United Video*. Neither case supports  
23 this extraordinary shrinking of ordinary First Amendment analysis.

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<sup>3</sup> The government did claim the changes would increase the profits to existing copyright holders. We address this and these other interests that the government alleges in section 🍏 below.

1 As Appellants suggested, this Court has rightly adopted the rule, as stated by  
2 Judge Wald, that “cases in which a first amendment defense is raised to a copyright  
3 claim do not utilize an O’Brien analysis.” 1190. As we have explained, this rule reflects  
4 the fact that Congress has protected First Amendment interests in defining the *scope* of a  
5 copyright. Thus, as Judge Wald explained in *United Video*, this Court would not  
6 recognize “a first amendment right to express themselves using the copyrighted  
7 materials of others.” 1190.

8 Such use of otherwise legitimately copyrighted material was the essence of the  
9 claim in *United Video*, as Judge Wald’s opinion makes clear. Petitioners demanded a  
10 right to rebroadcast otherwise legitimately copyrighted material. They were not  
11 claiming that the material at issue could not be copyrighted; they were not challenging  
12 the statute under which copyright was granted to the material. Petitioners were simply  
13 asserting the right to use property otherwise legitimately vested in an original  
14 copyright holders. “This crucial fact,” as Judge Wald explained, “distinguishe[d] the  
15 case from *Century Communication*,” where this Court did apply *O’Brien* to police  
16 regulations affecting the press. 11.

17 The same fact distinguishes *United Video* from this case. Appellants are not  
18 asserting the right to use otherwise legitimately copyrighted material. We are not, in  
19 effect, demanding a First Amendment right to trespass on someone else’s property.  
20 Compare *Hudgens v. NLRB*, 424 U.S. 507 (1976). We are challenging the statute under  
21 which the property at stake was granted. Nothing in *United Video* forecloses our right to  
22 raise that challenge.

23 *Harper & Row* indicates no differently. In *Harper*, *The Nation* was sued by Harper  
24 & Row for copyright infringement. *The Nation* had scooped *Time Magazine*’s exclusive

1 right to publish excerpts from President Ford’s biography; Time therefore cancelled a  
2 contract to publish excerpts from the book. In defending against a copyright  
3 infringement suit, The Nation claimed a “first amendment right” to use this otherwise  
4 legitimately copyrighted material. The Court rejected that right, stating that the First  
5 Amendment interest that The Nation raised had been adequately protected by Congress  
6 when Congress to protect expression rather than ideas.

7       Once again, The Nation was not challenging the underlying copyrights. It was  
8 not claiming that the Ford Biography could not be copyrighted. It was simply  
9 demanding a First Amendment right to use Harper & Row’s property.

10       The government tries to convert these limited holdings into a general First  
11 Amendment copyright exception — that any First Amendment challenge to the  
12 copyright act must fail so long as Congress protects “expression” rather than “ideas.”  
13 But these cases do not establish that extraordinary general proposition. Again,  
14 appellants cannot believe that the Supreme Court would reject a First Amendment  
15 challenge to a copyright act that denied copyright to “indecent speech” on the grounds  
16 that copyright protects expression, and not ideas. Nor would the First Amendment  
17 interests be exhausted by the “idea/expression” distinction if Congress denied  
18 copyright to felons writing about their crimes. In each case, whether the First  
19 Amendment claim would ultimately prevail over copyright or not, the analysis of that  
20 claim would proceed outside of the Congressional prophylactic of “idea/expression.”

21       So for example, when the Authors League of America raised a First Amendment  
22 challenged the “Manufacturing Clause” of the Copyright Act,<sup>4</sup> the Second Circuit did

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<sup>4</sup>  explain

1 not dismiss the challenge on the grounds that any First Amendment interest had been  
2 exhausted by the “idea/expression” distinction. Rather the Court reached the  
3 substantive merits of the First Amendment claim. And while the Court ultimately  
4 rejected the First Amendment claim, the significance of the case is it did not view either  
5 the Supreme Court, or any other Circuit Court, as establish a rule that the only First  
6 Amendment issue for copyright law is whether the law reaches “ideas” rather than  
7 “expression.”

