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Comment

The Dream that Never Dies: *Eldred v. Ashcroft*, the Author, and the Search for Perpetual Copyright

> [O]ne is a writer as Louis XIV was king, even on the commode.[1]
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> —Roland Barthes

In 1998, Mary Bono, congresswoman and widow of singer/actor/congressman Sonny Bono, implored her colleagues to adopt the Copyright Term Extension Act (CTEA) that bore her departed husband's name and ideological imprimatur.[2] Mrs. Bono reported that Mr. Bono had "wanted the term of copyright protection to last forever,"[3] though the CTEA's drafters modestly aspired to add only twenty years to the then-existing term of the author's life plus fifty years.[4] The additional term provided virtually no additional incentive to authors, diminished the public domain, and was not rationally related to the progress of creative

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[1] ROLAND BARTHES, MYTHOLOGIES 30 (Annette Lavers trans., Hill & Wang 1972) (1957).

[2] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[3] 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). Congresswoman Bono was advised by staffers that her husband's desire was unconstitutional. Accordingly, she suggested that the proposal of Jack Valenti, then head of the MPAA, for copyright duration of "forever less one day" should be considered during the next Congress. *Id.* § 102 at H9952.

[4] Sonny Bono Copyright Term Extension Act § 102. The CTEA also added twenty years to the work-for-hire term.

expression, yet the Supreme Court validated the extension in *Eldred v. Ashcroft* despite the CTEA's dubious utility and constitutionality.[5]

The Court's actions were unfortunate but predictable. Such foresight merely required looking backwards to the "author's" persistent prominence in legal and social discourse.[6] The excessive focus on the author resulted in the Court using a fundamentally flawed calculus to assess the rationality of the monopoly grant accorded to the producers of copyrighted material in exchange for their creative output.

Flawed, yes; novel, no, nor accidental. Media interests, whether early-eighteenth century London publishers or twenty-first century multinational conglomerates, have used authors both as the source of property and as a means to further protect that property once acquired, sublimating their own interests into pleas for the authors'. The resulting system of copyright protection pays tribute to authors yet accords them minimal benefits, restricts the public's access and use of creative expression, and funnels money and power to media corporations in amounts that are both enormous and disproportionate to the corporations' importance in disseminating expression.

Absent the Copyright Clause's dictates, mere iniquity proves nothing. However, the purpose of the constitutional language is clear: the promotion of learning, for which limited copyright duration is essential.[7] The Court's willingness in *Eldred* to accept the proposition that "[w]hether 50 years is enough, or 70 years too much . . . is not a judgment meet for this Court"[8] is troubling when considering two further questions: Are future increases in

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[5] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[6] *See* MICHEL FOUCAULT, *What is an Author?*, *in* THE FOUCAULT READER 101, 108-09 (Paul Rabinow ed., 1984); *see also* BARTHES, *supra* note 1, at 29-31. The seminal work relating the "author effect" to copyright law is Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 41 DUKE L.J. 455 (1991). For a critique of the Romantic vision of copyright law, see Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997). Lemley asserts that "Romantic authorship can be viewed in two ways – as an argument that is used in intellectual property cases, or as a broader explanation for the law of information." *Id.* at 878. He is primarily concerned with the latter. Yet, while he makes several excellent points about an overly facile reading of the "author effect," there seems to be substantial overlap between the two views.

[7] *See* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 938 (2003).

[8] *Eldred*, 537 U.S. at 193 (quoting Brief for Petitioners at 14).

copyright duration likely to be sought and if so, what are their chances of passing constitutional muster?

Alone, the CTEA is merely a lamentable manifestation of congressional overzealousness when a major source of revenue is slipping away from U.S. businesses. However, taken in the context of a continuing struggle by powerful media corporations to obtain perpetual copyright protection, it is evidence that the desire for perpetual protection, which has persisted for centuries, remains active. Therefore, judicial intervention is all the more necessary if a future Congress exceeds its mandate. One almost certainly will. After all, if twenty extra years provide a substantial increase in the revenues from copyrighted material, why not forty? Why not forever less one day? One obvious answer is that such increases would be unconstitutional. Yet, this ought to provide little comfort given the CTEA's own status as merely a lesser (though ignored by the Court) violation of the Copyright Clause.[9] If, as in *Eldred*, the needs of the author mask the interests of those seeking to further extend copyright protection, the necessary intervention will not occur.

This Comment therefore attempts three things. First, to show that the history of copyright is replete with the use of the author to further the interests of the major media powers. Second, to show that this history demonstrates that the CTEA springs from a property rights ideology shared by centuries of publishers, making further attempts to increase copyright protections as clear a predictive certainty as is possible. Third, to unpack the "author" rhetoric in *Eldred* (and, to the extent that it exists, in the CTEA) and by so doing, appropriately situate the author in the current copyright regime and thereby allow the weighing of copyright-term-extension constitutionality.

I

BACKGROUND

Critiquing extended copyright terms, and specifically the legitimating role of the author in those extensions, necessarily assumes two things: that "the author" is a useful concept for

[9] Congress may be increasingly ignoring constitutional limitations when drafting statutes and simply assuming that the Supreme Court will fix any problems. *See* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001); Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2D 47 (2002).

describing the ways in which people think about the source of creative expression, and that perpetual (or merely the further extension of) copyright duration should be avoided.

A. The Ongoing Role of the Author in Copyright Law

The evolution of the "author" as a specially valorized individual occurred as part of an effort by eighteenth century writers to ensure their livelihood by asserting the unique value derived from their contributions.[10] Before the rise of the Romantic author, the efforts of writers were already regarded as valuable, and authorship "had positive connotations as a designation for literary activity of special merit."[11] However, the Romantic author was more than the producer of the book's text, one member of the team consisting of "the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book binder, sometimes even the gilder and the brass-worker, etc."[12] The new author was not a member of the team; she stood outside, creating from within herself. This "coming into being of the notion of 'author' constitutes the privileged moment of *individualization* in the history of ideas, knowledge, literature, philosophy, and the sciences."[13]

The role of the author in the development of copyright law, for profit or ill (or nil), has been debated extensively over the last fifteen years.[14] Much of the current debate centers not on the existence of the Romantic vision, but on the degree to which it

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[10] *See* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984).

