

1 **SCHEDULED FOR ORAL ARGUMENT OCTOBER 5, 2000**
2
3

4
5 **IN THE UNITED STATES COURT OF APPEALS**
6 **FOR THE DISTRICT OF COLUMBIA CIRCUIT**
7

8 No. 99-5430
9

10
11 **ERIC ELDRED, et al.,**

12
13 Plaintiffs/Appellants,

14 v.

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

16
17 Defendant/Appellee.
18

19
20 **ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR**
21 **THE DISTRICT OF COLUMBIA**
22

23
24 **BRIEF FOR THE APPELLEE**
25

26
27
28
29 DAVID W. OGDEN
30 Acting Assistant Attorney General

31
32 WILMA A. LEWIS
33 United States Attorney

34
35 WILLIAM KANTER
36 ALFRED MOLLIN
37 (202) 514-0236
38 Attorneys, Appellate Staff
39 Civil Division, Room 9554
40 Department of Justice,
41 601 D Street, N.W.
42 Washington, D.C. 20530-0001
43
44
45
46
47
48

1
2
3
4
5
6
7
8
9
10
11
12
13

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 28(b) and Circuit Rule 28(a)(4), the appellee, Janet Reno, states as follows:

A. Parties

All parties appearing before the district court and in this Court are listed in the Brief for the Appellants.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for the Appellants.

C. Related Cases

The related cases are set forth in the Brief for the Appellants.

GLOSSARY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

App. Br.	Appellants’ Brief
J.A.	Joint Appendix
CTEA	The Copyright Term Extension Act, 17 U.S.C. § 304
EU	European Union
Senate CTEA Hearing	<i>The Copyright Term Extension Act of 1995, Hearing before the Committee on the Judiciary, S. Hrg. 104-817, 104th Cong. 1st Sess. 113 (Sept. 20, 1995)</i>
Senate CTEA Report	S. Rep. No. 315, 104th Cong., 2d Sess July 10, (1996)
Hearing	<i>Extending the Duration of Copyright Protection in Certain Cases: Hearing Before Subcomm. No. 3 of the Comm. on the Judiciary, 87th Cong. 12 (1962)</i>
Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed Paris, May 4, 1896, revised Berlin, Nov. 13, 1908, 1 L.N.T.S. 217, completed Berne, Mar. 20, 1914, revised Rome, June 2, 1928, 123 L.N.T.S. 233, revised Brussels, June 26, 1948, 33 U.N.T.S. 217, revised Stockholm, July 14, 1976, 828 U.N.T.S. 221, revised Paris, July 24, 1971 U.N.T.S., 943 U.N.T.S. 178

1
2 **No. 99-5430**

3
4 **IN THE UNITED STATES COURT OF APPEALS**
5 **FOR THE DISTRICT OF COLUMBIA CIRCUIT**

6
7
8 **ERIC ELDRED, et al.,**

9
10 Plaintiffs/Appellants,

11 v.

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

13
14 Defendant/Appellee.

15
16
17 **BRIEF FOR THE APPELLEE**
18
19

20
21 **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

22
23
24 1. Whether Congress violated the Copyright and Patent Clause of the United
25 States Constitution by extending the copyright protection of works with subsisting
26 copyrights by 20 years.

27 2. Whether Congress violated the First Amendment by extending the term of
28 copyright protection for works with subsisting copyrights as well as newly created
29 works by 20 years.

1 Congress' powers under the Copyright Clause. Plaintiffs' First Amendment
2 arguments were rejected on the ground that this Court "has ruled definitively that
3 there are no First Amendment rights to use the copyrighted works of others."²

4 STATEMENT OF FACTS

5 A. History Of Copyright Duration.

6 The Nation's copyright laws have adopted 5 different terms of protection for
7 copyrights, each change increasing the duration of the term of protection. These
8 terms were set at 28 years beginning in 1790; 42 years beginning in 1831; 56 years
9 beginning in 1909; approximately 75 years beginning in 1976; and approximately
10 95 years beginning in 1998.³ In each change, subsisting copyrights also received
11 the benefit of extended terms.

12 **1. Act of 1790.** The Statute of Anne, enacted in England in 1710, protected
13 certain classes of authors for two 14 year terms, provided the author survived the
14 first term.⁴ Under the Articles of Confederation, 12 of the 13 states had modeled

These arguments were not raised in the Appellant's Brief ("App. Br."), and no further reference to them is made in this brief.

² J.A. 76 (quoting *United Video v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989)).

³ The 1976 and 1998 laws changed calculation to the life of the author plus terms of 50, then 70 years. Terms of life plus a fixed term can be compared to fixed terms. A 1961 Report to Congress by the Register of Copyrights sets out statistical data for the period 1930 through 1955, reflecting that the "average span between [the author's] median age at publication and age at death" is 20 years. Therefore, the Register concluded that a term of life plus 50 years would roughly correspond with a fixed term of 70 years. The Report also suggested that an additional six years should be added to compensate for the increase in life expectancy during the period since the data was collected. Therefore, life plus 50 years is approximately equal to a 75 year fixed term; life plus 70, a 95 year term. Report of the Register of Copyrights on the General Revision of U.S. Copyright Law, House Comm. on the Judiciary, 87th Cong. 1st Sess. (Comm. Print July 1961), at 50.

⁴ 8 Anne, ch. 19, 1710.

1 copyright acts on the Statute of Anne. However, 6 states did not follow the Statute
2 of Anne in either the number or length of the terms of protection.⁵

3 The first federal copyright statute, also modeled on the Statute of Anne, was
4 enacted by Congress in 1790. The statute provided copyright protection for an
5 initial period of 14 years, and , if the author were a U.S. citizen still living at the
6 expiration of the initial 14 year term, a further term of 14 years.⁶ The statute
7 extended the same terms of protection both to newly created works and to works
8 with subsisting copyrights.⁷

9 **2. The Act of 1831.** In 1831, Congress increased the initial term of
10 copyrights from 14 to 28 years. The additional renewal period remained 14 years,
11 making the total potential life of the copyright 42 years.⁸ The House Judiciary
12 Committee’s Report explained that the change was intended “to place authors in
13 this country more nearly on an equality with authors in other countries.”⁹
14 Congress noted that most European nations, including England, had adopted much
15 longer periods of protection for copyrighted works, and that the United States was
16 “very far behind” other countries in protecting intellectual property.¹⁰

⁵ James J. Guinan, *Duration of Copyright, Copyright Office Study No. 30, Subcomm. on Patents, Trademark, and Copyrights of the Senate Comm. on the Judiciary*, 86th Cong. 2d Sess., COPYRIGHT LAW REVISION STUDIES 1 (1 Comm. Print 1960)

⁶ Act of May 31, 1790, §§ 1 and 3, 1 Stat. 124-125.

⁷ Act of May 31, 1790, § 1.

⁸ Act of Feb. 3, 1831, § 1-2, 4 Stat. 436.

⁹ 7 Register of Debates in Congress, 21st Cong. 2d Sess., App. CXIX (Dec. 17, 1830).

¹⁰ Act of Feb. 3, 1831, §1-2.

1 The 1831 statute, like its predecessor, also extended terms of subsisting
2 copyrights.¹¹ The statute amended the Copyright Act to permit copyrights to be
3 renewed for an additional 14 year term if either the author or the author's widow or
4 children were still living upon the expiration of the initial 28 year term.¹² The 1831
5 Act expressly made the extended copyright term applicable to pre-existing works
6 with copyrights that had not yet expired.¹³

7 **3. The Act of 1909.** The duration provisions of the Act of 1831 remained
8 largely unchanged until 1909, when Congress enacted a comprehensive revision of
9 the copyright laws.¹⁴ The 1909 Act left the initial copyright term unchanged at 28
10 years, and extended the renewal period from 14 to 28 years, making the maximum
11 term of copyright protection 56 years.¹⁵ It permitted copyrights to be renewed and
12 extended by the author or his heirs.¹⁶ The longer renewal term was applied both to
13 works yet to be published and to pre-existing works with subsisting copyrights.¹⁷

14 **4. The Copyright Act of 1976.**

15 In 1976, Congress fundamentally altered the method of computing copyright
16 terms by adopting a basic copyright term for individual authors measured by the life

11/ *Id.*

12/ *Id.*, § 2.

13/ Act of Feb. 3, 1831, ¶ 16.

14/ Act of March 4, 1909, 35 Stat. 1075-1088.

15/ *Id.*, § 23.

16/ *Id.*

17/ *Id.*, § 24.

1 of the author plus fifty years.¹⁸ A basic term of copyright protection equal to the
2 life of the author plus 50 years had been recommended for members of the Berne
3 Convention;¹⁹ it became mandatory for Berne Convention members in 1948, and
4 “by 1976 had been adopted by a substantial majority of foreign nations.”²⁰ Since
5 the basic term was to be computed from the author’s death, special provisions were
6 needed to “deal with cases where the authorship is not revealed or where the
7 ‘author’ is not an individual.”²¹ Accordingly, section 302 of the Act provided a
8 term of 75 years from first publication or 100 years from creation, whichever is
9 shorter, for anonymous works, pseudonymous works, and works made for hire.²²
10 The House Judiciary Committee’s Report explained that, “[i]n general, the terms in
11 these special cases approximate, on the average, the term of the life of the author
12 plus 50 years established for other works.”²³

13 The 1976 Act afforded parallel extended protection to subsisting copyrights.
14 A maximum term of 75 years after publication was adopted for pre-1978 works
15 with subsisting copyrights, including an initial term of 28 years and a renewal period

18/ Pub. L. No. 94-553 § 301, 90 Stat. 2541, 2572 (1976).