8         Likewise in *Schnapper*, relied upon by the government below, where the  
9 petitioner, M.B. Schnapper, challenged the grant of a copyright to a government funded  
10 work, the film “Equal Justice Under Law.” This Court found Schnapper had standing to  
11 raise a First Amendment challenge to the Copyright Act, and interpreted his claim to be  
12 a demand for a compulsory license under the act. This Court rejected that First  
13 Amendment claim — analogous to the claims in *United Video* and *Harper* that Schnapper  
14 had a First Amendment right to use the property of another. As in *United Video*, the  
15 Court relied upon the prophylactics that Congress had established to protect First  
16 Amendment interests in the context of copyright’s scope.

17         But this Court went on to say that that these congressional prophylactics would  
18 not limit the Court from considering “afresh the First Amendment interests implicated”  
19 by the claims appellant raised if in fact the “doctrine of fair use and the distinction  
20 between an idea and its expression fail to vindicate adequately” the First Amendment  
21 interests raised. 115 Thus *Schnapper* does not stand for a general rule that First  
22 Amendment challenges to the copyright act are exhausted by the “idea/expression”  
23 distinction.

1           Where a litigant claims a free speech right to use the property of someone else, it  
2 is perfectly unexceptional that the Court would defer to the free speech protections built  
3 into the statute granting the property right. But where the challenge is to the property  
4 right itself — raising issues distinct from the free speech issues about copyright’s scope  
5 — then cases from the narrow context of “free speech defenses” cannot generalize to  
6 every context where a First Amendment claim might be made. Outside of the context of  
7 “free speech defenses,” ordinary First Amendment analysis is required.

8           **D.     The Free Speech Interest Raised by Copyright Duration are Distinct**  
9           **From the Interests Raised by Its Scope**

10           The Supreme Court has acknowledged the distinction between the *scope* of a  
11 copyright and its *duration*. As it said in *Twentieth Century Music Corp. v. Aiken*,

12                   The limited scope of the copyright holder’s statutory  
13 monopoly, like the limited copyright duration required by the  
14 Constitution, reflects a balance of competing claims upon the  
15 public interest: Creative work is to be encouraged and  
16 rewarded, but private motivation must ultimately serve the  
17 cause of promoting broad public availability of literature,  
18 music and other arts. ¶156(emphasis added)

19           This distinction is critical to understanding the copyright monopoly, but it is  
20 ignored by the government. Both scope and duration affect the value of a copyright. But  
21 the nature and limit of each effect is distinct. There is no conceptual problem  
22 envisioning “fair use” limiting the scope of a copyright; it is not even clear what it  
23 would mean for “fair use” to limit duration. Likewise, one can understand what it  
24 means to say that the scope of a copyright cannot protect “ideas,” but only  
25 “expression.” But there is no sense to saying a duration can only protect expression and  
26 not ideas. Thus, while these particularized prophylactics adopted by Congress to  
27 protect First Amendment values make sense as applied to the scope of a copyright, they  
28 make no sense when predicated of its duration.

1           Yet without any authority, either from this Court or the Supreme Court, the  
2 government collapses the distinction between scope and duration by asserting, without  
3 argument, that the free speech protections on copyright’s scope also adequately police  
4 free speech values affected by copyright’s duration. This amounts to an assertion that  
5 there can be no free speech costs independently associated with copyright’s duration.

6           But that claim is plainly false, if *Harper & Row* sets the First Amendment test for  
7 copyright. As the Court in *Harper & Row* explained, copyright is not inconsistent with  
8 free speech because copyright functions as “engine of free expression.” It is an “engine”  
9 (rather than a brake) only because it produces more speech than it restricts. But as the  
10 argument in this part demonstrates, some changes in the duration of copyright do not  
11 even plausibly produce more speech than they restrict. In particular, at least in the  
12 context of retrospective changes, a change in the duration of a copyright plainly restricts  
13 speech without producing any plausible free speech benefit. This free speech cost exists  
14 whether or not fair use is protected, or whether copyright reaches expression only.

