

ORAL ARGUMENT SCHEDULED FOR OCTOBER 5, 2000

**No. 99-5430**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**ERIC ELDRED, et al.,**

*Plaintiffs-Appellants,*

v.

**JANET RENO,**  
In her official capacity as Attorney General,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the District of the District of Columbia Texas

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**BRIEF OF AMICUS CURIAE  
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND  
IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL**

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Erik S. Jaffe  
ERIK S. JAFFE, P.C.  
5101 34<sup>th</sup> Street, N.W.  
Washington, D.C. 20008  
(202) 237-8165

*Attorney for Amicus Curiae  
Eagle Forum Education &  
Legal Defense Fund*

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**INTEREST OF AMICUS**

Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) was organized in 1981 in part to support efforts to enforce constitutional limits on an encroaching federal government.<sup>1</sup> Eagle Forum views the retroactive provisions of the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”) as an attempt to

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<sup>1</sup> This brief is filed pursuant to party consent and this Court’s May 10, 2000 Order.

expand federal authority by ignoring enumerated bounds of the Copyright Clause and the further constraints imposed by the First Amendment.

## **ARGUMENT**

It is always important to “start with first principles.” *United States v. Lopez*, 514 U.S. 549, 552 (1995). For example: constitutional interpretation begins with the actual language of the Constitution; all such language is presumed to have meaning; and the enumeration of certain powers presupposes powers outside the scope of the enumeration. These first principles lead to the conclusion that *all* of the language of the Copyright Clause in one way or another limits congressional authority, and that the First Amendment limits the copyright power just as it limits all other Article I powers. If language in some cases might suggest otherwise, such language is wrong and *Eagle Forum* offers suggestions as to how this Court should proceed in light of such error.

### **I. COPYRIGHT POWER IS LIMITED TO PROMOTION OF THE PROGRESS OF SCIENCE.**

Article I, section 8, clause 8, of the Constitution enumerates the copyright power:

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ....

The district court rejected plaintiffs' Copyright Clause challenge to the CTEA, holding that the "introductory language of the copyright clause does not limit this power." *Eldred v. Reno*, 74 F. Supp.2d 1, 3 n. 6 (D.D.C. 1999) (citing *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982)).

The court also held that "any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time." 74 F. Supp.2d at 3 n. 7. Both of these holdings are erroneous.

#### **A. The "Power ... To promote the Progress of Science" Is a Limited Enumeration of Authority.**

The introductory language of the Copyright Clause defines, and therefore delimits, congressional power in this area as "promot[ing] the Progress of Science." The structure of the provision defines a power "to do X by means of Y." In the case of the copyright power, "X" – to promote the progress of science – is not a mere superfluity; it *is* the power granted to Congress. The remainder of the clause – "by securing for limited Times," etc. – is not an affirmative grant; it is a negative limit on the *means* by which the power "[t]o promote" may be exercised.<sup>2</sup> The Supreme Court recognizes the plain meaning of this clause's language and

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<sup>2</sup> See also, e.g., U.S. Const., art. II, sec. 2, cl. 2 ("[The President] shall have the Power, *by and with the Advice and Consent of the Senate*, to make Treaties ...."); art. IV, sec. 1 (regarding full faith and credit for State acts, records, and proceedings, "Congress may *by general Laws* prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof"). The "by" language limits the means of exercising a particular authority; it does not imply that the language enumerating the power itself lacks any limiting function.

structure in the context of the intertwined and parallel Patent Clause. In *Graham v. John Deere Co.*, the Court stated:

The clause is both a grant of power and a limitation. This qualified authority... *is limited to the promotion of advances* in the “useful arts.” ... The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. ... [A patent system] by constitutional command must “promote the Progress of \* \* \* useful Arts.” *This is the standard expressed in the Constitution and it may not be ignored.*

383 U.S. 1, 5-6 (1966) (emphasis added). If patent laws “must ‘promote the Progress of ... useful Arts,’” then surely copyright laws similarly “must” promote “the Progress of Science,” and Congress’ copyright power is limited accordingly.