19/ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed Paris, May 4, 1896, revised Berlin, Nov. 13, 1908, 1 L.N.T.S. 217, completed Berne, Mar. 20, 1914, revised Rome, June 2, 1928, 123 L.N.T.S. 233, revised Brussels, June 26 Brussels, June 26, 1948, 33 U.N.T.S. 217, revised Stockholm, July 14, 1976, 828 U.N.T.S. 221, revised Paris, July 24, 1971 U.N.T.S., 943 U.N.T.S. 178 (“Berne Convention”)

20/ H. R. Rep. N. 94-1476, 94th Cong. 2d Sess. 135 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5751. At that time, most of the developed and industrialized countries, with the exception of the United States, belonged to Berne. *See* Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 321 (Centre for Commercial Law Studies Queen Mary College 1987)

21/ *Id.*, 5753.

22/ Pub. L. 94-553 at § 302(c).

23/ H. Rep. No. 94-1476 at 138, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5754. *See* note 3, *supra*, concerning the comparability of these terms to life terms.

1 of 47 years.^{/24} The Report of the House Judiciary Committee reflects that the fixed
2 term of years (rather than the life plus 50 year standard) was retained for pre-1978
3 works with subsisting copyrights because “[a] great many of the present
4 expectations in these cases are the subject of existing contracts, and it
5 would be unfair and immensely confusing to cut off or alter these interests.”^{/25} The
6 extended period of protection, like other rights associated with a copyright, are
7 vested in the author unless and until there has been a valid transfer of ownership of
8 the copyright by the author.^{/26}

9 **5. The Act of 1998.** On October 29, 1993, the European Union “EU”, a
10 consortium of European nations, issued a Directive on Term that was intended to
11 harmonize the terms of copyrights among member countries of the EU.^{/27} The
12 Directive required each member country of the EU to implement a basic copyright
13 term equal to life of the author plus 70 years, thus extending the previous
14 international standard embodied in the Berne Convention by 20 years.^{/28} The
15 Directive also required member countries of the EU to adopt a “rule of the shorter

²⁴ Pub. L. No. 94-553, 90 Stat. 2572 at § 304.

²⁵ H. Rep. 94-1476 at 139, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5755.

²⁶ 17 U.S.C. § 201(a) and (d). Even if the copyright had previously been transferred, the 1976 Act incorporated a special provision designed to ensure that, wherever feasible, authors and their families, rather than transferees, would have the opportunity to benefit from the year extension of the renewal period for pre-1978 works. Specifically, the statute created a right of termination under which the author, or certain designated surviving members of the author’s family, may terminate a prior transfer of a copyright effective at the end of the original 56 year term. Pub. L. No. 94-553, 90 Stat. 2574-2575 at § 304(c). The termination right was granted for all pre-1978 works with subsisting copyrights other than copyrights in works made for hire. *Id.*

²⁷ *The Copyright Term Extension Act of 1995, Hearing before the Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. at 11 (Sept. 20, 1995) (“*Senate CTEA Hearing*”) (Statement of Marybeth Peters, Register of Copyrights).

²⁸ *Id.*, 12.

1 term” with respect to countries outside of the EU.²⁹ Under that rule, the EU would
2 provide protection for copyrighted works for the “shorter term” applicable in the
3 country of origin of a particular copyrighted work.³⁰

4 On March 2, 1995, Senator Hatch introduced S. 483, the central terms of
5 which were ultimately incorporated into the CTEA. The CTEA adopted a basic
6 term of copyright protection for works created on or after January 1, 1978, equal to
7 the life of the author plus 70 years.³¹ Like the 1976 Copyright Act that preceded it,
8 the CTEA substituted a fixed term of copyright protection (intended to approximate
9 the life plus 70 year term otherwise applicable) for certain types of works for which
10 the life of the author cannot be ascertained (anonymous and pseudonymous works)
11 and “works made for hire” created by authors that are corporate entities.
12 Specifically, it established a fixed copyright term of 95 years after publication or 120
13 years after creation of the work, whichever is shorter.³²

14 Like all preceding Acts amending copyright duration, the CTEA also extends
15 the terms of subsisting copyrights. The CTEA applies the same 95 year term to
16 pre-1978 works with copyrights subsisting in their renewal term upon the date of
17 enactment of the CTEA.³³

18 The CTEA also created a right of termination similar to that adopted in 1976
19 under which the author, or certain surviving members of the author’s family, can

29/ *Id.*

30/ The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827.

31/ *Id.*, § 102(b)(1) (amending 17 U.S.C. § 302(a)).

32/ *Id.*, § 102(b)(3) (amending 17 U.S.C. § 302(c)).

33/ Section 102(d)(1)(B) of the CTEA, (amending 17 U.S.C. § 304(b)).

1 terminate a prior transfer of a copyright effective at the end of the original 75 year
2 term.^{/34}

3 **B. District Court Decision.**

4 The district court granted the Government’s motion for judgment on the
5 pleadings and denied plaintiffs’ motion for judgment on the pleadings, or, in the
6 alternative, summary judgment. The district court rejected plaintiffs’ First
7 Amendment arguments on the ground that they had been already decided by this
8 Court in *United Video v. FCC*.^{/35} The district court rejected plaintiffs’ “limited
9 Times” challenge on the grounds that this judgment is committed to the discretion
10 of Congress and that Congress has authority to enact retrospective laws under the
11 copyright clause.^{/36}

12 This appeal was taken from that judgment.

13 **SUMMARY OF ARGUMENT**

14 **I. The Extension of the Terms of Subsisting Copyrights by Twenty** 15 **Years Is Within Congress’ Article I Powers.**

16 **A. Standard Of Review.**

17 This Court has held that “judicial review of challenges to congressional power
18 based upon the supposed limits of the Copyright Clause is limited * * *,” [and] “the
19 courts will not find that Congress has exceeded its power so long as the means
20 adopted by Congress for achieving a constitutional end are “appropriate” and
21
22

^{34/} The termination right provided by 17 U.S.C. § 304(d) supplements those granted in the 1976 Act at 17 U.S.C. §§ 203(a)(3) and 304(c).

^{35/} J.A. 75, *United Video v. FCC*, 890 F2d 1173.

^{36/} J.A. 76.

1 “plainly adapted” to achieving that end.’³⁷ Thus, a rational connection between
2 means and end will suffice to uphold Congress’ legislation.³⁸ The legislative history
3 discloses a variety of such rational bases.

4 **B. Ensuring A Fair Return To The Owners Of Subsisting Copyrights**
5 **Is A Rational Basis For Extending The Term Extension Of Subsisting**
6 **Copyrights.**

7
8 In order to achieve public purposes, Congress enacts copyright terms to
9 assure authors that they will receive a fair return for their labor. To this end, the
10 1976 Act encouraged authors to create and publish new works with the expectation
11 that their copyright protection would last not only for their lives, but for the lives of
12 their children, by enacting a copyright term of 50 years plus the life of the author.
13 Twenty years experience convinced Congress that this goal had not been achieved,
14 due to increases in life expectancy. One goal of the CTEA was to correct this
15 failure by enacting a longer term that would, in fact, achieve the protection of the
16 author for his life and that of his children. Correcting failures of prior laws to
17 achieve the intended inducement is reasonably related to the goal of the Copyright
18 Clause and is itself a rational basis for term extension of subsisting copyrights.
19 Moreover, the extension of the terms of subsisting copyrights not only does justice,
20 but it also creates incentives for the creation of new works. People have more
21 incentive to create new works within a system in which the Government keeps its
22 promises.

³⁷ *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied* 455 U.S. 948 (1982).

³⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

1 In addition, Congress believes that a fair return also be commensurate with
2 the marketable lives of creative works. Due to changed circumstances, Congress
3 concluded that copyright holders are obtaining less than a fair portion of the
4 marketable life of a product, and it corrected that error. Similarly, potential authors
5 will be more inclined to produce new works knowing that Congress will assure
6 them a fair portion of the marketable life of a product, should circumstances change.

7 **C. Establishing A Greater Degree Of International Harmony Is A**
8 **Rational Basis For Extending The Terms Of Subsisting Copyrights.**

9
10 The certainty and simplicity that uniform international copyright terms bring
11 to international business dealings is a benefit to copyright holders. It makes the
12 exercise of their rights safer and more effective. A copyright act that brings such
13 benefits to American authors is thus a means of securing the rights of authors,
14 which is one of the goals of the Copyright Clause. It is widely believed that such
15 harmonization is now especially urgent in order to counteract the threats of the
16 digital age. This benefit, sought by both the 1976 copyright legislation and CTEA,
17 is sufficient in itself to justify Congress' enactment of term extensions to subsisting
18 copyrights. Moreover, viewing the copyright system as a whole, authors will have
19 more incentive to produce new works within a system that will attempt to secure
20 authors' rights in the future in changing circumstances.