15           The government has produced no authority for collapsing the distinction the  
16 Supreme Court drew in *Aiken* between *scope* and *duration*; it has offered no argument  
17 why the free speech interests protected by fair use and the “idea/expression” would  
18 adequately protect free speech interests affected by duration. The government has  
19 therefore given this Court no reason to deviate from the ordinary First Amendment  
20 analysis of a statute by “Congress” that abridges the “freedom of speech or of the  
21 press.” That analysis, Appellants submit, is *O’Brien*.

1           **E.     The “Interests” the Government has Offered to Justify CTEA Are**  
2           **Insufficient as a Matter of Law, or Must, in the Alternative, be Weighed**  
3           **by the District Court.**

4           In the court below, the government offered three interests which it argued  
5 justified the changes of the CTEA. None of these interests is an “important  
6 governmental interest” for purposes of the Monopolies Clause. Alternatively, if this  
7 Court views these interests as “important,” then it must remand this case to the District  
8 Court to apply the *O’Brien* analysis.

9           Appellants have argued that the “important governmental interest” justifying  
10 speech regulation is the production of more speech. Whatever other benefit a copyright  
11 law advances, Appellants maintain that a necessary condition on a valid speech  
12 regulation is that it also advance this primary speech engendering interest. As the  
13 Supreme Court has indicated,

14                     The *sole* interest of the United States and the primary object  
15                     in conferring the monopoly lie in the general benefits  
16                     derived by the public from the labors of authors. *Fox Film*  
17                     *Corp v. Doyal*, 286 U.S. 123, 127 (1932) (emphasis added)

18           The only “general benefit[]” produced by “the labors of authors” is the  
19 production of more creative speech. This is the interest that justifies the speech  
20 restrictions of copyright law.

21           The interests identified by the government — to the extent they are general  
22 benefits at all — are not “general benefits” produced by the “labor of authors.” They are  
23 instead benefits produced by publishers and film producers. Appellants do not doubt  
24 these benefits are benefits. But they are not benefits that flow from the creative process,  
25 and they are not benefits that justify a restriction on speech.

1           We briefly review these interests alleged by the government to demonstrate that  
2 they cannot, as a matter of law, suffice as justifications for the speech restrictions of the  
3 CTEA. They are not, in other words, “important governmental interests.” But even if  
4 this Court believes them “important governmental interests,” then Appellants submit  
5 that the government has not sustained its burden under *O’Brien*, and the case should be  
6 remanded to the District Court for further proceedings.

7           1.       *Need for Harmonization of Copyright Laws*

8           The government argues (1) that the CTEA harmonizes United States copyright  
9 law with European law, and (2) harmonized copyright laws are an “important  
10 governmental interest” since they will advance international trade in copyrighted  
11 material. The first claim is false; the second claim is unsupported.

12           As numerous commentators and witnesses before Congress asserted, the CTEA  
13 does not “harmonize” United States law with the law of European Union. Appellants  
14 concede that is what Congress said it was doing. But the Court is not permitted simply  
15 to accept the ipse dixit of Congress when it comes to First Amendment rights. Instead,  
16 there must be a reasonable basis for this Court to believe that the restriction on speech  
17 actually advances an important governmental interest. But there is no possible way to  
18 view the CTEA as harmonizing copyright law internationally:

- 19           1. The CTEA extends the copyright period for corporate “authors” to 95 years  
20           (or 120 years if the work is unpublished), while the European Union offers  
21           corporate authors only 70 years of protection.
- 22           2. United States law after the CTEA provides longer terms than required by “the  
23           Berne Convention, the Agreement on Trade Related Aspects of Intellectual  
24           Property Rights (TRIPs), [and] the Europe Union for photographers, creators

1 of applied art, broadcasters, sound recording and film producers. Neil  
2 Weinstock Netanel, Copyright and Democratic Civil Society, 106 Yale L.J.  
3 283, 367 (1996).

- 4 3. The CTEA exacerbates uniformity with respect to many particular works. For  
5 example, as Professor Dennis Karjala testified before Congress, under existing  
6 law, the works of George Gershwin, for example, were about as  
7 “harmonized” as they could be. He died in 1937, so his entire oeuvre goes  
8 into the public domain in Europe no later than 2008, no matter what we do  
9 here. Prior to the CTEA, his works were scheduled to enter the public domain  
10 during the period 1999 to 2013. Now, under the CTEA they will enter the  
11 public domain in 2019-2033. Dennis S. Karjala, Statement of Copyright and  
12 Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589,  
13 and S. 505, “The Copyright Term Extension Act”: Submitted to the Senate and  
14 House Committees on the Judiciary, 105th Cong. 16 (1998) (“Karjala Stmt.”).  
15 Thus for at least 11 years, Europeans will have the benefit of free access to  
16 Gershwin’s work while Americans will not.

