IN THE SUPREME COURT OF THE UNITED STATES

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ERIC ELDRED, ET AL., :

Petitioners :

v. : No. 01-618

JOHN D. ASHCROFT, ATTORNEY :

GENERAL :

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Washington, D.C.

Wednesday, October 9, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

LAWRENCE LESSIG, ESQ., Stanford, California; on behalf of the Petitioners.

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 01-618, Eric Eldred v. John D. Ashcroft.

Mr. Lessig.

ORAL ARGUMENT OF LAWRENCE LESSIG

ON BEHALF OF THE PETITIONERS

MR. LESSIG: Mr. Chief Justice, may it please the Court:

Petitioners are before you this morning challenging Congress's 1998 Sonny Bono Copyright Term Extension Act, which extended the term of subsisting and future copyrights by 20 years. Petitioners submit such a blanket extension of existing terms exceeds Congress's power under the Copyright Clause and it violates the First Amendment.

Now, the Government has responded to petitioners' argument in a way that betrays a simple but fundamental confusion. The Government has argued as if petitioners had advanced a general theory of the Copyright Clause, or a general constraint under which Congress must operate. That is a mistake. This case is about limits to an enumerated power. It's not about general power of Congress to exercise its copyright authority. Petitioners have advanced a particular interpretation of the only

express limits in the Copyright Clause designed to give those limits meaning.

QUESTION: Mr. Lessig, I'll tell you what bothers me about your position, and that is that Congress has extended the term so often through the years, and if you are right, don't we run the risk of upsetting previous extensions of time? I mean, this seems to be a practice that began with the very first act.

MR. LESSIG: Justice, we do not believe that the very first act extended terms at all. Speaking technically, which for a lawyer means speaking accurately, the 1790 act did not extend a Federal term. The 1790 act granted a term for works that already existed in precisely the pattern that the English parliament had done in the Statute of Anne in 1710, and that the English parliament did with monopolies, general monopolies in the statute of --

QUESTION: But there have been a number of extensions since.

MR. LESSIG: That's right.

QUESTION: Even if you can get over the first hurdle.

MR. LESSIG: That's right. That's the important hurdle, and we'd like to jump that first, but the other ones, Justice, you're right, in 1831 and in 1909 Congress

extended terms in a way that is inconsistent with the strongest form of the test that we have advanced. Those extensions, however, were never challenged in any court and certainly not considered by this Court.

QUESTION: Well, doesn't that itself mean something, Mr. Lessig? The fact that they were never challenged, perhaps most people, and perhaps everybody felt there was no basis for challenging them.

MR. LESSIG: Well, Mr. Chief Justice, it's absolutely true that this case is here because of a fundamentally important changed circumstance that makes the Framers' limitations on the Copyright Clause much more significant. This is the first time I can remember where this Court has been pointed to changed circumstances as a reason to reaffirm the Framers' values, because for most of this period, Mr. Chief Justice, the only people who were regulated by copyright law under the Copyright Act would have been commercial publishers, primarily, and now for the first time the scope of this exclusive right has expanded because of the changed technology of the Internet to reach an extraordinarily broad range of creativity that never would have been imagined before.

Now, it's not the case that the earlier extensions were not questioned on constitutional grounds. In fact, Melville Nimmer, in the consideration of the 1976

act, suggested they were plainly under --

QUESTION: Well, I'm talking about court challenges, not academic challenges.

MR. LESSIG: That's right, there is no court challenge.

QUESTION: Mr. Lessig, your theory, as I understand it, regardless of changed circumstances or not, your basic theory, which on your argument would have been appropriate at any time historically, is that there has at least got to be the possibility of a kind of a causal connection between the extension and the promotion or inducement for the creation of some subsequent work, but why is that any more plausible a reading of the Promotion Clause than simply a reading that says the Promotion Clause requires that there be a general scheme in place, which overall tends to promote or induce, and part of one aspect of that scheme can be that the -- that at the discretion of Congress the period of protection is extended from time to time?

Why do you require -- why do you say the clause has got to be read by this kind of specific causation theory as opposed to a kind of systemic theory of promotion?

MR. LESSIG: Justice Souter, the reason is exactly related to the point I began with, that this is a case about limits and not about discretion. If it's not

the case that this Court --

QUESTION: No, but that's -- I mean, that's the issue in the alternative reading.

MR. LESSIG: That's right.

QUESTION: And why is it a limit case, rather than a discretion within a general scheme kind --

MR. LESSIG: That's right.

QUESTION: -- of clause?

MR. LESSIG: Because if this Court does not adopt a reading of the form we've offered, then there is no limit to the ability of Congress to extend subsisting terms.

QUESTION: Do you say the same thing for scope? This case is about duration, but Congress from time to time -- in fact, you mentioned --

MR. LESSIG: Yes.

QUESTION: -- the expanded applications of copyright, and Congress itself extends the scope from time to time.

MR. LESSIG: That's right.

QUESTION: Would you make, as far as, say, translation rights that didn't exist before, the same argument?

MR. LESSIG: I --

QUESTION: Why -- or -- and if you wouldn't, why

not?

MR. LESSIG: I -- no, Justice Ginsburg, we would not, and the reason is again related to the method we have adopted to interpret "limited times." We have not said that "promote the progress of science" is a general and independent constraint on the Copyright Clause authority. We've said it must be looked to to interpret the scope of "limited times," and unless retrospective extensions are forbidden, it will eviscerate the meaning of "limited times." That does not occur in the context of the scope of exclusive right, nor in the context of the power to secure. If that's --

QUESTION: Could we then go back to Justice O'Connor's question? To make that very specific, if we agree with you, does that mean that we would, in principle, have to hold the 1976 extension unconstitutional? I mean, in 1976, Congress extended the term from 28 years renewable once, to life of the author plus 50 years. Now they're extending it life of the author plus 70. If the latter is unconstitutional on your theory, how could the former not be? And if the former is, the chaos that would ensue would be horrendous.