21 **D. Providing Increased Resources To Stimulate Creation Of New**
22 **Works and To Preserve Existing Works Is A Rational Basis For**
23 **Extending The Terms Of Subsisting Copyrights In Works For Hire.**

24
25 A work made for hire is owned by the employer of the people who create the
26 work. The CTEA extends these terms by 20 years. The principal class of works for
27 hire that have significant economic value at the end of the former 75 year term of

1 protection are motion pictures. Congress concluded that a term extension would
2 provide an additional income stream that would stimulate these companies to
3 produce new works of art. On this basis, Congress has constitutional authority to
4 extend the terms of subsisting copyrights in works for hire. In addition, the 20 year
5 extension promotes the preservation of art. Recent technological developments have
6 created a unique opportunity to restore and preserve many artistic works from the
7 1920s and 1930s that might otherwise degrade. However, there is a disincentive to
8 invest the sums of money necessary to transfer these works to a digital format,
9 absent some assurance of an adequate return on that investment. By extending the
10 current copyright term for works that have not yet fallen into the public domain, the
11 CTEA creates the possibility that present copyholders might recoup their
12 investment.

13 **E. The CTEA Does Not Violate The Originality Or “Limited Times”**
14 **Requirement Of The Copyright Clause Of The Constitution.**

15
16 **1. The requirement of originality is not violated.** Plaintiffs argue that at
17 the time the copyright extension takes effect, the “novelty has worn off,”³⁹ so that
18 a work is no longer an original work as required by the Copyright Clause. But the
19 purpose of the originality requirement is to determine whether a work is eligible for
20 copyright protection or is already in the public domain. Works with subsisting
21 copyrights are, by definition, not a part of the public domain – they are within the
22 exclusive domain of the copyright owner. Originality, therefore, is a condition
23 relating to eligibility for a new copyright. It has nothing to do with extending the
24 term of existing copyrights, which have already satisfied the condition of eligibility.

1 The argument that when a copyrighted work reaches the end of its original
2 term, “the novelty has worn off,” confuses the public’s perception of a work with a
3 condition of eligibility for copyright.

4 **2. The “limited Times” requirement of the Constitution is not violated**
5 **by extending the term of a subsisting copyright.** Plaintiffs note that the
6 extension of terms of subsisting copyrights reduces the supply of previously
7 protected works that would enter into the public domain. They argue that because
8 there are no balancing incentives, the Constitution is violated. But the extension
9 does provide incentives. And, in any event, the importance of the public domain as
10 an element in promoting speech is a balance that must be struck by Congress.

11 **3. Plaintiffs’ “limit” and “originality” arguments contradict centuries**
12 **of national tradition.**

13 **a. The CTEA is consistent with the national tradition.** The CTEA
14 follows the pattern of every major revision to the law governing copyright, enacted
15 by different Congresses, including the First Congress. And it follows the trend of all
16 of these prior changes, in which the term of protection has steadily increased by
17 relatively modest and equal amounts. The terms of extension have been from 28
18 years, to 42 years, to 56 years, to approximately 75 years, to, currently,
19 approximately 95 years. A continuous, undisputed tradition that reaches into four
20 different centuries is nearly conclusive. Plaintiffs, to prevail, must do far more than
21 provide an alternate reading to a clause of the Constitution.

^{39/} App. Br. 26

1 **b. Upholding the CTEA’s extension of the terms of subsisting**
2 **copyrights does not mean Congress need not comply with the “limited**
3 **Times” provision of the Constitution.** In essence, plaintiffs’ argue that upholding
4 the CTEA drains the term “limited” of any meaning, and any term would be as
5 valid as a term of 20 years. It may well be that some extensions are so long that a
6 court could conclude that the Congress has in effect created an unlimited term. But
7 this case concerns a term extended on the basis of alterations in the traditional
8 indicia by which the fairness of a term is measured: the life of the author and his
9 offspring, and the commercial life of his products, have lengthened; harmony with
10 criteria of other nations is desirable; and a unique opportunity to promote and
11 secure art is at hand. An extension of subsisting copyright terms on such bases
12 provides no occasion for the Court to speculate upon whether or when a term
13 extension, lacking such rational and traditional predicates, would become
14 constructively unlimited.

15 **II. Congress Did Not Violate the First Amendment by Extending The**
16 **Term of Copyright Protection.**

17
18 **A. Plaintiffs Lack Standing To Challenge The Prospective Application**
19 **Of The CTEA.**

20
21 Plaintiffs are either individuals or entities whose sole allegations of injury
22 concern the effect the CTEA has on their ability to go about their business. No
23 plaintiff alleges or intimates that it will be injured by the CTEA’s extending the
24 copyright terms of new works. Lacking injury, they lack standing.

25 **B. Plaintiffs Have No First Amendment Right To Reproduce The**
26 **Copyrighted Works Of Others.**
27

1 Plaintiffs argue that the CTEA is a content-neutral regulation of speech which
2 can be justified if it (1) advances important Government interests unrelated to the
3 suppression of free speech, and (2) does not burden substantially more speech than
4 necessary to further [those] interests.

5 **1. This Court has held that because only expression and not ideas can**
6 **be copyrighted, plaintiffs lack a First Amendment right to use the works of**
7 **subsisting copyright owners.** The district court correctly concluded that this case
8 is controlled by this Court's decision in *United Video, Inc. v. FCC*, where the
9 Court stated:

10 [P]etitioners desire to make commercial use of the copyrighted works
11 of others. There is no first amendment right to do so. Although there
12 is some tension between the Constitution's copyright clause and the
13 first amendment, the familiar idea/expression dichotomy of copyright
14 law, under which ideas are free but their particular expression can be
15 copyrighted, has always been held to give adequate protection to free
16 expression.⁴⁰

17
18 **2. Plaintiffs have failed to distinguish this case from *Harper* and**
19 ***United Video*.** Plaintiffs argue that this case differs from *United Video* because they
20 are challenging the validity of the statute, and not merely demanding a right to use
21 the property of others that is protected by copyright, as were the plaintiffs in *United*
22 *Video*. But this is a distinction in phrasing, not in substance. The assertion by
23 plaintiffs in *United Video*, that they had a First Amendment right to use material
24 that is protected by copyright laws, could have succeeded only if the copyright law
25 is unconstitutional insofar as it forbids the use plaintiffs wish to make of it.

⁴⁰ *United Video, Inc. v. FCC*, 890 F.2d at 1191.

1 created by an author, it is no longer possible to provide the author with an incentive
2 to create that work: What exists needs no incentive to be brought into existence.
3 Plaintiffs conclude, therefore, that the enactment of additional benefits for subsisting
4 copyrights – such as an extension of the term of subsisting copyrights – exceeds
5 Congress’ powers under the Copyright Clause.

6 **A. Standard Of Review.**

7 In *Stewart v. Abend*, the Supreme Court recognized that a court’s review of
8 Congress’ choice of the duration of copyright protection is exceedingly deferential:

9 [The] evolution of the *duration of copyright protection* tellingly
10 illustrates the difficulties Congress faces in attempting to “secur[e] for
11 limited Times to Authors * * * the exclusive Right to their respective
12 Writings.” * * * [I]t is not our role to alter the delicate balance
13 Congress has labored to achieve.⁴³

14
15 In *Schnapper v. Foley*,⁴⁴ this Court reasoned in the same vein as *Stewart v. Abend*.
16 Plaintiffs in *Schnapper*, like plaintiffs in this case, had argued that Congress’s
17 legislative power under the Copyright clause “only [referred] to the need to provide
18 economic incentives * * *.”⁴⁵ The Court noted that “judicial review of challenges
19 to congressional power based upon the supposed limits of the Copyright Clause ‘is
20 limited.’”⁴⁶ The Court held that under the settled construction of the Necessary
21 and Proper Clause, “[t]he courts will not find that Congress has exceeded its power
22 so long as the means adopted by Congress for achieving a constitutional end are

⁴³ *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (emphasis added) (citations omitted).

⁴⁴ *Schnapper v. Foley*, 667 F.2d 102.

⁴⁵ *Schnapper v. Foley*, 667 F.2d at 112.

⁴⁶ *Schnapper*, 667 F.2d at 112 (quoting with approval *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979), cert. denied 445 U.S. 917 (1980)).

1 “appropriate” and “plainly adapted” to achieving that end.’⁴⁷ Thus, the
2 appropriate standard of review for claims such as those made by plaintiffs is lenient.
3 A “rational basis” – that is, a rational connection between means and end – will
4 suffice to uphold Congress’ legislation.⁴⁸ Under this lenient standard of review, the
5 legislative history discloses a variety of rational bases for the CTEA that are
6 appropriate and plainly adapted to achieving the ends of the Copyright Clause.

7 **B. Ensuring A Fair Return To The Owners Of Subsisting Copyrights**
8 **Is A Constitutional Basis For Congress To Extend The Terms Of**
9 **Subsisting Copyrights.**

10
11 Prior to the CTEA , due to new conditions, the Copyright Act no longer
12 provided a fair return to authors with subsisting copyrights. The theory underlying
13 the Copyright Clause is that if authors are promised a fair return for their works,
14 they will serve the public interest by publishing and disseminating their works. If
15 the fair return that induced authors to publish is dissipated by future conditions, the
16 promise of a fair return provides less inducement to present authors to publish. If,
17 on the other hand, authors work within a system in which changing conditions are
18 not allowed by Congress to undercut the worth of the fair return that was promised,
19 published authors will have a stronger incentive to publish new works and thus
20 serve the public interest. Therefore, it promotes the progress of the arts to modify
21 the terms of subsisting copyrights in light of changing conditions, and, thereby, it
22 satisfies the underlying theory of the Copyright Clause.

