

Journal of Intellectual Property Law
Spring, 2001

Case Comment

***223** ELDRED V. RENO: AN EXAMPLE OF THE LAW OF UNINTENDED CONSEQUENCES

L. Ray Patterson [FNa1]

Copyright © 2001 Journal of Intellectual Property Law Association; L. Ray

Patterson

In *Eldred v. Reno* the U.S. Court of Appeals for the D.C. Circuit held that the Copyright Term Extension Act (CTEA), which extends the copyright term for present and future works for twenty years, was a constitutional exercise of Congress's copyright power. [FN1] The CTEA [FN2] thus puts an end (at least for two decades) to a policy in effect for more than two centuries, since the Copyright Act of 1790, that the copyright of a work expires at the end of a stated term defined at the time the copyright was granted. [FN3] Since works were copyrighted annually, the policy meant that each year a certain number of copyrighted works entered the public domain, as the copyright terms ended seriatim. The mandate of the CTEA is that no copyrighted work in the United States will go into the public domain before year 2018. [FN4] The *Eldred* case thus constitutes judicial approval of the legislative moratorium of the constitutional mandate that copyright protect the public domain, a policy in partial fulfillment of the fact that copyright, as the U.S. Supreme Court has repeatedly stated, is primarily to benefit the public, only secondarily to benefit the author (as copyright holder). [FN5] *224 Arguably, the CTEA serves the interest of no one except that of publishers (and other copyright holders) and their heirs.

Eldred is thus contrary to the Supreme Court's long tradition of rendering copyright decisions that serve the public interest in preference to the publishers' interests. In *Wheaton v. Peters*, decided in 1834, the Court ruled that copyright is a limited statutory monopoly, not the perpetual common law monopoly that the publishers sought; [FN6] in *Baker v. Selden*, decided in 1879, the Court ruled that copyright does not protect ideas, as the plaintiff claimed in seeking to protect his method of bookkeeping; [FN7] in *Bobbs- Merrill v. Straus*, decided in 1908, publishers sought a ruling to give them the right to control the secondary market for works they published, but the Court ruled that the publisher's sale of a copy of a work exhausts the right to control the future sale of that copy; [FN8] in *Sony Corp. of America v. Universal City Studios, Inc.*, decided in 1984, publishers desired to establish precedent for a compulsory licensing scheme for personal copying, but the Court held that an individual can copy a copyrighted motion picture off-the-air for personal use without infringing the copyright; [FN9] and in *Feist Publications, Inc. v. Rural Telephone Service Co.*, decided in 1991, the Court held that the white pages of telephone directories are not copyrightable because they are not original and originality is a constitutional condition for copyright. [FN10] The Court also ruled that there is a constitutional right to use uncopyrightable material in a copyrighted work. [FN11]

Unfortunately, lower federal courts have not always followed the lead of the High Court in copyright cases and have created their own tradition by rendering copyright decisions that serve the publishers' interest in preference to the public interest. The most enigmatic example, perhaps, is the decision in *West Publishing Co. v. Mead Data Central*, in which the lower courts acquiesced to West's claim that the copyright monopoly protects its publication of the opinions of both state and federal courts. [FN12] The general *225 rule is that law is not copyrightable and the copyright statute specifically denies copyright protection for works of the U.S. Government [FN13] (of which judicial decisions are a prime example), which would seem to have presented insuperable obstacles to West's claim. The lower courts, however, were up to the task. They granted protection to the page numbers of the reports, [FN14] but they did not explain how copyright for the pages of the reports does not provide copyright protection for cases in the reports, however limited. [FN15]

Perhaps the most brazen example of the lower courts' too often Pavlovian response to the petition of publishers for relief to which they are not entitled, in order to obtain a precedent that the copyright statute does not justify, is the crippling of the fair use doctrine, a judicial creation of the 19th century that Congress codified in the 1976 Act. [FN16] Thus, despite the language of section 107 of that statute that the fair use of a copyrighted work, including use by copying for purposes such as news reporting, comment, criticism, teaching (including multiple copies for classroom use), scholarship, and research is not

(Cite as: 8 J. Intell. Prop. L. 223)

an infringement of copyright, [FN17] publishers have persuaded lower courts that the language does not mean what it says. The argument was that the first paragraph, which contains the operative language, is subordinate to the second, which lists the four factors for courts to consider in determining if a use is fair. [FN18]

As a rule, of course, the particular provisions of a statute should prevail over the general, except when they defeat the purpose of the statute as defined by the general provisions. Despite the fact that fair use is an equitable doctrine, which logically brings the exception into play, publishers have been very skillful in persuading courts that the exception does not apply to fair use, even though not applying it is a rejection of the basic rule of statutory construction that no provision of a statute should be disregarded. In *Basic Books, Inc. v. Kinko's Graphics Corp.*, the U.S. District Court for the Southern District of New York held that a copyshop, although acting *226 for and at the request of professors to make copies for classroom use, was guilty of copyright infringement. [FN19] The U.S. Court of Appeals for the Sixth Circuit ruled the same way in *Princeton Univ. Press v. Michigan Document Servs., Inc.*, [FN20] thus perpetuating the odd rule that the legal duty of the agent to a third party (not to copy copyrighted works without permission) overrides the statutory right of the principal (to copy as a matter of fair use for teaching purposes).

