

The Public Beneficial Interest in the Intellectual Commons: The Implications of the Public Trust Doctrine and Necessary Standing to Represent the Public Interest.

Robert I. Reis

Professor of Law

State University of New York

The Buffalo School of Law

Abstract

This presentation is based on a preliminary review of cases decided in the early formative years of Copyright law prior to 1909. The search was to identify indicators of the underlying public interest as a positive right. The preliminary belief, if that can be supported by a negative inference, is that in this early commentary and focus on the creation, perfection and enforcement of private rights, there lurked in the shadows commentary useful to recognition of the public beneficial interest as an enforceable right. The impetus of the search was the belief that prior natural resource rights of similar public nature had found recognition and protection through the use of remedial constructs, such as the Public Trust Doctrine and other forms of civil action. One proposition that emerges from these readings, and the wealth of secondary scholarship, is that a wide gap remains between the teachings of those versed in the Public Trust Doctrine and the application of this doctrine to intellectual resources. In part, this may be the result of unduly narrowed informed appreciation of the remedial function of trust doctrines in general and their broad use for public purposes outside the natural resource area, as well as the limiting conceptualization of the doctrine as applying almost exclusively to “navigable and tidal waters.” The implications of creating formal recognition for public beneficial interest issues can be underappreciated until informed by a reading for this purpose the opinions in *Eldred* and *Grokster* on issues raised by the parties, as well as to the reception accorded amicus presentations in both cases.

I – The underlying “public beneficial interest”

The underlying “public beneficial interest” in intellectual activities includes whatever interests may form the larger whole of right that preceded and belongs to the public not specifically carved out and privatized. It includes all or part of that referenced as the Public domain, the Commons or any other descriptor of public right current or future.¹ The breadth, essence and richness of the public beneficial interest described in Amicus brief of the AALL:

¹ These terms are used interchangeably in this paper. While many have written before and after, the richness of our understanding of the differences and commonalities in our descriptions of the public resource was forever enhanced by the Conference held at Duke University in 2001 on the Public Domain though the efforts of Professor James Boyle. The publication of the special volume *The Public Domain*, 66 LAW & CONTEMP. PROB. 1 (2003) is a reference outstanding proportion. See also, Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1 (2005), Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998) and Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

The public domain is the priceless repository of works that are ineligible for copyright, were created before copyright law existed, have had their copyrights expire, or have been freely given to the public by their authors.²

The term beneficial has been inserted as part of the concept to affirmatively assert it as an interest that belongs to all members of society collectively, as well as to each individual member of the public as a matter of right and redress. It reflects the composite of interests described as being public, but takes the perspective of characterization as a positive right for the necessary purpose of recognition and standing.³

This inquiry reflects the common link that has caused many to search in the face of what might appear to be insoluble puzzles. The historic concept of the Public Trust Doctrine appears constrained by its prominent association in the natural resources and environmental arena, in particular as applied to “navigable and tidal waters.”⁴ While one

² Brief of Amici Curiae American Association of Law Libraries, American Library Association, Association of Research Libraries, digital Future coalition, Medical Library Association and Society of American Archivists in Support of Petition for Writ of Certiorari at page 4.

³ Note in particular: Boyle, *The Public Domain: Foreword: The Opposite of Property?* 66 LAW & CONTEMP. PROB. 1 (Winter/Spring 2003); Boyle, *The Second Enclosure Movement*, 66 LAW & CONTEMP. PROBS. 33 (Winter/Spring 2003), Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147 (Winter/Spring 2003), Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (Winter/Spring 2003), David Nimmer, FAIREST OF THEM ALL AND OTHER FAIRY TALES OF FAIR USE FACTORS, 66 LAW & CONTEMP. PROB. 263 (Winter/Spring 2003) and *Negativland, Two Relationships to a Cultural Public Domain*, 66 LAW AND CONTEMP. PROBS. 239 (Winter/Spring 2003) [hereinafter *Negativland*].

⁴ *Eldred v. Reno*, 74 F. Supp. 2d 1, (D.D.C. 1999):

Plaintiffs allege that the retroactive extension of copyright protection violates the public trust doctrine. Pls.' Mem. at 58-69. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81, 98 L. Ed. 2d 877, 108 S. Ct. 791 (1988); District of Columbia v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine. At pages 3 and 4 of the lower court decision – (fn *Eldred v. Reno*, 74 F. Supp. 2d 1, 3-4 (USDC DC 1999) (See also, Constitutional Intent Relative to Copyright Heritability, 3 YALE SYMP. L. AND TECH. 7, at footnote 107 (Fall 2000): The Eldred court gave the plaintiffs' public trust challenge equally short shrift. *See Eldred*, 74 F. Supp. at 3-4. The public trust doctrine was developed around, and has traditionally been applied to, protection of the public commons of navigable and tidal waters, including associated beaches. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984) ("At the core of the public trust doctrine is the principle that navigable waters are held by the sovereign in trust for certain public uses... Use of these waters and lands [is] circumscribed by the public's paramount interests in navigation, commerce and fishing."). Such resources are protected under this doctrine based on the view that piecemeal exploitation of a shared resource destroys its value while the costs of exploitation are externalized substantially or entirely--a classic commons problem. *See generally* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing how the concept of a commons problem applies to the public domain for information products). The *Eldred* plaintiffs, following Litman, *supra*, argued that the public trust

might craft a scholarly tome to demonstrate the narrowness of this perspective by enumerating instances highlighting the broader application of “trust” doctrine to park lands, forests, wildlife, school and other common resources of importance to the public, the value of any permutation of “trust” doctrine lies in recognition of rights in the beneficiaries along with the function of standing and representation to protect them in the balance of decision making.⁵

Securing recognition and protection for a positive public beneficial interest in intellectual activities may therefore be just such an insoluble puzzle.⁶ Recognition of a complete and balanced public right, as distinct from, but including the public benefit to be obtained through the provisions of Article I, Section 8 has been elusive despite repeated and earnest efforts. These efforts seem not only to flail of late, but may also be losing ground.⁷ While there had been a succession of term extensions prior to CTEA,⁸ the nature of the public beneficial interest in the underlying larger public domain remained sustainable despite potential limitations inherent in codification of the common law “fair use” right and limitations imposed by the DMCA.⁹

doctrine should protect the "information commons" as well. *See* Pls.' 2d Am. Compl., *supra* note, at PP69-70. Adopting a literal reading of the public trust doctrine, the *Eldred* court held that "insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine." " (at 4).

⁵ Christopher D. Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. CALIF. L. REV. 450 (1972); Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970); the Dissent of Justice Douglas in *Sierra Club v. Morton*, 405 U.S. 727, 741, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972).