[11] Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 32 (Martha Woodmansee & Peter Jaszi eds., 1994) [hereinafter *Copyright*]; *see also* John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 191 (Martha Woodmansee & Peter Jaszi eds., 1994).

[12] Woodmansee, *supra* note 10, at 425 (quoting and translating GEORG HEINRICH ZINCK, ALLGEMEINES OECONOMISCHES LEXICON, col. 442 (Leipzig, 1753)).

[13] FOUCAULT, *supra* note 6, at 101.

[14] *Compare* Jaszi, *supra* note 6 (discussing the constantly shifting nature of the author in copyright law), *with* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works,* 42 J. COPYRIGHT SOC'Y 93, 107 (1994) (asserting that the author effect is not nearly so great a motive force in copyright law as some assert), *and* Lemley, *supra* note 6 (distinguishing between different types of effects of the author construct).

has affected and continues to affect legislative and judicial decision-making. Discerning the Romantic author's importance is made more difficult by the fact that while the paradigm of the genius in the garret is easily attacked as having little purchase on reality, a subtler, almost pre-Romantic notion of authorship survives. That notion abandons the strict doctrines of the pure Romantic author. Yet, it carries the coloring of entitlement to rewards solely because the expression is a commodification of the self. This faded specificity has enabled the author's use to buttress a multitude of different—and often contradictory—policies, such as its use to support moral rights and increased copyright duration. This flexibility of meaning thus serves to both obfuscate and solidify the author's cultural power.

Yet, despite its legitimating role in increasing copyright protection, as Peter Jaszi has observed, viewing the author as merely "a stalking horse for economic interests . . . better concealed than revealed" assumes too much.[15] Instead, Jaszi suggests that the Romantic conception of authorship stands in permanent tension with the media interests' desire for complete alienability of property;[16] between the two lies the truth.

The actuality is one of continually shifting and overlapping geographies of interest: author, publisher, and public all striving to maximize their position, never governing the path of cultural forces and ideological trends, but making the best of each new development. And on this mutable terrain, media interests have been ceaselessly adept at advancing their own agenda, usually through language emphasizing the importance of incentives for both authors' production and their own dissemination of the authors' work. Granting authors a significant level of copyright protection to reward past and encourage future production is at minimum a constitutionally sound notion. Yet, this deserving status often clouds the judgment of those who determine appropriate copyright protection and can serve to disrupt, to the detriment of the public, the proper balancing of incentives.

Indeed, the absolute and omnipotent manipulation of authors and the concept of authorship by a continuing media cabal are not argued. No such plan presents itself, even in hindsight. Ulterior motives by media interests should not be taken to mean that authors passively allow the facile manipulation of sentiment in

[15] Jaszi, *supra* note 6, at 500.
[16] *Id.* at 501-02.

the media interests' favor. Increased property rights are clearly not inimical to authors, as any benefit has the potential to flow to them. More importantly than any economic rationale, casting authors as geniuses and guileless dupes all at once rings hollow as a workable paradigm. Yet even if one accepts for the moment that authors deserve something like perpetual copyright protection, they invariably receive the lesser share of the benefits. When authors' and media corporations' interests diverge and one group's position must yield,[17] even on the rare occasion when the latter does not triumph, the media corporations' interests are hardly dampened. Ultimately, the moments of authorial supremacy serve mainly to illustrate the manner in which perceived advances by authors are deflected or minimized while the media interests acquire and retain tremendous benefits through their association with authors.

Media interests have always enjoyed the structural advantage of size and the corresponding actuarial ability to view every work as part of a larger group of potential, but not definite, sources of revenue. Yet, the asymmetric symbiosis between the two groups is more apparent today than ever before, a phenomenon resulting primarily from the prevalence of works-for-hire and the natural concentration of ownership of the rights to such works. Greater consolidation of media corporations is also a concern, as is the potential impact this centralized ownership and control could have over creative expression.[18] These circumstances dictate the need for a proper accounting of copyright protection and an assessment of the true role of the author in securing that protection.

B. Perpetual Copyright

Authorship's fluid meaning is amply illustrated by the arguments surrounding this Comment's second assertion: perpetual (or extended) copyright is undesirable. The primary reason underlying this assertion is the adverse effect on the public domain—the commons of unprotected expression that all may draw

[17] *See, e.g.*, Stewart v. Abend, 495 U.S. 207 (1990). However, while the rights of the author took precedence over those of the transferee, this case merely reached a favorable result by construing a statute already replaced with one that effectively nullified the result of the case.

[18] This trend has been met with growing resistance. *See* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

upon in the creation of new works—caused by greater copyright duration.

Those favoring an extended term include the "neoclassicists,"[19] who assert that the market achieves the most efficient allocation of goods and to this end desire increased propertization. To this group, the public domain is merely a different expression for the tragedy of the commons. Yet, "author's rights" language can be indirectly used to further the neoclassicist goal of greater duration and alienability. Initially, authors are asserted to have a proprietary interest in their work that justifies a legal relationship distinct from that used for other forms of property. Once the distinct relationship is accepted, the knot between the author and the work need only be loosened, leaving the conception of copyrighted material as properly held in a monopoly grant, but without the ongoing interest of the author.

The overlap between authors' rights and the neoclassicists' efforts is especially interesting because they are so logically and ideologically incompatible. Granting authors real rights in their creations means adopting a regime similar to that in Europe, where authors permanently retain certain rights in their copyrighted work.[20] Conversely, the neoclassicist would cut the tie between the work and the author much as the car is taken from the manufacturer—with no future interest at all. Tension emerges occasionally, such as when "authors' rights" birthed the Moral Rights movement, but the author concept is sufficiently malleable to support both authors' rights and neoclassicist goals.