The publishers, however, may have achieved their most notable success in *American Geophysical Union v. Texaco, Inc.* In that case, the U.S. Court of Appeals for the Second Circuit held that Texaco was liable for copyright infringement because research scientists in Texaco's laboratory copied articles for their files to use for their research, even though Texaco paid for three subscriptions to the periodical (a scholarly journal) from which the articles were copied. [FN21] The court justified its conclusion by characterizing the copying (by individual scientists for their individual files) as archival copying. [FN22] Since the implication is that the copies are made for posterity rather than personal use in scholarly research, the archival characterization is of dubious propriety.

Eldred v. Reno, which held that the Copyright Clause empowers Congress to extend the copyright monopoly by adding a twenty-year term to existing copyrights, [FN23] is firmly in the tradition of inferior courts producing inferior copyright decisions. The grant of subsequent copyright protection is clearly beyond both the wording and the spirit of the Copyright Clause. [FN24] The court thus could have reached its result only by ignoring the fact that the Copyright Clause is a limitation on as well as a grant of Congress's copyright power. Further, because the court apparently was not aware that the limitations define the policies of the Copyright Clause, it treated the clause as a grant of plenary power that enables Congress to extend extant copyright monopolies at will.

Two reasonable questions follow from the court's decision in *Eldred*: Why the judicial tradition of granting the petitions of publishers in knee-jerk fashion in the first place, and why the U.S. Court of Appeals for the D.C. *227 Circuit followed it in the second? Neither question has a definitive answer, but there are some ideas that may be relevant. As to the first question, a helpful idea is the role of culture in governing our reasoning process, an axiomatic proposition that needs no further discussion. Suffice it to say that the publishers have used the proprietary culture that dominates the legal system to persuade courts that copyright is merely an example of garden-variety private property, which it clearly is not. Garden-variety property is not created and defined by a statute that also limits the term of its existence, [FN25] and distinguishes between a physical object and the right to which that object is subject. [FN26] But the property fiction served-and continues to serve-the cause of the publishers. Since property is by definition monopolistic, if copyright is merely an example of private property, any argument that it is monopolistic descends to the realm of irrelevance. Moreover, copyright is treated as being at the top of the hierarchy of private property because it has the cachet of being the product of intellectual creativity. However, one need only consider copyright for "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays," [FN27] to see how infirm the claim of intellectual creativity is as a justification for the copyright monopoly. But, of course, one of the characteristics of culture is that it is immune to logic, and given the proprietary culture of the common law system, the rationalization of rewarding intellectual activity has served the purpose of the publishers-a bloated copyright monopoly-without examination.

As to the second question, the U.S. Court of Appeals for the D.C. Circuit was merely following a tradition of the common law system, that is, piecemeal jurisprudence. Each case is to be decided on its own merits in relation to the rights of the parties, not the public interest. And, of course, each case can serve as precedent for future cases, which explains the astounding comment of the court in regard to copyright and First Amendment rights. "[W]e held in *United Video* that copyrights are categorically *228 immune from challenges under the First Amendment." [FN28] This is piecemeal jurisprudence with a vengeance, a rule that can only have been spawned in disregard of the fact that the subject of both the Copyright Clause and the First Amendment copyright is the communication of ideas.

(Cite as: **8 J. Intell. Prop. L. 223**)

The overlap of free speech rights and copyright presents abundant opportunities for conflict because of the different approaches to the subject, negative in the First Amendment ("Congress shall make no law . . ." [FN29]), affirmative in the Copyright Clause ("The Congress shall have Power . . . To promote the Progress of Science . . ." [FN30]). Such a conflict can, of course, be avoided by judicial fiat. Unfortunately, such a fiat could be issued only in ignorance of or contempt for the policies of the Copyright Clause. Arguably, the United Video statement is evidence of the court's contempt for those policies, as discussed below.

Only policy can explain the grant and denial of a congressional power as to the same subject matter in two separate constitutional provisions, one of which is an amendment. The negative approach in one instance and the affirmative approach in the other suggests that indeed there is a policy that reconciles the two ostensibly conflicting provisions. Given that the subject matter of both provisions is information in the form of facts—the building blocks of knowledge—logically that policy can be only the right of public access. In short, the governing principle of both the First Amendment and the Copyright Clause is the right of public access to materials that enable the people to learn, for political purposes in some instances, and for personal education in others. Unfortunately, the principle of access has been obscured by the emphasis on the right to print and speak under the First Amendment and on copyright as private property under the Copyright Clause. But why would the Framers forbid Congress to regulate the right to print and speak and give Congress the power to create a property right in writings unless, in both instances, the goal is to enable the people to read and hear? The important point is that under the First Amendment, Congress cannot constitutionally deny public access to either the spoken or printed word, and under the Copyright Clause, Congress can constitutionally enact *229 only a copyright statute that protects the right of public access to the printed word, which is why the Framers empowered Congress to grant copyright only for published books. [FN31]

The court provides further evidence of its disdain for policy in its statement that, "The CTEA is but the latest in a series of congressional extensions of the copyright term, each of which has been made applicable both prospectively and retrospectively." [FN32] What the court did not say (and what it may not have known) was that every extension it cited was enacted in conjunction with the enactment of a copyright statute (in 1790) or a major revision of the statute (in 1830, 1870, 1909 and 1976). The cited statutes thus involved policy considerations different from those presented by a stand-alone statute that extends the copyright term of extant works with no discernible benefit to the public interest, as does the CTEA. [FN33]

Moreover, the logic of the argument that the scope of Congress's constitutional copyright power can be measured by the statutes that Congress enacts in exercising that power is difficult to find. It may just be possible that Congress on occasion exceeds its power, and courts should decide whether it has done so in enacting a particular statute independently of congressional action. To put the point bluntly, courts should not rely on the action of Congress in enacting a statute as proof of its constitutional right to do so. Moreover, if the U.S. Supreme Court is correct in continually reiterating that copyright is primarily to benefit the public interest and only secondarily to benefit the author, it seems only fair that the Eldred court should have explained how a statute that contravenes a basic policy of the Copyright Clause—protection of the public domain—benefits the public in preference to publishers and their heirs, born and to be born.