MR. LESSIG: Justice Breyer, under our theory as we've advanced it, you're right; the 1976 act would be unconstitutional. Whether this Court would apply such a

holding in this case to that act is a question that would have to be resolved under the retrospective --

QUESTION: Maybe we ought to find another theory, then. Is there any --

(Laughter.)

MR. LESSIG: Justice, the theory, which would advance the aim of limiting times in a way that is enforceable, is only applicable in the case that we brought before you here to the '98 act, and would not necessarily be applicable under the '76 act for the reasons the Government has offered. We would not advance this argument, but the Government has offered an argument in a parallel case that suggests a distinction between the '76 act and this case. That's not been briefed here. It's been grounded in their claim that the treaty power creates some special power. We wouldn't advance that claim, but the point is there are a number of issues that the '76 act --

QUESTION: In essence, you think it's at least arguable that the '76 act had various positive aspects to it in terms of the purpose of the Copyright Clause that this act lacks?

MR. LESSIG: That's certainly true, and we also believe that, for the reasons averted to by amicus AOL in this case and the reasons you've just suggested, the

disruption in that context under the retrospectivity cases Ryder and Reynoldsville Casket Company would be sufficient to fit it within the, quote, "severe disruption exception" to the retrospectivity.

QUESTION: Well, I suppose implicit in the argument that the '76 act, too, should have been declared void, and that we might leave it alone because of the disruption, is that for all these years the act has impeded progress in science and the useful arts. I just don't see any empirical evidence for that.

MR. LESSIG: Justice, we are not making an empirical claim at all. Nothing in our Copyright Clause claim hangs upon the empirical assertion about impeding progress. Our only argument is, this is a structural limit necessary to assure that what would be an effectively perpetual term not be permitted under the copyright laws.

QUESTION: Well, perhaps I misunderstood. I thought the whole thrust of your argument was that there is a great First Amendment force here that's being silenced, that's being thwarted.

MR. LESSIG: Well, the thrust certainly --

QUESTION: I thought that's the whole underpinning of your case.

MR. LESSIG: It's certainly the case that we are

asserting, in light of the changed circumstances, that the opportunity to build upon works within the public domain is a fundamental First Amendment interest, and that the First Amendment values, vital speech interest at stake of this case, is that the public domain be permitted as a source for cultivating work about our culture without unnecessary legal restriction.

QUESTION: Well, but you want more than that. You want the right to copy verbatim other people's books, don't you?

MR. LESSIG: We want the right to copy verbatim works that should be in the public domain and would be in the public domain but for a statute that cannot be justified under ordinary First Amendment analysis or under a proper reading of the limits built into the Copyright Clause.

QUESTION: Mr. Lessig, on your First Amendment argument I don't see where the retroactivity-prospectivity comes in, because -- I follow your argument under the Copyright Clause, but if you're saying that the time is too long, the public domain should get this stuff sooner rather than later, would you explain to me how your prospectivity-retrospective line fits into your First Amendment claim?

MR. LESSIG: Justice, we've argued that it would

be inappropriate in this case for the Court to consider the prospective line until they decide whether the case, whether the prospective and retrospective is severable, and we submit it's an easy case to show that it's not.

QUESTION: On the First Amendment --

MR. LESSIG: Yes.

QUESTION: -- argument you're making that as, I take it, an argument independent of, it doesn't hang on your Copyright Clause argument.

MR. LESSIG: That's right. I --

QUESTION: And so let's just take -- let's say that was your only argument in this case. How does that tie into a retrospective-prospective distinction?

MR. LESSIG: Well, the strongest First Amendment argument is about the retrospective extension, because of a fundamental change that occurs when Congress extends subsisting copyrights, rather than when Congress legislates prospectively.

When Congress legislates prospectively, it has no way to know who's going to benefit from its extension. It is simply evaluating what the term should be prospectively in a way that we presume this Court should presume is legitimate under the First Amendment. When it legislates retrospectively, it is, in effect, looking at particular authors and estates of authors who are before

Congress asking for this extension, and it's choosing between these particular authors and the public at large.

Now, it may be that in exercising that choice in this case, Congress made an objective valuation of who would be in the best position to advance the interests of promoting the progress of science, or any original --

QUESTION: But you -- under your intermediate scrutiny test we would not be hypothesizing what might have been in Congress's mind. Your First Amendment test is a stringent one. You have to have an important purpose, and the means that you use is necessarily tied to that purpose. If you take that position, I don't see how you make the retroactive-prospective line work.

MR. LESSIG: Well, the line comes from deciding what the First Amendment interest is, and if this Court heed the First Amendment interest off of this difference between selecting who gets the benefit of 20 years of extension and just simply legislating in a general way prospectively, then this Court could hold, with respect to the prospective, that it's not even necessary to raise the intermediate scrutiny in that context, but again, for Ashwander reasons we don't think that this Court should address the prospective aspect of the CTEA even under the First Amendment.

QUESTION: Even though Congress's pattern has

been to treat all authors equally? I mean, the reason that it's been prospective and retrospective is that people should be, people who hold copyrights should be subject to the same regime and not have some people who got their copyrights the week before the law passed treated differently than people who got it the week after.

MR. LESSIG: Well, Justice, that certainly is the reason the Government offers for this pattern. It, of course, doesn't explain actually what Congress has done and, even in this case, when a work has passed into the public domain, then there is precisely the same week before/week after problem that you advert to, that extension does not extend to all subsisting works, it only extends to all subsisting copyrights. So that line is already drawn in the practice that Congress has adopted, but our point is, the only way to assure --

QUESTION: But Congress has -- or, you're not disputing that Congress has always made these extensions, both retroactive and prospective?