See also the following materials which provide the basis for the initial structure of this inquiry on both the Public Trust Doctrine and the impacts of technology and behavior on Copyright:

Reis, *Geographic Information Systems and Analysis: The Future of the Public Trust Doctrine*, 2 ALBANY LAW ENVIRONMENTAL OUTLOOK 70 (1996), Reis, *A Brief Inquiry into the Imperatives of the Coastal Zone and the Processes of Institutional Change*, 1 SEA GRANT LAW JOURNAL 5 (1976), Reis, *Technology Enablement: Normative Behavior and Rules of Law*, Law and Society Annual Meeting, (June 2005), Reis, *Adirondack Park: Sovereign Responsibility*, Published in *Centennial Publications*, (1994), Reis, *Alienation of Public Trust Lands in New York The Constitutional and Case Law Limitations*, NEW YORK STATE MARINE POLICY FORUM, Albany, NY, (December 15, 1983), Reis, *Land Under Water*, Published as part of *Warren's Weed Law of Real Property*, Matthew Bender, New York (1986), Reis, *Coastal Zone Management*, Published as part of *Warren's Weed Law of Real Property*, Matthew Bender, New York (1988), Reis, *Adirondack Park Land Use and Management*, Published as part of *Warren's Weed Law of Real Property*, Matthew Bender, New York (1987), *The Public Trust Doctrine and the Adirondack Park* presented at Government Law Center, Albany School of Law (1992-1993), Reis, Consultants report, New York State Office of General Services, Study of New York Management, Control and Disposition of Lands Under Water, 1989-1990.

⁶ This inquiry could certainly make one feel they are lost in a “space” somewhere between the free fall of Alice, the tardiness of the mad hatter and the pathos of Don Quixote in full battle dress.

⁷ See generally, Qianwei Fu, *Eldred v. Ashcroft: Failure in Balancing Incentives and Access*, 38 U.C. DAVIS L. REV. 1755 (2005).

⁸ Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998). 17 U.S.C. 302 (1998).

⁹ Digital Millennium Copyright Act (DMCA), 17 U.S.C. 512, 1201-1205, 1301-1332, 28 U.S.C. 4001 (2000). See generally, See Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) for an exposition of the background of CTEA.

Implicit, as a part, of the ongoing puzzle is a possible diminution in sense of assurance that the judicial oversight role concerning the legislative process will both recognize and protect the full range of beneficial public interests in a sustainable intellectual public domain.¹⁰ This further takes into account the recurrent and well documented legislative history of responding to the perceived needs of Copyright content protections, as well as term limits and the easing of statutory requirements for perfection of the copyright interest.¹¹ There is an obvious need for securing sustainable balance for all affected interests in rapidly changing contexts and technologies. The paradigm shift is fundamental and pervasive, subject to rapidly changing normative and as well as legal process. Never before have such large segments of populations been “enabled” through evolving technologies to create, publish, alter, copy, archive and utilize ideas, expression and content, protected or otherwise, without the intervention of traditional third party structures for production, distribution and the creation of market structures.

Privatization is an appropriate element for the encouragement of contribution to the public beneficial interest respecting public rights by balancing the costs associated with protection with the full range of the underlying public beneficial interest. Through the period of analog content, boundaries could be established that had a reasonable prospect of containment and enforcement. “Leakage” due to unlawful activity was partially curtailed by normative compliance with the law, or direct legal intervention. Losses in content value were not documented as disproportionate to traditional brick and mortar distribution processes and likely could be taken into account in market pricing structures. Normative compliance and the ability of legal systems to protect these interests have changed as well have protection and enforcement costs to society and the underlying public intellectual interest. Historic models need to evolve in a balanced manner to assure sustainable futures. Unless normative structures can be turned back to respect for private content rights, the present informs us that success will depend on restoration of balance when the general population believes their rights are respected as they would respect the rights of others.¹²

The article is premised on the above stated as a relatively simple proposition, that there is a need to invert the paradigm by putting the end objective before the means, the public beneficial interest before the “Copyright.”

The bold move by Eldred¹³ initiating an action challenging CTEA stands in stark contrast to the fact that the nature of Copyright litigation to date has been that of a party seeking to enforce a Copyright interest. How many cases to date were brought by a party claiming standing to enforce or protect the underlying public beneficial interest in

¹⁰ *Supra* note 2.

¹¹ Jessica Litman, *Digital Copyright* (Prometheus Books (2001)).

¹² See generally, Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House (2001)); Reis, *Technological Enablement and Normative Behavior*, paper presented at Law and Society Annual Meeting, (Summer 2004), see also, (USA Today, Graham, *Filesharing Beat Goes On* (June, 29 2005) wherein it was represented that the day after the court decision in Grokster there were between 5.2 and 5.4 million downloads per hour using file sharing. Most of the empirical data is anecdotal regarding file sharing behavior.

¹³ *Eldred v. Ashcroft*, 537 U.S. 186 (2003)

intellectual activities or content? Deep within the wealth of private and public interest writings concerning Copyright, as well as amicus intervention in *Eldred* and *Grokster*, lies the strength of informed scholarship with the infirmities attendant to lack of recognition and standing to speak to the public beneficial interest.¹⁴

To restate this slightly differently in the best tradition of “supposals”, suppose the Constitution had provided that intellectual rights in the Science and the useful Arts were fundamental rights of the public not be subject to limitation other than as necessary and proper to that end whereby Congress is hereby authorized:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, par. 8.

This was not what they said, but could it be posited as implicit? Was there reason for those drafting these provisions not to appreciate the limited common law rights of exclusion or control that existed prior to publication or disclosure which dissipated once made public because the public had not only access to, but also the right to benefit wherefrom?¹⁵ The default rule at common law would thus appear to be that but for the advent of Copyright, all rights would have belonged to the public. Was this the situation, what would be the mandate of Congress? Would we read the “preamble” such that there would be limitations on boundaries and duration of these monopoly interests? Would there be other factors of balance considered inherent in private rights thus nurturing the domain of the public beneficial interest?

Is this the perspective understood by historic luminaries, whether they be academic, activist or Justice of the Supreme Court in their engagement of the public toward recognition of underappreciated public beneficial interests?¹⁶ Has this not been a goal of affected public beneficiaries in other resource areas in the quest to secure both recognition and protection of their right positing the public trust doctrine, or by intervention using *Qui Tam* actions? There are those who fill these roles for the current quandary.

But, still no explicit recognition of the right that they address, nor standing to sue on behalf of these interests as parties, nor recognition they should be participants in the collective legislative process, although their involvement may well be reflected in the

¹⁴ The following Amicus briefs were filed in *Eldred*: American Association of Law Libraries et al. (Petition) Constitutional law Professors et al. (Petition) Copyright law professors (Petition) Eagle Forum Education & Legal Defense Fund et al. (Petition) Internet Archive (Petition)

¹⁵ Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROB. 75 (Winter/Spring 2003).