47/ *Id.*

48/ *United States v. Carolene Prods. Co.*, 304 U.S. at 152. *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

1 **1. The goals of the 1976 Copyright Act were to protect an author’s**
2 **return for at least the life of the author and his children.** “The rights
3 conferred by copyright are designed to assure contributors to the store of
4 knowledge a fair return for their labors.”⁴⁹ There are no inherent guides or
5 principles that determine what a “fair” return is. Historically, a fair return for
6 individual authors has included a concern that the economic benefits of copyright
7 extend to the author through his old age and to his dependents. As the Register of
8 Copyrights stated in 1962, while Congress was considering legislation to extend
9 subsisting copyrights until the enactment of a general revision of the Copyright
10 Act,⁵⁰ the “principal reason * * * [of such extensions is] to assure the benefits of
11 copyright to the author during his old age or to his dependents, a point which has
12 been made again and again this morning.”⁵¹ Thus, with the increased life
13 expectancy due to medical breakthroughs, extension of the copyright law was seen
14 as necessary by many.⁵² The House Report noted: “It has been suggested that the

⁴⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

⁵⁰ See Pub. L. No. 87-668, 76 Stat. 555 (1962).

⁵¹ *Extending the Duration of Copyright Protection in Certain Cases: Hearing Before Subcomm. No. 3 of the Comm. on the Judiciary*, 87th Cong. 12 (1962) (“Hearing”) at 62 (testimony of Abraham L. Kamenstein). See also, *Hearing*, at 4 (statement of Hale Boggs) (extending the protection would enable authors “many of whom are alive, whose works were published in the period between 1906 and 1911” to “continue to earn their livelihood and to support themselves out of the earnings derived from those of their works which still enjoy public favor. The families of creators who have died will be able to maintain themselves as self-supporting citizens from the proceeds of their patrimony.”); *Hearing*, at 9 (statement of John Schulman) (“The authors of these works, many of whom are still living and who wrote during a lush period of our national culture, will be deprived of their property....”); *Hearing*, at 25 (Marc Connelly, counsel for Authors League of America) (“This term assures that he can participate in income from his works so long as he lives; and it permits his family and heirs to have the benefits of the literary property he has created for a limited time after his death”).

⁵² The expression of such sentiments was legion. Representative Boggs argued that the historical underpinnings of the 1831 and 1909 copyright revisions increasing the terms of subsisting copyrights were also, in great part, the results of the increased life span of the American people, and that the 1976 Copyright Act should take the same matters into consideration. *Hearing*, 3-4 See also *Hearing*, 23 (testimony of Helen Sousa Abert, daughter of John

1 term of copyright has been lengthened from time to time in a manner reflecting the
2 increased life expectancy.”⁵³ With such goals in mind, Congress, in the 1976
3 Copyright Act, changed the general formula for calculating the term of copyright
4 protection from a fixed term to a term of life of the author plus 50 years.

5 **2. One goal of the CTEA’s term extensions was to keep the promise**
6 **made in the 1976 Copyright Act to provide authors with a fair return.** The
7 experience of 20 years under the 1976 Copyright Act convinced Congress that the
8 goal of the 1976 act – providing copyright protection for authors for their lives and
9 for their children – had not been achieved. As Senator Feinstein, one of the
10 sponsors of the CTEA stated:

11 The fundamental animating principle of copyright protection was – and
12 remains – assuring that the Nation’s most creative individuals have and
13 retain a sufficient economic incentive to continue to craft
14 * * * the incomparable mosaic of our Nation’s cultural life. * * * Such
15 incentive has been considered to be the right to profit from licensing
16 one’s work during one’s lifetime and to take pride and comfort in
17 knowing that one’s children – and perhaps their children – might also
18 benefit from one’s posthumous popularity. * * * Human longevity,
19 however, is increasingly undermining this fundamental precept of
20 copyright law, * * * and with it the economic incentive deemed
21 essential by the authors of the Constitution.⁵⁴

22 Likewise, Senator Hatch stated:
23
24

Phillip Sousa) (“The Congress, I am sure, has passed a number of laws that suit the change and progress of our times. As the science of geriatrics advances, the copyright laws should keep pace, just as the others have said before me.”); *Hearing*, at 11 (testimony of John Schulman) (“I need not remind the committee of the great progress that has been made in this country which has resulted in the increase of the lifespan of our population. Our people live longer; and our authors live longer; their period of creativity starts earlier and ends later. What was adequate in 1909 is not adequate today.”); *Hearing*, at 68 (statement Burton Lane, President, American Guild of Authors and Composers) (“It is highly incongruous that while science has focused much of its progress upon lengthening the lives of our citizens, many of the most creative of these may be deprived of necessities of life by a quirk in the structure of our laws.”).

⁵³ H.R. Rep No. 87-1742, at 2.

⁵⁴ 141 Cong. Rec. S3393 (daily ed. March 2, 1995).

1 20 years ago, Mr. President, Congress fundamentally altered the way
2 in which the U.S. calculates its term of copyright protection by
3 abandoning a fixed-year term of protection and adopting a basic term
4 of protection based on the life of the author. In adopting the life-plus-50
5 term, Congress cited three primary justifications for the change
6 [including] * * * the insufficiency of the U.S. copyright term to
7 provide a fair economic return for authors and their dependents
8 * * *. Developments over the past 20 years have led to a widespread
9 reconsideration of the inadequacy of the life-plus-50-year term * * *.
10 Among the main developments is the effect of demographic trends,
11 such as increasing longevity and the trend toward rearing children later
12 in life, on the effectiveness of the life-plus-50 term to provide adequate
13 protection for American creators and their heirs.⁵⁵

14
15 Similarly, the Senate Judiciary Committee was also concerned that the terms
16 established by the 1976 Copyright Act had become “increasingly inadequate to
17 protect some works for even one generation of heirs as parents are living longer and
18 having children later in life.”⁵⁶ Consequently, the Committee concluded that an
19 additional 20 years of copyright protection was necessary “[i]n order to reflect
20 more accurately Congress’ intent and the expectation of America’s creators that the
21 copyright term will provide protection for the lifetime of the author and at least one
22 generation of heirs * * * .”⁵⁷ That is, in 1976, Congress was not merely granting
23 authors an arbitrary term of 50 years plus life. Rather, the term was a means to an
24 end: The 1976 Act was encouraging authors to create and publish new works with
25 the expectation that their copyrights would last not only for their lives, but for the
26 lives of their children.

27 This intended inducement was not achieved in fact. Thus, one goal
28 underlying Congress’ enactment of the CTEA was to correct the failure of the 1976

⁵⁵ 144 Cong. Rec. S12377-01, S12378.

⁵⁶ S. Rep. No. 315, 104th Cong., 2d Sess, at 10 (July 10, 1996) (“*Senate CTEA Report*”).

1 Act. A longer term was called for in order to achieve the protection that had been
2 intended and expected.

3 To be sure, the ultimate aim of providing a fair return for creative labor is a
4 public purpose, “to stimulate artistic creativity for the general public good.”⁵⁸
5 Correcting failures of previous laws to achieve the intended fair result to authors is
6 reasonably related to the goal of the Copyright Clause and is itself a sufficient basis
7 upon which Congress could have extended the terms of subsisting copyrights.⁵⁹
8 However, even if plaintiffs’ arguments concerning the need for “incentives” had
9 merit, Congress’ extension of subsisting copyrights has that effect. Potential
10 authors, aware that Congress is attentive to ensuring that they will receive a “fair
11 return” that will not be frustrated by future, unpredicted contingencies, will have a
12 greater incentive to produce works. Plaintiffs’ error lies in limiting their focus to the
13 immediate beneficiaries of the benefit bestowed. When one’s viewpoint shifts to the
14 functioning of the copyright system as a whole, the incentive provided by Congress’
15 traditional extensions of subsisting copyrights is clear. People have more incentive
16 to create new works within a system in which the Government keeps its promises.

17 **3. The CTEA term, under present conditions, no longer provides**
18 **authors with subsisting copyrights a fair share of the marketable life of a**

⁵⁷ *Id.* 11.

⁵⁸ This Court has stated, not each exercise of the copyright power need “be shown to promote the useful arts.” 667 F.2d at 112. *See also Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932). *See Kendall v. Winsor*, 62 U.S.-(21 How.) 322, 327-328 (1858); *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 241-242 (1832).

⁵⁹ In *Schnapper*, where the Court was concerned with the ability of the Government to obtain copyrights in works commissioned by the Government, the Court emphasized that the introductory language of the Copyright Clause – “To promote the Progress of Science and useful Arts” – does not place “a limit on congressional power,” and not

1 **work.** Members of Congress also expressed concern that the holders of copyrights
2 were no longer, due to changed circumstances, deriving a fair share of of the
3 marketable life of their works. As Senator Hatch noted, there was widespread
4 concern in Congress that:

5 The U.S. copyright term [has failed] to keep pace with the substantially
6 increased commercial life of copyrighted works resulting from the
7 rapid growth in communications media. * * * * [U]nprecedented
8 growth in technology over the last 20 years, including the advent of
9 digital media and the development of the national Information
10 Infrastructure and the Internet, have dramatically enhanced the
11 marketable lives of creative works.⁶⁰

12
13 Implicit in Senator Hatch’s comments is that a fair return to the holders of a
14 copyright should also be commensurate with the marketable lives of creative
15 works.⁶¹ Congress has broad flexibility to implement the stated purpose of the
16 Framers by selecting the policy that in its judgment best accomplishes the
17 constitutional aim. Hence considerations such as the marketable life of a product are
18 among reasonable bases for establishing the fair term limits that should be afforded
19 to copyright holders. If Congress recognizes that, due to changed circumstances,

each exercise of the copyright power need “be shown to promote the useful arts.” *Schnapper*, 667 F.2d at 112 (citations omitted).