This strange alliance illuminates the difficulty of determining the proper length of copyright protection without a clear articulation of the likely effects of the policy proposals put forth under one ideological banner or another. Perhaps the neoclassicists have it right—though this is highly unlikely for reasons that will become apparent—yet advancing their interests under the wing of authorship does a disservice to any actual debate about the matter.

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[19] "Neoclassicist" is a term used by Neil Netanel in his article *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996), and one that I adopt for purposes of this Comment as being both accurate and more elegant than "law and economics view." *See id.* at 312.

[20] For a general discussion of authors' rights under the Berne Convention, see Stephen Fraser, *Berne, CFTA, NAFTA, & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law*, 18 HASTINGS COMM. & ENT. L.J. 287, 290-97 (1996).

The importance of the public domain, and by extension the argument against increased copyright duration, is perhaps most vividly illustrated by granting the neoclassicists their desire and examining the results. With the increased duration, less material is freely available to others for use in their work because the material is subject to copyright. If the material is necessary to the new work, potential users must bargain with the owner. However, predictive valuation of any nonexistent (or often, existent) piece of expression is overwhelmingly difficult, making reasonably informed bargaining by either side nearly impossible because there is almost no way to adequately gauge the value of such expression. The effect is obvious: increased propertization is less likely to foster further production of expression.[21] This is the fundamental problem with the extended duration: those in control of already existing expression (i.e., large corporations) are temperamentally disposed—and perhaps rightly so in a system with a less vigorous public domain—toward exploiting already created properties rather than developing new works.

Given the vital role of past expression in the creation of new, the increased propertization model is akin to building the second floor by removing and using, piece by piece, the materials comprising the first floor. Without the public domain—the first floor—there is nothing to build on.[22] In a sense, this is the ultimate, perverse expression of Romantic authorship, as it assumes that creation can be traced back to a single source, and that all further creation should either pay the originator or create the world anew.

The willingness to brook the harm caused by extended copyright duration may be partly due to the softening effects that other elements of the copyright scheme have on any potential injury.[23] The idea/expression division is one significant example of how a copyright doctrine's inherent subjectivity and adaptabil-

[21] Under the neoclassical doctrine, incentives for creation are less important than securing a functioning market that will theoretically serve to properly allocate all resources. *See* Netanel, *supra* note 19, at 309-10.

[22] Some have noted that the "Romance of the Public Domain" serves to obscure the distributional iniquities of the public domain when considering intellectual endeavors such as traditional and folk knowledge. *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004). This is merely another example of the problem with overemphasizing the author when measuring appropriate copyright.

[23] For example, the neoclassicists offer fair use as a solution for market failure in a totally propertized world. For a discussion of fair use and market failure, see Wendy

ity of application serves as a safety valve when new creative work is put under the pressure of history.[24] As a statement about the interconnectedness of copyright law, this buffering effect captures some of the dynamics at play. For example, modifying duration can cure the harm that other copyright doctrines cause by removing the protections from the expression after a limited period of time.

However, simply because other protections exist does not mean that any one of them is disposable. Overemphasizing the importance of the author and increasing copyright duration reduces the public domain, without which the actual work of creation cannot normally occur. Furthermore, doctrines such as fair use and the idea/expression dichotomy are merely outgrowths of the public domain and allow the normal transmutive, creative function to occur without the fear of sanction.[25]

The rioting forth of scholarship and artistry that has occurred during ever-increasing copyright duration gives one pause when questioning the wisdom of greater duration. Yet, the CTEA and *Eldred* demonstrate that the distorting role of the author and the desire for perpetual copyright remain strong. If those tendencies are to be counteracted, the true interests of all parties affected and the need to maintain a vibrant public domain must be moved to the fore. This can only occur when the CTEA and *Eldred* are placed in historical context as the latest chapter in a long line of similar efforts and analyzed accordingly.

J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1631 (1982).

[24] *See, e.g.*, Judge Hand's application of the idea/expression dichotomy in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (elucidating the "abstraction test"). Another example is fair use. *See, e.g.*, Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (allowing the Roy Orbison song "Pretty Woman" to be parodied by 2 Live Crew). For an example of the parody defense failing to provide a safe haven, see *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (finding infringement for the use of Mickey in a sordid counter-culture role).

[25] Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990). There are some strong and valid critiques of the "Romance of the Public Domain" as enabling the transfer of traditional and folk knowledge to countries that then produce copyrightable material based upon that knowledge. *See* Chander & Sunder, *supra* note 22. However, as this is a critique of both the unequal power relationships between postindustrial and still-industrializing economies and the overemphasis on authors as the baseline for determining validity of copyright ownership, it is partially within and partially beyond the scope of this Comment. Accordingly, the public domain is herein assumed to be a positive and necessary concept, yet is not presumed to be a panacea for all ills.

II

THE RISE OF COPYRIGHT LAW

The CTEA and *Eldred* are twinned across the centuries by the English booksellers' efforts to secure perpetual copyright. Comparison of the two time periods, as with any other historical analogy, offers few explicit points—the rub of particular contexts inevitably dulls down any knowledge extracted from the juxtaposition. Nevertheless, a blunt lesson emerges about the manner in which concentrated, powerful media interests push authors to the forefront when discussing appropriate duration, producing a transient emotional effect that masks their own distinct aim: lengthier copyright protection. Lost in the push is an adequate examination of the primary question, namely, what duration will maximize the constitutionally mandated goal of promoting creative expression? Backgrounded by the early struggles over copyright's proper role and extent, the CTEA and *Eldred* appear for what they are: the latest iterations of a long-fought struggle. Awareness of their contextualized significance is therefore vital for an accurate assessment of their role in the copyright regime's development.