MR. LESSIG: Well, in 1831 it did not. In 1831 it granted the benefit of its extension to a subset of all subsisting copyright holders.

QUESTION: Let's stick with 1976.

MR. LESSIG: In 1976 --

QUESTION: Because that was what you said --

that's -- the pattern under the CTEA is identical to the one in the '76 act.

MR. LESSIG: That's absolutely right, yes. So they have extended it to both. But our argument is, unless this Court draws a line about this extension, then for the reasons Judge Sentelle suggested below, there will be no limit to Congress's ability to --

QUESTION: Judge Sentelle did not deal with the First Amendment, as far as I --

MR. LESSIG: That's right.

QUESTION: -- recall.

MR. LESSIG: That's right.

QUESTION: And so I'm asking you -- perhaps I'm missing it. I haven't seen where you get the prospective-retrospective in connection with your First Amendment. It seems that you're just saying there that 70 years is an unreasonable -- is not necessary.

MR. LESSIG: Yes.

QUESTION: And it doesn't serve an important purpose.

MR. LESSIG: Yes. Precisely -- actually, we're not saying anything about the 70 years in this case even under the First Amendment, because we believe it's unseverable, but --

QUESTION: But I thought you were saying that if

you accept the Copyright Clause argument, then you have a way, in effect, of devaluing the Government's claim of its important interest and important objective when you get to the First Amendment intermediate scrutiny analysis. Whereas if you don't accept the Copyright Clause claim, then, in order to make the First Amendment analysis we've simply got to say, well, gee, is the promotion of useful art and so on more important than the public domain, and can we say that that allows a distinction between 50 years and 70 years?

We're pretty much at sea, so I thought your Copyright Clause argument was necessary to give us some handle with which to deal with the First Amendment.

MR. LESSIG: Our Copyright Clause argument is certainly a way of framing why extensions of subsisting terms cannot be seen to promote the First Amendment interest of speech at all.

QUESTION: Okay. Let's assume we don't -- for the sake of argument here, let's assume we don't accept the Copyright Clause argument. Do you have an independent First Amendment argument in your brief?

MR. LESSIG: Yes, of course we do.

QUESTION: Okay, and it is -- tell me in a sentence or two what it is. I mean, at that point I'm where Justice Ginsburg is.

MR. LESSIG: Yes. The First Amendment argument we've argued in our brief is with respect to the retrospective extension, and the First Amendment argument is, that needs to --

QUESTION: No, but that's the Copyright Clause argument, and it seems to me you're saying, okay, we then apply that in First Amendment analysis, which allows us to make a coherent intermediate scrutiny argument.

If we don't accept the Copyright Clause retrospectivity argument --

MR. LESSIG: Yes.

QUESTION: -- then what is your First Amendment argument?

MR. LESSIG: That's right, I'm sorry, Justice. What I'm saying is not that it's the retrospectivity that makes the First Amendment argument troubling -- I mean, that drives our First Amendment argument. All I'm saying is, we have addressed the retrospective portion of CTEA, and so I'm saying in the retrospective portion of CTEA you would apply ordinary, intermediate First Amendment review, and you would ask --

QUESTION: Well, this Court really has not -- if you say that the Copyright Clause is not violated, I don't think there are examples where this Court has then resorted to First Amendment analysis to invalidate the

same act.

MR. LESSIG: Well --

QUESTION: I mean, this would be quite a new proposition.

MR. LESSIG: Well, Justice O'Connor, the First Amendment is always an independent limitation on what otherwise would be legitimate exercises of congressional authority, so this --

QUESTION: Yes, but the Framers seem to have adopted these two things at the same time --

MR. LESSIG: That's right.

QUESTION: -- in effect.

MR. LESSIG: That's right, and if --

QUESTION: And I think there are not examples that I can think of where we have said, well, we'll analyze it under the Copyright Clause, but if that fails we'll turn to the First Amendment.

MR. LESSIG: Justice, that's right. If only we had the Framers' copyright before us, because of course, again remember,the exclusive right the Framers spoke of was the right to print and publish. It didn't include the derivative rights, it didn't include the display rights, and it certainly --

QUESTION: Right. It has expanded very much, and they also envisioned a very short term, and I can find

a lot of fault with what Congress did here --

MR. LESSIG: That's right.

QUESTION: -- because it does take a lot of things out of the public domain that one would think that someone in Congress would want to think hard about.

MR. LESSIG: That's right.

QUESTION: But having done that, it's very difficult to find the basis in the Constitution for saying it isn't a limited term. It's longer than one might think desirable --

MR. LESSIG: Right.

QUESTION: -- but is it not limited?

MR. LESSIG: Well, if it is limited, then there is no limit to the ability of Congress to extend subsisting terms, and that fundamentally destroys the objective that the --

QUESTION: The rule against perpetuities might jump in there at some point.

(Laughter.)

MR. LESSIG: Right, and we submit the Framers had something very different in mind than the rule against perpetuities. The point is, if this is permitted, then there is no limit to the ability to extend terms, and that is precisely contrary to what the Framers had in mind when they worried about this problem originally.

What was the problem they were solving? It was, as this Court stated in Graham --

QUESTION: Well, I could agree with you, in terms of policy, that this flies directly in the face of what the Framers had in mind, absolutely. But does it violate the Constitution?

MR. LESSIG: Well, if it flies in the face of what the Framers had in mind, then the question is, is there a way of interpreting their words that gives effect to what they had in mind, and the answer is yes.

QUESTION: Well, you know, certainly what is happening in the country today in the way of congressional -- under the Commerce Clause is totally different than what the Framers had in mind, but we've never felt that that was the criterion. What the Framers thought of, there weren't steamboats, there weren't railroads.