⁶⁰ See also Register of Copyrights, Copyright Law Revision, 87th Cong., 1st Sess., 6 (Comm. Print 1961) (emphasis added):

[The limitations on copyright] should be broad enough to give them a fair share of the *revenue to be derived* from the market for their works.

⁶¹ See also, e.g., (Statement of Mr. George David Weiss, President, Songwriters Guild of America) “Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright term Extension; and Copyright Per Program Licenses,” Hearing Committee of the Judiciary; Subcommittee on Courts and Intellectual Property, 98-H521-9, June 27, 1997 (p. 86).

There is yet another, related reason why a 20 year extension is important to creators. Technological developments over the last two decades have greatly increased the commercial life and value of copyrighted works, even those that are older. The CD and the VCR are obvious examples of new technologies that have and will increase creators’ rewards. Moreover, expanded cable television,

1 copyright holders are obtaining less than what Congress determines to be a fair
2 portion of the marketable life of a product, it may correct this error. And, similarly,
3 potential authors, be they individuals or companies, will be more inclined to produce
4 new works knowing that Congress will assure them a fair portion of the marketable
5 life of a product, should circumstances change.

6 **C. Harmonizing Copyright Laws With Those Of Foreign Nations Is A**
7 **Rational Basis For Extending The Terms Of Subsisting Copyrights.**

8
9 The certainty and simplicity that uniform copyright terms bring to
10 international business dealings is a benefit to copyright holders. It makes the
11 exercise of their rights safer and more effective. A copyright act that brings such
12 benefits to American authors is thus a means of *securing* the rights of authors,
13 present and future, which is one of the goals of the Copyright Clause.⁶² This
14 benefit, sought by both the 1976 copyright legislation and CTEA, is sufficient to
15 justify Congress' enactment of term extensions to subsisting copyrights.⁶³ For
16 Congress is empowered to “secure” the rights of authors with subsisting copyrights.
17 And under the courts' settled construction of the Necessary and Proper Clause,
18 Congress may utilize “all appropriate means which are conducive or adapted to the

satellite services, and the “information superhighway” all will require programming—music and video. Creators and their heirs should benefit from these technological advances.

⁶² See generally Orrin Hatch, *Essay: Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 728 and *passim* (1998).

⁶³ See 141 Cong. Rec. E379 (daily ed. February 6, 1995) (statement of Rep. Moorhead):

The last time the Congress considered and enacted copyright term extension legislation was in 1976. At that time the House report noted that copyright conformity provides certainty and simplicity in international business dealings. * * * The 1976 law needs to be revisited since [this] objective[is] not being met.

1 end to be accomplished, and which in the judgment of Congress will most
2 advantageously effect it.”⁶⁴

3 Moreover, the current global situation makes achieving uniformity more
4 urgent. The current global trend in copyright protection is a term of the life of the
5 author plus 70 years. As Senator Hatch pointed out:

6 Of particular importance is the 1993 directive issued by the
7 European Union, which requires its member countries to implement a
8 term of protection equal to the life of the author plus 70 years by July
9 1, 1995.

10
11 According to the Copyright Office, all the states of the European
12 Union have now brought their laws in compliance with the directive.
13 And, as the Register of Copyrights has stated, those countries that are
14 seeking to join the European Union, including Poland, Hungary,
15 Turkey, the Czech Republic, and Bulgaria, are likely, as well, to amend
16 their copyright laws to conform with the life-plus-70 standard.⁶⁵

17
18 Recent technological advances, which make possible the cost-free transmission of
19 authors’ works to any part of the world, make uniform world standards and
20 international cooperation particularly important. The United States has great
21 prestige; the economic power and value of its copyrights are immense. It is evident
22 that as long as the United States has different standards, there will be no world
23 uniformity. Other nations, on the basis of the United States’ example, might set
24 different terms, which do not secure for American authors the exclusive rights to
25 their works for a fair and just time. As the Report of the Senate Judiciary
26 Committee stated:

⁶⁴ *The Legal Tender Cases*, 110 U.S. 421, 440 (1884); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 420; *Schnapper*, 667 F.2d at 112; *Mitchell Bros. Film Group*, 604 F.2d at 860.

⁶⁵ 144 Cong. Rec. S12377-01, S12378.

1 The Committee recognizes the increasingly global nature of the market
2 for U.S. copyrighted works. Uniformity of copyright laws is
3 enormously important to facilitate the free flow of copyrighted works
4 between markets and to ensure the greatest possible exploitation of the
5 commercial value of these works in world markets for the benefit of
6 U.S. copyright owners and their dependents. Indeed, in an age where
7 the information superhighway offers widespread distribution of
8 copyrighted works to almost anywhere in the world at limited costs,
9 harmonization of copyright laws is imperative to the international
10 protection of those works and to the assurance of their continued
11 availability.⁶⁶

12
13 The same points are reiterated in testimony of the Register of Copyrights before the
14 Committee:

15
16 The Copyright Office believes harmonization of the world's copyright
17 laws is imperative if there is to be an orderly exploitation of
18 copyrighted works. In the past, copyright owners refrained from
19 entering certain markets where their works were not protected. In the
20 age of the information society, markets are global and harmonization of
21 national copyright laws is, therefore, crucial. . . . [T]he development of
22 the global information infrastructure makes it possible to transmit
23 copyrighted works directly to individuals throughout the world and has
24 increased pressure for more rapid harmonization.⁶⁷

25
26 Thus, seeking uniform standards to help to “*secur[e]* * * * the exclusive Right to
27 their respective Writings” is today an urgent matter.⁶⁸

28 Moreover, as in other areas, it may reasonably be presumed that authors have
29 more incentive to produce new works within a system that is concerned to protect
30 and secure their rights in the future by seeking global harmonization to counteract
31 the threats of the digital age. Every time the Government takes steps to secure the
32 safety of the benefits that induced authors to publish in the past, the point is made

⁶⁶ Senate CTEA Report at 8.

⁶⁷ Senate CTEA Hearing at 20.

⁶⁸ Constitution, Art. I, § 8, cl. 8 (emphasis added).

1 that the Government will not allow its promises to be undercut by future
2 contingencies. Every time this happens, new writers have more incentive to
3 produce and disseminate their works to the public.

4 Plaintiffs respond that the CTEA does not establish full harmony: it brings us
5 out of harmony with some Asian countries that provide less protection, and that in
6 other respects, such as protection for corporate authors, the CTEA provides more
7 protection than does the European Union.⁶⁹

8 But harmony need not come in one fell swoop. And Congress could
9 conclude that the harmony that has been achieved – the setting of a basic term of
10 life plus 70 years – is a fundamental first step, and that it is sufficiently significant to
11 outweigh other points of disagreement. The judgment about how far to go, or how
12 much can in practice be accomplished, is one for Congress to make: “Congress
13 has the constitutional authority and the institutional ability to accommodate fully the
14 varied permutations of competing interests that are inevitably implicated by * * *
15 new technology.”⁷⁰

16 **D. Providing Increased Resources To Stimulate Creation Of New**
17 **Works and To Preserve Existing Works Is A Constitutional Basis For**
18 **Extending The Terms Of Subsisting Copyrights In Works For Hire.**
19

20 A work made for hire is owned by the employer of the people who create the
21 work “within the scope of [their] employment.”⁷¹ For such works, there is no
22 “author” by whose life a copyright term may be measured. The term of protection
23 for works for hire in the 1976 Copyright Act was set at 75 years from the date of

⁶⁹ App. Br. 44-45.

⁷⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

1 publication or 100 years from the date of creation, whichever comes first. Under
 2 the CTEA, following the general pattern of increasing terms by 20 years, these
 3 terms were extended to 95 years and 120 years, respectively.

4 **1. Extending terms of subsisting copyrights of works for hire**

5 **stimulates the production of new art.** Generally speaking, the principal class of
 6 works for hire that are likely to have significant economic value at the end of the
 7 former 75 year term of protection are motion pictures; the Copyright Office has
 8 stated that 19,465 motion pictures would have expired during the term of the
 9 CTEA extension.⁷² The stream of income generated by this great number of
 10 motion pictures can safely be assumed to be very substantial.⁷³ This stream of
 11 income is returned to companies engaged in the production of art. Congress
 12 concluded that this income stream would stimulate the creation and production of
 13 new works of art:

14 The Committee believes that the basic functions of copyright protection
 15 are best served by the accrual of the benefits of increased commercial
 16 life to the creator for two reasons. First, the promise of additional
 17 income will increase existing incentives to create new and derivative
 18 works.

*

*

*

71/ 17 U.S.C. § 101.

72/ *Funding the Arts Through a Copyright Term Extension Fee*, A Report of the Register of Copyrights at 25 (February 23, 1998.) Works derivative from motion pictures, such as “Mickey Mouse,” would also retain value. The other works that would retain significant value through the extension period, such as writings and musical compositions, are rarely works for hire. *Id.*

73/ The Senate Committee’s Report identified two sources of such increased resources. First, by virtue of the “rule of the shorter term” adopted by the EU, “[f]ailure on the part of the United States to provide equal protection for works in the United States will result in a loss for American creators and the economy of the benefits of 20 years of international copyright protection that they might otherwise have.” *Senate CTEA Report* at 7. Second, recent technological developments have extended the commercial life of copyrighted works. As a result, “the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly” *Id.* 12.