At the turn of the seventeenth century, London book publishers, the major media interest of the day, struggled to protect their fading privileges. In 1556, they were granted a charter to form the Stationers' Company. That charter included powers to regulate unlawful publishing, which gave the publishers what amounted to a protocopyright.[26] Rights in works vested completely in the publisher and were both freely alienable and perpetual[27]—in short, empyrean bliss for the publishers. Their apogee of power came in 1662 with the passage of the Licensing Act, which was widely and accurately perceived as a vehicle for monopoly and state censorship.[28] Discontent with the Act led to Parliament allowing it to lapse in 1694,[29] leaving the publishing business open to both piracy and a surfeit of competition. Sympathy for the publishers' loss of privileges did not run high; some other rationale was needed to justify reacquiring their monopoly. An even greater obstacle was the joinder of copyright and censorship in the minds of those who had experienced the Licensing

[26] Patterson & Joyce, *supra* note 7, at 913.
[27] *Id.* at 913-14.
[28] *Id.* at 919.
[29] *Id.* at 916.

Act's injustices. Unless some way to sever the two could be found, Parliament was likely to rebuff the publishers' efforts to substitute new restrictions on printing for those lost when the Licensing Act expired.[30]

Shifting copyright rhetoric away from a discussion of publishers' rights and censorship to focus on the rights of the producers was that way. The shift was not always subtle or complete. Comparing the copyright statute ultimately passed by Parliament with earlier alternatives put forth reveals the interests that were submerged in the author-centric rhetoric and points to the author's use in justifying perpetual copyright that has persisted through the CTEA and *Eldred*. Most striking is the provision in the statute's early version that would have given authors an ongoing interest in their work as opposed to simply being paid a lump sum and sent back to the creative coal mine for more product.[31] The text of the statute was altered to remove language giving an author the right to "reserve to himself" the rights to a work, thus preventing the results from conforming *too* closely to the rhetoric.[32]

Authors proved a sympathetic group, effectively drawing the debate away from the statute's relation to monopolies and censorship and toward the vision of public-spirited furtherance of knowledge.[33] Thus, when Parliament passed the Statute of Anne—the first true copyright legislation—in 1710, the stated purpose was "for the Encouragement of Learned Men to Compose and Write useful Books."[34] The evil sought to be avoided was the practice of "Printing, Reprinting, and Publishing . . . Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families."[35] These are the same professed concerns that resonate through the CTEA and *Eldred*.

The Statute's goals were threefold: first, to encourage learning; second, to ensure public access to knowledge; and third, to en-

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[30] John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUBLISHING HIST. 19 (1980).

[31] *Id.* at 36.

[32] *Id.* at 35-36.

[33] *Id.* at 31.

[34] Act for the Encouragement of Learning (Statute of Anne), 1710, 8 Ann., c. 19 (Eng.).

[35] *Id.*

hance the public domain.[36] All three were furthered by the Statute's copyright terms of twenty-one years for existing works and fourteen years, once renewable, for new works.[37] These terms ensured incentives for producing new works by granting a limited monopoly but removed that protection relatively quickly, sending the works into the public domain. John Feather's description of the Statute of Anne's mixed results is especially prescient and, by modifying an uncomfortably small number of words, might describe the status of copyright today:

> With their internal machinery of oligarchic control . . . their monopoly of distribution through the wholesaling congers, the control of production by a few wealthy capitalists, and the exclusive trade sales to ensure that no copies fell into the wrong hands, they were already safe enough; but to all this was now added the majesty of the law, protecting them without involving them in the delicate and unpopular area of censorship. The 1710 Act may have encouraged learning: that is rather difficult to quantify. In the long term, it even provided a spring-board from which professional authors could assert their power. But its most immediate effect was that it ensured the continued dominance of English publishing by a few London firms, and their continued and ever increasing prosperity.[38]

Thus, submerged within its author-centered language was the primary motive force behind the Statute of Anne: securing the publishing monopoly lost when the Licensing Act lapsed.[39] The abortive elision of publisher control thus ended, but not without far reaching consequences. Foremost was the new copyright's use "to create a stable legal foundation for a market in texts as commodities."[40] By the middle of the century, authors were increasingly independent of the patronage system,[41] opening the field to authors who appealed to less constrained tastes.

Additionally, although the Statute of Anne occurred before the rise of the Romantic notion of the author, the publishers' efforts to place the author at the fore were an indirect force behind the rise of that ideal, as the "laws which regulate . . . writing

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[36] Patterson & Joyce, *supra* note 7, at 918.

[37] Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

[38] Feather, *supra* note 30, at 37.

[39] *Id.* at 20. The use of the author as a tool of repression also occurred in France. Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS 109, 111-12 (1990).

[40] *Copyright*, *supra* note 11, at 32.

[41] Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 54 (1988).

practices" served to legitimize and reinforce the author-as-source-of-original-material creative model.[42]

The drive to enact the Statute of Anne demonstrates how the overlapping interests of authors, publishers, and the public may all benefit under certain copyright regimes, even if the benefit is not balanced equally. The process that gave rise to the Statute, although driven by the publishers' desire to assure themselves a sinecure from perpetual copyright, also gave rise to tangible benefits for authors and the public.

Yet, while the Statute of Anne assured the publishers some security and prosperity, it did not give them the permanent monopoly that they desired. Therefore, the decades following the Statute's enactment found the publishers attempting to have legislation passed that would provide for copyright protection "for a longer term of years, or for life."[43] The situation became especially dire as 1731, the date on which the first copyrights secured by the Statute of Anne began entering the public domain, came and went. Attempts to obtain additional copyright protection failed in 1735, 1738, and 1739;[44] wealthy publishers struggling to regain the franchise that had both served as an engine of repression and simultaneously brought them great wealth and power did not constitute a terribly congenial cause.

Having failed to obtain a legislative solution, the publishers attempted a judicial one. Predictably, they again used the author as a vehicle to demand rights for themselves. Beginning in 1731, and culminating in the cases *Millar v. Taylor*[45] and *Donaldson v. Beckett*[46] (which litigated the rights to publish the works of the author James Thomson), publishers argued that copyright properly was a natural right of the author (freely assignable, of course) that existed independently of any statute.[47] The exalta-

[42] Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15 (Martha Woodmansee & Peter Jaszi eds., 1994); *see also* Rose, *supra* note 41, at 54 ("[C]opyright . . . not only makes possible the profitable publishing of books but also, by endowing it with legal reality, produces and affirms the very identity of the author as author.").