MR. LESSIG: That's right.

QUESTION: We've said there was a general grant, and that Congress was free to run with it in many respects.

MR. LESSIG: In many respects, Mr. Chief Justice, but, as this Court has also said, there are limits to what Congress can do under the Commerce Clause.

QUESTION: But isn't --

QUESTION: Can I ask you about one of the limits, just focusing on the Copyright Clause and the progress of science and useful arts? In your view, does that -- is that limited to encouraging creativity by authors and inventors, or does it also include the distribution of materials that might not otherwise be distributed, like old films and so forth?

MR. LESSIG: We're happy to adopt a broader interpretation of what promote the progress is about, within the general framework that the Framers established in light of the English practice, which was a quid pro quo. The ability to facilitate distribution --

QUESTION: So that if the quid pro quo is that we can facilitate distribution of some old film by an additional monopoly grant, you'd think that's permissible?

MR. LESSIG: So long as the grant is conditioned upon the distribution. So long as the grant --

QUESTION: In other words you could have -- right now, if Congress decides to have a law, and this law is going to give copyrights in 1) the Bible, 2) Shakespeare, 3) Ben Jonson, and the reason they do it is that they think that that would lead publishers to produce those and distribute them, and they're right, they will, okay? In your view, that's perfectly constitutional?

MR. LESSIG: No, that's the view of the

Government's, Justice Breyer. My view is --

QUESTION: Well, I thought that was the question you were getting, and I thought you were saying -- I must have misunderstood. I thought you were saying that was constitutional.

MR. LESSIG: No. What we were saying is, if Congress wants to permit restoration of films, for example, an issue that's been well briefed here, Congress can say, if you restore the film, then the restoration gets a copyright so long as it satisfies originality as outlined in Feist, and it gets a copyright for a period of time. But this Court's opinion in Graham and in Feist made clear that it could not extend copyrights to works in the public domain. The Government doesn't concede that, but we stand on that as a way of understanding why this Court --

QUESTION: So your answer to Justice Stevens is no, they cannot give a copyright purely for purposes of dissemination to publishers, is that right?

MR. LESSIG: No.

QUESTION: Oh, all right.

MR. LESSIG: They cannot give a copyright purely for purposes of distribution to publishers.

(Laughter.)

MR. LESSIG: They would need to satisfy all of

the implied limitations that this Court has expressed in the context of this, the most carefully limited clause in Article I, section 8. It is one of the --

QUESTION: Mr. Lessig, the clause says, Congress shall, and suppose Congress decides in this expanded world of ours that it's going to make certain changes and demand other changes from our treaty partners. Suppose it says, well, the Germans led the fight for 70 years in the European Union, we'll go with that, but we're going to insist that they have a more expansive notion of, say, a fair use. Now, why couldn't that fit within the promotion of knowledge?

MR. LESSIG: Justice Ginsburg, we have no quarrel with the objective of harmonization fitting within the "promote the progress of science" understanding, subject to constitutional limitations.

If France adopted a rule that said you couldn't grant copyrights to hate speech, we could not harmonize with that rule consistent with our First Amendment and similarly, as Mary Beth Peters testified before Congress, ours is the only Constitution that has an express limitation on terms. That's got to mean something, and if it means that we are limited in our ability to agree with the Europeans as they continually expand the term in light of their own vision of what copyright is about, then

that's the meaning of a constitutional restriction.

This Court's interpretation of "limited times" could, of course, eviscerate that term of any meaning, but under the principle of enumeration as this Court has articulated it, this Court should interpret that clause in a way that gives its terms effect in a simple way. Just as a limited addition print is not a limited -- is not limited if each time a customer comes in a new print is printed, so, too, a limited term is not limited if each time copyright holders come to Congress they can extend the term.

QUESTION: Well, but the difference -- the reason that analogy doesn't cut it for me is that the limited edition print depends basically on an implied understanding between the person who makes the print and the person who buys it, and the understanding is, you won't go beyond 100, or whatever number you write.

We're not engaged in a contractual analysis under the Copyright Clause between the writer and the -- and somebody representing the public domain.

MR. LESSIG: That's right.

QUESTION: The analogy doesn't seem to work.

MR. LESSIG: That's right. All that I'm suggesting is, here is a plain meaning of the term that gives effect to the constitutional limit in a way that

assures that, in fact, the limit is respected, contrary to the Government's argument, which, in effect, permits Congress the power perpetually to extend terms.

If I may reserve the remainder of my time.

QUESTION: Very well, Mr. Lessig.

General Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE RESPONDENT

GENERAL OLSON: Mr. Chief Justice, and may it please the Court:

The questions today, especially the initial questions, suggest one of the many insurmountable obstacles to petitioners' petition in, position in this case. That is that the first Congress explicitly gave copyright protection to the authors of any books already printed as well as explicitly the owners of existing copyrights. Thereafter, in 1831, 1909, 1976, and 1998, and in numerous private copyright bills and temporary extensions of the copyright law and in repeated patent law revisions, Congress extended the terms of Federal copyright and patent protection of subsisting works.

As this Court explained 100 and some years ago in its Burrows-Giles opinion, such constructions are accorded very great weight and, as that Court went on to say, when consistent and unchallenged for over a century

are almost conclusive that consistent construction by Congress of its authority under the Copyright and Patent Clause now has lasted from the 105th -- from the first through the 105th Congress. It has been sustained by Justices of this Court and early decisions of this Court. It is consistent with what the law of England was from the Statute of Anne --

QUESTION: Yes, but take one of the early extensions, just extending a -- an already granted patent to an inventor for an extra 10 years. How can that be squared with the language of the provision? Maybe Congress did it, but maybe it acted improperly when it did it.