17 Even if the CTEA did “harmonize” international copyright law, the government  
18 has done nothing to demonstrate why harmonized law advances an “important  
19 governmental interest”. Appellants are at a loss to understand why different statutory  
20 terms would affect the willingness of citizens internationally to comply with copyright  
21 law; the government has offered nothing more than ipse dixit to show how it would  
22 affect willingness to comply.

23 Finally, even if the government did demonstrate some connection between  
24 “harmonized law” and copyright compliance, the District Court would still need to

1 weigh that benefit against the free speech cost. There is no evidence in the record as it  
2 stands to apply *O'Brien* to this alleged “interest.” At a minimum the government must  
3 come forward with evidence of the purported benefit relied upon by Congress.

4 No case has ever justified a speech restriction on so thin a ground as  
5 “harmonization.” No doubt Congress has some interest in harmonization; no doubt it  
6 would be legitimate to try to persuade Europe to adopt terms that are consistent with  
7 our own Constitutional requirements. But the government has failed to demonstrate  
8 how trivial interest becomes an “important governmental interest” for purposes of  
9 *O'Brien*.

10 2. *Providing Increased Resources to Stimulate Creation of New Works*

11 The government next argued that the CTEA will “promote the development of  
12 new works of authorship by allowing American authors, and U.S. copyright-related  
13 industries generally, to benefit from increased resources that result from the extension  
14 of the copyright term.” If the link between “new works of authorship” and “increased  
15 resources” were plausible, Appellants would agree that this would constitute an  
16 “important governmental interest.” But there is no way to believe that Congress  
17 “reasonably believed” that any such link exists.

18 Stated most simply, the government’s argument comes to this: That by giving the  
19 grandchildren of past authors money today, while removing creative resources from  
20 pool available to other writers and readers today, we are likely to create more “new  
21 works of authorship” than what would have been created had the resources of the  
22 public domain not be reduced. Benefiting them, by restricting speech to others, will  
23 produce more speech than it will restrict.

1           This argument is simply wrong. The flaw is in the causation. Unlike ordinary  
2 copyright law, which, by conditioning “increased resources” on the production of  
3 “creative works,” doesn’t pay until the creator performs, the windfall of the CTEA is  
4 **given** *whether or not the descendents of authors produce anything at all*. There is no more  
5 reason to believe that this windfall will induce descendents to produce new work than  
6 to believe it will induce them to take a vacation in the Caribbean. There is simply no  
7 connection between the grant and any incentive to produce.

8           The government cites the testimony before Congress of Jack Valenti, President of  
9 the Motion Picture Association, in support of their claim that this unconditional  
10 windfall will in fact produce more new works. Mr. Valenti testified that “**♣**.” But it is at  
11 best implausible to believe that Hollywood is waiting for the income from films  
12 released in 1923 before deciding to invest in the latest edition of Star Wars. **♣**. A speech  
13 restriction must be supported by something more solid than the testimony of lobbyists.

14           3.       *Preservation of Existing Works*

15           Finally, the government argues that the retrospective aspect of the CTEA is  
16 justified by the need to preserve some types of existing works which may, because of  
17 time, decay or be destroyed. In particular, the government points to old films, or **♣**,  
18 which require restoration to preserve. This restoration requires an addition monopoly,  
19 to make worthwhile the investment in these old media.

20           This interest too fails to justify the sweeping scope of the CTEA. The CTEA does  
21 not limit itself to old media that requires restoration to preserve. Even if Congress might  
22 have the power to pass a targeted protection measure for such copyrights, it would not  
23 justify the extension of copyright in poems, or music, or books.