[43] Donaldson v. Becket, 17 Parl. Hist. Eng. (1774), 991-92 (De Grey, Lord Chief Justice).

[44] Patterson & Joyce, *supra* note 7, at 923.

[45] Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.).

[46] Donaldson v. Becket, (1774) 98 Eng. Rep. 257 (H.L.).

[47] Patterson & Joyce, *supra* note 7 at 925-27. For a discussion of the logic of self-ownership, see J. W. HARRIS, PROPERTY AND JUSTICE 188-97 (1996).

tion of authors and the natural law copyright supposedly vesting in them thinly and unpersuasively masked the publishers' intention "to benefit themselves, not the author, by having the author assign the copyright to them forever."[48] Although the publishers persuaded the *Millar* court to recognize a common law copyright,[49] the House of Lords was unsympathetic to the publishers' ahistorical argument for common law copyright and refused to grant an extra-statutory, perpetual copyright in *Donaldson*.[50]

When the United States faced the problem of setting copyright protection, the drafters of the Constitution and the Copyright Act of 1790 were well aware of the Statute of Anne and its antecedents. Therefore, they recognized that although the promotion of learning justified copyright's monopoly grant, such a scheme was more regulatory than proprietary. Furthermore, the limited grant's ability to cure defects in the awarding of the monopoly was too important to give a perpetual copyright.[51] Nevertheless, a predictable attempt to circumvent the statutory scheme by asserting a common law copyright occurred in the 1834 case *Wheaton v. Peters*.[52] However, the attempt met with an identical fate to *Donaldson*, and the Supreme Court refused to judicially recognize what the legislature had denied.[53]

Another illuminating early example of the dissonance between publishers' desires and true authors' rights is found in the period immediately preceding the passage of the English Copyright Act of 1842. The push for increased duration in the extant copyright statute occurred near the height of Romanticism. The originally proposed extension strove to maximize the benefit to authors' families by extending the term to life plus sixty years.[54] The veneration of the authors' efforts and the need for special reward is

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[48] Patterson & Joyce, *supra* note 7, at 925.

[49] *Millar*, 98 Eng. Rep. 201.

[50] *Donaldson*, 98 Eng. Rep. 257.

[51] Patterson & Joyce, *supra* note 7, at 939, 945-46. The Copyright Act of 1831 had already extended copyright duration, in no small part due to the ministrations of Noah Webster, who traveled to Washington D.C. in 1830 to lobby for greater copyright protection. Webster's efforts were validated by the passage of the 1831 Act. Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2d 37, 38-39 (2002).

[52] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[53] *Id.*

[54] John Feather, *Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part II: The Rights of Authors*, 25 PUBLISHING HIST. 45, 47 (1989).

best expressed by Wordsworth's 1838 poem urging greater copyright, "A Plea for Authors":

> Failing impartial measure to dispense
> To every suitor, Equity is lame;
> And social Justice, stript of reverence
> For natural rights, a mockery and a shame;
> Law but a servile dupe of false pretence,
> If, guarding grossest things from common claim
> Now and for ever, She, to works that came
> From mind and spirit, grudge a short-lived fence.
> 'What! lengthened privilege, a lineal tie,
> For Books!' Yes, heartless Ones, or be it proved
> That 'tis a fault in Us to have lived and loved
> Like others, with like temporal hopes to die;
> No public harm that Genius from her course
> Be turned; and streams of truth dried up, even at their source![55]

However, for once the publishers were against the increase. They feared having to pay excessive amounts to authors who would have little chance of succeeding to posterity in the manner of Wordsworth or Scott or Coleridge, yet would expect more compensation for signing away the rights which, theoretically at least, had greater earning potential than before. This interlude in the publishers' search for greater copyright protection illustrates two important points. First, the publishers' desire for a lengthier term does not stand outside economics. If it ceases to be a profitable pursuit, or rather if it appears to cease being so, the quest is abandoned. The second and related point is that the moment authors' rights no longer coincide with their agenda, media interests are immediately willing to drop the authors' rights language. Neither point is surprising, but each bears attention, as they reinforce the author concept's status as a historical artifact that is subject to the pressures of the moment, whatever its resilience as a cultural construct.

Immediately apparent when comparing early copyright law with the CTEA and *Eldred* is the publishers' long-standing desire for perpetual copyright—to conform intellectual property

[55] WILLIAM WORDSWORTH, *A Plea for Authors*, *in* WORDSWORTH: POETICAL WORKS 222, 222-23 (1967).

law to a functional identity with other forms of property.[56] The methods that the publishers employed in their push for complete alienability also demonstrate the extent to which they were able to utilize an emerging conception of the author to their own advantage. Total control of the process or the results of their ideological sleight of hand never existed. Significant benefits did flow to authors and the public, yet the structure of copyright laws and market practices assured that the publishers reigned supreme.

Despite the intervening three centuries between the Statute of Anne and the CTEA, the motivating ideology of the media corporations remains largely focused on expanding property rights. The ideological battles fought over the nature of copyright duration in eighteenth and nineteenth century England and the United States possess more than just historical significance. They prefigure the struggle playing out today. The use of the author as a sympathetic—and often complicit—figure in the service of realizing that goal remains unchanged.

III

THE COPYRIGHT TERM EXTENSION ACT AND *ELDRED V. ASHCROFT*

The desire for perpetual copyright and the continued use of the author to subvert proper accounting of perpetual copyrights' benefits and detriments are evinced by the passage of the CTEA and its subsequent legitimation in *Eldred v. Ashcroft*.[57] The rationales at work are not identical to those in the period surrounding the passage of the first copyright legislation. While the concept of the author remains powerful and is reified in much of copyright law, recourse to its protections is not needed as often today. With no memories of the repressive Licensing Act to dissuade them, Congress is evermore willing to grant extraordinary protections to copyright owners without need to disguise the true beneficiaries.

