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**WILL COPYRIGHTS EXPIRE IN 2019? REVISITING THE
COPYRIGHT CLAUSE: “LIMITED TIMES” AND
COPYRIGHT TERM EXTENSIONS IN THE WAKE OF
*GOLAN***

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ABSTRACT

In the early 2012 case Golan v. Holder, the Supreme Court rejected the notion that Congress was attempting to create perpetual copyrights. Yet the Court deliberately made an effort to note that such conduct would be constitutionally impermissible. In just a few short years, in approximately 2019, the Court is very likely to be faced with this specter of perpetual copyrights again. If Congress passes another copyright extension, the Court will likely have to rule on its constitutionality, much like 2003’s Eldred v. Ashcroft. But in 2019, the case against copyright extensions is likely to be fundamentally different in nature and context. This Article aims to explore the language and reasoning in Eldred and Golan in search of analytic clues as to how the Supreme Court is likely to evaluate a future copyright extension the next time famous copyrighted works and characters face imminent entrance into the public domain. Ultimately, this Article concludes that absent significant international lengthening of copyright terms, the future United States extension will have no legitimate justification other than a naked desire to create perpetual copyrights. In such a case, the Supreme Court would find such a future act an unconstitutional attempt to bypass the “limited Times” provision of the Constitution.

I. INTRODUCTION

Writing for the majority in the recent Supreme Court opinion *Golan v. Holder*, Justice Ruth Bader Ginsberg explained that “as long as Congress legislated in installments, perpetual copyright terms would be achievable.”¹ Such conduct, she proceeded, would constitute “legislative misbehavior.”² Although the Supreme Court found such conduct to be “far afield”³ from the circumstances in *Golan*, the language echoes the Court’s earlier condemnations of perpetual copyrights in *Eldred v. Ashcroft* and *Dastar v. Fox*.⁴ In fact, *Golan* was the first time that the Supreme Court discussed the Copyright Clause since *Eldred* in 2003, when the Court upheld a twenty-year extension of copyright terms. In light of this recent disapprobation on attempts to create perpetual copyrights, attention is paid to the fact that in the not-so-distant-future—2019, approximately—the Court may again have to rule on the constitutionality of yet another copyright extension.

Why? Because, in 2019, copyrights will again begin to expire and the public domain will resume growing.⁵ Indeed, the public domain has not grown since 1998, when it was frozen in time due to the Sonny Bono Copyright Term Extension Act (“CTEA”),⁶ which extended the duration of all existing copyrights by twenty years.⁷ As a result of the

¹ *Golan v. Holder*, 132 S. Ct. 873, 885 (2012).

² *Id.*

³ *Id.*

⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 209 (2003) (“As the Court of Appeals observed, a regime of perpetual copyrights ‘clearly is not the situation before us.’ Nothing before this Court warrants construction of the [Copyright Term Extension Act]’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.” (citation omitted)); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (“To hold [for plaintiff] would be akin to finding that § 43(a) [of the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.”). The Supreme Court had also earlier noted, in more general terms outside the context of Congress’s authority, that “copyright protection is not perpetual.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 443 n.23 (1984).

⁵ See U.S. COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 7 (2010) (“Unless copyright law is changed again, no works under protection on January 1, 1999, will fall into the public domain in the United States until January 1, 2019.”).

⁶ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

⁷ See U.S. COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 4 (2010) (“[T]he Sonny Bono Copyright Term Extension Act of 1998 (P.L. 105-298) enacted October 27, 1998, . . . extended the term of copyrights for an additional 20 years.”).

CTEA, the copyrights that *would* have expired and entered the public domain in 1999 were instead protected for an additional twenty years.⁸ But on January 1, 2019, the extra years granted to these copyrights by the CTEA will begin to expire.⁹ Soon thereafter, the copyrights in works such as Robert Frost’s *New Hampshire* poems, Virginia Woolf’s *Mrs. Dalloway*, Ernest Hemingway’s *The Sun Also Rises*, Alfred Hitcock’s *The Lodger*, Disney’s *Steamboat Willy*, and characters like Mickey Mouse will finally enter the public domain.¹⁰

That is, of course, unless Congress passes another copyright extension first. And there are good reasons to believe that such an extension will happen.¹¹ If it does, the enactment will likely be challenged on constitutional grounds, just as the CTEA was challenged in *Eldred*. The big question, of course, is what will happen if the Supreme Court grants certiorari? Will the Court uphold the extension as constitutional (as it did in *Eldred*), or will it find that this time Congress is in fact impermissibly seeking to create a perpetual copyright through installments (a “legislative misbehavior” the Court recently condemned once again)?

This Article aims to analyze the constitutional viability of future copyright term extensions. Enough ink has been spilled criticizing *Eldred v. Ashcroft* and the CTEA. By accepting the past, however erroneous or unwise, the intention of this Article is to find clues in the *Eldred* and *Golan* opinions about the Court’s current attitudes on the

⁸ See Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, COPYRIGHT INFORMATION CENTER (Jan. 1, 2012), <http://copyright.cornell.edu/resources/docs/copyrightterm.pdf> (explaining when a copyright will expire based on when the work was published).

⁹ For example, the copyrights that were originally set to expire on January 1, 1999 will expire on January 1, 2019, and each subsequent year copyrights will expire after their twenty-year extension has run its course. See Sonny Bono Copyright Term Extension Act § 102.

¹⁰ See Dennis S. Karjala, *Some Famous Works and Year of First Publication (Subverted Public Domain List)*, ARIZONA STATE UNIVERSITY, <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/PDlist.html>.

¹¹ See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 215-18 (2004) (explaining how the content industry and heirs to famous authors actively and successfully lobby Congress to extend copyrights when copyrights of commercially valuable works are about to expire). Thus, it seems plausible, even likely, that Disney, the Motion Picture Association of America, the Recording Industry Association of America, and the estate of Robert Frost, among others, will again go to Capitol Hill as 2018 approaches to indirectly “buy” another bill extending copyrights. For more on the generally corruptive potential of money in politics and campaign donations, see LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

Copyright Clause, deference to Congress, and copyright terms, in order to predict how the Court may evaluate a future copyright extension circa 2018.

Section II will lay the background of the discussion by summarizing the CTEA and *Eldred*, as well as the recent case, *Golan v. Holder*. Section III then analyzes the *Eldred* and *Golan* opinions, gleaned clues about the Court's treatment of the Copyright Clause and its deference to Congress in enacting intellectual property legislation. Section IV brings us to the present (and soon future) by introducing a hypothetical future copyright term extension act, and then evaluates how the future copyright term extension act would likely fare against a constitutional challenge. Ultimately, this Article predicts that the next copyright term extension will carry with it a strong suspicion, if not a presumption, of an impermissible intent to achieve perpetual copyrights. Absent a good faith justification to negate this suspicion of impropriety, such as harmonization with international copyrights laws, the Court will likely find any subsequent extension to be an unconstitutional attempt to bypass the "limited Times" provision: Art. I, § 10, cl. 18. Section V addresses the analytic and theoretical difficulties of determining just when an extension of copyright terms might be constitutional or not. Section VI concludes with a unique observation of how the increasingly technologized access to copyrighted works may be globalizing copyright law in a way that essentially allows the public to ignore lengthy United States copyright terms that it perceives as exceeding foreign copyright terms by an unacceptable degree.

II. COPYRIGHT EXTENSIONS AND THE COPYRIGHT CLAUSE, FROM *ELDRED V. ASHCROFT* TO *GOLAN V. HOLDER*

A. The CTEA and *Eldred v. Ashcroft*

The issue of copyright extension became highly contentious in the late 1990s in response to the Sonny Bono Copyright Term Extension Act, which sought to extend all existing and future copyright terms twenty years.¹² Individuals with a strong interest in using works in the public domain, and thus a desire to see the public domain continue to grow, filed a constitutional challenge against the extension in 1999.¹³

¹² See Sonny Bono Copyright Term Extension Act § 102.

¹³ Brief for Petitioners at 3, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter "Eldred Petitioners' Brief"]. In addition to the plaintiffs in *Eldred*, which included various book and film companies and associations dependent on using works in the public domain, many other groups filed amicus briefs challenging

The claim alleged that the CTEA violated the Copyright Clause by impermissibly extending copyrights.¹⁴ By 2003, the case reached the Supreme Court in *Eldred v. Ashcroft*.¹⁵ In a 7-2 decision, the Court upheld the copyright extension as constitutional and within Congress's authority, but expressed doubt that the CTEA was wise policy.¹⁶

Copyright extensions are nothing new—since the nascence of the United States federal copyright system in 1790,¹⁷ terms have been extended in 1831,¹⁸ 1909,¹⁹ and 1979²⁰ with no constitutional challenge.²¹ So what was the big deal with the CTEA?

According to the plaintiffs, the problem with the CTEA was that extending the term of existing copyrights (a retroactive extension) violates the Copyright Clause, which guarantees authors exclusive rights in their works only for “limited Times.”²² If a work's term,

the CTEA. The numerous amici included: art associations; five constitutional law professors; seventeen economists; fifty-three intellectual law professors; internet archives like Project Gutenberg; fifteen library associations; and the National Writer's Union. See *Eldred v. Ashcroft Legal Document Archive*, BERKMAN CENTER FOR INTERNET & SOCIETY, <http://cyber.law.harvard.edu/eldredvreno/legaldocs.html> (last visited Oct. 16, 2012).