The Eldred court's apparent premise—the scope of Congress's constitutional power is measured not by the Constitution but by what Congress does—enables the court to use congressional action in support of its position. *230 Thus, the court noted that in 1976 Congress altered "the way the term of a copyright is computed so as to conform with the Berne Convention and with international practice." [FN34] The way Congress chose to compute the copyright, of course, was from the moment of fixation, [FN35] a constitutionally questionable change in view of the limitation of copyright to published books in 1787. Constitutional issues aside, however, one can be almost certain that the purpose of the change in the method of computation was simply to enlarge the term of copyright monopoly, for which the Berne Convention provided political cover. Thus, there is reason to be concerned about the impact of the Berne Convention on American copyright law. The concern is that the court gave its imprimatur to the apparent decision of Congress to use the Berne Convention, not the Copyright Clause, as the measure of its copyright power.

We see here evidence of the publishers' greatest success in their efforts to shape the copyright culture. Somehow, they have managed to persuade lower courts that the Copyright Clause is irrelevant to both Congress's power to enact copyright statutes, and the courts' duty to interpret those statutes, despite the fact that logically courts should be bound by the Copyright Clause in interpreting copyright statutes just as Congress should be bound by it in enacting them. The success of the publishers is surely explained in part by the courts' reluctance to accept the relevance of this truism to their decision process, [FN36] but it may also be explained in part by both the proprietary culture and the piecemeal jurisprudence of the common law system. But in view of the deference that courts normally give to statutes that Congress has enacted, a major reason probably is the lobbyists of the copyright industry who line the halls of Congress eager to replenish the reelection coffers of

(Cite as: 8 J. Intell. Prop. L. 223)

members of the right committees. (The custom of allowing the copyright industry to write copyright legislation apparently dates back to 1905 when Thorvald Solberg, the Register of Copyright, wanted a new copyright statute and realized that he would have to have the cooperation of the industry to get it. [FN37])

*231 Contributing to the relegation of the Copyright Clause to irrelevance and to the industry's success in shaping copyright law is judicial ignorance of the policies in the Copyright Clause. [FN38] This is not a criticism, but a situation reflecting the fact that in the law school curriculum, copyright has emerged from the backwater category only in recent years, and even today, few copyright casebooks deal with the constitutional dimensions of copyright. Thus, most courts must use on-the-job training in copyright cases and necessarily rely on the citations and arguments presented by copyright counsel whose bias naturally represents their clients, copyright holders. And we can say with confidence that the interest of those clients is not congruent with the policies. Those policies are three: 1) the promotion of learning; 2) the protection of the public domain; and 3) public access to copyrighted material. Thus, the Constitution requires that the copyright statute Congress enacts shall be designed to do three things: to promote learning, because the clause so states; to protect the public domain, because copyright is available only to authors only for their original writings only for a limited time; and public access, because the "exclusive Right" that the Framers in 1787 gave Congress the power to grant was the exclusive right to publish a work. [FN39]

Presumably the U.S. Court of Appeals for the D.C. Circuit in *Eldred* was engaged in on-the-job training; otherwise, it surely would have recognized that these three constitutional policies promote "Science," [FN40] that is, knowledge. And the court might even have agreed with President George Washington about the importance of knowledge as he stated in his address to Congress on January 8, 1790, encouraging the enactment of a copyright statute. "Knowledge is, in every country," he said, "the surest basis of public happiness." [FN41] And he went on to note that in a country "in which the measures of government receive their impression so immediately from the *232 sense of the community as in ours, it is proportionably essential." [FN42] President Washington's comments suggest that he considered knowledge as important to a free society as private property and, perhaps, even more so. Washington's position, of course, is confirmed by the three constitutional copyright policies. And since he was one of the Framers of the Constitution, it is not unreasonable to think that the Copyright Clause was the source of his sentiments, especially since those sentiments were expressed to encourage the enactment of a copyright statute.

The copyright policies, however, are not a part of the current copyright culture. We can assume that one reason is that the policies are contrary to the interest of publishers, who have had the largest role in shaping attitudes toward copyright. Publishers, for example, would probably find the idea of a copyright policy to protect the public domain laughable, a conclusion supported by the preeminent copyright lobbyist Jack Valenti, who is supposed to have said the limited time provision of the Copyright Clause means that Congress can provide for a copyright term one day short of eternity. Allied with the publishers, of course, are their lawyers who, in copyright litigation, lack any interest in providing the court with any information that gives support to the U.S. Supreme Court's position that copyright is primarily to benefit the public interest, as the policies clearly do. That, of course, is the cynical view. A less cynical view is that copyright lawyers are ignorant of the policies, which can be traced to the first English copyright statute, the Statute of Anne of 1710, which is the source of the language in the Copyright Clause. [FN43] The courts, however, bear some responsibility for ignoring the copyright policies because an analysis of the Copyright Clause, found in the Intellectual Property Clause (IP Clause), makes the policies clear. The IP Clause reads: "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" [FN44]

One value of analyzing the IP Clause is that it makes clear that the clause is to be read distributively; copyright is not, as is often said, to promote both *233 "the Progress of Science and useful Arts." The latter goal is the purpose of patents, [FN45] and the goal of copyright is to promote Science, that is learning. [FN46] This is apparent from the fact that the Intellectual Property Clause contains the Copyright Clause and the Patent Clause, and thus grants to Congress two powers, the copyright power and the patent power. Congress has exercised each of the powers independently of each other since April, 1790, [FN47] when it enacted the first patent statute, and May, 1790, [FN48] when it enacted the first U.S. copyright statute.