Yet, they are protections for copyright *owners*. The decision to formulate such protections cannot be surprising given the enormous revenues that pour into the United States from the sale of copyrighted materials as well as the significant role of intellectual

[56] *See* Feather, *supra* note 30, at 35; *see also* Rose, *supra* note 41, at 53 (discussing the aftermath of *Donaldson* and the feeling held by some that "a vast amount of property by contemporary values had been annihilated").

[57] 537 U.S. 186 (2003).

property rights in the wealth of a postindustrial society. The natural tendency is to conflate the author and ownership of the work,[58] but this inevitably assumes that authors retain the rights to their work or that they are appropriately compensated for it at the time of sale. Neither is necessarily true, but both serve to disguise the real beneficiaries of the CTEA: the modern equivalent of publishing houses, institutions such as the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA).[59]

This does not mean that revenues should not be protected or that they are not important. Distributors are vital to maintaining the marketplace for expression. Nevertheless, fostering new expression should not be subordinated to the goal of extracting every possible dollar out of existing works. Therefore, concern for the public domain is essential, as without it new creation, the intended byproduct of the Copyright Clause, will be reduced.

A. The Passage of the CTEA

The CTEA's passage was unsurprising to the cynically inclined, as without it Disney's favorite mouse was not long for the copyrighted world. However, it was more than simply the product of Mickey's skill in the black arts of legislative influence, equipped as he is with more lobbyists than magic brooms in *Fantasia*. The Act undeniably secured enormous revenues to one of the United States' largest export sectors. Yet, the CTEA provides an unwelcome glimpse into how distant the discussion about copyright is from questions of constitutional purpose, as it focuses almost exclusively on benefits to be derived from existing copyright, not on the creation of new expression.

The CTEA was not passed to provide further incentives to authors, nor was the rhetoric used to support it overly concerned with disguising the proprietary interests of copyright holders in securing greater term duration. Congress did feel the need to at least acknowledge the rights of authors and the benefits that the statute would provide them. Yet, more than anything else, the incentive language used seems to be a post hoc nod to embedded notions of the proper beneficiaries of copyright protection. While the CTEA illustrates the hold the author retains on our collective imagination, the CTEA's significance lies mainly in its

[58] *See* Jaszi, *supra* note 6, at 471-81.

[59] *Eldred*, 537 U.S. at 267-69 (Breyer, J., dissenting).

granting greater copyright protection while at the same time paying little attention to constitutional demands.

The House Report accompanying the CTEA offered the following as the purpose behind the Act:

> In 1995, the European Union extended the copyright term for all of its member states from life of the author plus fifty years to life of the author plus seventy years. As the world leader in the export of intellectual property, this has profound effects for the United States if it does not extend copyright term as well.
>
> European Union countries, which are huge markets for U.S. intellectual property, would not have to provide twenty years of copyright protection to U.S. works and the U.S. would lose millions of dollars in export revenues. Extending copyright term to life of the author plus seventy years means that U.S. works will generally be protected for the same amount of time as works created by European Union authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States.
>
> Extending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public. Authors will be able to pass along to their children and grandchildren the financial benefits of their works.[60]

This is the clearest statement of legislative intent available and is worth parsing carefully. It begins with a declaration that the legislation will, as Representative Jackson-Lee observed, "finally permit us to enjoy the full and appropriate term that European copyright owners have enjoyed for some time now."[61] Yet, there

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[60] H.R. REP. NO. 105-452, at 4 (1998). By way of comparison, this is part of the comparable House Report from the enactment of the 1909 Copyright Statute:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . . In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

H.R. REP. NO. 2222 at 7 (1909).

[61] 144 CONG. REC. H9949 (daily ed. Oct. 7, 1998) (statement of Rep. Jackson-Lee).

is nothing magical in a seventy-year duration or in the European Union's decision to set copyright duration for that period. Moreover, the language suggests total acceptance of the neoclassicist model of propertization. The extra twenty years are characterized as securing revenues that U.S. companies would otherwise "lose," rather than as an extra tax on the public for works long paid for and an infringement on the public domain. Furthermore, the actual value of this incentive is virtually nonexistent to most authors, as life plus fifty years provides the vast majority of authors with the effective maximum amount of benefit.[62]

Nevertheless, the increase in duration to match the European Union's level of protection is subsequently offered as the reason why the CTEA is within the powers granted to strictures of the Copyright Clause. Then, the author is evoked, whose ability to pass down the property rights to her grandchildren will assumedly drive her to greater lengths than if she was merely passing the rights on to her children under the 1976 Act.[63] By linking increased protection to incentives for authors, the CTEA sidesteps the increasing prevalence of copyrighted works falling under the category of works-for-hire.[64] This category grants the financial benefits described in the CTEA not to the author's grandchildren, but to the grandchildren of the shareholders in the corporation that owned the copyright from the moment of creation.[65]

The avowed purpose of the CTEA is thus largely a nullity, though the use of the only figure more sympathetic than the poor, incentive-lacking author—that of the poor, incentive-lacking author with needy grandchildren—is not for naught. A party does emerge from the CTEA with a benefit and an incentive: those who already have copyrighted material worth restoring and further disseminating.

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[62] *Eldred*, 537 U.S. at 254-56 (Breyer, J., dissenting).

[63] In fact, the Recording Artist Coalition said exactly this during the consideration of *Eldred*. *See* Brief of Amici Curiae Recording Artist Coalition, *Eldred*, 537 U.S. 186 (No. 01-618). Concern for the children of authors was especially important in the discussion surrounding the English Copyright Act of 1842. *See also* Feather, *supra* note 54.

[64] *Eldred*, 537 U.S. at 267-69 (Breyer, J., dissenting).