¹⁴ See Eldred Petitioners' Brief, *supra* note 13, at 10 (“These repeated, blanket extensions of existing copyright terms exceed Congress's power under the Copyright Clause, both because they violate the ‘limited Times’ requirement and because they violate this Court's ‘originality’ requirement. They violate the ‘limited Times’ requirement, first, because terms subject to repeated, blanket extensions are not ‘limited’; second, because a term granted to a work that already exists does not ‘promote the Progress of Science’; and third, because the grant of a longer term for already existing works violates the Copyright Clause's quid pro quo requirement—that monopoly rights be given *in exchange* for public benefit in return.”). Plaintiffs also challenged the CTEA on First Amendment grounds, which the Supreme Court also rejected and which is largely beyond the scope of this Article. Eldred Petitioners' Brief, *supra* note 13, at 11.

¹⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 186 (2003).

¹⁶ *Id.* at 194 (“In accord with the District Court and the Court of Appeals, we reject petitioners' challenges to the CTEA. In that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations.”); see *infra* note 44 and accompanying text.

¹⁷ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

¹⁸ Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

¹⁹ Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1080-81.

²⁰ Copyright Act of 1976, 17 U.S.C. § 302 (2006).

²¹ *Eldred*, 537 U.S. at 188 (“[T]his Court never before has had occasion to decide whether extending existing copyrights complies with the ‘limited Times’ prescription . . .”).

²² See *id.* at 193 (“Congress went awry, petitioners maintain, . . . in enlarging the term for published works with existing copyrights. The ‘limited Tim[e]’ in effect

once granted, could be extended, then it would no longer be “limited”²³ as contemplated in the Constitution, because Congress could indirectly achieve perpetual copyrights by repeatedly extending copyrights once they near expiration.²⁴ Copyrights must be limited, the argument goes, so the public is ensured that copyrighted works will enter the public domain eventually.²⁵ And a rich public domain is vital to the promotion of science and the useful arts, the underlying goal of the Copyright Clause.²⁶ Thus, the syllogistic argument was that retroactive extensions are unconstitutional because they create the potential for perpetual copyrights, and because the CTEA included such a retroactive extension, the CTEA must be unconstitutional.²⁷

This blanket argument against retroactive extensions was highly problematic. As the Court noted, each of the previous copyright acts also retroactively extended copyrights,²⁸ past courts have long upheld

when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend.”).

²³ Eldred Petitioners’ Brief, *supra* note 13, at 14 (“[W]hether extensions for works already created prevent copyrights from being for ‘limited Times,’ and exceeds a power to ‘promote the Progress of Science,’ is a judgment that this Court can appropriately make. The line between *prospective* and *retroactive* extensions is a clear one. If ‘limited Times’ is to have any meaningful content, it is a line this Court must draw.”).

²⁴ *Id.* at 18 (“Thus, the sole issue is whether Congress may achieve indirectly what it cannot achieve directly—a perpetual term ‘on the installment plan.’”).

²⁵ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”) (emphasis added); *id.* at 443 n.23 (“Moreover, since copyright protection is not perpetual, the number of . . . works in the public domain necessarily increases each year.”).

²⁶ See *Eldred*, 537 U.S. at 241 (Stevens, J., dissenting) (“[A]s our cases repeatedly and consistently emphasize, ultimate public access is the overriding purpose of the constitutional provision.”); *id.* at 246 (Breyer, J., dissenting) (explaining that the Copyright Clause is designed to benefit the public interest, and as to “increase and not to impede the harvest of knowledge,” operates on a premise that works will enter the public domain for public access and consumption); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 50 (2001) (“[A]ll the stuff protected by copyright law is in one sense the same: It all depends fundamentally upon a rich and diverse public domain. Free content, in other words, is crucial to building and supporting new content.”).

²⁷ See *Eldred*, 537 U.S. at 198 (“[c]oncerning petitioners’ assertion that Congress might evade the limitation by stringing together ‘an unlimited number of ‘limited times’”).

²⁸ *Id.* at 200-01; see *id.* at 193 (“As in the case of prior extensions, principally in 1831, 1909, and 1976, Congress provided for application of the enlarged terms to

the extension of existing patents,²⁹ and, semantically speaking, “limited” does not necessarily mean “fixed.”³⁰ Thus, the Court rejected the petitioners’ premise that retroactively extending copyrights is categorically beyond Congress’s authority under the Copyright Clause.³¹

The narrower and perhaps more salient argument for the petitioners would have been that even if Congress were allowed to retroactively extend copyrights, the CTEA *specifically* was nonetheless an impermissible congressional attempt to bypass the Copyright Clause’s “limited Times” provision and create perpetual copyrights.³² Although plaintiffs noted the possible threat of perpetual copyright terms on the “installment plan,”³³ any CTEA-specific argument was understated and largely overshadowed by the categorical challenge to retroactive extensions.³⁴ The Court addressed this concern briefly, finding that “[n]othing before this Court warrants

existing and future copyrights alike.”); *id.* at 200-01 (“History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions Congress has regularly applied duration extensions to both existing and future copyrights.”).

²⁹ *See id.* at 201 (“Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights.”).

³⁰ *See id.* at 199 (“The word ‘limited,’ however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: ‘confine[d] within certain bounds,’ ‘restrain[ed],’ or ‘circumscribe[d].’ . . . Thus understood, a timespan appropriately ‘limited’ as applied to future copyrights does not automatically cease to be ‘limited’ when applied to existing copyrights.”).

³¹ *See id.* (“Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”).

³² *See id.* at 208 (“Petitioners contend that even if the CTEA’s 20-year term extension is literally a ‘limited Tim[e],’ permitting Congress to extend existing copyrights allows it to evade the ‘limited Times’ constraint by creating effectively perpetual copyrights through repeated extensions.”).

³³ *See* Eldred Petitioners’ Brief, *supra* note 13, at 18 (“Thus, the sole issue is whether Congress may achieve indirectly what it cannot achieve directly—a perpetual term ‘on the installment plan.’”).

³⁴ *See id.* at 13, 19 n.7 (arguing that retroactive extensions creates a line-drawing problem of when a term becomes too extended, urging that the Court draw the line at the CTEA, and claiming that “the Act violates the Constitution” and “crosses the line of any plausible limit”). Unfortunately, the petitioners did not develop this brief argument or attempt to distinguish the CTEA from past extensions.

construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint."³⁵

Curiously enough, certain language in the majority opinion seemingly suggests that the Court wanted the petitioners to make this, or *any*, argument specific to the CTEA's constitutionality. For example, the Court gave great weight to the history of previous retroactive extensions,³⁶ expressed hesitance to rule against centuries of these congressional actions,³⁷ and explicitly faulted petitioners for failing to meaningfully distinguish the CTEA in a constitutionally significant way.³⁸ The Court wanted to hear how the CTEA violated the "limited Times" provision in a way that was different from previous extensions; likely because such an argument would have provided the Court with an avenue to strike down the CTEA without implicating the validity of all the previous Copyright Act extensions.³⁹ Yet, without this avenue before the Court, the petitioners' principal challenge to the CTEA was simply that it extended existing copyrights, something that every previous copyright act had also done.⁴⁰ Thus, the Court seemed constrained to find that the CTEA was constitutional.

Finding no violation of the "limited Times" provision, the Court then employed a very deferential rational review of the statute in light

³⁵ *Eldred*, 537 U.S. at 209-10 ("As the Court of Appeals observed, a regime of perpetual copyrights 'clearly is not the situation before us.' Nothing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint. Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not. . . . Those earlier Acts did not create perpetual copyrights, and neither does the CTEA.") (citations omitted).

³⁶ *See id.* at 213 ("Such consistent congressional practice is entitled to 'very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive.'").

³⁷ *See id.* at 221-22 ("If petitioners' vision of the Copyright Clause held sway, it would do more than render the CTEA's duration extensions unconstitutional as to existing works. . . . The 1976 Act's time extensions, which set the pattern that the CTEA followed, would be vulnerable as well.").

³⁸ *See id.* at 209-10 ("Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not.").

³⁹ *See supra* note 37 and accompanying text.

⁴⁰ *See Eldred*, 537 U.S. at 200 ("History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.").

of the Copyright Clause's objectives.⁴¹ Largely persuaded by Congress's claim that the CTEA would promote the objectives of the Copyright Clause by achieving significant international harmonization with foreign copyright laws, the Court found the CTEA had a rational basis, which could not be questioned.⁴² The Court then mentioned that Congress had also considered "demographic, economic, and technological changes" and projections that longer terms would add incentives for authors to create.⁴³ While the Court subtly expressed its skepticism of the CTEA's wisdom (twice),⁴⁴ it deferred to Congress's judgment in establishing an intellectual property policy that best carries out the purpose of the Copyright Clause "to promote the Progress of Science."⁴⁵

Justice John Paul Stevens and Justice Stephen Breyer each wrote separate dissenting opinions.⁴⁶ Justice Stevens' dissent largely relied on analogies to patent law to conclude that Congress, in enacting the

⁴¹ *See id.* at 204 ("Satisfied that the CTEA complies with the 'limited Times' prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.").

⁴² *See id.* at 205-06 ("As respondent describes . . . a key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years. Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.") (citations omitted).

⁴³ *See id.* at 206-07 ("In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.") (citations omitted); *see also* Brief for Respondent at 33-34, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) [hereinafter "Eldred Respondent's Brief"]; H.R. REP. NO. 105-452, at 4 (1998) (explaining the term extension "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public").