The unique characteristic of the IP Clause is that it states not only the goal for which the power is granted to Congress, but also the procedure by which the goal is to be achieved. In the case of copyright, this procedure is to grant to authors for a limited time the exclusive right to their writings. A stated goal, of course, limits the power to achieve that goal. Thus, for a court to say, as did the *Eldred* court, that the goal of the promotion of learning is irrelevant to the power of Congress to enact copyright legislation [FN49] is to say that the power the Framers designed to be limited becomes unlimited. And for a court to rule that the copyright power is unlimited is to amend the Copyright Clause by judicial fiat by reason of the rule of stare

(Cite as: 8 J. Intell. Prop. L. 223)

decisis, which gives the ruling continuing efficacy within the court's jurisdiction. The court makes the point by relying on its rule in *Schnapper v. Foley*, [FN50] "in which we rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.'" [FN51] The court in *Eldred* thus ignored the fact that in *Schnapper* it rewrote the Copyright Clause to read: "Congress shall have Power to secure for limited Times to Authors the exclusive Right to their Writings." [FN52] Presumably the court's judicial revision of the Copyright Clause was unwitting, but to avoid perpetrating the error, the court should recognize that it takes only one further unwitting step in the reasoning process to ensure that the copyright power of Congress shall be absolute. That step is *234 to define limited times as one day short of eternity, and we can be sure that the step is one that the publishers are willing to assist the courts in taking.

The dissent in *Eldred* rejected *Schnapper*, which apparently caused the majority some discomfort, because it supported its position with alternative reasoning, that it need only decide that the CTEA is a " 'necessary and proper' exercise of the power conferred upon the Congress by the Copyright Clause." [FN53]

Said the majority:

The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. [FN54] If called upon to do so, therefore, we might well hold that the application of the CTEA to subsisting copyrights is "plainly adapted" and "appropriate" to "promot[ing] progress." [FN55]

There is, insofar as I can determine, no language in the Copyright Clause that empowers Congress to grant a copyright for the preservation of works. Indeed, it has been understood from the beginning of statutory copyright that the creation of a new work is the unalterable condition for copyright, a condition that the Framers, as the U.S. Supreme Court has recognized, made a part of the Copyright Clause, and that Congress retained in the 1976 Copyright Act. [FN56] The last point is significant because Congress in the 1976 Act revolutionized copyright law by, among other changes, eliminating publication as a condition for copyright. [FN57] Moreover, as I read the Copyright Clause, it does not, despite what the court said, provide for "promot[ing] progress." [FN58] Rather, it provides for "promot[ing] the Progress of Science," [FN59] that is learning.

*235 An additional copyright term for a restored work, of course, may encourage the preservation of knowledge, but it does not "promote progress," and its cost is prohibitive; the price is the forfeiture of the constitutional policy that copyright protect the public domain. The protection of the public domain, of course, is why the condition for the copyright monopoly is somewhat more stringent than the condition for the restoration of a work. The condition for copyright is the creation of a new work, not the recycling of old works.

Assuming that the Court of Appeals for the D.C. Circuit respects rulings of the U.S. Supreme Court, we have here an example of unintended consequences, for the court's reasoning will lead to the revival of the sweat-of-the-brow doctrine that the U.S. Supreme Court held to be unconstitutional in *Feist*. [FN60] Arguably, no matter how skilled the restorer, the restoration will lack that element of creativity that *Feist* held to be a part of the originality required for copyright. [FN61] Moreover, presumably the court meant that the restoration copyright is available to all copyright holders, even those who are assignees of the author. Thus, the court creates by implication a judicial fiction that a restorer is an author, a counterpart to the statutory fiction that the employer of an author is the author. While courts may be willing to sustain a fiction to create authors employed by Congress, this does not mean that they themselves should engage in the process of creating authors by fiction. This would entitle non-authors to copyright protection contrary to the express language of the Copyright Clause. [FN62] One of the purposes of limiting copyright to authors was to keep the monopoly of copyright within reasonable bounds; thus, to leave the author out of the copyright equation is to extend those bounds (and encroach onto the public domain).

Moreover, it is difficult to understand how the application of the CTEA is " 'plainly adapted' and 'appropriate' to 'promot[ing] progress.'" [FN63] The court apparently overlooked the fact that the extension of copyright to older works in need of restoration is just as likely to inhibit, as to promote, "progress," whatever that means. The copyright of the restored work *236 becomes the property of the restorer, and if the first copyright has expired, restoration recalls the work from the public domain, which restores the power to control access to the work. But the reason for the limited copyright term in the first place is to protect and enrich the public domain by terminating that power.

Given the fact that the court wrote the introductory language out of the Copyright Clause, one is justified in suspecting that the court's motive here is to provide another way to rewrite the Copyright Clause, "the necessary and proper" exercise of the

(Cite as: 8 J. Intell. Prop. L. 223)

copyright power. Perhaps this is why the court supported its position by employing Congress's statement that preserving older works justifies an extension of the copyright monopoly, which somehow, seems to be reminiscent of bootstrap reasoning. Apparently, the court did not recognize that the effect of this exercise of the "necessary and proper" exercise of the copyright power gives Congress the power to destroy the public domain.