1 Second, extended protection of existing works will provide added
2 income with which to subsidize the creation of new works. This is
3 particularly important in the case of corporate copyright owners, such
4 as motion picture studios and publishers, who rely on the income from
5 enduring works to finance the production of marginal works and those
6 involving greater risks (i.e., works by young or emerging authors).⁷⁴

7
8 Although there is no requirement that the income received be used to create new
9 art, it is a fair assumption that income received by companies that produce art will
10 stimulate the production of more art. Stimulating creative activity by authors for
11 the benefit of the public is one of the principal purposes of copyright protection.⁷⁵
12 On this basis, Congress has constitutional authority to extend the terms of subsisting
13 copyrights in works for hire.

14 Plaintiffs' only relevant argument in response is that it is "implausible to
15 believe that Hollywood is waiting for the income from films released in 1923 before
16 deciding to invest in the latest edition of *Star Wars*."⁷⁶ This may or may not be
17 true. But it is not Congress' concern. Rather, Congress is concerned about an
18 additional stream of income "to finance the production of marginal works and those
19 involving greater risks (i.e., works by young or emerging authors)."⁷⁷

20 **2. Extending terms of subsisting copyrights of works for hire**
21 **stimulates the preservation of old art.** The Reports of both the House and the

⁷⁴ *Senate CTEA Report* at 12. As Jack Valenti, President of the Motion Picture Association, explained to the Senate Judiciary Committee, the ability of the American motion picture industry to finance the production of new films is dependent upon the availability of capital derived from prior works. *Id.* 90.

⁷⁵ *Sony*, 464 U.S. at 429; *Goldstein v. California*, 412 U.S. at 555; *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975).

⁷⁶ App. Br. 48. Plaintiffs also argue that Congress is wrong to assume that "by giving the grandchildren of past authors money today" more new works will be produced. App. Br. 47. Nor did Congress say this. Its only concern with stimulating production of new works of art was in the work for hire context.

⁷⁷ *Senate CTEA Report* at 12.

1 Senate Judiciary Committees reflect the fact that the CTEA’s increased copyright
2 term for pre-existing works also is intended to provide an “incentive to restore older
3 works and further disseminate them to the public.”⁷⁸ As the Senate Report shows,
4 recent technological developments have created a unique opportunity to restore and
5 preserve many artistic works from the 1920s and 1930s that might otherwise
6 degrade:

7 Until now, copyrighted works have been fixed in perishable media,
8 such as records, film, audiotape, paper or canvas. Copies or
9 reproductions of these works usually suffer significant degradation of
10 quality. The digital revolution offers a solution to the difficulties of film,
11 video and audio preservation, and offers exciting possibilities for
12 storage and dissemination of other types of works as well.

13
14 In these circumstances, incentives to preserve art fall within the goals of the
15 Copyright Clause, for they increase incentives to disseminate work to the public. As
16 the Supreme Court observed:

17 Creative work is to be encouraged and rewarded, but private
18 motivation must ultimately serve the cause of promoting *broad public*
19 *availability* of literature, music, and the other arts.⁷⁹

20
21 Amicus Eagle Foundation argues that “*preservation* of existing materials * * * does
22 not constitute promotion of *progress*” because preservation involves “avoidance of
23 decay” and progress involves “forward movement.”⁸⁰ However, plaintiffs argue
24 *passim* that allowing works to pass into the public domain promotes progress by
25 allowing others to use the material in creative ways. If there is no preservation of
26 existing, decaying materials, these decaying materials will never enter the public

⁷⁸ H. R. Rep. No. 105-452, 105th Cong. 2d Sess. 4 (March 18, 1998); *Senate CTEA Report* at 13.

⁷⁹ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. at 431-432, (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 156) (emphasis added).

1 domain. No one will ever be able to make use of them. On the other hand,
2 providing incentives to preserve this decaying material will enrich the public domain
3 with art that would otherwise be lost forever. On plaintiffs' own terms, Congress'
4 taking advantage of this *unique* opportunity to preserve old works of art in
5 permanent media fosters progress in the arts.

6 Plaintiffs also argue that preserving art is not a basis for extending the term of
7 other classes of copyrights. Whether this is true or not, the extension of term for
8 work for hire is fully justified. The justifications for extending the terms of other
9 classes of copyright have been elaborated above.

10 **E. The CTEA Does Not Violate The Originality Or "Limited Times"**
11 **Requirement Of The Copyright Clause Of The Constitution.**

12
13 **1. The originality requirement of the Constitution is not violated by**
14 **extending the term of an subsisting copyright.** Plaintiffs argue that extending
15 the term of a subsisting copyright does not differ from granting a new copyright to
16 a "work simply copied from an earlier copyrighted work."⁸¹ Plaintiffs argue this is
17 true because, at time the copyright extension takes effect, the "novelty has worn
18 off."⁸² Plaintiffs argue that this identity requires that the validity of the extension
19 must be measured by the same Constitutional conditions that govern the grant of
20 new copyrights.⁸³ Relying on cases in which the Supreme Court has held that
21 machines in the public domain cannot be patented, plaintiffs argue that extensions of

80/ Eagle Foundation Brief 9 (emphasis in original)..

81/ App. Br. 25.

82/ *Id.* 26.

83/ *Id.* 25, 26.

1 subsisting copyrights fail the Constitution’s “originality” requirement: “Just as a
2 patent cannot cover ‘existent knowledge’ from the public domain’ * * * so too may
3 a copyright not extend to ‘existent knowledge’ even if granted to the original
4 author of that knowledge.”⁸⁴

5 No court has ever equated extending a subsisting copyright to granting a new
6 copyright.

7 The purpose of the originality requirement is to determine whether a work is
8 eligible for copyright protection in the first place. The requirement that a work be
9 original is a fairly modest requirement; “it means only that the work was
10 independently created by the author (as opposed to copied from other works), and
11 that it possesses at least some minimal degree of creativity.”⁸⁵ Hence, a work that
12 is simply a copy of another work that is in the public domain is not eligible for
13 copyright because it is not an “original work of authorship.”⁸⁶ But works with
14 subsisting copyrights are, by definition, not a part of the public domain – they are
15 “within the exclusive domain of the copyright owner.”⁸⁷ They have never been a
16 part of the public domain. Only if documents become part of the public domain by
17 lapse of copyright would “originality” become a relevant concept. Originality,
18 therefore, is a condition relating to eligibility for a new copyright. It has nothing to
19 do with extending the term of existing copyrights, which have already satisfied the
20 condition of eligibility.

⁸⁴ *Id.* 27-28.

⁸⁵ *Feist Publications v. Rural Tel. Ser. Co.*, 499 U.S. 340, 345 (1990) (emphasis added).

⁸⁶ 17 U.S.C. § 102(a).

1 Plaintiffs' argument that when a copyrighted work reaches the end of its
2 original term, "the novelty has worn off," confuses the public's perception of a
3 work with a condition of eligibility for copyright.^{/88}

4 In explaining why facts could not be copyrighted, the Supreme Court noted
5 that "[t]o *qualify* for copyright protection, a work must be original to the author
6 * * * [meaning] only that the work was independently created by the author (as
7 opposed to copied from other works)."^{/89} An extension of the term of a copyright
8 is not a "copy" of a prior work. As Congress stated in the CTEA, the original
9 copyright "endures" for an additional time.^{/90}

10 **2. The "limited Times" requirement of the Constitution is not violated**
11 **by extending the term of a subsisting copyright.** Plaintiffs argue that the
12 Constitution provides Congress with the power to grant copyrights for "limited
13 Times." They argue further that "Copyright terms are appropriately 'limited
14 Times' only if they are terms that 'promote the Progress of Science.'"^{/91} Because
15 the extension of terms of subsisting copyrights "chok[es] off the supply of
16 previously protected works into the public domain," while providing no increase in
17 incentives to balance the restriction of the public domain, they argue that the
18 Constitution is violated.^{/92} Plaintiffs contend that upholding the CTEA means "there

87/ *Sony Corp. of Am. v. Universal City*, 464 U.S. 417, 433 (1984).

88/ App. Br. 26.

89/ *Feist Publications v. Rural Tel. Ser. Co.*, 499 U.S. at 346 (emphasis added).

90/ 17 U.S.C. § 304(a).

91/ App. Br. 29.

92/ App. Br. 28-30.

1 could be no limit to Congress' grant of a copyright, so long as each term was fixed
2 in length. A term of 1,000 years would be as valid * * * as a term of 10 years."⁹³

3 But no court has held that extending the term of subsisting copyrights is
4 equivalent to copyrighting a work in the public domain. To the contrary, in
5 *McClurg v. Kingsland*, in the context of examining which of two laws governed the
6 status of a patent, the Supreme Court stated that Congress may modify the benefits
7 or rights of subsisting patents:

8 [The law governing the rights of patent holders depends] on the law as
9 it stood at the emanation of the patent, together with such changes as
10 have been since made; *for though they may be retrospective in their*
11 *operation, that is not a sound objection to their validity*; the powers
12 of Congress to legislate upon the subject of patents is plenary by the
13 terms of the Constitution, and as there are no restraints on its exercise,
14 there can be no limitation of their right to modify them at their
15 pleasure, so that they do not take away the rights of property in
16 existing patents.⁹⁴

17
18 Plaintiffs are correct to note that the grants of copyrights for limited terms are
19 ultimately intended to serve the public interest. The Supreme Court has noted that:

20 [T]he limited copyright duration required by the Constitution[] reflects
21 a balance of competing claims upon the public interest: Creative work
22 is to be encouraged and rewarded, but private motivation must
23 ultimately serve the cause of promoting broad public availability of
24 literature, music, and the other arts. The immediate effect of our
25 copyright is to secure a fair return for an "author's" creative labor.
26 But the ultimate aim is, by this incentive, to stimulate artistic creativity
27 for the general good.⁹⁵

93/ App. Br. 30.