GENERAL OLSON: Well, the Congress --

QUESTION: And that's our question, really.

GENERAL OLSON: Well, that -- it seems to me that there may be -- this is -- the clause itself is a very, very broad grant. It says the --

QUESTION: Do you view it as entirely a grant, or do you think it also contains limitations?

GENERAL OLSON: Well, I think that to the extent that there may be limitations, Justice Stevens, they are -- require considerable deference by this Court to the judgment of Congress --

QUESTION: Well, I understand that, but do

you -- I'd be interested in knowing, do you think it does contain limitations?

GENERAL OLSON: It contains -- the clause itself contains limitations, limited times, authors, exclusive rights and things of that nature. I don't think -- and the petitioners expressly disclaim the assertion that there are any substantive limitations in the "Promote the-Progress" Clause.

What the Framers were saying is, we want to give Congress the authority to promote the progress of useful arts and sciences, and --

QUESTION: How did the example we just talked about, a patentee giving an extra 10 years on his -- how does that promote the progress of science?

GENERAL OLSON: Well, it may provide additional incentives for the patentee to exploit and promote and disseminate that particular work. With respect to creative works like works of art, books and that sort of thing, it may provide many ways --

QUESTION: I'm just concentrating on our patentee, and I'm wondering how that fits into the notion that there was a bargain in effect between the inventor and the Government that at a certain period of time it would become part of the public domain. It seems to me it's inconsistent with that.

GENERAL OLSON: It isn't inconsistent, I submit, Justice Stevens, for the Congress to exercise its juris -- its responsibility under this broad grant of power to determine that there could be many ways in which the holder of an existing right may benefit the public by continuing to have that right for an additional period of time, the same reason that Congress -- same reasons that Congress had when it created the right in the first place. It's not just the right --

QUESTION: No, the reason for the right in the first place was to encourage invention.

GENERAL OLSON: Well, but I -- we submit that specifically with respect to the Copyright Clause, but I think it applies to the patent portion of the clause at all, it isn't just the invention, it isn't just the writing of the work -- and this relates to the questions that were asked of my colleague a moment ago. It includes the dissemination of the work, not necessarily --

QUESTION: Dissemination alone?

GENERAL OLSON: Not necessarily the dissemination alone --

QUESTION: Well, no, not -- don't say not necessarily. I'm -- for purposes of my thinking about it, I'd like to know, imagine we have just dissemination.

GENERAL OLSON: That something is already in the

public domain.

QUESTION: That's correct. The only justification for the extension, there is no other, is dissemination of a work that is already in existence.

GENERAL OLSON: I would not want to rule that out, Justice Breyer, for the very reason --

QUESTION: Well, I want to say, do you think yes or no?

GENERAL OLSON: Well, I think that it could very well be yes, for the reason that in the 1790 statute the Congress specifically was aware of -- that there were State copyright laws which didn't last as long as the Federal statute. Several of the States hadn't finished enacting those copyright laws, and a couple of States hadn't enacted them at all.

QUESTION: So in your opinion, in my example, if you recall it --

GENERAL OLSON: It's --

QUESTION: -- your answer would be, if Congress tomorrow wants to give a copyright to a publisher solely for the purpose of reproducing and disseminating Ben Jonson, Shakespeare, it can do it?

GENERAL OLSON: It may --

QUESTION: I hate to say may --

GENERAL OLSON: Well --

QUESTION: -- because that really -- that's an important question.

GENERAL OLSON: Well, because I don't think that a per -- I don't think there is a per se rule that should apply here because this is a grant of Congress, to Congress to exercise its judgment as to what may be beneficial. There may be other constitutional provisions that come into play, or there may be other existing --

QUESTION: All right, let me explain to you why it's important to me. I have a list. This is an economic statute. The harms that seem to be caused by it, the extension, I've listed as follows, approximate numbers, made up, but magnitude correct.

The existing copyright holders who survive, their copyright survives 70 years, who have already been paid, on the numbers that were given, about $24 billion or more, will receive an extra $6 billion. That, I take it, is a harm. Their works have already been created.

Harm number 2. The fact that people, for the 99 percent of the copyrights that have no commercial value after 70 years, have to find the copyright holder to put them in databases. The cost of that, on my numbers in here, made up, at least a billion dollars, or they can't find the people at all and get permission, an innumerable cost, un -- valuable cost to people who want to use it.

Those are costs.

On the plus side I see uniformity, dissemination, and -- now, you tell me.

GENERAL OLSON: Well, I also see compliance with international competitive markets and the laws that are being adopted, and the incentives --

QUESTION: Uniformity. That's uniformity.

GENERAL OLSON: Well, that's not just uniformity. It's providing incentive to people to publish here, as opposed to publish in Europe, where longer terms might be available. There is an incentive to distribute existing works that may be necessary. It's the consistency that Congress is promoting by saying to individuals, as they might have said when they enacted the Copyright Clause in the first place, we will not only give you 14 years, but if we change our mind tomorrow, and think that a better, a longer period is necessary, we're -- this is consistency, but it's also a matter of fairness, and it's --

QUESTION: Why -- on the last point, it's -- I've counted that as zero. The reason I've counted it as zero is it seems to me that the added value, incentive value to produce between life plus 50, or life plus 70, is zero. It's carried out, as the economists do, to three decimal points, divide by 100 for the probability of your

ever having such a work, and you get virtually zero, no difference between this and a perpetual copyright.

GENERAL OLSON: Well, I think that that's a very good illustration of why the authority is granted to Congress, because if you are an 80-year-old writer, that may make a considerable difference in terms of what you decide to do.

QUESTION: How could it?