The district court’s holding that the initial language of the Copyright Clause “does not limit” Congress ignores first principles of constitutional interpretation. The Supreme Court has recently reaffirmed that the very act of enumeration also constitutes a limit on federal power:

The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *Lopez*, 514 U.S. at 552 (*quoting* Federalist No. 45); *id.* at 553 (“The enumeration presupposes something not enumerated”) (*quoting* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).).

In fairness, the district court was relying on this Court’s statement in *Schnapper v. Foley* that it “cannot accept appellants’ argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.” 667 F.2d at 112. Read broadly, this statement in *Schnapper* misinterprets the Constitution and would seem to be *dicta*. But in context, this statement can be read in a narrower fashion.

*Schnapper* considered whether a copyright in a government-funded public-television program and assignment of that copyright to the government violated the Copyright Clause. Addressing the “not wholly clear” argument that the initial portion of the Copyright Clause somehow forbade such copyrights and assignments, this Court discussed the Fifth Circuit’s views on the scope of the copyright power, 667 F.2d at 111-12, and then noted the Fifth Circuit’s conclusion

that Congress need not “require that *each* copyrighted work be shown to promote the useful arts ....” [*Mitchell Bros. Film Group v. Cinema Adult Theater*,] 604 F.2d [852,] 860 [(5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)]. That being so, we cannot accept appellants’ argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.

*Id.* at 112 (emphasis added). The Fifth Circuit, however, rejected only a writing-by-writing application of the “promote” requirement, but acknowledged that the “promote” language *does* limit Congress: “The words of the copyright clause of the constitution do not require that *Writings* shall promote science or useful arts:

they *require that Congress shall promote those ends.*” 604 F.2d at 859-60 (emphasis added; citation omitted).

This Court’s endorsement of that narrower point made by the Fifth Circuit was all that was required to resolve *Schnapper* – the copyright eligibility of an individual program is not limited by the “promote” requirement. And copyright protection for government-commissioned public-television programs generally seems to have satisfied the “promote” requirement. 667 F.2d at 108-11, 112. In context, *Schnapper*’s language should be understood to mean that the constitutional language did not limit government authority to grant *the particular copyright in question*, not that the “promote” language could *never* constitute a limit on Congress. Thus understood, *Schnapper* does not control this case. Alternatively, if the language in *Schnapper* is read broadly, then it would be *dicta* beyond what was necessary to decide the case and it would be wrong in substance. On such an alternative view it would still not control this case. This Court thus should proceed to evaluate whether the retroactive extension of copyright terms promotes the progress of science.<sup>3</sup>

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<sup>3</sup> Even if this Court reads *Schnapper*’s language as controlling this case, that does not end the matter. While this panel may not overrule *Schnapper*, it either could *sua sponte* seek *en banc* overruling of the thus-interpreted error, *see* Fed.R.App.P. 35(a), or it could reluctantly follow *Schnapper* while candidly acknowledging the error of that earlier decision, thus facilitating further review. *See Central Green Co. v. United States*, 177 F.3d 834, 838-39 (9<sup>th</sup> Cir. 1999) (following precedent but acknowledging potential error), *cert. granted*, 120 S. Ct. 1416 (2000).

## **B. Retroactive Extension of Existing Copyright Terms Does Not Promote the Progress of Science.**

The power to “promote the Progress of Science” is limited to inducing the creation of new material in the sciences (broadly understood). “Promote” means “to help forward,” “to encourage.” New Lexicon Webster’s Dictionary 800 (1994). “Progress” means “forward movement,” “improvement, advancement.” *Id.* at 799. In combination, the copyright power must be used to induce the new, and not merely reward or sustain the old. *Cf. Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1983) (“the limited grant [of monopoly privileges] is ... intended to motivate the creative activity of authors”). Retroactive increases in copyright terms do not motivate creativity in any way, and hence exceed the copyright power.

*McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), cited by the district court, is not to the contrary. The retroactive provision at issue in *McClurg* enforced the benefit-of-the-bargain of previously granted patents by authorizing a new patent “when an original one was invalid by accident, inadvertence, or mistake.” *Id.* at 207. Such remedial protection of mistakenly lost prior incentives still promotes progress by “securing” the very rights that encouraged innovation in the first place. But the CTEA’s retroactive grant of an entirely new benefit not part of the original incentive structure is an entirely different beast, and the approval of

retroactivity in the former context cannot be read as endorsing retroactivity in the latter context.