To escape the Alice-in-Wonderland logic of Eldred, we need to return to the language of the Intellectual Property Clause, and read it as it was written, that is distributively. The Copyright Clause reads: "Congress shall have Power to promote the Progress of Science by securing for [a] limited Time[] . . . to Authors the exclusive Right to their Writings." [FN64]

The Patent Clause reads: The "Congress shall have Power . . . [t]o promote the Progress of . . . useful Arts, by securing for [a] limited Time[] to . . . Inventors the exclusive Right to their . . . Discoveries." [FN65]

Thus, Congress can promote the progress of knowledge by securing for a limited time to authors the exclusive right to their writings, and promote the useful arts by securing for a limited time to inventors the exclusive right to their discoveries. Contrary to the court's cavalier treatment of the limited time provision, there is a good argument that it is the most important limitation on Congress's copyright power. If the copyright is not limited, it is perpetual; and a perpetual copyright inhibits the progress of learning, destroys the public domain, and does not provide for public access. Anyone who views these conclusions as fanciful will be surprised to learn that this was precisely the situation in England with the perpetual publishers' copyright that was the predecessor to the limited term statutory author's *237 copyright of the Statute of Anne, the direct source of the policies contained in the Copyright Clause, which merits further discussion.

Of the three policies, the protection of the public domain and public access are most easily established. The requirement of originality and the limited term mean that copyright cannot be used to capture works in the public domain and that all copyrighted works go into the public domain after a "limited Time." [FN66] The public access policy is made clear by the meaning of the "exclusive Right" as the right to publish writings, which ensured public access. [FN67] This, of course, is why copyright was limited to printed books in the Copyright Act of 1790, and to assume that the "exclusive Right" meant more is to attribute to the Framers a prescience to which even they are not entitled. [FN68]

The problematic policy is the promotion of learning, as indicated by the court's position that the provision is not a limitation of Congress's power. Presumably the reason for this position, although not stated, is that if taken in its normal meaning, the phrase would require a content-based copyright, which would surely violate the free press clause of the First Amendment. Yet, it is difficult to believe that the Framers would include in the Constitution language that has no meaning; moreover, history tells us why they did include it. In this instance, history speaks with a particularly clear voice because we can identify the direct source of the language in the Copyright Clause. In 1710, copyright was only fifteen or so years removed from its use as a device of censorship and continued to be used to monopolize the book trade. The contemporary concerns for this use of the "property in books" shaped the Statute of Anne [FN69] and ultimately the Copyright Clause of the U.S. Constitution. [FN70]

Recall that copyright is a monopoly and that one of the features of a monopoly is the right of the monopolist to control access. The societal context that led to the enactment of the Statute of Anne—the monetary and *238 political monopolies of the booktrade—demonstrate the two reasons for controlling access to copyrighted works. One is to protect the monopoly for marketing the work; the other is to protect the content of the work against access for political reasons, that is, censorship. This, indeed, was the dual purpose of the publishers' copyright in England that was the predecessor of the statutory copyright. The Licensing Act of 1662, [FN71] which forbade the publication of schismatical, blasphemous, seditious and heretical material, protected the publishers' copyright in return for the publishers' aid to the official licensors. The copyright that preceded the statutory copyright was thus both a device of monopoly and an instrument of censorship, and the Statute of Anne was carefully crafted to prevent the continued use of copyright for these purposes. Thus, the English act contained a provision for controlling the prices of books, an anti-monopoly provision; and made the goal of copyright the encouragement of learning, an anti-censorship provision.

The phrase-to promote the Progress of Science—captures in a few words both the anti-monopoly and the anti-censorship goals. Monopoly prices inhibit learning for monetary reasons (the reason for the price control provisions of the Statute of Anne) and control of access in the form of censorship inhibits learning for political reasons. This is why copyright was made available only for printed books. Thus, contrary to the publishers' copyright, which came into existence with the registration of the title of any book, the statutory copyright did not come into existence until a newly written book was published. The grant of copyright for an original work that was published ensured that copyright would promote learning and not be used as a device

(Cite as: 8 J. Intell. Prop. L. 223)

of official censorship. At the least, it would have made the licensing scheme inefficient and a policy resented by the people, as was censorship, [FN72] would need to be as efficient as possible. Moreover, the narrow scope of copyright in 1787 prevented the use of copyright for the purpose of private censorship. That scope was limited to the right to reproduce copies of the copyrighted book for sale, but the right was limited to the book as it *239 was published. Thus, it was not an infringement of copyright to abridge, translate or otherwise adapt the book and publish it.

A vestige of this doctrine survives in the form of the "idea/expression dichotomy," which is said to prevent copyright from violating the First Amendment. [FN73] This protection for First Amendment rights, however, is more appropriate for political than for artistic expression, whether in visual or written form. The point is that the copyright monopoly has been so enlarged that the distinction has become irrelevant in regard to creative works. The right to prepare derivative works, for example, provides protection for ideas. The ideas in the novel are protected when the novel is made into a screenplay for a motion picture, even though the expression is entirely different. It is this change, together with new communication technology, that has brought the problem of private censorship to the forefront. Thus, the enlargement of the proprietary base of copyright provided the publishers with a platform to persuade Congress and the courts that new technology entitles them to control access to copyrighted material after that material has entered the stream of commerce. The silent premise, of course, is that greater control of access means greater profit. In terms of scope, copyright can be viewed as a horizontal monopoly; in terms of time, copyright can be viewed as a vertical monopoly. In combination, the result is to enhance the copyright monopoly in geometric, not arithmetic, terms. This is why the CTEA is so harmful to the public welfare.