1 But even so narrowed, this justification cannot, consistent with *Feist*, sanction an  
2 extension in the copyright term. For either the restoration would qualify as an “original  
3 work” or it would not. If it did, then there would be no need to extend the old copyright  
4 to protect this work; existing copyright law would automatically protect the restoration.  
5 If the restoration was not an “original work,” then under the rule of *Feist*, copyright  
6 cannot extend to it. This justification therefore as a matter of law fails to sustain the  
7 extensions of the CTEA.

8 For all these reasons, the justifications offered by the government are either (1)  
9 not “important governmental interests,” or (2) overbroad, or (3) require weighing by the  
10 District Court against the speech restrictions effected by the statute. For these reasons,  
11 they cannot be relied upon to sustain the judgment of the District Court.

12 **II. The Retrospective Aspect of the CTEA is Beyond Congress’s Enumerated**  
13 **Powers**

14 The District Court held that the CTEA did not exceed Congress’s Copyright  
15 Clause power (1) because Congress has discretion to set the copyright term, and (2)  
16 because the Supreme Court has held that it may set that term retrospectively, citing  
17 *McLurg v. Kingsland*. 42 U.S. (1 How.) 202, 206 (1843). Appellants agree with proposition  
18 (1), though in light of the Supreme Court’s interpretation of the Monopolies Clause,  
19 Congress’s discretion is plainly limited. But we reject proposition (2): Neither *McLurg*  
20 nor any Supreme Court or lower court case, before the instant case, has considered the  
21 question of a retroactive extension of a copyright term, let alone affirm it.

22 **A. The Monopolies Clause is Unique Among Congress’s Enumerated**  
23 **Powers**


24 The Monopolies Clause of Article I, section 8, states that:

1 “Congress shall have power ... [t]o Promote the Progress of  
2 Science and useful Arts, by securing for limited Times to  
3 Authors and Inventors exclusive Right to their respective  
4 Writings and Discoveries”

5 This clause is unique among Congress’s enumerated powers. It is the only  
6 enumerated power that expressly states the purpose of its enumeration. The powers  
7 granted by the clause — the power to “secure for limited Times to Authors and  
8 Inventors exclusive Right” — are to be granted “[t]o Promote the Progress of Science  
9 and useful Arts.” No other enumerated power is similarly conditioned.

10 The Supreme Court has acknowledged this special structure to the Monopolies  
11 Clause, and has adopted a distinctive method for interpreting it. In *Graham*, the Court  
12 wrote “the clause is both a grant of power and a limitation.” 45. The “primary  
13 objective” of this power “is not to reward the labor of authors.” 46feist:349. Its objective,  
14 the Court has said, is “Progress” — to “motivate the creative activity of authors and  
15 inventors.” 47Sony:429

16 The Court has respected this distinctive clause by adopting a form of heightened  
17 review for statutes that purport to draw their authority from the Monopolies Clause.  
18 Rather than interpreting the particular terms of Monopoly Clause in the abstract (as the  
19 government proposes and as the Court below did) the Court has consistently read the  
20 terms of Monopoly Clause in light of the express purpose of the clause. This reading has  
21 lead the Court to adopt a narrower understanding of the terms “Authors” and  
22 “Writings” than would have been adopted had the Court followed the interpretive  
23 methodology that the government proposes. Instead, the Court has not hesitated to


1 restrict the reach of the Monopolies Clause where a statute cannot be said to “motivate  
2 the creative activity of authors and inventors.” Sony:429.<sup>5</sup>

3 Two cases in particular evince this special interpretive method. The first is *Feist*,  
4 which considered whether copyright could reach an ordinary telephone directory. The  
5 Court held that it did not. Overturning a long line of lower court practice granting  
6 copyright protection on a “sweat of the brow” theory to works that were not “original,”  
7 the Court affirmed the view that the constitution restricts copyright to “original” works.

8 On the government’s method for interpreting the Monopolies Clause, this  
9 conclusion is inexplicable. The term “original” does not appear in the Monopolies  
10 Clause. The Monopolies Clause merely requires that an “author” produce a “writing.”  
11 Read in the abstract, as the government proposes the term “limited times” should be  
12 read in this case, there would be no reason to limit “writings” to “original writings.”  
13 Read in the abstract, a phone book is a “writing,” and the producer of the phone book is  
14 plainly an “author.”