94/ *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843) (emphasis added). The Supreme Court has cited *McClurg* with approval concerning the proposition that "[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability." *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

95/ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted).

1 Inducing authors to make their works available is the public interest sought to be
2 served. Sending works more quickly into the public domain may or may not be a
3 significant element in achieving that public interest. In hearings on the CTEA, the
4 Copyright Office has noted that positions have been taken on both sides of the issue.
5 Some argued that:

6 In fact, the advantage of the “public domain” as a device for making
7 works more available to the public is highly overrated; especially if
8 availability is equated with “low cost” to the public. In contrast with
9 the fact that prices charged the public do not necessarily come down,
10 or the supply of the work increase, when copyright terminates—the
11 paperback book is evidence that copyright protection is not
12 incompatible with mass circulation at low cost to the public.⁹⁶

13
14 Plaintiffs, by contrast, place great importance upon the public domain.⁹⁷ But
15 wherever the truth may lie upon this subject, even plaintiffs agree that “[w]hether a
16 particular copyright term ‘promote[s] progress is a judgment ordinarily reserved to
17 Congress.’”⁹⁸ The Supreme Court has emphasized “[t]he judiciary’s reluctance to
18 expand the protections afforded by the copyright without explicit legislative

⁹⁶ *Statement of Marybeth Peters* 24 (quoting comments by Irwin Karp, then-Register of Copyrights, in testimony during the revision that led to the 1976 Act).

[The Copyright Office takes the position that it] does not believe that a case has been made that extension of the copyright term would diminish the creation of new works. To make such a case, we suggest comparing the experiences in countries with a shorter term to those with a longer term.” *Id.* at 25.

⁹⁷ App. 28-29.

⁹⁸ App. Br. ~~at~~ 29. Among the reasons given by the House Judiciary Committee for lengthening the 1976 Act was (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134-35):

Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author’s expense. In some cases, the lack of copyright protection actually restrains dissemination of the work since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

1 guidance * * *.⁹⁹ While there is no doubt that Congress has been granted the
2 copyright power in order to advance the public good, it is for Congress to weigh the
3 interests and strike the balances. As the Supreme Court noted:

4 As the text of the Constitution makes plain, it is Congress that has been
5 assigned the task of defining the scope of the limited monopoly that
6 should be granted to authors or to inventors in order to give the
7 public appropriate access to their work product. Because this task
8 involves a difficult balance between the interests of authors and
9 inventors in the control and exploitation of their writings and
10 discoveries on the one hand, and society's competing interest in the
11 free flow of ideas, information, and commerce on the other hand, our
12 patent and copyright statutes have been amended repeatedly.¹⁰⁰

13
14 There is no ready guidance for a court to interpret the range of the mandate of the
15 Copyright Clause. It is for Congress to judge to what extent the entry of art into
16 the public domain should take precedence over other interests.

17 **3. Plaintiffs' "limit" and "originality" arguments contradict centuries**
18 **of national tradition.** While the criteria that should be used in determining
19 whether extensions of the terms of subsisting copyrights are appropriate are not
20 obvious, there is a history of judgments about the duration of copyright in this
21 country with which CTEA is consistent and which contradicts plaintiffs' reading of
22 the Copyright Clause.

23 **a. The CTEA is consistent with the national tradition.** The copyright
24 act enacted in 1790 by the first Congress created a copyright term of 14 years,
25 renewable for an additional 14 years.¹⁰¹ This term of protection was afforded both
26 to works "already printed" and subject to protection by state copyright, as well as

⁹⁹ *Sony Corp. of Am. v. Universal City*, 464 U.S. at 430.

¹⁰⁰ *Sony Corp. of Am. v. Universal City*, 464 U.S. at 430.

1 writings “that hereafter be made and composed.”¹⁰² It is evident that
2 considerations in addition to inducing the production of new works led the First
3 Congress to extend the full term of protection to works already published. The
4 value of uniformity, for example, would have been sufficient to justify protecting
5 existing works already protected by state copyright for some period of time.

6 Since this first act, “as the technology available to authors for creating and
7 preserving their writings has changed, the governing statute has changed with it.”¹⁰³
8 There have been five substantial revisions to the statute governing copyrights,
9 including the CTEA.¹⁰⁴ On four occasions, the term of copyright was extended.¹⁰⁵
10 Each time the term was extended, the term of existing copyrights was extended to
11 provide protection to existing copyright holders that was as nearly similar as
12 possible to what was extended to copyrights for newly produced works. Each time,
13 works already in the public domain were left unaffected. Never has an extension of
14 the term of protection for new copyrights not been accompanied by parallel
15 extensions for subsisting copyrights.

16 Thus, CTEA follows the pattern of every major revision to the law governing
17 copyright, enacted by different Congresses, including the First Congress, spaced

101/ Act of 1790, 1 Stat. 124.

102/ Act of 1790, § 1.

103/ *Sony Corp. of Am. v. Universal City*, 464 U.S. at 460.

104/ Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, §§ 85-111; Act of Mar. 4, 1909, 35 Stat. 1075 (formerly codified as 17 U.S.C.); Copyright Revision Act of 1976, 90 Stat. 2541 (codified as 17 U.S.C. § 1101 *et seq.* (1982 ed)).

105/ Plaintiffs imply that Congress’ use of the Copyright power has been irresponsible because the CTEA is “the eleventh time in thirty-seven years that [Congress] has extended the term for subsisting copyrights.”App. Br.1.

1 through more than two centuries. And it follows the trend of all of these prior
2 changes, in which the term of protection has steadily increased by relatively modest
3 and equal amounts. The terms of extension have been from 28 years, to 42 years,
4 to 56 years, to approximately 75 years, to, currently, approximately 95 years.¹⁰⁶

5 This continuous national tradition suggests strongly that plaintiffs' proposed
6 construction of the Copyright Clause is wanting.¹⁰⁷ As the Supreme Court has
7 noted, in the context of a shorter national tradition:

8 The construction placed upon the constitution by the first act of 1790
9 and the act of 1802, by the men who were contemporary with its
10 formation, many of whom were members of the convention which
11 framed it, is of itself entitled to very great weight, and when it is
12 remembered that the rights thus established have not been disputed
13 during a period of nearly a century, it is almost conclusive.¹⁰⁸

14
15 In this case, a continuous, undisputed tradition that reaches into four different
16 centuries is, if anything, more than nearly conclusive. Plaintiffs, to prevail, must do
17 far more than provide an alternate reading to a clause of the Constitution.

18 **b. Upholding the CTEA's extension of the terms of subsisting**
19 **copyrights does not mean Congress need not comply with the "limited**
20 **Times" provision of the Constitution.** In essence, plaintiffs' argue that upholding
21 the CTEA drains the term "limited" of any meaning:

However, except for CTEA and the 1976 Act, the extensions to which plaintiffs refer were merely placeholders, maintaining the status quo until the revisions under consideration had been enacted.

¹⁰⁶ Congress estimated the mean time between an author's death and his obtaining a copyright at approximately 26 years, so life of the author plus 50 years is approximately 75 years. See note 3, *supra*.

¹⁰⁷ The tradition of affording new benefits to subsisting copyrights as well as newly produced documents is not limited to duration. For example, the expansion of copyright protection to include the right of public display was given to subsisting copyrights. See Edward Samuels, *The Public Domain in Copyright Law*, Copyright Soc'y U.S.A. 137, 172-73 (1993).

¹⁰⁸ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

1 [T]here could be no limit to Congress' grant of a copyright, so long as
2 each term was fixed in length. A term of 1,000 years would be as
3 valid under the government's reading as a term of 10 years. And a
4 term that retrospectively extends the copyright by 1,000 years, or that
5 recovers material from the public domain and re-protects it under the
6 copyright clause is also valid on the government's reading.¹⁰⁹

7
8 Plaintiffs are certainly correct insofar as they hypothesize that the terms fixed by
9 the CTEA are not written in stone. Unforeseen circumstances could lead Congress
10 in the future to change the terms again. For example, the recent discovery of the
11 human genome might lead to dramatic increases in life expectancy, which might
12 lead Congress to reconsider the length of copyright term again. But this case does
13 not concern whether every fixed term is within the ambit of Congress' powers
14 under the Copyright Clause. It may well be that some term extensions are so long
15 or so lacking in rational basis that a court could conclude that the Congress has in
16 effect created an unlimited term. But this case concerns a term extended on the
17 basis of changes in the indicia that have traditionally guided Congress in measuring
18 the fairness of a term: the life of the author and his offspring, has lengthened; the
19 commercial life of his products has lengthened; harmony with criteria of other
20 nations is desirable; and a unique opportunity to promote and secure art is at hand.
21 Thus, the CTEA has extended the terms of subsisting copyrights in a manner that is
22 consistent with the trend and pattern of all major copyright acts in this Country's
23 history. An extension of subsisting copyright terms on such bases provides no
24 occasion for the Court to speculate upon whether or when a term extension, lacking
25 such rational and traditional predicates, would become constructively unlimited.

26 II

¹⁰⁹ App. Brief 30.

1
2 **CONGRESS DID NOT VIOLATE THE FIRST AMENDMENT**
3 **BY EXTENDING THE TERM OF COPYRIGHT PROTECTION OF**
4 **PRE-EXISTING WORKS WITH SUBSISTING COPYRIGHTS**
5 **AS WELL AS NEWLY CREATED WORKS.**
6

7 Plaintiffs argue that the CTEA violates the First Amendment both as it applies
8 to subsisting copyrights, and as it applies to copyrights issued on new works.