[65] As the prevalence of works-for-hire increases, large corporations (and by extension their shareholders) own an increasing portion of the most valuable copyrights. For a review of two recent books on the general subject of consolidated corporate ownership of copyrights, see Michael J. Gerhardt, *The First Amendment's Biggest Threat*, 89 MINN. L. REV. 1798 (2005).

The passage of the CTEA can be seen as a response to changing and threatening circumstances. English booksellers that were faced with the elimination of their monopoly on the book trade and fearful of the new business model attempted to skirt the clear language of the Statute of Anne through judicial recognition of a natural copyright. Modern media corporations are similarly threatened, though with a change in social rather than structural norms. The generational notion of entertainment or information as properly acquired for free is a major blow to the copyrighted industries. Thus, as distribution becomes less controllable, the focus on the author may in the long run prove to bite back at the corporations. If all legitimacy resides in the author, there is little reason to feel a moral obligation to pay the distributor. Yet, however one interprets the CTEA, the Supreme Court's decision in *Eldred* was a disappointing example of the power of the author to dominate thinking about copyright legislation even when media interests stand to acquire nearly all the gain.

B. Eldred v. Ashcroft

The CTEA emerges as a wholly unsurprising iteration of the long line of efforts, both legislative and judicial, to secure greater copyright duration. Given its language, there seems little doubt that further such efforts will occur. For that reason, the Court's decision in *Eldred* is vitally important, as it provides a glimpse into how the Court will respond to those future efforts.

The power of the author to influence the contours of the debate about copyright, as well as the outcome of that debate, is apparent in the Court's reasoning in *Eldred*, the case that tested the constitutionality of the CTEA and the rhetoric employed by those who agitated for the decision. The case was argued on fairly narrow grounds, and perhaps the Court simply decided that restraint was the better part of judicial valor when declining to invalidate the Act.[66] Yet, the language and reasoning illuminates the Court's thinking about the role of the author in modern copyright law.

The distorting influence of the author first surfaced during the Court's analysis of Congress' authority to increase copyright duration. In the process of rejecting Justice Stevens' dissenting ar-

[66] *Eldred*, 537 U.S. at 204-05.

gument that the limitations on copyright duration serve to prevent the type of monopoly that plagued England before the Statute of Anne, the majority asserted that any comparison to English copyright was totally inapposite because "[t]he Framers guarded against the future accumulation of monopoly power in booksellers and publishers by authorizing Congress to vest copyrights only in 'Authors.'"[67]

That phrase tellingly reveals the Court's conception of copyright as centered on the author. Furthermore, it ignores the possible accumulation of these freely assignable copyrights. The Court failed to account for the changing nature of mass media, specifically, the consolidated ownership of creative expression in the hands of a dwindling number of massive corporate entities with no mandate or reason to be concerned about the market for expression save their continued profitability.[68] Thus, the paradigm of the author bounded the Court's conceptualization of the CTEA's effects but had little relation to the question before the Court.

The Court's analysis was therefore fundamentally flawed from the beginning, as it assumed that the CTEA was addressed to furthering incentives for authors. Instead, the CTEA's term extension provided increased revenues almost exclusively to media corporations, which hold multiple copyrights and can afford to take the chance that some will prove dear to posterity. Yet, the possibility of any single copyrighted work remaining profitable over fifty years after its author's death is so tenuous that there is little chance that authors will see that increased revenue.

The Court then considered whether the CTEA was "a rational exercise of the legislative authority conferred by the Copyright Clause."[69] Greater understanding of the role that the author plays in masking the enrichment of media interests to the public domain's detriment did not ensue. The Court began by noting deferentially that "it is not our role to alter the delicate balance Congress has labored to achieve."[70] Among the factors in that "delicate balance" were "because Europe has gone that way"[71] and "increasing longevity and the trend toward rearing children

[67] *Id.* at 200 n.5.

[68] *Id.*

[69] *Id.* at 204.

[70] *Id.* at 205 n.10 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).

[71] *Id.* at 206 n.11 (quoting *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et. al. Before the Subcomm. on Courts and Intel-*

later in life."[72]

However, when the Court addressed the central constitutional question of incentives for creation, authors themselves naturally came to the fore.[73] Indeed, when faced with the congressional testimony of Quincy Jones and Bob Dylan, both of whom supported the copyright extension, who could easily refuse the requested increase?[74] Also testifying about the benefits that would accrue to the author, and thus to the public, was the Register of Copyright, who stated that "[a]uthors would not be able to continue to create . . . unless they earned income on their finished works."[75] This statement, while on one level a meaningless platitude, takes the logic of the Copyright Clause and uses it to provide a veneer to an act only glancingly concerned with providing greater economic security for authors.

These instances indicate not that the registrar or the specific authors named are complicit or unwitting tools of the media interests, but rather highlight the immense force a specific conceptualization of the author can have on the debate about proper copyright protection. The statements shift the focus. Authors are pushed to the fore and exalted, and the benefit they are to obtain outweighs considerations of potential harm to the public interest. This is a far cry from the Court's statement in *Sony Corp. of America v. Universal City Studios, Inc.* that "[t]he copyright law . . . makes reward to the owner a secondary consideration."[76] The *Eldred* Court only discussed reward. After noting that authors are in favor of the extension, the Court did not even acknowledge that detrimental effects might flow from the legisla-

lectual Property of the H. Comm. on the Judiciary, 104th Cong. 230 (1995) (statement of Marybeth Peters, Register of Copyright)).

[72] *Id.* at 207 n.14 (quoting 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch)).

[73] *See, e.g.*, Brief of Recording Artist Coalition, *Eldred*, 537 U.S. 186 (No. 01-618).

[74] *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 158 (1995); *Hearings Before the S. Comm. on the Judiciary*, 104th Cong. 55-57 (1995). Perhaps Don Henley (who testified to similar ends) could be ignored, but certainly not the man who produced "Thriller," much less the definitional singer-songwriter of the twentieth century.

