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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 :
- - - - -X

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.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

5 Mr. Lessig.

6 ORAL ARGUMENT OF LAWRENCE LESSIG

7 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

20 MR. LESSIG: That's right.

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

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

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

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

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

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

1 act, suggested they were plainly under --

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

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

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

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

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

1 the case that this Court --

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

4 MR. LESSIG: That's right.

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

7 MR. LESSIG: That's right.

8 QUESTION: -- of clause?

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

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

16 MR. LESSIG: Yes.

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

20 MR. LESSIG: That's right.

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

24 MR. LESSIG: I --

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

1 not?

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

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

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

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

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

5 (Laughter.)

6 MR. LESSIG: Justice, the theory, which would
7 advance the aim of limiting times in a way that is
8 enforceable, is only applicable in the case that we
9 brought before you here to the '98 act, and would not
10 necessarily be applicable under the '76 act for the
11 reasons the Government has offered. We would not advance
12 this argument, but the Government has offered an argument
13 in a parallel case that suggests a distinction between the
14 '76 act and this case. That's not been briefed here.
15 It's been grounded in their claim that the treaty power
16 creates some special power. We wouldn't advance that
17 claim, but the point is there are a number of issues that
18 the '76 act --

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

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

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

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

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

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

22 MR. LESSIG: Well, the thrust certainly --

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

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

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

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

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

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

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

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

5 QUESTION: On the First Amendment --

6 MR. LESSIG: Yes.

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

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

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

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

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

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

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

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

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

25 QUESTION: Even though Congress's pattern has

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

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

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

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

23 QUESTION: Let's stick with 1976.

24 MR. LESSIG: In 1976 --

25 QUESTION: Because that was what you said --

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

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

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

10 MR. LESSIG: That's right.

11 QUESTION: -- recall.

12 MR. LESSIG: That's right.

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

18 MR. LESSIG: Yes.

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

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

25 QUESTION: But I thought you were saying that if

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

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

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

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

22 MR. LESSIG: Yes, of course we do.

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

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

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

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

11 MR. LESSIG: Yes.

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

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

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

1 same act.

2 MR. LESSIG: Well --

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

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

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

11 MR. LESSIG: That's right.

12 QUESTION: -- in effect.

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

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

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

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

1 a lot of fault with what Congress did here --

2 MR. LESSIG: That's right.

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

6 MR. LESSIG: That's right.

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

11 MR. LESSIG: Right.

12 QUESTION: -- but is it not limited?

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

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

19 (Laughter.)

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

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

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

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

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

18 MR. LESSIG: That's right.

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

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

25 QUESTION: But isn't --

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

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

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

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

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

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

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

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

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

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

20 MR. LESSIG: No.

21 QUESTION: Oh, all right.

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

24 (Laughter.)

25 MR. LESSIG: They would need to satisfy all of

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

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

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

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

1 that's the meaning of a constitutional restriction.

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

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

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

21 MR. LESSIG: That's right.

22 QUESTION: The analogy doesn't seem to work.

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

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

4 If I may reserve the remainder of my time.

5 QUESTION: Very well, Mr. Lessig.

6 General Olson, we'll hear from you.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

14 GENERAL OLSON: Well, the Congress --

15 QUESTION: And that's our question, really.

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

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

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

25 QUESTION: Well, I understand that, but do

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

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

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

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

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

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

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

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

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

19 QUESTION: Dissemination alone?

20 GENERAL OLSON: Not necessarily the
21 dissemination alone --

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

25 GENERAL OLSON: That something is already in the

1 public domain.

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

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

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

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

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

18 GENERAL OLSON: It's --

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

23 GENERAL OLSON: It may --

24 QUESTION: I hate to say may --

25 GENERAL OLSON: Well --

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

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

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

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

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

1 Those are costs.

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

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

7 QUESTION: Uniformity. That's uniformity.

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

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

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

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

8 QUESTION: How could it?

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

13 QUESTION: In -- I --

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

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

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

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

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

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

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

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

1 petitioners --

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

4 GENERAL OLSON: That would seem --

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

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

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

12 (Laughter.)

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

19 GENERAL OLSON: Well --

20 QUESTION: I mean, we know that.

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

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

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

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

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

3 QUESTION: Okay, assuming --

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

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

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

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

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

1 QUESTION: The work has already been created.

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

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

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

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

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

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

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

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

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

19 QUESTION: How --

20 QUESTION: Okay, but you --

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

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

9 GENERAL OLSON: Well, the --

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

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

25 All of these variations are quintessentially

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

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

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

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

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

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

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

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

1 brief --

2 QUESTION: Okay.

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

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

18 GENERAL OLSON: Yes.

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

25 GENERAL OLSON: Yes, Justice Scalia, and the

1 examples that are --

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

5 GENERAL OLSON: The implicit promise that --

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

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

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

15 GENERAL OLSON: That's --

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

19 GENERAL OLSON: That is correct.

20 QUESTION: This is subsisting copyrights.

21 GENERAL OLSON: That is correct.

22 QUESTION: So --

23 QUESTION: But why wouldn't it?

24 QUESTION: Why? Why not?

25 QUESTION: Why wouldn't it? If the equity

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

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

13 QUESTION: And if you don't --

14 GENERAL OLSON: This is a rational --

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

17 QUESTION: Well, the difficulty --

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

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

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

25 GENERAL OLSON: Congress --

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

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

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

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

25 Now, the petitioners make this *quid pro quo*

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

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

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

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

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

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

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

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

9 GENERAL OLSON: Well, it --

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

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

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

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

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

17 Thank you.

18 QUESTION: Thank you, General Olson.

19 Mr. Lessig, you have 3 minutes remaining.

20 REBUTTAL ARGUMENT OF LAWRENCE LESSIG

21 ON BEHALF OF THE PETITIONERS

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

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

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

17 Now, we offer a simple way to make this clear,
18 express limit make sense, and that is precisely the
19 understanding we suggest that existed in 1790. The only
20 precedents that existed in 1790 were precedents of
21 setting a term, and then when parliament was asked in
22 1735, '37, and '39 to extend it, they rejected it, and as
23 amicus historians said, they rejected it because, as a
24 pamphleteer described it, that would be effectively a
25 perpetual term

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

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

12 Thank you very much.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lessig.

14 The case is submitted.

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

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