GENERAL OLSON: It may -- because you may -- if you have no incentive, if you know that this is going to go into the public domain sooner rather than later, it may affect your judgment with respect to --

QUESTION: In -- I --

GENERAL OLSON: It might also affect whether the publisher -- what the publisher pays for your prospective work, Justice Breyer. We -- the Copyright Clause incentive provides incentives not just for -- not just to the creators, but to the disseminators, the publishers, the broadcasters, the film companies.

QUESTION: So you think, say, Verdi, Othello, Verdi, Othello, 80 years old, the prospect of an extra 20 years way down the pike would have made a difference?

GENERAL OLSON: Well, I think again that illustrates why the authority is vested in Congress to make these judgments rather than in courts to make these

judgments, because we're not talking about the effect on an individual author, or an individual creator. What the Framers of the Constitution were concerned about is a gross judgment with respect to what might generally provide incentives to the population --

QUESTION: But it is hard to understand how, if the overall purpose of the Copyright Clause is to encourage creative work, how some retroactive extension could possibly do that. I -- one wonders what was in the minds of the Congress, even if somehow they didn't violate the clause. But if we affirm here, is there any limiting principle out there that would ever kick in?

GENERAL OLSON: Well, that's a -- that is a difficult question to say whether there is any limiting principle when such a broad grant of power, authority is given to Congress and has been exercised so repeatedly that --

QUESTION: Well, if it's a limited term, as the Constitution says, is there indeed any limit out there?

GENERAL OLSON: What I submit -- well, first of all, even the petitioners acknowledge that, as far as prospective limits are concerned, that isn't a judgment that this Court is being made to ask and, in fact, the petitioners acknowledge that it isn't a judgment that this Court should make, so the only point that the

petitioners --

QUESTION: Well, if Congress says we're going to grant this copyright indefinitely, forever --

GENERAL OLSON: That would seem --

QUESTION: -- that violates the limited term, does it not?

GENERAL OLSON: I acknowledge that. And anything that --

QUESTION: In Victorian England you could buy a box seat for 900 years. There was serene complacency about their culture, and God bless them, but --

(Laughter.)

QUESTION: -- I really think this is an important question and, as Justice O'Connor points out, if we have to ask what's the most plausible explanation for this rule, to reward existing vested interest or to stimulate new works, it seems to me that it's probably the former.

GENERAL OLSON: Well --

QUESTION: I mean, we know that.

GENERAL OLSON: It is -- well, it -- let me say with respond -- in response to both of those questions, an unlimited time would violate the Copyright Clause. Something that was the functional equivalent of an unlimited time would violate the Copyright Clause, but the

Framers specifically did not put in numbers. They had the opportunity to do that. Thomas Jefferson suggested that a number should be put in. We submit that it would be -- even -- since the petitioners don't suggest that it's an appropriate function of this Court, certainly in this case, to pick a number, 133 years or something of that nature, but it is quite clear that Congress from the Statute of Anne, 1710, we have 300 years of history, of Congress thinking that it continues to benefit the process, not just of the productivity, of the creation of the work itself, but the dissemination of it to provide --

QUESTION: General Olson, you say that the functional equivalent of an unlimited time would be a violation, but that's precisely the argument that's being made by petitioners here, that a limited time which is extendable is the functionable, functional equivalent of an unlimited time, a limited time that 10 years from now can be extended, and then extended again, and extended again. Why -- their argument is precisely that, a limited time doesn't mean anything unless it means, once you have established the limit for works that have been created under that limit, that's the end.

GENERAL OLSON: Well, the Framers had an opportunity to say immutable, unalterable, unamendable. They didn't use that. They used the phrase, limited term,

which means then, meant then and means now, a certain specified --

QUESTION: Okay, assuming --

GENERAL OLSON: -- number of years under the statute.

QUESTION: With the exception of a limitation which illustrates the distinction between forever on the one hand and a definite number on the other, is there any limitation in the clause? Does the promotion, does the preambular recitation of promotion as such place a limit on it?

GENERAL OLSON: I submit, Justice Souter, that there's no per se limitation, that if there is, as Justice Scalia suggested, for -- if it is true that Congress, having specified 14 years or 28 years, decides that doesn't work very well because of the economies of other countries, the parade of constraints on artists in other countries, the reasons that we want things to be preserved or distributed, it should be 2 more years, or 5 more years later --

QUESTION: Yes, but that argument would apply to new copyrights, but to extension of already existing copyrights your argument doesn't apply.

GENERAL OLSON: It does apply, Justice Stevens, because --

QUESTION: The work has already been created.

GENERAL OLSON: The work has already been created, but the artists that are creating works day in and day out take into consideration the fact that Congress has decided, there's an ease of administration --

QUESTION: But for them, they get the benefit of the longer term if you don't apply it to an existing copyright. I mean, if you say you need 70 years because of changes in the economy to encourage works, you grant 70 for the future, but why does that, making that apply to somebody who created his work 20 years ago and has already provided what he, the quid pro quo, why do you need it for him?

GENERAL OLSON: We're not just -- because we're not just talking about the author. If we -- we're talking about --

QUESTION: The Constitution refers to the authors and the inventors, doesn't it? They're certainly the prime actors in this scene, aren't they?

GENERAL OLSON: Yes, but all of the history of the development of these clauses suggests that -- and this Court has indicated in its decisions with respect to copyright, that the Framers were concerned and the Congress is legitimately concerned not just in providing the spark of creativity, but to make sure that that's

distributed widely and available, and there may be many reasons why -- we're -- we --

QUESTION: And that it gets into the public domain at the expiration of the term. That was an important part of the bargain.

GENERAL OLSON: Yes, and what -- but the definition of the term was a responsibility vested in Congress, because it has the power -- the legislative history of the 1998 act itself suggests what was going on here and suggests why the Framers gave this authority to Congress. There were numerous hearings, there were testimony by the folks that represent the same position as petitioners here as to why this shouldn't be done, why it should be done.