15 But this was not the interpretive method of the Supreme Court. Instead, it read  
16 “writings” and “authors” in terms of the express purpose of the Monopolies Clause —  
17 to promote “progress.” In light of that purpose, it read these terms narrowly to imply  
18 an “originality requirement.” Without this express purpose, there would have been no  
19 reason for the Court to limit Congress’s power as *Feist* does.

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<sup>5</sup> These cases are not inconsistent with this Court’s holding in *Schnapper*. In that case, Schnapper did not argue for a narrowed interpretation of the terms “Author” or “Writing” in light of the purposes clause. He instead argued that the purposes clause was an independent limitation on the scope of the copyright power. Appellants do not argue for this latter position. We maintain simply that the terms of the Monopolies Clause must be read in light of the express purpose of the clause — as the Court indicated in Graham, and has done so in the other cases we rely upon in this section.

1           The second case is *The Trademark Cases*, decided by the Supreme Court over a  
2 century ago. The issue in *The Trademark Cases* was whether Congress' Trade-Mark Act  
3 was within its enumerated powers. The Court held that was not within the power  
4 granted by the Monopolies Clause. Though a trade-mark is certainly a "writing" and no  
5 doubt a writing by "author," the Court refused to find trade-marks sanctioned by the  
6 Monopolies Clause. If, as the Court said in *Apple*, the aim of the Monopolies Clause  
7 was "motivate" creative activity, then a trademark covered by the Trademark Act "may  
8 be, and generally is, the adoption of something already in existence." <sup>94</sup> The Trade-  
9 mark Act would not, then, "Promote" progress; it could not, therefore, be supported  
10 under Congress's "Progress" clause.

11           Once again, this holding is inexplicable under the government's method for  
12 reading the Monopolies Clause. Abstracted from the purpose of the clause, a trademark  
13 is a "writing" that has been produced by an "Author." The holding of the Trade-mark  
14 Cases only makes sense in light of the express purpose of the clause. There was no other  
15 reason to restrict "writings" to those writings not "already in existence." That extra-  
16 limitation makes sense only in light of the purpose of the clause.

17           These two cases affirm what the Supreme Court said in *Graham*: that the  
18 Monopolies clause expresses both a power and a limitation on Congress' power. They  
19 make it clear that the meaning of the terms of Monopolies Clause must be found in light  
20 of this express purpose. This the Court below did not do.

21           **B.     The Retrospective Aspect of the CTEA Violates the "to Authors" term of**  
22           **the Monopolies Clause**

23           The aim of the Copyright Clause is to "motivate the creative activity of authors  
24 and inventors." *Apple*:429. By granting a copyright term to an already existing work,

1 the retrospective aspect of the CTEA does not grant copyright “to Authors” in the sense  
2 in which that term has been read by the Supreme Court. The grant “to Authors” must  
3 be to induce new writings; it must be a grant “primarily” to “promote Progress,” not a  
4 grant explicable only by the desire to “benefit authors.” 🍏

5 The authority for this argument is again *The Trade-Mark Cases*, for this is  
6 essentially the issue decided there. While the design of a trademark itself would, no  
7 doubt, constitute a creative original act, the Court rejected the notion that trade-mark  
8 might be grounded upon copyright because “[t]he trade-mark may be, and generally is,  
9 the adoption of something already in existence.” 🍏<sup>94</sup>. Copyright could not extend to  
10 this, the Court reasoned, because it would not be a grant to produce an inventive or  
11 creative act. All the invention of the trade-mark had been realized before the trade-mark  
12 act has been passed. The copyright would not be inducing anything more.

13 The extending of a copyright to “something already in existence” is precisely the  
14 aim of the CTEA. While the works to which the CTEA would extend the copyright were  
15 no doubt themselves originally copyrightable, the retrospective aspect of the CTEA  
16 tries, like the trade-mark law, to extend protection to something “already in existence.”  
17 It would not, therefore, *motivate* any creative activity, 🍏*sony*. It would simply reward  
18 authors and their heirs. No doubt Congress has the power to reward authors — or  
19 anyone else for that matter. But the power to reward through the grant of a speech-  
20 restricting copyright is limited to those cases where the reward “primarily” motivates  
21 creative activity. The retrospective portion of the CTEA is therefore outside the scope of  
22 the Monopolies Clause power.