¹⁶ One should not dismiss the problem of recognition, public support and judicial obstacles during the early days before “Earth Day” dawned. Nor, should one assume the limitations imposed on the interpretation of the basic rights of resource allocation and environmental rights by those who resist the public interest representation in intellectual activities are not misinform by their narrow interpretation of historic doctrine. One only has to read the dissent of Justice Douglass in *Sierra Club v. Morton*, supra note 5.

proposed orphan legislation. Sustainable balance requires these elements and meaningful access to both Congress and the courts.

It is thus we find the most perplexing questions remain on how to secure recognition, standing and meaningful protection from both Congress and the courts.¹⁷

II – Reflections on the Public Beneficial Interest

A. History Rich in the Shadows Connoting the Public Beneficial Interest:

1. Treading the path of early decisions:

The task of reviewing eighteenth and nineteenth century cases to find an affirmative declaration of the public beneficial interest in intellectual activities and content is daunting by any standard.¹⁸ A few broad issues emerge from these early cases that permit construction of the public beneficial interest that remained in the shadows of the express concerns these actions sought to determine (1) the relationship of the Constitutional provisions and subsequent enabling legislation to prior “copyright” or private content rights under common law or affirmative state action or (2) the imperative of compliance with statutory requirements necessary to perfect the private interest and secure the benefits of copyright. In each instance, the benefits were noted to be both during the term of the limited private right and thereafter when the public would be permitted unlimited use. The early cases engage the symmetry of underlying purpose and reward through discussion that the Copyright benefits the public by encouraging and rewarding those that contribute to the public benefit. Few, if any questions were raised focused on the propriety of the Copyright as a means to this end.¹⁹

¹⁷ See generally, Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998) and Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). See also, Willful Infringement, *infra* 80.S.

¹⁸ One early and simplistic methodology of this paper was to read and skim every decision before the Supreme Court on Copyright from 1790 through 1909. The check list included noting the parties, the nature of the action, the notions of the court on the public interest (without further characterization) to determine whether there were distinctions being made, to get a sense of whether the court took the position of questioning the impact of private right creation and enforcement on the public interest and, perversely though it might seem, to determine whether the role played by the court could in anyway be characterized as “protecting” the underlying public right. Perhaps this would be wishful thinking that Justice Douglas might have had an early counterpart in the copyright arena. What emerged was a picture that confirmed the understanding that there weren’t plaintiffs for the public interest; there were only plaintiffs for content rights.

¹⁹ Until the dissents of Justice Stevens and Breyer in *Eldred*, there was little detailed questioning that Copyright was but a means to an end. Nor was there any pronounced analysis seeking to distinguish between and among the benefits the public received from the granting of the Copyright. As Justice Ginsburg sets forth for contemporary consideration in *Eldred*, it was probably assumed that the private interest in securing the Copyright and the public benefit from the activity are not mutually exclusive and they serve the same or similar ends.

A number of early cases concerned themselves with the powers exercised at common law or by legislation in the states covered by either Copyright legislation or Patent laws since there was no express preemption of the field. This discussion continued in a number of forms, including *Gibbons v. Ogden*²⁰ through *Wheaton v. Peters*²¹ covering the lack of federal common law, the nature and variety of laws adopted by the colonies and then states, that any federal enforcement of common law would be of the law of the state and the paradox of having a right of limited time created by the Federal government then being supplemented by a right of indefinite duration if there were a common law of copyright. In either event, one can infer in these discussions the presence in the shadows of the public interest unfettered by private right as one of free use at the termination of the Copyright. Moreover, a reading of the court in *Ewer v. Coxe*²² may support the notion that the limited monopoly was descriptive rather than literal in qualifying the propriety and duration of the privatized interest.

Questions concerning the statutory requirements of perfecting the copyright (or patent) interest raise interesting and conventional questions concerning the relationship and balance between private interests and the public beneficial interest. As thoroughly discussed in *Wheaton*,²³ the requirements of the legislation creating the Copyright were mandatory, not discretionary and required literal and complete compliance.

The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.

A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right. Is it perfect? If so, the other two requisites are wholly useless.

How can the author be compelled either to give notice in the newspaper, or deposit a copy in the State Department? The statute affixes no penalty for a failure to perform either of these acts; and it provides no means, by which it may be enforced.

But we are told they are unimportant acts. If they are indeed wholly unimportant, congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts.

²⁰ 23 U.S. 2 (1824).

²¹ (21) 33 U.S. 591 (1834).

²² See *Ewer v. Coxe*, 4 Washington's Circuit Court Reports 487 cited in *Wheaton*.

²³ 33 U.S. 591 (1834).

Judging then of these acts by this rule, we are not at liberty to say they are unimportant and may be dispensed with. They are acts, which the law requires to be done, and may this court dispense with their performance?

But the inquiry is made shall the non-performance of these subsequent conditions operate as a forfeiture of the right?

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute: but other acts are to be done, unless congress have legislated in vain, to render the right perfect.²⁴

In the event the statutory requirements were not met, no copyright issued. The arguments of counsel and preliminaries of the case revealed:

In the absence of all right on the part of the complainants, not much difficulty is apprehended from any supposed possession or enjoyment, by colour of privilege. Judge Washington, in delivering his opinion in *Ewer v. Cox*, disposes of this question to our hand. 4 Wash. C.C. Rep. 489. "I hold it to be beyond controversy," says he, "that if the plaintiff has no copyright in the work of which he claims to be the owner, a court of equity will not grant him an injunction. *** But surely if he has no title at all, or such a one as would enable him to recover at law, even that judge would, I presume, refuse an injunction.

The authorities cited by Judge Washington support the principle, which he maintains.

Against whom is this mere naked possession claimed? Not the defendant; for during the period when it has existed he was only one of the mass of individuals who had not any particular concern in disturbing the complainants' colourable claims. It is therefore against the public, who cannot thus be baffled of their rights.²⁵

There is some discussion in *Wheaton* that the failure to perfect the statutory Copyright was tantamount to a divestiture of a property right at Common law. The decision of the court determined that the right never vested unless there was full compliance with the statute. The corollary of this position would respect that rights of the public to all that was made available to the public domain, but for the force of the Copyright Acts. Thusly, strict compliance would also be warranted in that the public would suffer a divestiture of rights it enjoyed and to which it was vested. If there were any argument of divestiture in derogation of the common law it might be thought applicable to this interest.²⁶

²⁴ Id.

²⁵ Wheaton at 139,140 (Lexis pagination)

Therefore, as a statute in derogation of the comm²⁶ There are innumerable refers to this staid judicial rule touching on such common matters we deal with as "wills" or title to

The nature of the public benefit, in some of the perfection cases has been highlighted as the immediate benefit acquired through the requirements of publication and disclosure for public use in the context of both Copyrights and Patents. The longer term benefits to the public “domain” and thereby public beneficial interest are also noted referencing public use after the termination of the privatized interest.²⁷ Further quantitative or qualitative discussion of the public benefit, underscored the simple fact that most resource commons were underappreciated or valued in quantitative or market terms. These resources lacked scarcity, control, and exclusivity and only marginal perceptions of their ultimate utility.