The mechanics of copyright today are essentially the same as when copyright was used as a device of public censorship. And it seems likely that the draftsman of the Statute of Anne, reputed to have been Jonathan Swift, recognized that private censorship could be as inimical to the public welfare as official censorship. Thus, the pattern of the Statute of Anne--original writings, publication, and price control--was designed to preclude copyright for this purpose. Except for price control--not an appropriate provision for a constitution--the design was adopted by the Framers for the Copyright Clause of the U.S. Constitution.

That a highly respected federal court could be so wrong on so important an issue as the power of Congress to extend a private monopoly over information in a free society to the benefit of the few and the detriment of the many is an enigma. Perhaps the best explanation is that the court was *240 the victim of the law of unintended consequences. The consequence in this case is that publishers can use their private property for profit by using a system of private licenses to control the public's political right to know, which surely was unintended. I say this because unintended consequences almost invariably result from ignorance. The relevant ignorance here--which is not limited to the D.C. Circuit--is that copyright represents a conflict between two fundamental policies of American law: property rights and political rights.

Both rights are fundamental to a free society. Without private property, the citizen has no power to act against tyranny, and without knowledge, he or she has no reason to act. Thus, the conflict is in the fact that the subject of the property of copyright is information, which calls for a modification of property principles, as, indeed, the phrase "intellectual property" suggests. The modification of property principles, of course, calls for compromise. The value of copyright history is that it enables us to see the struggle to achieve compromise and the terms of the compromise that resulted, which are seen in the Copyright Clause: The grant of an exclusive right for a limited time to authors of original works. History also shows the extent to which the compromise is at risk because property is a more tangible benefit than knowledge, and property owners continually seek to enlarge their property rights. The classic effort in this regard was the effort of publishers in England to replace the limited statutory copyright with a perpetual common law copyright, which was finally defeated by the House of Lords in *Donaldson v. Beckett* in 1774. [FN74] The Supreme Court cases discussed at the beginning of this essay, however, provide sufficient proof of the point.

The CTEA, of course, is in the tradition of publishers seeking to enhance their monopoly, and it should be noted that publishers use both the legislative and the judicial forums to achieve their goal. They used the legislature to obtain an extension of the copyright term, [FN75] but they used courts to destroy the fair use doctrine, at least for teaching [FN76] and research. [FN77] *241 Rarely, however, have the publishers had such a victory as lawyers for the U.S. Government and the U.S. Court of Appeals for the D.C. Circuit gave them in the *Eldred* case. Not only do they get a twenty-year extension for their monopolies, they also have a precedent that will empower Congress to grant them another twenty-year extension at the end of the current extension. Surely the *Eldred* court did not realize that because of the CTEA, no copyrighted work in the U.S. will go into the public domain until 2018, a moratorium that is contrary to the policy that copyright shall enrich the public domain. Indeed, the court manifests a lack of awareness of the point in its conclusion, which deserves a few comments.

(Cite as: **8 J. Intell. Prop. L. 223**)

First, the court said, "The plaintiffs' first amendment objection fails because they have no cognizable first amendment interest in the copyrighted work of others." [FN78] This statement reflects the parochial view that the First Amendment is only to protect the rights of the speaker and printer, not the people. This is analogous to the trickle-down theory of economics. If the printer and speaker are protected, the people will read and hear, so the theory goes. But the theory falters if the printer and speaker can determine if--and on what terms--the people can read and hear, which they can do if their words are fixed and thus copyrighted. And under the 1976 Copyright Act, if the words are original, that is not copied from another, copyright cannot be avoided. The copyright monopoly is automatically granted for original works of authorship fixed in a tangible medium of expression.

Second, the court said: "[Plaintiffs'] objection that extending the term of subsisting copyright violates the requirement of originality misses the mark because originality is by its nature a threshold inquiry relevant to copyrightability, not a continuing concern relevant to the authority of the Congress to extend the term of a copyright." [FN79] By this reasoning, Congress is empowered to continue to renew extant copyrights almost to the end of time, that is until one day short of eternity. Arguably, in view of the limitations on Congress's copyright power, it would be more reasonable to say that the grant of a copyright exhausts the condition of originality, which cannot then be used to obtain another copyright term because it does not further contribute to the promotion of the "Progress of Science."

*242 Third, the court said: "Whatever wisdom or folly the plaintiffs may see in the particular 'limited Times' for which Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality." [FN80] But is rationality to be measured in terms of the desires of publishers or the words of the Copyright Clause? Given the constitutional policies of copyright, the question is not did Congress act rationally, but why did it act so irrationally.

One suspects that the U.S. Court of Appeals for the D.C. Circuit did not act irrationally, that is in ignorance of what it was doing, at all. Given what I suspect was its premise--it is vitally important to protect the economic interests of American publishers in today's shrinking world--its result, albeit achieved by reasoning of questionable soundness, was wholly rational. The court's ruling thus reflects the truism that the property culture dominates judicial decisions whenever the protection of property is at issue, as it always is in copyright cases. But there are times when property rights must be subordinated to higher values, for the failure to act to protect the higher values inevitably proves to have been a costly mistake. The classic example is the Dred Scott decision in which property in the form of people was preferred over human freedom.