While some language in *McClurg* rejects a complaint against “retrospective” operation by stating broadly that Congress’ power “to legislate upon the subject of patents is plenary ... [and] there are no restraints on its exercise,” 42 U.S. (1 How.) at 206, that assertion misreads the Constitution, goes further than was necessary in that case, and is contradicted by subsequent Supreme Court cases. Indeed, when the Supreme Court in *Graham* cites to *McClurg*, it reads *McClurg* for the significantly qualified proposition that “[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability. [Citing *McClurg*, 1 How. at 206.]” *Graham*, 383 U.S. at 6 (emphasis added). An overbroad reading of *McClurg* eschewing *all* limits on retroactive congressional power thus is no longer the law, if it ever was.

The district court never reached the merits of whether retroactive copyright extensions promoted the progress of science. In her briefs below, however, Attorney General Reno, proffered three ways in which retroactive term extensions supposedly promote the progress of science: (1) by harmonizing copyright law with the law in Europe; (2) by encouraging preservation of certain materials at risk of deterioration; and (3) by making more resources generally available to potential authors. None of these alleged effects “promote[s] the Progress of Science.”

For example, there is no credible claim that prior lack of “harmony” with Europe undermines enforcement of existing U.S. copyrights. Rather, under the European “rule of the shorter term,” American authors received precisely the same protection in Europe as here. That they did not receive a windfall *beyond* the scope of their U.S. copyrights did not undermine U.S. protections or hamper progress in any conceivable way.

As for supposedly encouraging *preservation* of existing materials, that does not constitute promotion of *progress*. “Progress” involves forward movement, advancement, and creation, whereas preservation involves the very different realm of stasis and avoidance of decay. *See* New Lexicon Webster’s Dictionary 792 (“preserve ... to keep up, maintain, prevent from ruin or decay”). While preservation might *benefit* science or the public generally, authorizing the promotion of mere preservation would effectively nullify the word “Progress” and more broadly empower Congress to promote science *in toto*.

Finally, making additional resources unconditionally available to the beneficial owners of existing copyrights does not “promote” progress or anything else because the connection between the given right and the benefit is too attenuated and speculative. As the Supreme Court observed in *United States v. Morrison*, 120 S. Ct. 1740, 1752 (2000), reasoning that follows a “but-for causal chain ... to every attenuated effect” implicating an enumerated power is

“unworkable if we are to maintain the Constitution’s enumeration of powers.”

While it might be different if the retroactive extension were somehow conditioned on further acts of creativity, merely throwing money at people in the attenuated *hope* they use it creatively only mocks the constitutional enumeration.

### **C. The “limited Times” Requirement Is Not Satisfied by Periods Only Nominally and Temporarily Fixed.**

According to the district court and the government, any fixed period short of infinity – whether adopted singularly or piecemeal – satisfies the “limited Times” restriction of the Copyright Clause. But that view renders the words “limited Times” all but meaningless and imputes an unlikely frivolousness to the Framers’ inclusion of this language. The challenge for this Court, therefore, is to discern a judicially enforceable standard from the language while still affording Congress discretion to choose from within a range of sufficiently “limited Times.”

One promising approach is to infer that the use of the plural “Times” was designed to match the plural “Writings and Discoveries,” but that use of the singular “the exclusive Right” suggests only a singular “Time[]” per each writing or discovery. This interpretation would require Congress to select a time and stick to it for copyrights already granted, though it could modify the “Time[]” prospectively as to any future copyright. This approach has the benefit of avoiding the seriatim grant of supposedly limited copyright terms that could, as a practical

matter, be repeated indefinitely. Under the government's current approach, for example, the copyright on Mickey Mouse has already received two approximately twenty-year extensions, and the government proffers no legal principle that could prevent the next extension twenty years hence, or any other extension *ad infinitum*. Absent some theory limiting such repetition, the "limited Times" language is meaningless.