⁴⁴ *See Eldred*, 537 U.S. at 208 ("[W]e find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."); *see id.* at 222 ("Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress'[s] action, however, is not within our province to second-guess.").

⁴⁵ *Id.* at 212 ("[We] have said that '[t]he primary objective of copyright' is '[t]o promote the Progress of Science.' . . . We have also stressed, however, that it is generally for Congress, not the courts to decide how best to pursue the Copyright Clause's objections.").

⁴⁶ *See id.* at 222-42 (Stevens, J., dissenting); *id.* at 242-69 (2003) (Breyer, J., dissenting).

CTEA, exceeded its power under the Copyright Clause because the extension advanced neither twin purpose of the clause: encouraging new works and adding knowledge to the public domain.⁴⁷ Justice Stevens concluded by criticizing the majority's extreme deference to Congress⁴⁸ and ultimately opined that *all* retroactive extensions of copyright terms inherently "frustrate the central purpose of the [Copyright] Clause."⁴⁹ Justice Breyer's dissent also criticized the majority for its excessive deference to Congress,⁵⁰ but focused specifically on the CTEA, lambasting the extension as so lacking in any rational basis as to be unconstitutional.⁵¹ Dispatching with the

⁴⁷ *Id.* at 226-27 (Stevens, J., dissenting) ("Neither the purpose of encouraging new inventions nor the overriding interest in advancing progress by adding knowledge to the public domain is served by retroactively increasing the inventor's compensation for a completed invention and frustrating the legitimate expectations of members of the public who want to make use of it in a free market. Because those twin purposes provide the only avenue for congressional action under the Copyright/Patent Clause of the Constitution, any other action is manifestly unconstitutional.").

⁴⁸ *Id.* at 223 ("Because the majority's contrary conclusion rests on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors, and their successors, I respectfully dissent."); *id.* at 242 ("By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress[s] actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure.").

⁴⁹ *Id.* at 241 ("*Ex post facto* extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the Clause.").

⁵⁰ *Id.* at 244-45 (Breyer, J., dissenting) ("[I]t is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality."); *id.* at 264 ("We cannot avoid the need to examine the statute carefully by saying that 'Congress has not altered the traditional contours of copyright protection,' . . . for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance—at the far outer boundaries of the Clause—is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens.").

⁵¹ *Id.* at 245 ("Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the

justifications proffered for the CTEA one by one,⁵² Justice Breyer ultimately concluded that the act's extensions of both existing and future copyrights "cannot be understood rationally to advance a constitutionally legitimate interest," and that the extension therefore "falls outside the scope of legislative power that the Copyright Clause . . . grants to Congress."⁵³

And so ended the *Eldred* saga. The CTEA emerged constitutional, Congress was battered by the media for its lack of wisdom,⁵⁴ Disney and company were (imaginably) happy to be granted another twenty years of economic prosperity from their intellectual property assets, and the Court's opinion became the subject of volumes of criticism. *Eldred* passed into precedent, enshrining the CTEA as "good law" but bad policy.⁵⁵

As explained above, perhaps the Court wanted to strike down the CTEA but could not do so, without throwing all the previous extensions into doubt.⁵⁶ This was especially so given the limited questions before the Court on certiorari.⁵⁷ To the Court, the CTEA's validity depended on whether Congress had the authority to extend existing copyrights.⁵⁸ Upon concluding that Congress had such

Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress'[s] 'choice is clearly wrong.'")

⁵² *Id.* at 254-63.

⁵³ *Id.* at 266-67.

⁵⁴ For a collection of media coverage on the CTEA, see Dennis Karjala, *Important Media Coverage of Term Extension*, OPPOSING COPYRIGHT EXTENSIONS, <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/media.html> (last visited Oct. 16, 2012).

⁵⁵ See *supra* note 44 and accompanying text.

⁵⁶ See *supra* note 37 and accompanying text.

⁵⁷ See *Eldred*, 537 U.S. at 198 (addressing two issues: "whether the CTEA's extension of existing copyrights exceeds Congress'[s] power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights violates the First Amendment.").

⁵⁸ Throughout the majority's opinion, the Court frames the issue in broad, categorical terms of whether Congress had the authority to extend existing copyrights, the blanket conduct petitioners challenged as unconstitutional. See *id.* at 199 ("Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future."); *id.* at 204 ("[W]e cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress'[s] authority under the Copyright Clause."); *id.* at 208 ("Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress'[s] power under the Copyright Clause."); *id.* at

authority, and without any demonstration by the plaintiffs that the CTEA itself uniquely violated the “limited Times” clause, the CTEA had to be deemed constitutional.⁵⁹ On this note, it is thus important to recognize what was *not* meaningfully before the Court. The claim that the CTEA’s term length in itself exceeded “limited Times” was conceded,⁶⁰ and the claim that Congress enacted the CTEA, specifically, with the impermissible intent to create a perpetual copyright, was generally alluded to in the abstract but was not adequately presented and developed.⁶¹

A very interesting development came shortly after *Eldred* in another intellectual property case before the Supreme Court, *Dastar Corporation v. Twentieth Century Fox Corporation*.⁶² In *Dastar*, the plaintiff attempted to use trademark law (the Lanham Act) to protect a previously copyrighted work of authorship that had since entered the public domain.⁶³ The Court rejected this effort, holding that trademark protection applies only to the origin of physical goods, and cannot be used to protect the *creative content* within those goods.⁶⁴

218 (“For the several reasons stated, we find no Copyright Clause impediment to the CTEA’s extension of existing copyrights.”).

⁵⁹ *Id.* at 209-10 (“Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to ‘limited Times’ that the 1831, 1909, and 1976 Acts did not.”).

⁶⁰ *See id.* at 193 (“Petitioners do not challenge the ‘life-plus-70-years’ timespan itself. ‘Whether 50 years is enough, or 70 years too much,’ they acknowledge, ‘is not a judgment meet for this Court.’”); *id.* at 241 (Stevens, J., dissenting) (“Whether the extraordinary length of the grants authorized by the 1998 Act are invalid because they are the functional equivalent of perpetual copyrights is a question that need not be answered in this case because the question presented by the certiorari petition merely challenges Congress[s] power to extend retroactively the terms of existing copyrights.”) While this argument was not before the Court, the majority suggested, albeit in a footnote, that a boundary exists after which a term is so long that it violates “limited Times.” *See id.* at 211 n.17 (“Whether such referents [the CTEA’s term of life-plus-70-years] mark the outer boundary of ‘limited Times’ is not before us today.”); Brief for the Appellee at 17, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430) (“It may well be that some term extensions are so long . . . that a court could conclude that the Congress has in effect created an unlimited term.”).

⁶¹ *See Eldred Petitioners’ Brief*, *supra* note 13, at 18 (“Thus, the sole issue is whether Congress may achieve indirectly what it cannot achieve directly—a perpetual term ‘on the installment plan.’”); *see supra* note 34 and accompanying text.

⁶² *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

⁶³ *Id.* at 25.

⁶⁴ *Id.* at 37 (“In sum, reading the phrase ‘origin of goods’ in the Lanham Act in accordance with the Act’s common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that

Holding otherwise, the Court reasoned, would allow works to enjoy indefinite copyright protection cloaked in trademark law—what the Court called a “mutant” form of copyright law that would conflict with the mandatory regime of limited copyright duration.⁶⁵ The Court stated that perpetual copyrights were not permitted under the Copyright Clause, citing *Eldred*, reaffirming its earlier condemnation of perpetual copyrights.⁶⁶ It would then be another nine years before the Supreme Court would again address the Copyright Clause or copyright duration in *Golan v. Holder*.⁶⁷

B. Eldred’s Postlude, Golan v. Holder

In 2001, a group of plaintiffs filed a constitutional challenge against Congress’s adoption of provisions from the Uruguay Round Agreements Act (“URAA”), an international treaty that sought to harmonize international copyright laws.⁶⁸ The effect of the adopted provisions in the United States would be to restore the copyright protection of many foreign works that had already entered the public domain,⁶⁹ such as Sergei Prokofiev’s *Peter and the Wolf* and Dmitri Shostakovich’s *Symphony 14, Cello Concerto* (Op. 107).⁷⁰

The challenge asserted that by restoring these copyrights and removing works from the public domain, the URAA violated the “limited Times” provision of the Copyright clause because it would “turn[] a fixed and predictable period into one that [could] be reset or resurrected at anytime [sic], even after it expires.”⁷¹ Affirming *Eldred*, the Court held that “our decision in *Eldred* is largely dispositive of petitioners’ limited-time argument,” explaining again

are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.”).

⁶⁵ *Id.* at 33-34.

⁶⁶ *Id.* at 37 (“To hold [that trademark protection extends to the creative content of goods] would be akin to finding that [the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.” (citing *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003))).

⁶⁷ *Golan v. Holder*, 132 S. Ct. 873 (2012).

⁶⁸ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

⁶⁹ See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 101(b), 108 Stat. 4809, 4814 (1994); *Golan*, 132 S. Ct. at 874-76 (2012).

⁷⁰ Brief for Petitioners at 10-11, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545) [hereinafter “Golan Petitioners’ Brief”].