The analogy of Eldred can easily be criticized as being overwrought, but ultimately the issue in both cases was freedom, from private slavery in one instance, freedom from private censorship in the other. Is not ignorance a form of slavery? We must not make the mistake of underestimating the power of the profit motive and the willingness of publishers to become profiteers of the press by controlling the people's right to know, just as slave owners were profiteers in human misery.

To say that if the price of "globalization" and "harmonization" are fundamental values protected by the Free Speech and Copyright Clauses of the U.S. Constitution is a costly cynicism. Presumably, the thinking is that the cost is necessary for the price of progress, and, after all, as the Eldred court recognized, the Copyright Clause empowers Congress to "Promote Progress." There is, however, much to be said in favor of the Copyright Clause and the policies it mandates. And it may be that if we start with the policies in seeking to resolve the new conflict between property rights and political rights that new communications technology has thrust upon us, we *243 may find a solution for the people as satisfactory for the computer as the Framers found for the printing press. At the least, we should not foreclose the effort by decisions such as Eldred v. Reno, which seek to provide the answer without knowing the question. Such effort almost always produces unintended consequences, most of them unpleasant.

[FN1]. S.J.D. Harvard 1966, LL.B. Mercer University 1956, M.A. Northwestern 1950, A.B. Mercer University 1949. Mr. Patterson is the Pope Brock Professor of Law at the University of Georgia School of Law where he teaches Copyright Law, Legal Profession, and Legal Malpractice.

[FN1]. *Eldred v. Reno*, 239 F.3d 372, 57 U.S.P.Q.2d (BNA) 1842 (D.C. Cir. 2001). The Supreme Court of the United States has granted certiorari to hear this case. On appeal to the Court, the case is now styled *Eldred v. Ashcroft*.

[FN2]. Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[FN3]. 17 U.S.C. § 101 (1994).

(Cite as: **8 J. Intell. Prop. L. 223**)

[FN4]. Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[FN5]. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432, 220 U.S.P.Q. (BNA) 665, 674 (1984).

[FN6]. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

[FN7]. *Baker v. Selden*, 101 U.S. 99 (1879).

[FN8]. *Bobbs-Merrill v. Straus*, 210 U.S. 339 (1908).

[FN9]. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984).

[FN10]. *Feist Publication, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

[FN11]. *Id.* at 341.

[FN12]. *West Publ'g Co. v. Mead Data Cent.*, 799 F.2d 1219, 1226-27, 230 U.S.P.Q. (BNA) 805 (8th Cir. 1986).

[FN13]. 17 U.S.C. § 105.

[FN14]. See *Mead Data Central*, 799 F.2d at 1227.

[FN15]. *Id.*

[FN16]. 17 U.S.C. § 107 (1976).

[FN17]. *Id.*

[FN18]. *Id.* See *Patterson, Folsom v. March and Its Legacy*, 5 J. Intell. Prop. L. 431 (1998). The four factors: 1) purpose and character of the use, 2) nature of the copyrighted work, 3) amount used, 4) effect of use on the potential market. Logically, the first paragraph cannot subordinate because of the language that any determination of fair use "shall include" the four factor application.

[FN19]. 758 F. Supp. 1522, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991).

[FN20]. 99 F.3d 1381, 40 U.S.P.Q.2d (BNA) 1641 (6th Cir. 1996).

[FN21]. 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1994).

[FN22]. *Id.* at 919.

[FN23]. 239 F.3d 372, 57 U.S.P.Q.2d (BNA) 1842 (D.C. Cir. 2001).

[FN24]. See *Patterson, Understanding the Copyright Clause*, 47 J. Copyright Soc'y 365 (2000).

[FN25]. Sections 107-20 of the Copyright Act of 1976, 17 U.S.C. § 101 et seq. (1994) are limitations on the rights granted to a copyright holder in 17 U.S.C. § 106.

[FN26]. 17 U.S.C. § 106. The exclusive rights in this section, subject to limitations, are: 1) right to reproduce, 2) right to prepare derivative works, 3) right to distribute copies, 4) right to perform, and 5) right to display. They show the limited rights to which a copyright holder is entitled.

[FN27]. *Mazer v. Stein*, 347 U.S. 201, 220, 100 U.S.P.Q. (BNA) 325, 334 (1954) (Douglas, J., concurring).

[FN28]. See *Eldred*, 239 F.3d at 375 (explaining the application of *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) in that, "there is no First Amendment Right to make commercial use of the copyrighted works of others").

[FN29]. U.S. Const. amend. I.

(Cite as: **8 J. Intell. Prop. L. 223**)

[FN30]. U.S. Const. art. I, § 8, cl. 8.

[FN31]. The "exclusive right" that Congress can grant to authors is only the exclusive right to publish their writings. Note, for example, that the Copyright Act of 1790 was available only for printed books, a condition that continued in every copyright statute Congress enacted until the 1976 Copyright Act under the influence of the Berne Convention. See Patterson, [Copyright and "the exclusive Right" of Authors](#), 1 *J. Intell. Prop. L.* 1 (1993).

[FN32]. *Eldred*, 239 F.3d at 374.

[FN33]. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 4 *U. Ill. L. Rev.* 1119, 1174-76 (2000) (stating that the CTEA grants a twenty year income stream to favored industries).

[FN34]. *Id.*

[FN35]. See 17 U.S.C. § 102(a) (2001) ("Copyright protection subsists, . . . in original works of authorship fixed in any tangible medium of expression . . .").