The "single time" approach also has the benefit of allowing a more effective political check to cabin the length of copyright terms. To grant in one fell swoop copyright protection for hundreds or thousands of years would presumably occasion considerable debate and objection from the public, thus checking the uncontrolled exercise of power. But the same net result accomplished in dribs and drabs would more easily fall off the radar of importance for the general public, and hence would be driven primarily by the private interests of those about to lose assets to the public domain. The one-time approach thus sets up a natural limit whereby the future public and private interests can be weighed in the public interest without being overwhelmed by the immediate interests by those whose copyrights are about to expire.

## **II. THE FIRST AMENDMENT LIMITS CONGRESS' OTHERWISE AVAILABLE POWER UNDER THE COPYRIGHT CLAUSE.**

The district court rejected plaintiffs' First Amendment challenge by holding that "there are no First Amendment rights to use the copyrighted works of others," 74 F. Supp.2d at 3, citing to *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and *United Video v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). This proposition is wrong as a matter of basic constitutional interpretation, and overstates the holdings of the cases cited.

### **A. Copyright Is Not Immune from First Amendment Scrutiny.**

As the Supreme Court has recently reiterated in another context, Article I powers do not supersede restrictions created by Amendments. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, --, 119 S. Ct. 2199, 2205 (1999) (provision that "[a]ny State ... shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court ... for infringement of a patent" was unconstitutional, in part because "Congress may not abrogate state sovereign immunity pursuant to its Article I powers"). Rather, Amendments to the Constitution narrow congressional authority that would otherwise exist under Article I standing alone. In First Amendment cases against the federal government, Congress's basic authority to enact the law at issue often is

unchallenged. The First Amendment question is whether such action is unconstitutional *despite* Congress' enumerated power. The constitutional hierarchy is no different in the case of copyright law. A law within Congress's copyright power may *still* be prohibited by the First Amendment.

## **B. Prior Cases Do Not Dictate the Result Below**

The cases cited by the district court do not support a copyright exception to standard First Amendment analysis. In *Harper & Row*, the Court addressed the situation where the defendant “effectively arrogated to itself the right of first publication.” 471 U.S. at 549. The Court quoted with approval the statement that “that copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” *Id.* at 556 (citation omitted). But to say, in the context of a first-publication right, that copyright may protect “expression” without violating the First Amendment is a far cry from saying that the First Amendment allows *any* form of restriction to be placed on mere “expression.” And, indeed, the Court did not make such a sweeping ruling. Rather, it merely rejected a reading of the First Amendment that would “effectively destroy any expectation of copyright protection in the work of a public figure,” *id.* at 557, and thus completely override core aspects of the copyright power. That the Court took the time to note copyright’s positive effects

on First Amendment values in the context of that case, *id.* at 559, actually demonstrates the propriety of a targeted First Amendment analysis rather than simply applying a categorical rule excepting copyrights on “expression” from First Amendment scrutiny.<sup>4</sup>

The notion that copyright only prohibits particular expression, not the underlying ideas, and hence is not subject to First Amendment scrutiny, is mistaken. The First Amendment protects not only the conveyance of concepts generally, but the particular form of expression as well. Thus, Paul Robert Cohen was constitutionally entitled to display on his jacket a uniquely evocative disparagement of “the Draft,” not merely some alternative “expression” of the same basic sentiment. *See Cohen v. California*, 403 U.S. 15, 24 (1971) (“the usual rule [is] that governmental bodies may not prescribe the form or content of individual expression”). Indeed, *Cohen* recognized that protected expression

conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.

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<sup>4</sup> That the issue resolved by the Court was whether to expand “the doctrine of fair use to create what amounts to a public figure exception to copyright,” 471 U.S. at 560, perhaps explains why Justice O’Connor’s discussion was more a free-flowing analysis of the First Amendment rather than a traditional First Amendment analysis. But the less formal approach in that context hardly suggests that the usual First Amendment tests are no longer applicable in *any* copyright context.

*Id.* at 26. The First Amendment thus protects the intangible value associated with a particular “expression” independently from the underlying idea.<sup>5</sup> Indeed, in the case of music and much poetry and art, there may not be much of underlying “idea” beyond the descriptive beauty conveyed through the particularized “expression.” Yet such work is protected by the First Amendment as well as by copyright, and the idea/expression dichotomy is insufficient to accommodate the First Amendment interests at stake.