⁷¹ *Golan*, 132 S. Ct. at 884 (quoting Golan Petitioners’ Brief, *supra* note 71, at 22).

that “limited” does not mean static and unalterable, but “is best understood to mean ‘confine[d] within certain bounds.’”⁷²

As in *Eldred*, the petitioners again raised the further concern that allowing Congress to restore copyrights that have already expired could ultimately lead to perpetual copyrights.⁷³ The authority to *restore* copyrights even further augmented the existing concern over perpetual terms: not only could Congress keep things from ever entering the public domain through term extensions, but under *Golan v. Holder*, Congress could remove works from the public domain and reinstate their copyright protection *ad infinitum*.⁷⁴ In response to this specter of perpetual copyrights, the Court gave short shrift to the concern, once again dismissing it as exaggerated:

As in *Eldred*, the hypothetical misbehavior petitioners post is far afield from the case before us. . . . In aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored foreign authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights.⁷⁵

Again, finding no constitutional infirmity, the Court scrutinized the rationality of the URAA with respect to the Copyright Clause’s goal to “promote the Progress of Science and useful Arts.”⁷⁶ Discussing the international motives of the act, the Court found “no warrant to reject the rational judgment Congress made” that “exemplary adherence to Berne would serve the objectives of the Copyright Clause.”⁷⁷ As in

⁷² *Golan*, 132 S. Ct. at 884-85 (“The construction petitioners tender closely resembles the definition rejected in *Eldred* and is similarly infirm.”).

⁷³ See *id.* at 885 (“Carried to its logical conclusion, petitioners persist, the Government’s position would allow Congress to institute a second ‘limited’ term after the first expires, a third after that, and so on. Thus, as long as Congress legislated in installments, perpetual copyright terms would be achievable.”); *Golan* Petitioners’ Brief, *supra* note 71, at 15-16 (“Removing works from the public domain violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires. The entry of a work into the public domain must mark the end of protection, not an intermission. Otherwise, the limit is meaningless.”).

⁷⁴ *Golan* Petitioners’ Brief, *supra* note 71, at 23 (“A limit that can be reset even after it has been passed does not ‘restrain[]’ or ‘confine[]’ as the Copyright Clause requires. . . . If an unprotected work may become protected again decades after entering the public domain, the boundary between protected works and unprotected works is erased.”).

⁷⁵ *Golan*, 132 S. Ct. at 885.

⁷⁶ *Id.* at 887-88; U.S. CONST. art I, § 8, cl. 8.

⁷⁷ *Golan*, 132 S. Ct. at 889.

Eldred, once satisfied that the act did not expressly violate the provisions of the Copyright Clause, the Court gave great deference to the rationality of Congress's judgment in implementing intellectual property policy.⁷⁸

Again, though, Justice Ginsberg seemed to go out of her way to declare that a scheme to create perpetual copyrights would be impermissible, though such was not the case before the Court in either *Eldred* or *Golan*.⁷⁹ But where exactly does this leave us with regard to the state of copyright law?

III. THE CURRENT STATE OF THE LAW REGARDING THE COPYRIGHT CLAUSE, COPYRIGHT EXTENSIONS, AND DEFERENCE TO CONGRESS

A. Constitutionality of Extensions

Eldred and *Golan* leave many questions unanswered, but they do tell us a few important things. First, extending the term of existing copyrights is definitively within Congress's authority.⁸⁰ That is, "limited Times" for copyright protection does not mean static and fixed terms once set.⁸¹

That said, however, a second lesson from both cases is that not all retroactive extensions will necessarily be constitutional—an attempt to string together extensions to achieve perpetual copyright terms would be impermissible.⁸² Of course, in both *Eldred* and *Golan*, the Court summarily concluded that Congress lacked this pernicious motive.⁸³ Nonetheless, the Court condemned such an act as "legislative misbehavior," leaving open the possibility that if Congress ever

⁷⁸ *Id.* at 894 ("The judgment § 514 [of the URAA] expresses lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not.").

⁷⁹ *Id.* at 885 ("As in *Eldred*, the hypothetical legislative misbehavior petitioners posit is far afield from the case before us.").

⁸⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) ("Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.").

⁸¹ *Golan*, 132 S. Ct. at 884. See *Eldred*, 537 U.S. at 199 ("The word 'limited,' however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: 'confine[d] within certain bounds,' 'restrain[ed],' or 'circumscribe[d].' . . . Thus understood, a timespan appropriately 'limited' as applied to future copyrights does not automatically cease to be 'limited' when applied to existing copyrights.").

⁸² See *supra* notes 1, 76, and accompanying text.

⁸³ See *supra* notes 1, 76, and accompanying text.

intends for an extension to create perpetual terms, it would be unconstitutional for contravening the “limited Times” provision.⁸⁴

Similarly, in *Eldred*, Justice Ginsberg seemed to fault petitioners for failing to illustrate how the CTEA crossed “a constitutionally significant threshold” that former extensions had not.⁸⁵ Thus, Justice Ginsberg deliberately created the possibility that some threshold for extensions exists, beyond which would render an extension unconstitutional.⁸⁶ Although ambiguous, this “threshold” may be referring to the structure of the extension—how soon after the previous extension it was enacted, how many additional years it grants, how long the total term will become, and so forth.⁸⁷ Whether an extension then crosses this amorphous threshold may also depend on how strongly the extension’s structure indicates a naked intent to create perpetual copyrights, rather than some other legitimate aim of Congress. That is, the Court may analyze the form of the extension as a way of determining Congress’s true motivation and intent. For if the extension differs significantly from previous extensions, such discrepancy may indicate an intent to create perpetual copyrights.

As illustrated by *Eldred*’s and *Golan*’s treatment of “limited Times” challenges, the analysis largely puts substance over form, focusing less on the challenged action itself than on Congress’s motivation in taking that action. Indeed, in each case, had the exact same conduct (extension or restoration of copyrights) been an overtly admitted attempt to create perpetual copyrights, the Court would have found that Congress had contravened the “limited Times” provision.⁸⁸ Thus, in each case the constitutionality of *what* Congress did depended on *why* it did it.⁸⁹ That said, it remains to be seen whether Congress, even with good intent and bona fide justifications, could nonetheless overstep the “boundary of ‘limited Times’” simply by extending copyright terms too far.⁹⁰ Thus, a copyright term may become so long

⁸⁴ *Golan*, 132 S. Ct. at 885.

⁸⁵ *Eldred*, 537 U.S. at 210; *see supra* note 35 and accompanying text.

⁸⁶ *Eldred*, 537 U.S. at 210 n.17; *see supra* note 35 and accompanying text.

⁸⁷ *See infra* Section IV. B.

⁸⁸ *See Golan*, 132 S. Ct. at 885 (“In aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored authors, Congress can hardly be charged with a design to move stealthily towards a regime of perpetual copyrights.”); *Eldred*, 537 U.S. at 209-10 (suggesting that Congress’s justifications for the extension refuted any notion that the CTEA was “a congressional attempt to evade or override the ‘limited Times’ constraint”). These statements and their surrounding discussion show that an attempt to create perpetual copyrights that cannot be justified by any other legitimate aim would indeed be “legislative misbehavior” in violation of the Copyright Clause.

⁸⁹ *See supra* note 89 and accompanying text.

⁹⁰ *See supra* note 60 and accompanying text.

that it in itself becomes unconstitutional regardless of Congress's intent. The *Eldred* Court hinted at this possibility, but sidestepped addressing whether it fit the circumstances before it.⁹¹

And if the extension or restoration was passed for plausible, legitimate reasons, the Court will not substitute its judgment for that of Congress regarding how to best advance the policy goals of the Copyright Clause.⁹²

B. Deference to Congress's "Rational Judgment"

Third, we learn in both cases that once it finds no express violation of the Copyright Clause's provisions, the Court is very deferential to Congress in setting intellectual property policy.⁹³ So long as Congress has a "rational" foundation to believe that the policy will advance the goals of the Copyright Clause, the Court seems satisfied.⁹⁴ Of course this means that absent a rational basis, an intellectual property-related act could nonetheless fail.⁹⁵ Yet, the outer contours of what the Court is willing to accept as sufficiently rational remain unclear.

Fourth, and related to congressional deference, the *Golan* Court read the Copyright Clause very broadly and specified that an intellectual property act need not intend to incentivize or even benefit authors directly.⁹⁶ Congress can rely solely on a non-incentive based rationale for a setting policy.⁹⁷ Similarly, the Court is willing to consider benefits to the copyright-holding *industry* (not just to the "authors" specified in the Copyright Clause) when evaluating the validity of Congress's putative rationales.⁹⁸

⁹¹ *Id.*

⁹² *See supra* notes 44, 79 and accompanying text.

⁹³ *See supra* notes 41, 44, 79 and accompanying text.

⁹⁴ *Golan v. Holder*, 132 S. Ct. 873, 889 (2012).

⁹⁵ Indeed, the dissenting Justices in *Eldred* would have found the CTEA to be lacking a sufficient rational basis. *See supra* notes 47, 50 and accompanying text.

⁹⁶ *Golan*, 132 S. Ct. at 888 ("The creation of at least one new work, however, is not the sole way Congress may promote knowledge and learning. . . . Nothing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation.'").

⁹⁷ *Id.* (suggesting that promoting dissemination could faithfully honor the goals of the Copyright Clause as well). One cannot help but find it myopic and ironic that the Court found the URAA to promote dissemination of works: the purported future increase in dissemination from the URAA (an expansion of "the foreign markets available to U.S. authors") would come at the certain, immediate reduction of dissemination of works that would no longer be freely accessible in the public domain.