2. Apex and waypoint - two centuries of ambulating boundaries in the quest for balance:

The court in *Sony Corporation of America v. Universal City Studios* (Hereinafter Sony)²⁸ recapitulates the ontogeny of copyright and underlying public beneficial interest and informs again of the complex balance caused by constantly changing technologies that affect the boundaries between means and end, private rights and public beneficial interests. In the process of review, the court restates first, that Congress is limited in the monopoly “privileges” which it may grant as a means to the public end and second that the residual interest is in the public after the “limited” period of the private right.

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.²⁹

The immediate effect of the Copyright is a fair return³⁰ and reward for the author’s labor.³¹ This is always secondary to the main purpose which lies in “...the general benefits derived by the public....”³² The ultimate benefit of the Copyright

real estate and recording statutes. Rights which are vested at common law may be divested by legislation in the public interest, but these statutes are strictly construed as in derogation of the Common Law. If one posits that the rights of beneficiaries in the public domain were vested before the Constitutional Amendment, should the divestiture caused by carving out of the public domain monopoly interests receive such scrutiny. *See generally*: *Blum v. Stenson*, 1981 U.S. Briefs 1374 (1983):on law, it should be “given the effect which makes the least rather than the most change in the common law.” 3 C. Sands, *Sutherland Statutory Construction* § 61.01 (4th ed. 1974).

²⁷ *See generally* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 76 L. Ed. 1010, (1932) for commentary on the public benefit and reward to the Copyright holder.

²⁸ *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417; 104 S. Ct. 774 (S. Ct. 1984). (Hereinafter Sony Betamax or Sony).

²⁹ *Id.* at 429.

³⁰ *Id.* at 432.

³¹ *Id.*

³² *Id.*

inheres in further reading that the Copyright is of “limited duration,” reflecting “a balance of competing claims” against what interest – “upon the public interest.”

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.³³

It would not appear unwarranted to construe this language as a limitation on Congressional powers in furtherance of the ultimate objectives thereof, benefiting the public interest. Nor, would it appear out of line to suggest that judicial deference to the judgment of Congress forecloses review based on the Constitutional declarations “basic purpose.”³⁴

Changing circumstances, including constantly evolving technologies, require Congress repeatedly study and amend the Copyright laws. Technologies that enable have always been recurrent issue for Congressional attention with new methods of printing, copying, performing, transmitting and recording. Despite appropriate recognition these matters have been assigned to Congress and taking into account the repeated amendments necessary in furtherance of the grant of power,³⁵ there are no indications that deference

³³ *Id.* at 432

³⁴ This is a shamelessly use of these two words in the text which are part of a quote in Sony (at 430) from *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

³⁵ The court notes that there has always been a challenge due to new technologies. Sony at 430, 43: From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection.

Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. *Wheaton v. Peters*, 8 Pet. 591, 661-662 (1834). The remedies for infringement "are only those prescribed by Congress." *Thompson v. Hubbard*, 131 U.S. 123, 151 (1899). - Thus, for example, the development and marketing of player pianos and perforated rolls of music, see *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in § 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U. S. C. § 111(d)(2)(B) and § 111(d)(5) (1982 ed.) after years of detailed congressional study, see *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 129 (CA2 1982).

By enacting the Sound Recording Amendment of 1971, 85 Stat. 391, Congress also provided the solution to the "record piracy" problems that had been created by the development of the audio tape recorder. Sony argues that the legislative history of that Act, see especially H. R. Rep. No. 92-487, p. 7 (1971), indicates that Congress did not intend to prohibit the private home use of either audio or video tape recording equipment. In view of our disposition of the contributory infringement issue, we express no opinion on that question." (Footnotes omitted).

beyond the ordinary separation of powers and checks and balances should inform either branch of government.³⁶

At the heart of the public beneficial interest lies the historic equitable doctrine of “fair use.” The court in *Sony Betamax* engaged in the judicial application of the doctrine under both the 1909 and 1969 revisions of the Copyright Act and thereafter on the implications of the codification of “fair use” in section 107 of the 1976 revisions of the Copyright Act. The body of the opinion provides an excellent review of the status of “fair use” in Copyright jurisprudence using extensive quotes from the reports of both the House and the Senate prefatory to the 1909 act.

In its Report accompanying the comprehensive revision of the Copyright Act in 1909, the Judiciary Committee of the House of Representatives explained this balance:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . .

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).³⁷

as well as the 1976 revisions codifying “fair use” in section 107. These reports are both noted and quoted in the opinion of the court:

The House Report expressly stated that the fair use doctrine is an "equitable rule of reason" in its explanation of the fair use section:

³⁶ Two further quotations from *Sony* head note problems of judicial review and deference:

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology. (*Sony* at 430-432).

³⁷ *Sony* 430.

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. (450, fn 31)

The Copyright Act of 1909, 35 Stat. 1075, did not have a "fair use" provision. Although that Act's compendium of exclusive rights "to print, reprint, publish, copy, and vend the copyrighted work" was broad enough to encompass virtually all potential interactions with a copyrighted work, the statute was never so construed. The courts simply refused to read the statute literally in every situation. When Congress amended the statute in 1976, it indicated that it "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976).³⁸

A fair conclusion from these readings indicate that the prohibitions against unauthorized use of the Copyright were inclusive, yet the construction of these rights was never rigid or literal, rather always such as to "apply an equitable rule of reason" such as to permit the public a "fair use" taking into account the nature, purpose and extent of the public exercise of use. As quoted by the court again from the House Report:

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." H. R. Rep. No. 94-1476, *supra*, at 65-66.³⁹

The Senate report, on the revision indicated that the "fair use provisions" were not subject to rigid rules of construction, did not constitute a bright line and required balance in considering the commercial or non-commercial use of the protected material and the potential or demonstrable effect on the market of content holder's rights. The report of the Senate also noted that while there would be a presumption that commercial use would create harm that would not be the case where the use was for a non-commercial purpose, which would require a showing of harm, present or potential.

The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the

³⁸ These two quotations were taken from Sony from the House report at pages 450 and 447 respectively.

³⁹ Sony at 450.

author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

n32 "The Committee has amended the first of the criteria to be considered -- 'the purpose and character of the use' -- to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use.⁴⁰

The cornerstone of "fair use" was to be maintained in its' application as an equitable doctrine respecting the rights of the public beneficial interest.