23 The same point is implied by the Supreme Court’s dicta in *Graham v. John Deere*  
24 *Co.*, 383 U.S. 1, 6 (1966) and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146

1 (1989), suggesting that a patent could not remove ideas from the public domain. On the  
2 government’s reading of the Monopolies Clause, there is no way to understand the  
3 Supreme Court’s indication. Whether an idea is in the public domain or not, it is still a  
4 “Discovery” which was made by an “Inventor.” Read independently of the “promote  
5 Progress” clause, there would be no reason that Congress could not decide to grant an  
6 exclusive right to the Inventor, for his Discovery, even though that discovery had  
7 passed into the public domain.

8 The Supreme Court, however, has plainly indicated that Congress does not have  
9 this power. The reason is the same reason given in *The Trade-Mark Cases*: The  
10 “Inventors” to which Congress can grant monopoly rights are those who advance  
11 progress in the useful arts. The power is not the power to reward; the power is the  
12 power to incent.

13 **C. The Retrospective Aspect of the CTEA Violates the “limited times” term**  
14 **of the Monopolies Clause.**

15 The Monopolies Clause gives Congress the power to grant an “exclusive Right”  
16 for “limited times.” Just as the Court has done with the terms “Authors,” “Writings,”  
17 “Inventors,” “Discoveries,” the term “limited times” must be read in light of the express  
18 purpose of the Monopolies Clause. The issue is not what “limited times” could mean in  
19 the abstract. The question is its meaning in light of the express purposes that the  
20 framers set.

21 Appellants maintain that the term “limited times” has an obvious meaning in  
22 light of the express purposes of the Monopolies Clause. A copyright term, on this  
23 understanding, is an appropriately “limited time[.]” only if it is a term that is not  
24 perpetual and that “promote[s] progress.”

1 Under this interpretation, any prospective term would satisfy the constitutional  
2 requirement of the Copyright Clause (though not necessarily the First Amendment). If  
3 Congress extended the term from 95 years to 150 years, then that extension would be  
4 “limited” and can, in principle, consistent with the express purpose of the clause,  
5 induce further creative activity.

6 But a retrospective term cannot induce any creative activity. While extending the  
7 term for existing copyright might benefit an author’s family, or make it possible for the  
8 trade-deficit to be balanced, or bring American law in line with an European directive,  
9 it does not “motivate creative” activity in the sense described by *Sony*. Appellants  
10 therefore ask this Court to hold that a retrospective copyright term is not a “limited  
11 term[]” for purposes of the Monopolies Clause.

12 On the government’s view of “limited times,” the only constitutional  
13 requirement is that the term that Congress grants be of a fixed length. Thus, even  
14 though Congress has now extended the term of the 1923 class of copyrights 11 times,  
15 the term of the 1923 class of copyrights is nonetheless limited.

16 The government’s interpretation, as we have argued, is inconsistent with the  
17 method the Supreme Court has adopted for interpreting terms in the Monopoly Clause.  
18 It is also without limit. There is nothing in the government’s reading of the term  
19 “limited times” that would forbid the government from routinely extending the term of  
20 copyright — allowing perpetual copyright, as Professor Jaszi describes it, on the  
21 installment plan. 🍏

22 But the Framers’ intent was different. Their aim was not to recreate the political  
23 struggle that corrupted the original grants of monopoly in England. They sought a  
24 regime that would avoid just that incentive. The government’s reading of the Copyright

1 Clause, however, recreates just this regime. Copyright holders have a perpetual  
2 incentive to petition for special favor by extending copyright's term. The last 38 years  
3 are good evidence of this incentive.

4 A simple rule would avoid this conflict. By reading the "limited times" clause in  
5 light of its purpose, and holding that any retrospective extension of a copyright term is  
6 outside the meaning of "limited times," this Court would end the political struggle to  
7 extend already long and grossly disproportionate (to patent) copyright terms.  
8 Copyright holders would then live with the deal they original received, rather than  
9 pressure Congress for greater monopoly benefit.

10