⁹⁸ *Id.* at 889 ("Full compliance with Berne, Congress had reason to believe, would expand the foreign markets available to U.S. authors and invigorate protection against piracy of U.S. works abroad, . . . thereby benefitting copyright-intensive

Fifth, and again related to deference to Congress's rational judgment and decision-making, both Courts were susceptible to, or at least adequately satisfied by, the argument of international harmonization.⁹⁹ Indeed, international considerations were the sole justification in *Golan* and were given the most attention by the Court in *Eldred*.¹⁰⁰

C. Miscellany and the Unanswered

Sixth and finally, each case gives some insight into the current Court's view of the importance of the public domain in advancing the Copyright Clause's purpose of promoting science and the useful arts. The dissenters in *Eldred* vehemently urged that it was crucial for works to enter the public domain to ensure the public can fully benefit from the work after the author's limited monopoly.¹⁰¹ Yet, the *Eldred* majority only includes the phrase "public domain" two times, and in no place discusses the public domain's role in promoting the useful arts and sciences.¹⁰²

Similarly, while the *Golan* opinion discusses the public domain thoroughly, it ultimately finds that works in the public domain are not beyond the scope of the Copyright Clause or Congress's actions.¹⁰³ Again, the dissenting opinion vigorously argued that removing works from the public domain impedes their dissemination, imposes economic and non-economic costs on consumers,¹⁰⁴ and "inhibits an important preexisting flow of information."¹⁰⁵ In the light of *Eldred* and especially *Golan*, it is unclear what role, if any, the public domain continues to play in advancing the goals of the Copyright Clause.

Many additional questions remain unanswered: What "threshold" was Justice Ginsberg contemplating? How can one identify or infer an impermissible congressional intent to create perpetual copyrights?

industries stateside and inducing greater investment in the creative process.") (emphasis added). Accordingly, it seems that the Court would uphold as rational a congressional action pursuant to the Copyright Clause that primarily or solely benefits the copyright-industry, and not the authors themselves.

⁹⁹ *Id.* at 885, 887-89; *Eldred v. Ashcroft*, 537 U.S. 186, 205-06 (2003); see *supra* note 42 and accompanying text.

¹⁰⁰ *Golan*, 132 S. Ct. at 887-89; *Eldred*, 537 U.S. at 205-06 (discussing Congress's international harmonization justification first and in much greater detail than the other proffered justifications for the CTEA).

¹⁰¹ See *supra* notes 26, 47 and accompanying text.

¹⁰² See *Eldred*, 537 U.S. 186, 191-223 (2003).

¹⁰³ *Golan*, 132 S. Ct. at 884 ("The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain.").

¹⁰⁴ *Id.* at 899-900 (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 912 (Breyer, J., dissenting).

What even constitutes a perpetual copyright on an installment plan? Could a copyright term in itself, regardless of congressional intent, be so long as to violate the “limited Times” provision? What degree of rationality is needed to justify an intellectual property act or another copyright extension act? And is the Court unaware of or just indifferent to the overt, instrumental role that major lobbying entities (e.g., Disney) have played and are likely to continue to play in enacting copyright extensions?

The Supreme Court might be forced to answer some of these questions in the coming years if Congress again extends copyright terms as the CTEA’s extensions draw to an end on January 1, 2019.¹⁰⁶ Indeed, perhaps Justice Ginsberg anticipated this eventuality by mentioning the concern of a “perpetual copyright” in both *Eldred*¹⁰⁷ and *Golan*.¹⁰⁸ While the Court found that surreptitious perpetual copyright schemes were “far afield” from those cases, the next extension may not look quite as innocent as the CTEA and URAA.¹⁰⁹

IV. LOOKING FORWARD TO THE NEXT COPYRIGHT EXTENSION: HOW WILL THE COURT RESPOND GIVEN THE COURT’S ATTITUDES IN *ELDRED* AND *GOLAN*.

As 2019 approaches, we might expect to see lobbying overtures from the entertainment industry (Disney, et al.) for Congress to once again extend copyrights.¹¹⁰ Let us assume that such lobbying efforts will succeed and Congress will pass another twenty-year extension to become effective December 31, 2018.¹¹¹ For the sake of this thought experiment, let us call this extension the Save Mickey Mouse Act (“SMMA”).¹¹² Let us further assume that SMMA will be challenged

¹⁰⁶ See *supra* notes 5, 9 and accompanying text.

¹⁰⁷ *Eldred*, 537 U.S. at 209.

¹⁰⁸ *Golan*, 132 S. Ct. at 885.

¹⁰⁹ *Golan*, 132 S. Ct. at 885; see *Eldred*, 537 U.S. at 209.

¹¹⁰ See *supra* note 10 and accompanying text.

¹¹¹ From the content-industry perspective, it would be beneficial to have the next extension come into effect *before* the previous extension has run its course, as this would ensure that no copyrighted works would enter the public domain. In this instance, the effective date would have to be before January 1, 2019, when copyrights are scheduled to resume expiring. See *supra* note 5 and accompanying text.

¹¹² The CTEA itself was playfully nicknamed the “Mickey Mouse Protection Act” in the media. See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

and the case will reach the Supreme Court in early 2020. How will the future Supreme Court deal with the SMMA?¹¹³

We know from *Eldred* that the act would not be unconstitutional simply because it extends existing copyrights.¹¹⁴ But *Eldred* and *Golan* hinted that future extensions would not necessarily be constitutional either—if it appears that Congress is “legislative[ly] misbehaving” by attempting to create a perpetual copyright, the Court will likely not allow it.¹¹⁵ But how exactly can we tell if an extension is an attempt to create perpetual copyrights?

First, the Court could infer an improper congressional intent from a lack of legitimate, bona fide justifications for the extension. If the Court invalidates the extension in this way, let us call it an “inference from unjustifiability.”

Second, the Court could infer Congress’s intent to create perpetual copyrights by the nature and structure of the extension. That is, whether the extension violates the “limited Times” provision in a way that the previous extensions had not, by crossing some “constitutionally significant threshold.” This second approach can be called an “inference from structure.”

A. Inference from Unjustifiability: Would a lack of justifications for the SMMA suggest an impermissible congressional motive for re-extending copyrights?

A lack of a bona fide, legitimate justification for an extension may suggest that Congress’s true purpose is mischief—an attempt to achieve perpetual copyrights in installments. Based on what we have learned from *Eldred* and *Golan*, the constitutionality of the SMMA will hinge on the adequacy of Congress’s reasons justifying the extension.¹¹⁶

What possible reasons could justify the SMMA? While it is impossible to foretell what justifications may be germane to the SMMA in 2018-2019, the justifications used to support the CTEA

¹¹³ Assuming no major ideological shift in copyright jurisprudence from *Eldred*, *Dastar*, and *Golan*. For another legal scholar’s predictions in a similar analysis of a future hypothetical extension, see Thomas R. Lee, *Eldred v. Ashcroft and the (Hypothetical) Copyright Term Extension Act of 2020*, 12 TEX. INTELL. PROP. L.J. 1 (2003). Critically, however, this Article diverges from much of Lee’s reading of *Eldred*, his predictions of the Court’s method of analysis, and his ultimate conclusion. Moreover, this Article enjoys the benefit of additional insight from *Golan*.

¹¹⁴ See *supra* note 31 and accompanying text.

¹¹⁵ *Golan v. Holder*, 132 S.Ct. 873, 885 (2012).

¹¹⁶ See *supra* Section III. A.

give some indication of what to expect.¹¹⁷ In concluding that “[n]othing before this Court warrants construction of the CTEA’s twenty-year term extension as a congressional attempt to override the ‘limited Times’ constraint,” the Court found that the CTEA was justified by international harmonization with foreign copyright policy as well as economic, demographic, and technological changes that suggested longer copyright terms would better incentivize authors to create new works.¹¹⁸

Proponents of the CTEA argued that the extension was necessary to create uniformity and parity with the copyright terms accorded under the Berne Convention—that is, the United States had to “catch up” to the rest of the signatories.¹¹⁹ The SMMA, however, may not have a substantial international norm to “catch up” to in 2019. In fact, the United States copyright terms are currently among the longest in the world, outdone by only Mexico and Cote d’Ivoire.¹²⁰ Thus, unless there is a substantial movement toward extending copyrights abroad, it would appear that the SMMA could not seek shelter under the guise of international harmonization. Indeed, absent any international changes in copyright, if the SMMA were passed, it would create *disharmony* from the global norm.¹²¹

How else may the SMMA be justified? Would the same “economic, demographic, and technological changes” that were used to justify the CTEA be available to the SMMA? To the minimal extent that the Court acknowledged those justifications,¹²² they would apply with even less force to the SMMA. In *Eldred* the government argued that extensions of copyright terms since 1900 have been justified because “the average life span has increased . . . ; photocopying and digital media have lowered copying costs; new markets and media have increased the value and commercial life of works; and losses due to piracy have increased,” each of which “tends to justify a longer copyright term.”¹²³ Accepting this questionable

¹¹⁷ See *supra* notes 42, 43 and accompanying text.

¹¹⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 209 (2003); see also *id.* at 206-07.

¹¹⁹ *Id.* at 205-06.

¹²⁰ See WHERE TO COPYRIGHT, *List of Nations’ Copyright Duration*, <http://www.wheretocopyright.com/list.html> (last visited Oct. 25, 2012).