The Senate Committee similarly eschewed a rigid, bright-line approach to fair use. The Senate Report endorsed the view "that off-the-air recording for convenience" could be considered "fair use" under some circumstances, although it then made it clear that it did not intend to suggest that off-the-air recording for convenience should be deemed fair use under any circumstances imaginable. S. Rep. No. 94-473, pp. 65-66 (1975). The latter qualifying statement is quoted by the dissent, *post*, at 481, and if read in isolation, would indicate that the Committee intended to condemn all off-the-air recording for convenience. Read in context, however, it is quite clear that that was the farthest thing from the Committee's intention.⁴¹

In a time of rapid technological, social and economic change implicating the foundations of Copyright, Sony remained a guiding light for over two decades.⁴²

⁴⁰ Sony at 450-451.

⁴¹ *Id.*

⁴² It is interesting to recall that Justice Stevens wrote the opinion for the majority in Sony and then later authored or participated in two concurring/dissents, one in *Eldred* and the second in *Grokster*.

3. The End or Beginning of a New Era – CTEA and Eldred

It is sobering to image the confluence of two of the more significant factors in the history of intellectual activities in both their promise and reality. The first of these factors involved the end of the “limited time” for content protected under the copyright laws during the early part of the 20th Century. The second factor in this paradigm considers late 20th century resources for reproduction, digitalization and market distribution involving conventional and electronic means. Imagine the prospects of reproduction and distribution that render price a transparent factor. Imagine the creative rush of adaptation, alteration, compilation, prequels and sequels, molding characters into other stories and form, of verse and rhyme and reason. How does one conceive of a prospect of this magnitude? How does one quantify or qualify the benefits to be enjoyed or the collateral costs of postponement for decades?

The Copyright Term Extension Act was enacted into law to take effect in 1998 obtained public recognition becoming known as the Sonny Bono Copyright Extension Term Act (hereinafter referred to as CTEA).⁴³ The most prominent features of the Act were extending the terms of new copyright to “... a term consisting of the life of the author and 70 years after the author's death.”⁴⁴ In the event the author be anonymous, the copyright is for “... a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.”⁴⁵ These term limits are applicable to existing copyrights that were set to expire at an earlier term limit.⁴⁶ early House Report understated the current situation as follows:

The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law.⁴⁷

And so it shall.

Shortly after CTEA, suit was filed by Eric Eldred⁴⁸ to secure a judgment against the Attorney General of the United finding that CTEA is unconstitutional. The plaintiffs challenge CTEA based on their contentions that it violated the meaning of “limited times” under the Constitution which qualified the powers of Congress to affect their

⁴³ CTEA Pub. L. No. 105-298, 112 Stat. 2827 (1998), 17 U.S.C. § 302).

⁴⁴ 17 U.S.C. § 302(a).

⁴⁵ 17 U.S.C. § 302(b).

⁴⁶ If the work was created before 1978 the renewal term is extended to 67 years, a possible term of 95 years. Pub. L. No. 105-298 § 102(d), 112 Stat. 2827; 17 U.S.C. § 304.

⁴⁷ House Report No. 94-1476.

⁴⁸ The other parties joining with Eldred were Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons. These parties were commercial and non-profit users of works in the public domain. The amicus participants included: American Association of Law Libraries, American Library Association, Association of Research Libraries, digital Future coalition, Medical Library Association and Society of American Archivist in Support of Petition for Writ of Certiorari.

rights in the use of public domain, that it violated their fundamental rights of free speech, that it lack the requirement of originality as retroactively applied to existing copyrights.

The plaintiffs were given standing because they use and benefit from works in the public domain and they would be denied the use of through the application of CTEA.

The plaintiffs benefit from using works in the public domain and, but for the CTEA, they would be able to exploit additional works the copyrights to which would have expired in the near future. As such, they suffer an injury in fact that is traceable to the CTEA and that we could redress by holding the Act invalid. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).⁴⁹

It is subject to question whether this standing gave them full recourse to raise issues concerning the nature and extent of the public beneficial interest, or whether they would have been the proper parties to do so under the terms eloquently set forth by Justice Douglass in his dissenting opinion in *Sierra Club v. Morton*.⁵⁰ It remains a question whether the answer would have made any difference in the outcome or furthered the progress of an understanding of the nature of the public beneficial interest in intellectual activities.

The Court of Appeals decision⁵¹ unquestionably denied the preamble force in modifying the substantive power granted to congress and based on a literal and semantic reading of the word “limited” proceeded found on all three points raised by the plaintiffs the following: (1) that the CTEA is a proper exercise of the Congress's power under the Copyright Clause; (2) that plaintiff's have no cognizable first amendment interest in the copyrighted works of others; (3) originality is not applicable to extensions of existing copyrighted works. We are informed, however, by the Court's treatment of the meaning to be given “limited times:”

Whatever wisdom or folly the plaintiffs may see in the particular “limited Times” for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality. This is no less true when the Congress modifies the term of an existing copyright than when it sets the term initially, and the plaintiffs -- as opposed to one of the amici -- do not dispute that the CTEA satisfies this standard of review. The question whether the preamble of the Copyright Clause bars the extension of subsisting copyrights ... may be revisited only by the court sitting *en banc* in a future case in which a party to the litigation argues the point.⁵²

⁴⁹ Eldred v. Reno, 239 F.3d 372 (U.S. Ct. App. DC Cir. 2001).

⁵⁰ *Sierra Club v. Morton*, 405 U.S. 727, 741, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972).

⁵¹ Eldred v. Reno, 239 F.3d 372 (U.S. Ct. App. DC Cir. 2001).

⁵² Eldred v. Reno, 239 F.3d 372, 380 (U.S. Ct. App. DC Cir. 2001).

This finding arguably revives the question asked above regarding the nature of standing and representation accorded the plaintiffs in the action and at the same time may further inform us of the status and weight accorded amicus participation in these proceedings.

The decision of the Court of appeals was not without dissent. Judge Sentelle, dissenting in part, took pointed exception expressing his view of enumerated and delegated powers:

What then do I see as the appropriate standard for limiting that power?
* * * the *Lopez* Court acknowledged "that limitations on the commerce power are inherent in the very language of the Commerce Clause." 514 U.S. at 553. Just so with the Copyright Clause. What does the clause empower the Congress to do?

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries....

That clause empowers the Congress to do one thing, and one thing only. That one thing is "to promote the progress of science and useful arts." How may Congress do that? "By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress. The means by which that power is to be exercised is certainly the granting of exclusive rights--not an elastic and open-ended use of that means, but only a securing for limited times. *See Stewart v. Abend*, 495 U.S. 207, 228, 109 L. Ed. 2d 184, 110 S. Ct. 1750 (1990) ("The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors.").⁵³

This dissent addresses the underlying power of the court to engage in the interpretation of Constitutional provisions and thereafter to ensure that those delegated powers thereby are complied with respecting both the intent and express limitations therein.