9 **A. Plaintiffs Lack Standing To Challenge The Prospective Application**
10 **Of The CTEA.**
11

12 Plaintiffs argue that adding 20 years of copyright protection to works created
13 after the effective date of the CTEA is inconsistent with the First Amendment.
14 However, plaintiffs are either individuals or entities whose sole allegations of injury
15 concern the effect the CTEA has on “[their] ability to go about their business,”
16 insofar as it extends the terms of *subsisting copyrights* by 20 years.¹¹⁰ No plaintiff
17 alleges that it will be injured by the CTEA’s extending the copyright terms of *new*
18 *works*.¹¹¹

19 But the question of standing turns upon “whether plaintiff has ‘alleged such a
20 personal stake in the outcome of the controversy’ as to warrant his invocation of
21 federal-court jurisdiction and to justify exercise of the court’s remedial powers on
22 his behalf.”¹¹² As this Court noted in *Schnapper*, in the context of rejecting on
23 standing grounds a First Amendment challenge to a copyright law, plaintiffs “lack
24 standing * * * if they fail to allege any link between * * * the maintenance of the

110/ App. Br. 14

111/ See App. Br. 12-15; Plaintiffs’ Complaint J.A. 35-45.

112/ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

1 copyright[] and the purported injury.”¹¹³ Plaintiffs have made no such
2 allegation.¹¹⁴ Hence, plaintiffs lack standing to challenge the CTEA’s extension of
3 the copyright terms of newly created works.

4 **B. Plaintiffs Have No First Amendment Right To Reproduce The**
5 **Copyrighted Works Of Others.**

6
7 Plaintiffs argue that the CTEA is a content-neutral regulation of speech
8 “because it determines who can reproduce the particular *expression* of someone
9 else.”¹¹⁵ They argue that “[c]ontent-neutral regulations of speech are governed by
10 the test first announced in *United States v. O’Brien*, 391 U.S. 367 (1968) * * *
11 [under which the regulation of speech] can be upheld only if it (1) advances
12 important Government interests unrelated to the suppression of free speech, and (2)
13 does not burden substantially more speech than necessary to further [those]
14 interests.”¹¹⁶ On the ground that the Government has not shown that the CTEA’s
15 20 year extension to copyrights does not keep substantially more art from entering
16 the public domain than is necessary to further progress in the arts, plaintiffs argue
17 that the CTEA violates the *O’Brien* test and is unconstitutional.

18 **1. *O’Brien* does not apply in situations where conflicting speech**
19 **interests are at stake.** Initially, it may be noted that the *O’Brien* test has never
20 been used in situations such as this, where *competing speech interests* have been at
21 stake. Encouraging authors to publish by granting them fair returns is at least as

113/ *Schnapper v. Foley*, 667 F.2d at 113.

114/ The party attempting to invoke the powers of the court carries the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

115/ App. Br. 17 (emphasis added.)

1 much concerned with the public’s enjoying progress in the arts as is “feeding” the
2 public domain. Applying *O’Brien* in such circumstances would require the Court to
3 hold that feeding the public domain is the most significant means of serving progress
4 in the arts, and require Congress to demonstrate that any benefit provided to any
5 other means of promoting progress in the arts does not burden the public domain
6 more than is substantially necessary.

7 *O’Brien* comes into play when *other* legitimate Governmental interest are
8 competing with speech interests. *O’Brien* has no place in a court’s oversight of
9 Congress’ balance of the varying speech interests at stake in promoting art through
10 the Copyright Clause.

11 In any event, plaintiffs’ argument is foreclosed in this Circuit by existing
12 precedent.

13 **2. Because only expression and not ideas can be copyrighted, plaintiffs**
14 **lack a First Amendment right to use the works of subsisting copyright**
15 **owners.** The district court correctly concluded that this case is controlled by this
16 Court’s decision in *United Video, Inc. v. FCC*, where the Court stated:

17 [P]etitioners desire to make commercial use of the copyrighted works
18 of others. There is no first amendment right to do so. Although there
19 is some tension between the Constitution’s copyright clause and the
20 first amendment, the familiar idea/expression dichotomy of copyright
21 law, under which ideas are free but their particular expression can be
22 copyrighted, has always been held to give adequate protection to free
23 expression.¹¹⁷
24

¹¹⁶ App. Br. 17 (internal quotation marks omitted).

¹¹⁷ *United Video, Inc. v. FCC*, 890 F.2d at 1191.

1 This judgment is firmly rooted in Supreme Court precedent. In *Harper & Row*
2 *Publishers, Inc. v. Nation Enters.*, the Supreme Court held, in rejecting a First
3 Amendment challenge by a group of cable television companies who contended that
4 they had a First Amendment right to retransmit copyrighted television broadcasts:

5 [C]opyright’s idea/expression dichotomy ‘strike[s] a definitional
6 balance between the First Amendment and the Copyright Act by
7 permitting free communication of facts while still protecting an
8 author’s expression.’ 723 F.2d at 203. No author may copyright his
9 ideas or the facts he narrates. 17 U.S.C. § 102(b). See, e.g., *New York*
10 *Times Co. v. United States*, 403 U.S. 713, 726, n. (1971) (Brennan, J.,
11 concurring) (Copyright laws are not restrictions on freedom of speech
12 as copyright protects only form of expression and not the ideas
13 expressed).¹¹⁸

14
15 As *United Video* set forth, “cases in which a first amendment defense is raised to a
16 copyright claim do not utilize an *O’Brien* analysis.”¹¹⁹

17 The decisions of the Supreme Court and the D.C. Circuit in *Harper* and
18 *United Video* are controlling here. Because plaintiffs do not have a First
19 Amendment right to reproduce the copyrighted work of others in violation of the
20 Copyright Act, their First Amendment challenge to the CTEA is without merit.

21 **3. Plaintiffs have failed to distinguish this case from *Harper* and**
22 ***United Video*.** Plaintiffs argue that this case differs from *United Video* because, in
23 that case:

24 petitioners demanded a right to rebroadcast otherwise legitimately
25 copyrighted material. They were not claiming that the material at issue
26 could not be copyrighted. * * * [By contrast plaintiffs are not]
27 asserting the right to use otherwise legitimately copyrighted material *

118/ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)

119/ *United Video*, 890 F.2d at 1190.

1 * *. Instead, this challenge is to the constitutionality of the statute
2 under which the property at stake was granted.¹²⁰

3
4 But this is a distinction in phrasing, not in substance. The assertion by plaintiffs in
5 *United Video*, that they had a First Amendment right to use material that is
6 protected by copyright laws, could only have succeeded if the copyright law is
7 unconstitutional insofar as it forbids the use plaintiffs wish to make of it. *United*
8 *Video* could thus be phrased a challenge to the constitutionality of the copyright law
9 insofar as it forbids some particular use. In any event, plaintiffs have not argued
10 *why* the difference for which they contend should make any difference in the
11 Court’s First Amendment analysis. The duration of a copyright is akin to any other
12 element of the scope of copyright protection, and plaintiffs concede they have no
13 First Amendment right to challenge the scope of copyright.¹²¹

14 In addition, plaintiffs claim that applying the rule set forth in *United Video*
15 based on the distinction between expression and ideas in this context would lead to
16 absurd results such as a court’s “reject[ing] a copyright act that copyrighted the
17 United States flag, simply because it copyrighted ‘expression’ only.”¹²² The United
18 States’ flag is in the public domain. It is not subject to copyright because it is not
19 original. If plaintiffs mean that granting copyrights to works already in the public
20 domain raises different constitutional considerations, that argument has nothing to
21 do with this case. If plaintiffs mean instead that granting copyrights to a specific

120/ App. Br. 52-53.

121/ *E.g., id.*

122/ App. Br. 54.

1 item, rather than a class of items, raises different constitutional considerations, that
2 argument has nothing to do with this case.

3 **4. Plaintiffs' arguments lead to unreasonable results.** Plaintiffs'
4 arguments, if accepted, would prove too much. Plaintiffs argue, for example, using
5 valuation techniques that assume constant streams of income at assumed interest
6 rates, that the "increase in economic value [of the CTEA term prospective
7 extension] is tiny," and that the benefits of the 20 year increase are "too
8 speculative a gain" to satisfy *O'Brien's* requirement that a regulation not burden
9 substantially more speech than necessary.¹²³ It is undisputed that promoting
10 progress in the arts is an important Government interest. But for the plaintiffs, for
11 any fixed term, the Government must demonstrate that the duration of the term
12 does not withdraw substantially more art from the public domain than is necessary
13 to further progress in the arts. Such arguments would apply with equal force to any
14 of the Nation's copyright laws. It is not more demonstrable that 50 years plus the
15 life of the author, rather than 70 years, keep substantially more art from entering the
16 public domain than is necessary to promote progress in the arts to the fullest. Nor is
17 it demonstrable that the life of the author should be considered at all in such
18 calculations. Indeed, whether the term granted by the First Congress in the
19 Copyright Act of 1790, 28 years, does not keep substantially more art from entering
20 the public domain than is necessary to further to progress in the arts is not

¹²³ Not all would agree with Plaintiffs' modes of analysis. "[U]nlike real property and other forms of personal property, [a copyright] is by its very nature incapable of accurate monetary evaluation prior to its exploitation." 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 9.02, p. 9-23 (1989).