¹²¹ See *supra* Section III. A. Because the majority of countries currently have a life-plus-seventy copyright term, if the United States passed another extension, the new term would break from the current “harmony” with the majority and be longer than any other country in the world (again, assuming no other country extends their copyright).

¹²² See *Eldred*, 537 U.S. at 206-08 (mentioning these “changes” and giving them a very cursory treatment).

¹²³ *Eldred* Respondent’s Brief, *supra* note 43, at 26.

premise as true, these change-factors are still unlikely to justify the SMMA for the reasons given below.

Demographically speaking, the government in *Eldred* cited a thirty-year increase in lifespan since 1900 to support a claim that longer life-spans warranted longer copyright terms; thus, authors could be better assured that their children and possibly grandchildren would reap the benefits of the creative work.¹²⁴ However, between the CTEA (in 1998) and the SMMA, some twenty years later, it seems unlikely that the average lifespan will increase by such a magnitude that would compel extending copyright terms. Indeed, the average life expectancy at birth in 1998 was 76.7 years, while in the most recent data from 2009, it is 78.5 years, only a 1.8 year increase.¹²⁵ The United States Center for Disease Control and Prevention projects that life expectancy will be 78.9 years in 2015 and 79.5 years in 2020.¹²⁶ Accepting these numbers as accurate approximations, between the CTEA in 1998 and the SMMA, roughly in 2020, the growth in life expectancy will be modest at only approximately 2.8 years. This is a far cry from the thirty-year growth cited to support the CTEA.¹²⁷ Thus, absent any sudden and dramatic life-prolonging medical or technological advances, an increase in life expectancy is unlikely to be significant enough to plausibly justify another copyright extension.

Technologically and economically speaking, copying costs have gone down and losses due to piracy have gone up.¹²⁸ But does that not actually caution for *better* rather than *longer* copyright protection? Piracy is undoubtedly a problem that ought to be combated, but extending copyright terms is hardly a solution. Indeed, excessively lengthy copyright protection may be *encouraging* piracy and infringement rather than counteracting it.¹²⁹ People seeking access to

¹²⁴ *Id.* at 25.

¹²⁵ KENNETH D. KOCHANEK ET AL., NAT'L CTR. FOR HEALTH STATISTICS, *Deaths: Final Data for 2009*, in 60 NATIONAL VITAL STATISTICS REPORTS 3, 81 (Dec. 29, 2011).

¹²⁶ NAT'L CTR. FOR HEALTH STATISTICS, *Births, Deaths, Marriages, & Divorces: Life Expectancy*, in 59 NATIONAL VITAL STATISTICS REPORTS 2 (Dec. 2010).

¹²⁷ Eldred Respondent's Brief, *supra* note 43, at 26.

¹²⁸ Due to technology, making a copy of a work is now easy and inexpensive or free. Moreover, there is no limit to how many copies can be made. Compounding this, technology has permitted massive degrees of sharing these copies on the internet and through peer-to-peer networks. The content industry has reported increasing losses due to piracy. But, these figures should be taken with a grain of salt as they may be exaggerated.

¹²⁹ See *infra* Section VI; Eldred Petitioners' Brief, *supra* note 13, at 32. Of course, the content most commonly pirated is of a more contemporary nature, not

older works may grow impatient with unduly lengthy copyright terms and choose instead to pirate, for example, a copy of a Hemingway e-book rather than pay for it.

And while technology has increased the public's access to older works and thus has lengthened a work's *potential* commercial life, that does not, *ipso facto*, justify extending copyrights. Our copyright system does not set a work's protection to be coterminous with its commercial life-span.¹³⁰ If that were so, then most works would enter the public domain just a few years after their inception.¹³¹ Indeed, the vast majority of the works that the CTEA extended, and that the SMMA would extend, retain little or no commercial value.¹³² To the contrary, when a work's copyright term ends, it enters into the public domain regardless of its revenue-generating potential.

Furthermore, although an extension need not incentivize authors to be rationally supported,¹³³ it is nonetheless implausible that another extension would actually yield any additional incentive for authors to create. Aside from the sheer economics of it—that twenty additional years are likely to add virtually zero economic incentive¹³⁴—there is also the cognitive behavior perspective to consider. An individual is unlikely to comprehend or perceive value in an extension of copyright so far into the hypothetical future, such as seventy years after the individual's own death.¹³⁵ When figures become so great or so remote, we struggle to accurately conceive of them.¹³⁶ Take for example, an author who publishes a work on his deathbed in 2012. Currently his work would enjoy a copyright term of the life of the author plus seventy years—assuming the author dies in 2012, the

silent films. But even some older works remain highly sought, such as the novels of Fitzgerald and Hemingway or classic films.

¹³⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (noting the current timeframe for protecting copyrights).

¹³¹ Eldred Petitioners' Brief, *supra* note 13, at 7 (noting how few works remain commercially viable ("surviving works") that continue to earn royalties).

¹³² *Id.* (describing how the CTEA extended the copyrights of 50,000 commercially viable works along with 375,000 other works with no commercial value that were needlessly prevented from entering the public domain).

¹³³ See *supra* Section III. B.

¹³⁴ See *Eldred*, 537 U.S. at 255 (Breyer, J., dissenting) (noting that "from a rational economic perspective" the extra years granted by the CTEA "makes no real difference" to authors and potential authors) (emphasis omitted).

¹³⁵ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-28 (1998); RICHARD DAWKINS, *THE GOD DELUSION* 414-20 (2006) (explaining this limit to human cognition to process very remote or extreme concepts, calling such limitation the "Middle World" that we all live in).

¹³⁶ See *Eldred*, 537 U.S. at 254-58 (Breyer, J., dissenting) (expressing strong doubt that "somehow, somewhere, some potential author might be moved by the thought of great-grandchildren receiving copyright royalties a century hence . . .").

copyright would expire in 2082.¹³⁷ To that author, is there a meaningful difference in whether his work's copyright expires in 2082 or if the SMMA extends the term another twenty years into 2102? Probably not. The future is so remote any future value becomes incalculable at a certain point. And this problem is magnified further in the more common scenario when an author is *not* creating a work on his or her deathbed, and thus the copyright will persist even further into the unknown future. Simply put, as the copyright term is increased, there is a distinct point of diminishing returns with regard to additional incentive to authors, economically and conceptually.

It is of course possible that Congress could proffer additional justifications not discussed here. But in the absence of bona fide justifications, there would be a strong inference that Congress will be attempting to create perpetual copyrights with the SMMA. This suspicion of improper legislative intent would be especially prevalent given the SMMA's timing, becoming effective just before the CTEA would run its course and copyrighted works would begin to enter the public domain.

B. Inference from Structure: Does the SMMA's structure differ significantly from prior extensions in a way that may cross a "constitutional threshold"?

Additionally, the structure of the SMMA would support an inference of the "legislative misbehavior" of attempting to create perpetual copyrights. In several ways the SMMA would diverge from previous copyright extensions with regard to the "limited Times" provision, perhaps placing the SMMA beyond the "constitutionally significant threshold" alluded to by Justice Ginsberg.¹³⁸ These differences would offer evidence to support an inference of impermissible congressional intent to establish perpetual copyrights.

For example, the SMMA would become effective immediately before the prior extension's additional term was about to expire.¹³⁹ In contrast, all the previous copyright extensions came after the previous extension's additional grant of time had "worn off."¹⁴⁰ Put differently,

¹³⁷ See Sonny Bono Copyright Term Extension Act § 102.

¹³⁸ See *supra* note 35 and accompanying text.

¹³⁹ This would ensure that no copyrights extended under the CTEA would expire. See *supra* notes 6, 112 and accompanying text.

¹⁴⁰ The 1831 Act extended the copyright term by fourteen years. The next extension did not come until much more than fourteen years later, in 1909. Thus, copyrights expired between the two acts. In turn, the 1909 Act extended copyrights another twenty-eight years. The next extension did not come until 1978, much more

between each previous extension, copyrights were allowed to expire.¹⁴¹ If the SMMA were enacted immediately after the CTEA, no copyrights would be allowed to expire—a major difference from previous extensions; one that supports the claim that the SMMA would impermissibly violate the “limited Times” provision while other extensions had not.¹⁴²

Similarly, the SMMA would be distinct from previous extensions in the fact that it would be granting many works their second extension and many more works their *third* extension.¹⁴³ To illustrate, consider a work created in 1970 that had an initial copyright term of fifty six years.¹⁴⁴ The 1976 Act extended the copyright term an additional nineteen years (the first extension),¹⁴⁵ the CTEA granted the work a second extension of twenty years,¹⁴⁶ and the SMMA would grant the work a third extension. Historically, it was uncommon for any work to be granted a second extension, much less a third.¹⁴⁷ The CTEA marked the first extension that significantly granted an extension to

than twenty-eight years later. And again, copyrights expired. *See* 17 U.S.C. § 302. *See also supra* notes 17-20 and accompanying text.

¹⁴¹ *See supra* note 141 and accompanying text.

¹⁴² Arguably this same point could have been made to argue how the CTEA was markedly different from all the prior extensions—between the 1978 Act and the CTEA, copyrights only expired for one year, in 1997, before being re-extended in 1998 by the CTEA. Yet, little effort was made to substantively distinguish the CTEA from prior extensions. And now that the CTEA has been upheld as constitutional, any future extension must show how it crosses a threshold that even the CTEA did not cross. But while the CTEA was deemed constitutional, one might think of it as at or near the edge of a constitutional copyright extension.