Congress weighed -- as this Court, the phrase that this Court used, I think it was in the Feist case, the delicate balance that was so difficult for Congress to --

QUESTION: How --

QUESTION: Okay, but you --

QUESTION: -- what weighs in that balance, because to go back for one second, in practical, economic terms I gather the difference between a copyright that lasts for 100 years, lasts for 1,000 years, lasts forever, is probably something less than 1,000 -- on $1,000 a

penny. I mean, it's a penny on 1,000, or probably a lot less than that, frankly. So I can not only not imagine a person whose decision to write would be governed by such a thing, I cannot imagine a European who would come to America to copyright his work for such a reason. Indeed, I wonder why that European wouldn't come anyway, even if the term were 10 years, because if he doesn't come, he's not going to get protection.

GENERAL OLSON: Well, the --

QUESTION: I mean, who are these people that are going to be moved by that incentive?

GENERAL OLSON: The -- as we described in our brief, in pages 34 through 36, I believe it is in our brief, that the concerns about the limitation on exploitation and the limitation of a copyright period in Europe is based upon the country of origin of the work and the shortest time available. So that there may be differences, and we describe that, but that illustrates, Justice Breyer, the difference between 1 cents and 10 cents and $100 with respect to this particular author who's this particular age, or a particular author like Melville, whose works weren't -- weren't -- didn't -- or Schubert, whose works weren't properly appreciated or exploitable until many years after their death.

All of these variations are quintessentially

legislative judgments. It would be very difficult for the Framers to have eschewed deciding 14 years was a constitutional limitation, and for this Court to say 99 years is, and again, even the petitioners aren't asking the Court to make that judgment. The petitioners are only saying that there shall be a per se rule that the word "limited times," means unchangeable times.

QUESTION: But there has to be a limit, as you acknowledge. Perpetual copyright is not permitted. Who is the judge of -- within that line? Who is the judge of when it becomes unlimited? Is there, in other words, judicial review and, if there is, what standard would this Court apply to determine whether something short of perpetual is still unlimited?

GENERAL OLSON: Well, the issue before this Court, I hasten to say, as I said before, is only whether, once the Congress makes that judgment, it can ever change it retrospectively. The issue before this Court is not whether, in the future, a certain length of time would be appropriate. That -- but the answer to that, Justice Ginsburg, I submit, is found in the Necessary and Proper Clause, and this Court's interpretation of the Necessary and Proper Clause as to the extent that this Court would find or not find that the judgment made by Congress with respect to the implementation of this very broad power is

convenient or useful in terms of the achievement of the goals.

QUESTION: Okay, and is your argument that we should so find and hold against their retrospective argument, because there is some, at least plausible basis to say that there can be a causal connection between the retrospective extension and some benefit that can be traced to those particular works through the retrospective extension, like dissemination? Is that your argument?

GENERAL OLSON: That is among our arguments, Justice Souter.

QUESTION: Is it also your argument that even if you cannot trace that kind, or at least plausibly argue that there could be that kind of a causal benefit, that it would still be constitutional, because you should judge the extension simply as contributing to a general system, one feature of which is that from time to time there may be retrospective extensions, and so long as that general system induces the creation of works, or the dissemination of works, or the preservation of works, so long as the general system works, there is no review, no limitation on the tinkering that can be done, even retrospectively? Is that also your argument?

GENERAL OLSON: I think that's a fair statement of an argument that we have made and articulated in the

brief --

QUESTION: Okay.

GENERAL OLSON: -- that unless there is a -- the Court is -- because the circumstances change, that we are living in an era now where piracy is a significant problem, there's question of administrative ease, of administering a system where copyrights may be different for one set of authors, or different for another set of authors, there's changes that are taking place internationally, so that what we're saying is that not only could this Court conceive of reasons why Congress thought it was accomplishing the objectives of this clause, but that there are numerous objectives that are entirely legitimate in --

QUESTION: Do you also argue that the Necessary and Proper Clause alone will justify the retroactive extension simply as a matter of equity?

GENERAL OLSON: Yes.

QUESTION: That is, that the Copyright Clause justifies the extension for works not yet created, but it would be enormously inequitable to have other authors who put in the same amount of work get a lesser protection, so the Necessary and Proper Clause now allows you to do the retrospective?

GENERAL OLSON: Yes, Justice Scalia, and the

examples that are --

QUESTION: Can I ask you, why is it enormously inequitable if they get exactly what they were entitled to at the time they made the work?

GENERAL OLSON: The implicit promise that --

QUESTION: I mean, they have some right to expect that they will be -- you know, an additional grant, later on?

GENERAL OLSON: I think that's not an unreasonable expectation at all, Justice Stevens, because that was the premise of the --

QUESTION: That is the way it's always been done. There hasn't been any copyright extension that hasn't applied to subsisting work.

GENERAL OLSON: That's --

QUESTION: But there was one -- Justice Breyer brought up Ben Jonson, so -- this case doesn't involve works that are already in the public domain.

GENERAL OLSON: That is correct.

QUESTION: This is subsisting copyrights.

GENERAL OLSON: That is correct.

QUESTION: So --

QUESTION: But why wouldn't it?

QUESTION: Why? Why not?

QUESTION: Why wouldn't it? If the equity

argument under the Necessary and Proper Clause justifies extension of the copyright for those whose copyright will expire tomorrow if it's not extended, in order to put them on parity with those getting copyrights for new works, why doesn't it apply to the copyright, the holder of the copyright that expired yesterday?

GENERAL OLSON: You could arguably -- you could conceivably make that argument, Justice Souter, but there is a bright line there. Something that has already gone into the public domain, which other individuals or companies or entities may then have acquired an interest in, or rights to, or be involved in disseminating --

QUESTION: And if you don't --

GENERAL OLSON: This is a rational --

QUESTION: If you don't draw the line there, then Ben Jonson certainly gets recopyrighted.