The proper way to accommodate the First Amendment in this case is to apply the usual First Amendment tests, balancing the interests served, the means used, and the suppression of speech that results.<sup>6</sup> Applying such tests, this Court should carefully distinguish merely “valid” from constitutionally “important” interests. Importance is a measure of the actual ends achieved by the *particular* law, not of the value of the enumerated power as a whole. Furthermore, that an interest must be “important” necessarily suggests that some “valid” interests within

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<sup>5</sup> The government could not, consistent with the First Amendment, restrict publication of works by Plato or Marx on the theory that the ideas could still be conveyed through other “expression.”

<sup>6</sup> This Court’s statement in *United Video* rejecting application of the *O’Brien* test to the claims in that case, 890 F.2d at 1190, can be distinguished in that the case dealt with commercial use of copyrighted material going to the heart of copyright protection. Regardless whether the law is sufficiently settled in that context to make *O’Brien* balancing unnecessary, the same cannot be said of the law at issue here. And even if *United Video*’s broad statement cannot be avoided, the statement is substantively wrong for the reasons discussed above, and it misreads *Harper & Row*. It thus should be limited to its facts if possible or rejected in an appropriate manner. *See supra*, at 6 n. 3.

Congress' enumerated authority are not "important" for the First Amendment. Here there is no indication that the retroactive term extensions serve important interests.

## **CONCLUSION**

The decision of the District Court should be reversed.

Respectfully Submitted,

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Erik S. Jaffe  
ERIK S. JAFFE, P.C.  
5101 34<sup>th</sup> Street, N.W.  
Washington, D.C. 20008  
(202) 237-8165

*Attorney for Amicus Curiae  
Eagle Forum Education &  
Legal Defense Fund*

June 6, 2000

## CERTIFICATE OF SERVICE

I hereby certify that, on this 6<sup>th</sup> day of June, 2000, I caused two copies of the foregoing Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund to be served by First Class Mail, postage pre-paid, on:

Alfred R. Mollin  
William Kanter  
United States Department of Justice  
Civil Division/Appellate Staff  
601 D Street, N.W., Room 9554  
Washington, D.C. 20530  
*Attorneys for Defendant-Appellee*

Charles R. Nesson  
Lawrence Lessig  
Jonathan L. Zittrain  
The Berkman Center for  
Internet & Society  
1563 Massachusetts Avenue  
Cambridge, MA 02138  
*Co-Counsel for Plaintiffs-Appellants*

Professor Edward Walterscheid  
9 Timber Ridge  
Los Alamos, NM 87544  
*Amicus Curiae, Pro Se*

Geoffrey S. Stewart  
Gregory A. Castanias  
Portia A. Robert  
Jones, Day, Reavis & Pogue  
51 Louisiana Avenue, N.W.  
Washington, DC 20001-2113  
*Co-Counsel for Plaintiffs-Appellants*

Cary R. Ramos  
Lynn B. Bayard  
Carl W. Hampe  
Gaela K. Gehring-Flores  
Paul, Weiss, Rifkind, Wharton &  
Garrison  
1615 L Street, N.W., Suite 1300  
Washington, D.C. 20036-5694  
*Attorneys for Amici Curiae  
Sherwood Anderson et al.*

Professor L. Ray Patterson  
University of Georgia School of Law  
Athens, GA 30602

Professor Marcia Hamilton  
Yeshiva University  
Cardozo School of Law  
55 5th Avenue, 10th floor  
New York, NY 10003

Professor Laura N. Gasaway  
University of North Carolina  
School of Law  
Van Hecke-Wettach Hall  
CB No. 3380  
Chapel Hill, NC 27599-3380  
*Amici Curiae, Pro Se*

---

Erik S. Jaffe

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Reply Brief for Appellant complies with the 3500 word type-volume limitation of this Court's May 10, 2000 order in this case and Fed. R. Civ. P. 32(a)(7)(B) in that it contains \_\_\_\_\_ words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word 97. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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Erik S. Jaffe