¹⁴³ For a post-1978 work, the SMMA would be the second extension. For pre-1978 works, the SMMA would be the third extension.

¹⁴⁴ *See* Act of Mar. 4, 1909, §§ 23-24, 35 Stat. 1075 (granting an initial term of twenty-eight years, renewable once for another twenty-eight years).

¹⁴⁵ *See* Copyright Act of 1976, 17 U.S.C. § 302 (2006) (granting a nineteen year extension to all existing copyrights [increasing the total term from fifty-six to seventy-five] and setting the copyright term for any subsequently created works as life of the author plus fifty years).

¹⁴⁶ *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, §102, 112 Stat. 2827, 2827-28 (1998).

¹⁴⁷ The 1978 Act extended only three years worth of copyrights that had been extended once before. Copyrights of works created in 1906, 1907, and 1908 were extended once by the 1909 Act, and a second time by the 1976 Act. *See* Act of Mar. 4, 1909, § 24, 35 Stat. 1075; Copyright Act of 1976, 17 U.S.C. § 302 (2006). To be precise, a work from 1906 had its copyright extended in 1909 to a potential full term of fifty-six years, meaning it would expire in 1962. But starting in 1962, various interim extensions were passed as place-holders until the 1978 Act was finalized. Thus, when the 1978 Act become effective, the work’s term was extended to seventy-five years from its 1906 publication date—1981.

copyrights that had already been extended once (by the 1976 Act).¹⁴⁸ But to date, no work's copyright has been extended *three* times. The SMMA would do just that. Thus, again, due to its structure and timing, the SMMA would traverse a constitutional threshold that prior extensions had not, bolstering an inference that Congress is going beyond typical or historical copyright policy treatment and impermissibly seeking to create perpetual copyrights.

Finally, by adding twenty years to all existing copyrights, the full term for pre-1978 works would be 115 years, and for post-1978 works, it would be life of the author plus ninety years.¹⁴⁹ In challenging the SMMA, one could argue that such long terms in themselves far exceed what the Framers of the Copyright Clause had contemplated for "limited Times," much more so than the terms granted by previous extensions.¹⁵⁰ In *Eldred*, the petitioners did not contend that the terms granted under the CTEA (ninety-five years for pre-1978 works and life plus seventy years for post-1978) were unconstitutional.¹⁵¹ Thus, the Court needed not decide whether the lengthy term in itself violated the "limited Times" provision.¹⁵² But in a future challenge, the Court could consider this eloquently simple, yet pointed challenge: the term is simply *too* long to be constitutional. While still technically "limited," terms extended under the SMMA would be so long that they would be tantamount to perpetual terms for all practical purposes.¹⁵³ While it is true that very long terms may certainly support an inference of congressional intent to create perpetual copyrights, at a certain point, a copyright term may become so long that it exceeds "the outer

¹⁴⁸ The CTEA gave a second extension to fifty-five years of copyrights (1923-1978) that had already been extended once under the 1976 Act. *See* Sonny Bono Copyright Term Extension Act § 102; Copyright Act of 1976, 17 U.S.C. § 302 (2006). Again, this argument could have been made in *Eldred* to meaningfully distinguish the CTEA from the previous extensions.

¹⁴⁹ *Id.*

¹⁵⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 246-48 (2003) (Breyer, J., dissenting) (discussing how the Framers feared monopolies but permitted them in the context of patents and copyrights, their fears assuaged by the limitation of the monopoly to only a brief period of time).

¹⁵¹ *See supra* note 23 and accompanying text.

¹⁵² *See supra* note 60 and accompanying text.

¹⁵³ *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting) (positing that the CTEA's term was so long as to be virtually perpetual, not limited). While Justice Breyer largely focused on the economics of a work's commercial value, just in terms of the actual time and numbers, 115 years is hardly "limited" in the same sense that the original term of fourteen years was limited.

boundary of “limited Times” and therefore becomes unconstitutional, regardless of Congress’s intent.¹⁵⁴

In sum, absent any legitimate claim of international harmonization, the SMMA extension would likely be the kind of congressional “design to move stealthily toward a regime of perpetual copyrights” that the Court once again vilified in *Golan*.¹⁵⁵ And given the SMMA’s violation of the “limited Times” provision, the Court would not need to further explore its rationality in light of the Copyright Clause’s objectives.¹⁵⁶

V. HOW MUCH TIME MUST PASS BETWEEN EXTENSIONS TO BE CONSTITUTIONAL UNDER THE “LIMITED TIMES” PROVISION?

Changing the SMMA scenario slightly, imagine now that instead of becoming effective December 31, 2018, the SMMA will become effective on December 31, 2021. In this new set of facts, copyrights would expire in the three years between the “wearing off” of the CTEA and the effective re-extension of the SMMA. Would this “gap” in extensions be sufficient to disprove a scheme to create perpetual copyrights through incremental acts?

A strong argument can be made that the “gap” is inconsequential. While three-years worth of copyrighted works were allowed to expire (and therefore were not de facto perpetual), the vast, remaining anthology would continue to enjoy seemingly endless protection. Specifically, the copyright works from 1923, 1924, and 1925 would expire respectively in 2019, 2020, and 2021, whereas the works from 1926 on would remain monopolized.¹⁵⁷ Under such an extension-gap-extension scheme, Congress could extend copyrights repeatedly without ever technically having truly perpetual copyrights, because sooner or later (most likely later), each work would slip into a gap and expire. But this is a distinction without a difference. If each gap were for three years, and each extension were for twenty years, a copyright secured in 1940 would not expire until the year 2137,¹⁵⁸ and a

¹⁵⁴ See *id.* at 210 n.17 (suggesting that such an outer boundary on the term length itself exists).

¹⁵⁵ *Golan v. Holder*, 132 S. Ct. 873, 885 (2012).

¹⁵⁶ See *supra* notes 41, 79 and accompanying text.

¹⁵⁷ Works created in 1926 currently have a copyright term of ninety-five years and will expire on January 1, 2022. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 304(b), 112 Stat. 2827, 2827-28 (1998). Thus, the SMMA, effective on December 31, 2021, would extend the copyrights in those works another twenty years.

¹⁵⁸ Essentially under this system, three years worth of copyrights will expire for every twenty-three years that pass. The first twenty years, no works will enter the

copyright secured in 1960 would not expire until the year 2298.¹⁵⁹

Thus, while any given work's copyright term is technically still for "limited Times," for all practical purposes the term would be virtually limitless. Indeed, Justice Ginsberg's language of an intent to bypass the "limited Times" provision need not be drawn at the point of perpetuity.¹⁶⁰ While such a scheme of repeated extensions spliced with brief gaps in which works entered the public domain clearly would not create any single perpetual copyrights, doubtless it would significantly undermine any meaningful notion of "limited Times."¹⁶¹

Just how many years must Congress wait then between copyright extensions? There is no clear answer. One inexact way of measuring would be to ask whether enough time has passed as to negate any suspicion that the extension would be motivated by impermissible goals.¹⁶² That is, if enough time passes between each extension during which copyrights are allowed to expire that even a string of extensions would be ineffective at creating de facto perpetual copyrights.

A. An extension that does not violate the "limited Times" provision may theoretically still fail to rationally advance any copyright clause-based objective.

Assume, however, that enough time has passed between extensions that the Court finds no violation of the "limited Times" provision; the act must still be supported by Congress's rational judgment that an extension promotes the policy goals of the Copyright Clause.¹⁶³ While the Court has strongly suggested that it will continue to evaluate

public domain due to the extension, then three years of works will. For example from 1998-2021 the copyrights from 1923, 1924, and 1925 will expire, then the SMMA will extend all other existing copyrights twenty years until 2042. Then another three years of works would expire. Thus, it would take five cycles of extensions after the SMMA until works from 1940 slipped through the gaps between extensions.

¹⁵⁹ See *supra* note 159 and accompanying text.

¹⁶⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 209 (2003).

¹⁶¹ See *id.*

¹⁶² If, for example, in the year 2050, copyrights have not been extended since the CTEA in 1998, and Congress has decided that copyright terms should once again be extended because our future-selves have much greater life expectancy, then the fifty-two year gap coupled with a reasonable justification ought to justify the extension. In a less clear case, what if the SMMA were to become effective in 2029, after ten years of copyrighted works entering the public domain and thirty years after the previous extension (the CTEA)? On one hand, a ten-year gap between the end of one extension and the start of another may seem sufficient, but on the other hand, what if Congress offered a plausible explanation to justify the extension?