The Supreme Court decision⁵⁴ closely followed the decision of the Court of Appeals. The Court accepted amicus briefs from the American Association of Law Libraries, Constitutional law professors, Copyright law professors, Eagle Forum Education and Legal Defense Fund and Internet Archive. In sum, on the immediate concerns of the "public beneficial interest," as distinct from the first amendment issues considered by the court, the appeal resulted in the majority holding that "limited" times meant not in perpetuity and the preamble not a limitation on the grant to congress. The Court's noted it upheld the decision of the Court of Appeals:

"... that Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe "limited Times" for

⁵³ *Eldred v. Reno*, 239 F.3d 372, 381-382 (U.S. Ct. App. DC Cir. 2001).

⁵⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.

The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Time" as applied to future copyrights. Petitioners contend, however, that existing copyrights extended to endure for that same term are not "limited." Petitioners' argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever "fixed" or "inalterable." The word "limited," however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: "confined within certain bounds," "restrained," or "circumscribed." S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); see T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) ("confined within certain bounds"); Webster's Third New International Dictionary 1312 (1976) ("confined within limits"; "restricted in extent, number, or duration"). Thus understood, a time span appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights. And as we observe, *infra*, at 18, there is no cause to suspect that a purpose to evade the "limited Times" prescription prompted Congress to adopt the CTEA.⁵⁵

The decision then proceeds to issues of fundamental democratic concern as the majority expanded on its determination that selection of the best course of actions to secure these ends is with Congress, not the courts who will defer their judgment to that of Congress on these matters:

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. See *Stewart v. Abend*, 495 U.S., at 230 ("The evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces It is not our role to alter the delicate balance Congress has labored to achieve."); *Sony*, 464 U.S., at 429 ("It is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Graham*, 383 U.S., at 6 ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."). The justifications we earlier set out for Congress' enactment of the CTEA, *supra*, at 14-17, provide a rational basis for the conclusion that the CTEA "promotes the Progress of Science."⁵⁶

The majority position confirms their belief that the public benefit resides in Congress securing the activities of the recipients through a limited monopoly and that this lies in the economic philosophy behind the Constitutional provision. There is a leap of faith at this point that the interest of the individual in securing a Copyright is coincident and not mutually exclusive of the public ends. This certainly is an appreciation of economic

⁵⁵ *Id.*, at 199-200.

⁵⁶ *Id.*, at 212-213

factors and social behavior that some might find limiting.⁵⁷ While most might agree that in an ideal world this would be the goal, the reality of monopoly power under the Patent laws, as well as Copyright, often is punctuated by mutually exclusive behavior that subverts the public good to private gain.

By treating the public as the recipient of benefit from retroactive term extension of the copyright, the majority subsumed the public use was not implicated or diminished by the new “balance” in extending the terms of either present or future copyright interests.

And, finally for these purposes, the major expressly defers to the judgment of Congress as implicit in the “Framers instruction.”

As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. See *Graham*, 383 U.S., at 6 (Congress may “implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim.” (emphasis added)). 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' action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.⁵⁸

There is a distinction between deference in what is characterized as “policy” and the necessary review to determine whether that “policy” is within the purview of purpose or the limits of the Constitutional grant. Without active recourse to judicial review, what check or balance is there on this determination?⁵⁹

As with the decision of the Court of Appeals, the decision of the Supreme Court majority was not without dissents filed by both Justice Stevens⁶⁰ and Justice Breyer.⁶¹ In neither case does singling out small snippets of disagreement, capture the “spirited exchanges” these decisions engendered. The differences are not only in interpretation of facts and rules of law, but fundamental to the nature and function of governance. A full appreciation of these differences requires reading the exchanges in context. Notations out of context, however, may serve to enlighten and inform the premises herein regarding the nature of the beneficial interests in the public in intellectual activities.

⁵⁷ *Id.*, at 212.

⁵⁸ *Id.*, at 222.

⁵⁹ Isn't this one of the inherent difference between the majority opinion of Justice Ginsburg and Justices Stevens and Breyer?

⁶⁰ JUSTICE STEVENS, dissent at 222.

⁶¹ JUSTICE BREYER, dissent at 242.

Justice Stevens posited three interesting issues in his dissent pertinent to this inquiry.

(1) That extending the unexpired term under CTEA was simply invalid as not serving the ends of Article I, 8 by furthering the progress of the useful arts and sciences.

(2) His belief that the court operated under the mistaken premise that it had a passive role in reviewing congressional exercises of monopoly privileges and that this excessive deference to Congress violated the basic foundations of our constitutional form of government. That in doing so the Court has failed to satisfy its' obligations and abdicated its' responsibilities under law:

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' 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. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). We should discharge that responsibility as we did in *Chadha*.⁶²

(3) The proposition that extending existing grants of Copyright constitutes a taking of the beneficial interest and riches from the public domain and that this undervalues the public domain and treats it as worthless.⁽⁷⁹⁾ In doing so he questions the perception of the public domain having little, if any, cognizable value.

One must indulge in two untenable assumptions to find support in the equitable argument offered by respondent -- that the public interest in free access to copyrighted works is entirely worthless and that authors, as a class, should receive a windfall solely based on completed creative activity. Indeed, Congress has apparently indulged in those assumptions for under the series of extensions to copyrights, only one year's worth of creative work -- that copyrighted in 1923 -- has fallen into the public domain during the last 80 years. But as our cases repeatedly and consistently emphasize, ultimate public access is the overriding purpose of the constitutional provision. See, e.g., *Sony Corp.*, 464 U.S., at 429. *Ex post facto* extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the Clause.⁶³

Justice Beyer's dissent was one of disagreement with the implications of the term extensions and factual analysis stating that they did not serve the purposes attributed to them and, in fact, was a detriment to the promotion of progress of science and the useful arts. At the base of this disagreement rested his belief that the extensions were outside

⁶² Eldred at 244.

⁶³ Eldred at 241. This give and take raises the question if 1st Amendment issues have been set aside, what if the public beneficial interest is labeled "property," might this give rise to 5th Amendment questions?

the scope of Congress' delegated powers under Art I, 8 particularly as regards the First Amendment.

The Constitution's Copyright Clause grants Congress the power to "*promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.*" Art. I, § 8, cl. 8 (emphasis added). The statute before us, the 1998 Sonny Bono Copyright Term Extension Act, extends the term of most existing copyrights [*243] to 95 years and that of many new copyrights to 70 years after the author's death. The economic effect of this 20-year extension -- the longest blanket extension since the Nation's founding -- is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science" -- by which word the Framers meant learning or knowledge, E. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* 125-126 (2002).