[75] *Eldred*, 537 U.S. at 207 n.15 (quoting *Copyright Term, Film Labeling and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 165 (1995)).

[76] 464 U.S. 417, 429 (1984) (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).

tion. Rather, it moved on to the final argument: whether Congress could simply create perpetual copyright through periodic extensions to existing copyrights.

Again, the Court was not sympathetic to the petitioner's claims, stating that "[n]othing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint."[77] While there may not have been evidence in the record explicitly stating that this was Congress' intention—though some statements like those made by Congresswoman Bono came close—copyright history from its inception has evinced media interests' drive for perpetual copyright. One need not be conspiracy-minded to detect a distinct pattern and wonder when the next advance will be proposed. Unfortunately, although the majority acknowledged Justice Breyer's point that the incentives provided by the extension were virtually nonexistent, it pithily responded that "[i]t is doubtful . . . that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar."[78] Well put, but the Framers also likely thought in terms of decades, rather than centuries, when considering the meaning of "limited Times."

Although the Court avoided the question of incentives for corporate entities, the entities were not so shy. For example, the amicus brief of the MPAA offered the testimony of the Register of Copyright to support the theory that the CTEA provided a useful incentive and thus was both a benefit to the public as well as to authors (and, of course, to themselves):

> The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster[,] who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary.[79]

The substitution of the corporate entity for the author in this

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[77] *Eldred*, 537 U.S. at 209.

[78] *Id.* at 210 n.16.

[79] Brief for Amicus Curiae Motion Picture Association of America, Inc. in Support of Respondent at 12, *Eldred*, 537 U.S. 186 (No. 01-618) (citing *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 165 (1995)).

scenario is assumed, to the effect that the movie studios are placed in a position where the societal value seen to reside in authors is vested in the studio, thus utilizing the language of authorial incentives to tilt the equation toward their interests.

Furthermore, the MPAA brief noted that "Copyright owners—notably film studios—are unlikely to make the large investments required to produce derivative works, such as new editions of old works that include supplemental material such as never-before-seen outtakes and interviews," without a copyright duration sufficient "to assure them of the continued exclusive right to profit from works building on the underlying work."[80] The example used to drive this point home was the release of such "supplemental material" connected with *Citizen Kane*, the prototypical American *auteur* film.[81]

One might inquire into the MPAA's understanding of "derivative works," but this would be quibbling about actual meaning. Instead, the important point is the degree to which groups such as the MPAA were able to advance their own goals by associating themselves with authors. The major copyright holders were the focus of the statute granting them benefits, yet were mentioned only in passing in the decision validating that statute. The major beneficiaries thus placed themselves in the enviable position of benefiting without being saddled with greater expectations than an occasional special feature on re-released DVDs.

Petitioners also argued that the Copyright Clause contained an "impediment to the CTEA's extension of existing copyrights" and "that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment."[82] Neither argument was particularly meritorious, and neither will likely play a significant role in future litigation over copyright duration. And, neither was successful in persuading the Court to overturn the CTEA.

However, not all Justices accepted the merit of the CTEA. Although the Court was unswayed by Justice Breyer's lucid and cutting dissent, he destroyed the illusion of rationality that the majority sought to purvey.[83] He immediately recognized that the

[80] *Id.* at 13.

[81] *Id.* at 14 n.20.

[82] *Eldred*, 537 U.S at 218.

[83] Justice Stevens also filed a dissent, though he asserted that Congress could not extend a copyright past its expiration date. *Id.* at 222 (Stevens, J., dissenting).

CTEA's "primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors."[84] Perhaps most importantly, Justice Breyer recognized that with incremental change in copyright duration, no one time period will stand out as blatantly unconstitutional, yet the failings of the CTEA "amount to failings of constitutional kind."[85]

Addressing virtually every major failing of the majority opinion, Justice Breyer succinctly described the purpose of copyright and how it is intended for the benefit of the public, not private parties. The reward provided "is a means, not an end,"[86] and the monopoly grant is given only for the benefit received in exchange. However, the extra term of years effectively transfers "several billion extra royalty dollars to holders of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty 'reward.'"[87] He contrasted this amount flowing to copyright owners with the extra incentives that authors would receive for the potential value of their creations. The incentive is virtually nonexistent.[88] Justice Breyer thus directly addressed all of the major problems with the extension: little benefit to authors, no benefit to the public, no meaningful incentives for creation, most of the reward flows to corporate copyright owners, and a diminished public domain.

Yet the majority was not persuaded. Instead, by casting the discussion in terms of the author's perception of incentives, the Court, consciously or unconsciously, shifted the argument into one of measuring the immeasurable, a perfect way to allow it to withdraw behind the veil of rational basis review.[89] Moreover, the Court's logic implies that the key question is whether an author thinks that she is receiving more incentive, not whether she actually is receiving more.[90]

Conclusion

The comparison between early copyright law and the CTEA and *Eldred* indicates that the issues confronting those who are charged with developing copyright regimes remain largely un-

[84] *Id.* at 243 (Breyer, J., dissenting).
[85] *Id.*
[86] *Id.* at 245.
[87] *Id.* at 249.
[88] *Id.* 254-57.
[89] *Id.* at 204-05 (majority opinion).
[90] *Id.* at 207 n.15.

changed from those that existed three centuries ago. The problem therefore becomes not that Congress or the Court have deliberately ignored the incentive structure laid out by the Constitution. Rather, what emerges is that the CTEA and *Eldred* have both been the product of media interest pressure and the ability of the author to serve as a vessel in which the interests of unsympathetic and undeserving parties may be carried. The challenge for the future is to continue the project of analyzing the author's role in legitimating copyright law and addressing the degree to which the social construct provides a heuristic for interpreting the copyright regime. If and when the Court is called upon to determine the constitutionality of future attempts to increase the copyright term, only such awareness and highlighting of the author's role in diverting attention away from the primacy of the public's interest will ensure that the dream of perpetual copyright remains just that.