¹⁶³ See *supra* notes 41, 79 and accompanying text.

whether future congressional acts violate the “limited Times” provision,¹⁶⁴ once the Court is satisfied that there is no explicit constitutional violation, the Court truly does seem to have “quitclaimed to Congress its principal responsibility” of honoring the “central purpose of the Copyright/Patent Clause.”¹⁶⁵ Given that *Eldred* and *Golan* broadened the acceptable rational justifications for intellectual property policy, it seems probable that Congress would be able to conjure up a plausible rationale to the Court’s satisfaction.¹⁶⁶ In *Golan*, the Court explained that Congress is tasked with designing a whole *system* of copyright that promotes science and progress, and that each individual act of Congress need not necessarily promote dissemination or incentivize creation.¹⁶⁷ The Court went on to state that policies that benefit the copyright-holding *industry* are sufficient to justify a copyright act, despite the Copyright Clause’s emphasis on granting rights to “authors.”¹⁶⁸

Of course one could argue, as many do, that a public-favoring policy of a growing, rich public domain would *better* promote the useful arts by increasing dissemination of works than would alternative public policies that favor copyright-holding industries and extend copyright terms.¹⁶⁹ But the Court has explicitly passed along to Congress these judgment calls of which policy is wiser.¹⁷⁰ Seemingly, as long as Congress offers *some* rational basis for how the extension policy plausibly advances the Copyright Clause’s objectives, even if indirectly or holistically, the Court will likely respect that policy, regardless of its questionable wisdom.¹⁷¹

VI. GLOBALIZATION AND TECHNOLOGY CAUTION AGAINST OVERLY LENGTHY COPYRIGHT TERMS

Aside from whether Congress decides to extend copyright terms again and whether the Supreme Court allows Congress to do so, other *social* factors caution against overly lengthy copyright terms generally. Principally, technology and globalization are changing how the public views and consumes works in the public domain and may also be altering the public’s view of what it is willing to accept as a reasonable copyright term.

¹⁶⁴ See *supra* Section III. A.

¹⁶⁵ *Eldred*, 537 U.S. at 242 (Stevens, J., dissenting).

¹⁶⁶ See *supra* Section III. B.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *supra* note 26 and accompanying text.

¹⁷⁰ *Golan v. Holder*, 132 S. Ct. 873, 876 (2012).

¹⁷¹ See *supra* Section III. B.

To illustrate this phenomenon, consider a popular book that has entered the public domain in the United Kingdom, but not yet in the United States, such as F. Scott Fitzgerald's *The Great Gatsby*.¹⁷² A reader in the United States seeking to obtain an e-book of *The Great Gatsby* must pay \$12.99 for what someone in London can get for free.¹⁷³ Or, the United States reader, realizing this inequity, could easily obtain an e-book version from a public domain archive website (because the work is in the public domain in *some* places after all) without any verification that the reader is in the United States rather than the United Kingdom. If readers choose to "pirate" the online version meant for United Kingdom readers, rather than pay for the United States version, they will have essentially rejected the United States copyright term as being *too long*. In the aggregate, the effect is that the United States copyright term has been reduced to the United Kingdom term based on what the public is willing to accept as reasonable and fair.

Thus, in a way, the public domain itself has become global. If a work enters the public domain in one country and has been electronically uploaded to the internet for free, legal distribution within that country, citizens of *other* countries can download that work as well, even though it may still be copyrighted in their domestic country.¹⁷⁴ Of course, this would be copyright infringement.¹⁷⁵ But it

¹⁷² *The Great Gatsby* was published in 1925 by F. Scott Fitzgerald (1896-1940). Thus, under 17 U.S.C § 304(b), the work will enter the public domain after ninety-five years, on January 1, 2021. But in the United Kingdom, under the Copyright, Designs and Patents Act, 1988, c. 48, § 12 (U.K.), the book's term was life of the author plus seventy years, meaning that it entered the public domain on January 1, 2011. Australia would have worked for this hypothetical, as the *The Great Gatsby* is also in the Australian public domain.

¹⁷³ Price of *The Great Gatsby* e-book from Amazon as of October 5, 2012.

¹⁷⁴ Note that while the United States has a longer copyright than the United Kingdom, the reverse scenario is possible where a work is public domain here, but not in the United Kingdom. This could result from the copyright in a work not being properly renewed back before all renewal was made automatic. For example, *Peter Pan* is in the public domain in the United States but not in the United Kingdom. See *Copyright How-To*, GUTENBERG PROJECT (Mar. 25, 2012, 8:31 PM), http://www.gutenberg.org/wiki/Gutenberg:Copyright_How-To#Public_Domain_and_Copyright_Rules_for_the_other_countries.

¹⁷⁵ And indeed, public domain archive websites like Gutenberg Project and University of Pennsylvania's Online Books Page tell United States users not to download certain books and demarcate which books are only for distribution in certain countries. See, e.g., PROJECT GUTENBERG AUSTRALIA, <http://gutenberg.net.au/> (last visited Oct. 18, 2012); Mark Ockerbloom, *The Online Books Page*, UNIVERSITY OF PENNSYLVANIA, <http://onlinebooks.library.upenn.edu/nonus.html> (last visited Oct. 18, 2012) (listing *The Great Gatsby* as "NO US ACCESS").

lacks the sinister malevolence of piracy that colors the infringement of recently copyrighted works.¹⁷⁶ Currently, citizens are on the honor system not to download any foreign-country public domain works that are still copyrighted in their home-country.¹⁷⁷ But when presented with the option, consumers are unlikely to pay for an e-book that they could get, and readers abroad do get, for free.

This unlikelihood is compounded by two things. First, the consumer, not equipped with an understanding of copyright law, may genuinely believe that the work has entered the public domain in the United States, just as it has in the United Kingdom, and may download the work for free, not knowing he or she ought to be paying. Second, even if consumers do realize that lengthy United States copyright terms prohibit them from freely downloading the e-book, they may download the e-book for free anyways, compelled by a sense of inequality or unfairness that they must pay for something that *other* readers abroad can legally get for free.

Note, however, that this online globalization of the public domain and reduction of copyright terms to the lowest common denominator would *only* affect the copyright holder's exclusive *reproduction right* in the work. E-book technology and the internet have greatly facilitated *access* to a work that has entered the public domain of one country; readers in the United States may easily and without detection be able to reproduce for their own consumption a version of the *The Great Gatsby* that was lawfully uploaded for distribution within the United Kingdom or Australia. But because the work is still copyrighted in the United States, the copyright holder would still be able to exercise his or her *other* exclusive rights aside from the reproduction right, such as the derivative work right to prevent film or stage adaptations.¹⁷⁸

Thus, this potential phenomenon is not an adequate solution to the concern that Congress may attempt to impermissibly extend copyright terms to the detriment of the public interest of a thriving public domain. Instead it is a reaction, a reminder that the United States

¹⁷⁶ As opposed to contemporary works, the works in these circumstances are *free* to citizens of other countries. Thus, the piracy is not an instance of stealing a work that one would otherwise pay for, but rather claiming that that work ought to be free for everyone.

¹⁷⁷ It is not inconceivable that such websites would somehow verify the geographic source of the download-request to determine whether the work is available for legal distribution in that country. But as of right now, written disclaimers are the only things preventing individuals from one country downloading the public domain e-books from another country.

¹⁷⁸ And such kinds of infringement would be much more susceptible to detection than individual readers downloading e-books from foreign public domain archives.

copyright laws no longer live in isolation from those of the rest of the world, and a caution that technology may permit the public to reject extended copyright terms that it deems unacceptably lengthy by accessing for free those works that it feels ought to be in the public domain by now, and therefore free to access and enjoy.

If the United States continues to expand its copyright terms to lengths far exceeding the rest of the world, the public is likely to view such a restriction as unfair and will reject the long copyright terms, turning to the “global public domain” to freely access the works. Indeed, in the modern era, the notion that each individual country still has its own “public domain” is a farce—the internet is ushering in a corpus of works that is globally public. Congress should take note of this reality and keep it in mind when contemplating the next extension of copyright terms.

VII. CONCLUSION

In the wake of *Eldred v. Ashcroft* and *Golan v. Holder*, a popular sentiment among detractors from the two opinions has been that the Court gave Congress total carte blanche to extend copyrights forever.¹⁷⁹ This is simply not an accurate reading of the cases. While the fear of perpetual copyrights is certainly a legitimate one, it is hyperbolic and paradoxical to claim that the Court has permitted Congress to create perpetual copyrights, when in fact the Court recently reiterated that doing so would be “legislative misconduct.” Indeed, throughout *Eldred* and the Court’s most recent discussion of the Copyright Clause in *Golan*, the Court provided more clues as to how it may respond to the next copyright extension. As 2019 grows nearer, so too does the prospect of another copyright extension. If Congress has not learned its lesson from the much-criticized CTEA and passes an extension such as the SMMA, the onus will be on the Supreme Court to recognize that Congress has overstepped its authority under the Copyright Clause. Ideally, this Article will provide guidance to both Congress and the Court in evaluating a future copyright extension.

¹⁷⁹ See, e.g., David E. Shipley, *Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1260 (2007) (“Given Congress[s] exercise of general legislative powers, the Court’s deference to Congress[s] judgment in exercising its considerable power under the Copyright Clause as well as its historic reluctance to strike down intellectual property legislation, the Clause’s limitations on congressional authority could become meaningless . . .”).

In sum, *Eldred* and *Golan* have left open the possibility that the next extension could be struck down in at least two ways. If the next extension comes before or shortly after the CTEA's extension is about to expire, there will be a strong presumption that Congress is linking together extensions in pursuit of establishing de facto perpetual copyright terms. In such a scenario, unless Congress can proffer a compelling and legitimate justification for yet another copyright term extension, the Court could (and probably should) find a violation of the "limited Times" provision based on an inference that Congress was attempting to create perpetual copyrights. Notwithstanding Congress's intent to create perpetual copyrights, another twenty-year extension would result in terms so long that the terms would, in effect, no longer be "limited" in any meaningful sense as contemplated by the Framers, providing the Court yet another opportunity to definitively state that enough is enough. Rather than "saving" Mickey Mouse by further locking him up, perhaps it is time to let him rest and go free into the great Elysian Fields for timeless classics that is the public domain.