The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 72 L. Ed. 857, 48 S. Ct. 451 (1928) (Holmes, J., dissenting), overruled in part by *Alabama v. King & Boozer*, 314 U.S. 1, 8-9, 86 L. Ed. 3, 62 S. Ct. 43 (1941); accord, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678-679, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970). And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them.⁶⁴

⁶⁴ Eldred, Breyer dissent at 242-243. Justice Breyer had some additional commentary on his position at 264:

I share the Court's initial concern, about intrusion upon the decision making authority of Congress. *See ante*, at 14, n. 10. But I do not believe it intrudes upon that authority to find the statute unconstitutional on the basis of (1) a legal analysis of the Copyright Clause's objectives, *see supra*, at 4-6, 19-21; (2) the total implausibility of any incentive effect, *see supra*, at 13-16; and (3) the statute's apparent failure to provide significant international uniformity, *see supra*, at 16-19. Nor does it intrude upon congressional authority to consider rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary. *Supra*, at 2-4. We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright protection," *ante*, at 31, 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.

This the majority opinion characterizes as simply one that “misses the mark” because, as noted previously, “The two ends are not mutually exclusive, copyright serves public ends by providing individuals with an incentive to pursue private one.”⁶⁵ This characterization may well beg the very question and be syllogistic.

Lest it go unnoticed, one further finding of the lower court not addressed on appeal relative to Plaintiff’s contention that the retroactive extension of the Copyright Act under CTEA violated the Public Trust Doctrine. It appears not to have been pursued or fully appreciated by either the Plaintiffs or the Court and the question now must be posited whether these were either the correct parties to raise the issue, or even what the narrow characterization of application regarding Trust Doctrine has for future litigants.⁶⁶

III – The Digital Paradigm

1. The Analog Digital paradigm shift - So, what changed, if anything?

The digital paradigm shift informs us of the potential for growth in the richness of the public domain as well as the fundamental changes in social, legal and market structures affected by new methods of production, distribution in methods of creation, production and distribution, distribution and synergy due to electronic medium. It highlights the need to protect existing content right and at the same time ensure the cost of protection are not disproportionately externalized to the detriment of the public beneficial interest in intellectual activities and content. Were one to ask the question what has changed in the last twenty years or so since the decision in Sony Betamax, the answer

⁶⁵ Eldred at 212.

⁶⁶ Eldred v. Reno, 74 F. SUPP. 2D 1, 3-4 (USDC DC 1999):

Plaintiffs allege that the retroactive extension of copyright protection violates the public trust doctrine. Pls.’ Mem. at 58-69. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. *See, e.g.,* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81, 98 L. ED. 2D 877, 108 S. Ct. 791 (1988); District of Columbia v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.

See also, Constitutional Intent Relative to Copyright Heritability, 3 YALE SYMP. L. AND TECH. 7, at footnote 107 (Fall 2000):

“The *Eldred* court gave the plaintiffs’ public trust challenge equally short shrift. *See Eldred*, 74 F. SUPP. at 3-4. The public trust doctrine was developed around, and has traditionally been applied to, protection of the public commons of navigable and tidal waters, including associated beaches. *See* District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984) (“At the core of the public trust doctrine is the principle that navigable waters are held by the sovereign in trust for certain public uses. Use of these waters and lands [is] circumscribed by the public’s paramount interests in navigation, commerce and fishing.”). Such resources are protected under this doctrine based on the view that piecemeal exploitation of a shared resource destroys its value while the costs of exploitation are externalized substantially or entirely--a classic commons problem. *See generally* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing how the concept of a commons problem applies to the public domain for information products). The *Eldred* plaintiffs, following Litman, *supra*, argued that the public trust doctrine should protect the “information commons” as well. *See* Pls.’ 2d Am. Compl., *supra* note, at PP69-70.”

might be “almost everything.” The trickle of individuals now capable of transgressing the prohibitions against copying content of others is incalculable. With that capacity have come changes in normative behavior that unlawfully threaten the rights of content owners such that they defy conventional legal protection. There are many who have assumed the role of Rachel Carlson in warning of the impending dangers of unbalanced protection of either content rights or permissive public access to rights not in the public domain. As well the necessary attempt to define respective rights that they might be accorded the benefit of informed and balanced protection.

The public was informed through the popularization of Lawrence Lessig’s work in *Code and Other Laws of Cyberspace*⁶⁷ of the impending quandary in the effort to protect “Pandora’s Box.” This work fuel both the way for other popular works, such as “Digital Copyright”,⁶⁸ by Jessica Litman and by Siva Vaidhyanathan, “Copyrights and Copywrongs.”⁶⁹

Lessig’s work was prophetic regarding the need for legal code to protect computer code and the emergence of the Digital Millennium Copyright Act with it’s purpose of providing legal protection for Copyright content, digital or otherwise, by prohibiting circumvention of devices or codes designed to safeguard such content. If one could control the links of “enablement” of large segments of the population to copy, share and transmit content, then the challenges to content boundaries could be rendered manageable.

The primary protection for the movie industry and the digital format of DVD was encryption to lock the content safely beyond those that would copy in digital form. The encryption used was thought to be “unbreakable” which it was for all intents and purposes until the accidental transmission of the key to unlock the encryption was recognized by a young man in and shared with others. Pandora’s secrets had been violated and DVD contents could no longer be protected in closure. The DMCA provided what appeared to be relief by facilitating prosecution of those that distributed machines or applications that permitted circumvention of protected content. The thought was that by controlling distribution of applications that enabled the general population DVD content would again be secure.

Universal City Studios v. Reimerdes.⁷⁰ The defendant packaged and distributed a software application called DVD Xcopy which permitted anyone with a computer to decrypt, encode and burn a copy of any encrypted or non-encrypted DVD to a blank DVD. The quality of the copy were be “near perfect” relative to the loss of quality using videotapes to make copies of movies. The court enjoined the further distribution of the product which could be purchased over the Internet or act most brick and mortar stores

⁶⁷ See generally Lessig, *Code and Other Laws of Cyberspace* (Basic Books (1999)) and Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House (2001)).

⁶⁸ Jessica Litman, *Digital Copyright* (Prometheus Books (2001)).

⁶⁹ Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press (2003)).

⁷⁰ Universal City Studios, Inc. v. Reimerdes, 111 F. SUPP. 2ND 294 (2000)

dealing in computers or electronic products. The defendant tried to stay in business without the decryption module but failed due to the obvious fact that its primary use was to circumvent the protective encryption on DVDs.

Was Pandora's Box closed and secure once more. The defendant prior to closing shop apparently sold his programs and the remaining programs moved offshore. These programs were not only sold through at least 1995, but the program initially permitted only five activations. The number of activations permitted on transfer was restored to the full five regardless of how many the prior owner had used. Of perhaps greater significance are the untold numbers of other programs both free and marketed that are not only available for these purposes, but also touted to be better than the original. What does this tell us? That "program code" cannot protect content alone, that "legal code" has limitations in its effectiveness and that there are large numbers of the population that do not feel morally constrained by the existence of rights in others or the threat of legal action. Or, even worse for sustainable legal efficacy, perhaps they believe they have a right to these materials and don't believe in "Copyright." One could suggest that a part of this relates to the cost of content, bearing in mind that we appreciate content holders would never charge more for the product that balances against the public interest, or, that the laws are too complex and frustrating to most of the population, so they just ignore it,⁷¹ or that they simply are "pirates." If the implication of enforcement of content holder rights causes significant collateral damage to legitimate public interests, then the system has sustainability issues that need to be addressed.