[FN36]. See, e.g., *Schnapper v. Foley*, 667 F.2d 102, 112, 212 U.S.P.Q. (BNA) 235, 242 (D.C. Cir. 1981) (rejecting the notion "that the introductory language of the Copyright Clause constitutes a limit on congressional power.").

[FN37]. See H.R. Rep. No. 60-2222, at 2 (1909) (statement of Thorvald Soldberg) (emphasizing the need to update copyright laws in the light of insufficiencies in existing laws).

[FN38]. Even Judge Learned Hand, recognized as a, if not the, leading jurist in copyright, in the early twentieth century made a notable faux pas in ignorance of the copyright policies in the Copyright Clause. He fathered the sweat-of-the-brow doctrine that the U.S. Supreme Court held to be unconstitutional in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991). See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54, 28 U.S.P.Q. (BNA) 330 (2d. Cir. 1936).

[FN39]. See U.S. Const. art. I, § 8, cl. 8.

[FN40]. U.S. Const. art. 1, § 8, cl. 8.

[FN41]. President George Washington, *Address to Congress* (Jan. 8, 1790) (microform available in the University of Georgia Library).

[FN42]. *Id.*

[FN43]. The title of the Statute of Anne read: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." 8 Anne, ch. 19 (1710) (Eng.). The core ideas, the promotion of learning, authors, and limited times are the same as in the Copyright Clause. See U.S. Const. art. I § 8, cl. 8.

[FN44]. U.S. Const. art. I, § 8, cl. 8.

[FN45]. See, e.g., *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5, 148 U.S.P.Q. (BNA) 459, 462 (1966) (noting that "federal patent power stems from a specific constitutional provision which authorizes the Congress 'To promote the Progress of . . . useful Arts.'").

[FN46]. *J.L. Mott Iron Works v. Clow*, 82 F. 316, 320 (C.A. 7. 1897).

[FN47]. Patent Act of 1790, 1 Stat. 109 (1790).

[FN48]. Copyright Act of 1790, 1 Stat. 124 (1790).

[FN49]. *Eldred v. Reno*, 239 F.3d at 377-78.

(Cite as: **8 J. Intell. Prop. L. 223**)

[FN50]. 667 F.2d 102, 112, 212 U.S.P.Q. (BNA) 235, 242 (D.C. Cir. 1981).

[FN51]. Eldred, 239 F.3d at 378.

[FN52]. Id.

[FN53]. Id.

[FN54]. Id. at 379 (citing S. Rep. No. 104-315, at 12 (1996)).

[FN55]. Id. (citing *Ladd v. Law & Tech. Press*, 762 F.2d 809, 812, 226 U.S.P.Q. (BNA) 774, 777 (9th Cir. 1985)).

[FN56]. See 17 U.S.C. § 102 (2001) (requiring originality for a work to be copyrightable).

[FN57]. See H.R. Rep. No. 94-1476, at 129 (1976); *Pub. L. No. 94-553*, 1976 U.S.C.C.A.N. (90 Stat.) 5659, 5745 (stating that "the concept of publication would lose its all-embracing importance . . .").

[FN58]. Id.

[FN59]. U.S. Const. art. I, § 8, cl. 8 (emphasis added).

[FN60]. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating "primary objective of the copyright is not to reward the labor of authors but to 'promote progress of science and useful arts.'").

[FN61]. Id. at 358 (stating "originality requires . . . that it [the work] display minimal level of creativity.").

[FN62]. See U.S. Const., art. I, § 8 (granting Congress the power to secure for limited times "to Authors . . . the exclusive Right to their . . . Writings").

[FN63]. Eldred, 239 F.3d at 379.

[FN64]. U.S. Const. art. I, § 8, cl. 8.

[FN65]. Id.

[FN66]. Id.

[FN67]. See also Patterson, *supra* note 31 (defining and exploring the meaning of "exclusive right").

[FN68]. See *id.* at 14 (discussing the American understanding of copyright).

[FN69]. Statutes at Large, 1710, 8 Anne, ch. 19, p. 82.

[FN70]. I believe I am correct to assert that the Copyright Clause is the only provision of the Constitution for which we can identify its precise source. The closest example is the First Amendment, for which the source was almost certainly the Licensing Act of 1662, 13 & 14 Car. II, c. 33, in England. But the influence of the Licensing Act was negative-it told the Framers what to provide to avoid the evils of that Act.

[FN71]. 13 & 14 Car. II, c.33.

[FN72]. This author's justification for this is that the Licensing Act of 1662 always contained sunset provisions, and as soon as the question of the religion of the monarch-a major reason for press control-was settled by the Glorious Revolution of 1688, the Act was allowed to expire for all time six years later, in 1694.

[FN73]. *Harper & Row Publ'g, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985).

[FN74]. 1 Eng. Rep. 837, 98 Eng. Rep. 257 (H.L. 1774) (holding that common law copyright disappeared upon publication).

(Cite as: **8 J. Intell. Prop. L. 223**)

[FN75]. Act of Feb. 3, 1831, §§ 1-2, 4 Stat. 436 (repealed 1870); Act of Mar. 4, 1909, § 4, 35 Stat. 1075, 1076 (repealed 1976); 17 U.S.C. § 101 et seq.

[FN76]. Princeton Univ. Press v. Copyright Clearance Center, 99 F.3d 1381, 40 U.S.P.Q.2d (BNA) 1641 (6th Cir. 1996); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991).

[FN77]. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1995).

[FN78]. Eldred, 239 F.3d at 380.

[FN79]. Id.

[FN80]. Id.

END OF DOCUMENT