QUESTION: Well, the difficulty --

QUESTION: If we're just looking for a bright line, the line that they suggest between unexpired patents and copyrights and brand new ones is also just as bright.

GENERAL OLSON: Oh, I concede that it's a bright line, but it's a bright line that would have --

QUESTION: Except Congress chose this one and didn't choose the other one. That's --

GENERAL OLSON: Congress --

QUESTION: Basically you're saying the presumption ought to be in the congressional judgment about how to draw the line as well as in how long a line to draw.

GENERAL OLSON: I agree, and this Court has -- we're not just talking about the judgment of the Congress of the -- the 105th Congress in 1998. This is the way the Statute of Anne was written. This is the way the State copyright laws were written when this country became a Nation. This is the way the 1790 copyright statute, the number of --

QUESTION: Well, of course, the original statute was replacing a bunch of State statutes or State rules, partly common law, partly statutory, that -- they had kind of a mixed up legal situation, and there was an interest in having one uniform rule for the first time around.

GENERAL OLSON: Well, there was an interest in having a uniform rule, and that's precisely why the Framers created the Copyright Clause in the Constitution, but there was copyright protection in some States, there wasn't copyright protection in other States, and what we know from the decision of this Court in the Wheaton decision is that there was not a common law copyright in existence. This Court explicitly held that.

Now, the petitioners make this quid pro quo

argument that somehow implicitly the initial 1790 copyright statute was saying to people, you get a copyright if you exchange whatever existing rights you have. That simply does not make any sense. There is no language, and it's a relatively late-discovered argument, because it sees its full --

QUESTION: I want you to finish that, but I want you to go back to the -- I have one question on the equity principle. Are you -- I want you to finish.

GENERAL OLSON: I wasn't finished, but I'm happy to come back.

QUESTION: Go ahead. No, no, you finish first.

GENERAL OLSON: Well, I was going to say there's no language whatsoever of preemption, abandonment, abrogation, or exchange in the 1790 copyright, but compare -- Copyright Act. But compare that to the 1793 Patent Act under the same clause, where there is that exchange there.

The other thing, as this Court has said, there is no implied abrogation of common law rights which would be a doctrine which would be inconsistent with what the petitioner is arguing. Now --

QUESTION: Why -- I mean, I think you have a point on this equity principle. I wonder, is there any review there? That is, suppose you have a statute, as

this one arguably is, where 99.9 percent, many billions of dollars of benefits, are going to the existing holders of copyright on grounds of equity, and the effect of the statute in eliciting new works is near zero. I mean, that would seem -- where this equity idea is the camel and the production idea is the gnat, and is there any -- can we say something like that, or does Congress have total leeway in respect to --

GENERAL OLSON: Well, it --

QUESTION: -- who they want to give the money to, basically?

GENERAL OLSON: Justice Breyer, it's conceivable that the Court might do that if that situation was present, but it's not remotely the situation here. We have the adoption of copyright terms which are consistent, generally speaking, with copyright terms which exist in the European Union, our principal competitor, and in connection with international treaties.

We have a copyright term that's consistent with the concept of the creator plus the creator's first generation heirs. We have a copyright term, remember, which supersedes the earlier copyright provisions that were added to the period between creation and publication, so that the limited number of years in the first, the 1790 and the 1831 statute were the number of years plus the

relatively unlimited period of time between creation and publication, so we don't have anything remotely like that in this situation.

We have a process which, as you suggested, or one of the questions suggested, is -- may not have been the policy that you as a Member of Congress would have supported. You might have made the balance, that delicate balance that this Court has referred to, in another way, but that is something that Congress, through its ability to gather facts and make balances, is quintessentially capable of doing, and that is where the Framers vested the responsibility, and what this statute does is to favor, if at all, the creator with respect to the utilization of these rights, as opposed to the person who wishes to copy the creator. That's an entirely rational distinction for Congress to make.

Thank you.

QUESTION: Thank you, General Olson.

Mr. Lessig, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE LESSIG

ON BEHALF OF THE PETITIONERS

MR. LESSIG: General Olson has been perfectly clear in setting out the structure of the Government's argument. It is that there is no effective limit on Congress's power under the Copyright Clause. Now, were

this the first time this Court had considered Congress's copyright authority, that might be a plausible argument, but the very first time this Court ever struck down a law of Congress as exceeding Article I, section 8 power was in the context of the Copyright Clause.

We have 125 years of history of this Court making sure that the limits, both express and implied, in the Copyright Clause, have some meaning. The Feist opinion very clearly sets out the implied limits, a per se limit for originality, for the reasons Justice Breyer was trying to get me to say. The Harper as well as Graham set out very clear limits on the context of the ability to extend works in the public domain. Those limits make no sense under the reasoning the Government has offered. The Government's reasoning would make all of those opinions irrelevant and wrong.

Now, we offer a simple way to make this clear, express limit make sense, and that is precisely the understanding we suggest that existed in 1790. The only precedents that existed in 1790 were precedents of setting a term, and then when parliament was asked in 1735, '37, and '39 to extend it, they rejected it, and as amicus historians said, they rejected it because, as a pamphleteer described it, that would be effectively a perpetual term.

Now, this delicate balance that the Government invokes, Justice Breyer, let me give you the numbers. The delicate balance is that, under the most reasonable assumptions of copyright royalty income and under our interest rate of 7 percent, as the amicus economists note at page 6, note 6 of their brief, the current term gives authors 99.8 percent of the value of a perpetual term.

Now, that might be a delicate balance, that they give the author 99.8 percent and the public .2 percent, but in my mind, that's delicate in a very different sense of that term.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lessig.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)