This is not dissimilar to the chain of technological development from Napster⁷² to Grokster.⁷³ Despite some limited attempts to show non-infringing and justifiable uses of encrypting technologies in Reimerdes⁷⁴ and possible benefits of file sharing in Napster, the next major threat to content came with Grokster and P2P file sharing. Because the files were not stored on a single server, but widely distributed with redundancy limited only by the number of computers online and capable of being accessed with the software provided by Grokster, the form of control was over the provider of the software and the clear imposition of legal sanctions, including injunction and damages. There was never any question that those downloading and sharing were violating the rights of the content owners without any right or justification for their actions. The question was one of the theory on which Grokster could be held accountable for his actions in providing the program and affirmatively touting it for file sharing purposes. The court rightly decided against Grokster whose behavior clearly induced others to unlawfully share protected content.⁷⁵

A problem with Grokster inheres in the present or potential collateral damage facing any developer of new technologies that can be used for lawful, as well as unlawful

⁷¹ Jessica Litman, *Digital Copyright* (Prometheus Books (2001)).

⁷² A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. Cal., 2001).

⁷³ MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764; 162 L. Ed. 2d 781 (U.S. S. Ct. 2005). See also, MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. Cal., 2004) and the subsequent decision on remand, MGM Studios, Inc. v. Grokster Ltd., 419 F.3d 1005 (9th Cir. Cal., 2005).

⁷⁴ Universal City Studios, Inc. v. Reimerdes, 111 F. SUPP. 2ND 294 (2000).

⁷⁵ Seth Robert Belzley, *Grokster and Efficiency in Music*, 10 VA. J.L. AND TECHNOLOGY 1 (Fall 2005).

purposes. The case has sixty-one amicus briefs filed. A substantial number of these amicus addressed issues where P2P file sharing could be used for appropriate and lawful purposes having significant public benefit, as did the defendant. While the court characterized these uses as anecdotal in this case, it is not clear that they will not be important in the future. Nor is it predictable whether others will continue to develop and distribute the underlying technologies for P2P in the future similar to the instance of DVD decryption applications. The moment of final application has been postponed to the future since the remand of the Supreme Court to the Court of Appeals and thence to the Federal District Court resulted in a settlement of the action.

What is clear is that despite the ruling of the court in *Grokster*, public behavior the very next day was reputed to witness between 4 and 5 million downloads per hour by those using P2P protocols.⁷⁶ Reports of this matter bear stark witness to the efficacy of law and changing normative patterns.

Conclusion: Standing, tools and what the future may bring

The Intervention of Congress to secure balance and redress wrongs:

These are issues worn by centuries of search for sustainable balance in intellectual activities. The “intellectual property” authorized by the founders in the Constitution enriched the public domain, but created private value of a magnitude most likely not conceivable in that time or context. The intellectual capital that belonged to the public domain now is the property of private interests and market structures. The value is real and quantifiable and commands protection as an important element in the fabric of society not only for its furtherance of the initial objectives of the Constitution, but because of its independent significance to domestic and global economies. The growth of content value and content rights has flourished without competition from recognized and enforceable beneficial interests in the public domain. The lack of countervailing representation of these interests has permitted the content rights holder unfettered access to Congressional processes.⁷⁷ We now recognize that as with many examples involving the early exploitation of resources in the “new world,” things and interests with relatively little value were given away, bartered for societal progress. Professor Lessig warns of impending scarcity in “The Future of Ideas”⁷⁸ and we are informed on a daily basis of the closing of the commons and limitations on the substance of the public domain. There is need for recognition of the rights of the beneficiaries of the public domain in Congress and the courts.

The notice of Inquiry regarding “Orphan Works” in the Copyright filed in January of 2005 invited the participation of those that would claim or speak for the public beneficial interests. The report of the Copyright Office was released a year later recognizing the need for legislation in the area. Legislation will hopefully reflect the

⁷⁶ *USA Today*, Graham, “Filesharing Beat Goes On” (June, 29 2005).

⁷⁷ Jessica Litman, *Digital Copyright* (Prometheus Books (2001)).

⁷⁸ Lawrence Lessig, *The Future of Ideas: The fate of the commons in a connected world*, (Random House (2001)).

necessary compromises to ensure balance protecting the rights of both content owners and the public where conventional mechanisms for securing rightful use of the material due to the lack of an identifiable Copyright holder is not feasible.⁷⁹

Congress must be prevailed upon to recognize that its primary obligation is to the public and ensure that it reflects and represents that interest as primary in its balance and performances of duty under the Constitutional delegation. This is the cause for concern reflected by Justices Breyer and Stevens in *Eldred* and as well as by the dissents in *Grokster* of Justices O'Connor and at a later date. This is an affirmative duty, which can and should be subject to the ultimate test of judicial review fundamental to checks and balances.

Public Action:

Of course there is always “Willful Infringement”⁸⁰ violating Copyright for the purpose of making a point of civil disobedience or criminal protest. The disposition of *Grokster*, however, does not appear to favor defendants raising public interest issues when they have committed a deliberate wrong. And, certainly the “willful” label might countenance significant civil or criminal penalties. In this context, the willful infringement (small “w”) undertaken on a daily basis by digital downloads may be thought by some to be a form of civil protest as well. This protest may equally be ill conceived and an exercise in futility.

The Public Trust Doctrine and Qui Tam Actions:

The initial purpose and the “peg” not to be forsaken is The Public Trust Doctrine. As noted by Professor Sax, this is a remedy when institutions fail in a democratic society. The short rift given its use in *Eldred* may be due to the court not being fully informed by a party with the resources and intent to pursue fully the use of variants of the Public Trust in the forests of Wisconsin, the Waters of western states, the school and park lands, the Adirondack Preserve and claims of applicability to biodiversity and wildlife. The Public Trust Doctrine was limited only by its contemporary needs and applicability. Those things most important to early societies were related to navigation and fisheries. Matters, which later became of fundamental value, were recognized as subject to Trust Doctrine based on the underlying intent of recognizing and protecting the beneficial interests of the public in these resources. The time may not be right, the subject matter is growing in need, the education of the public is growing and the future may see utility in the Public Trust as a means to the end of securing recognition and standing for the protection of the public beneficial interest in intellectual activities.

This could be the end, or only a pause for a work in progress.

⁷⁹ See generally Murck, *Waste Content: Rebalancing Copyright Law to Enable Markets of Abundance*, 6 ALB. L.J. SCI. & TECH. 383(2006).

⁸⁰ “Willful Infringement” produced by Jed Horovitz and directed by Greg Hittelman, a DVD touted as “a report from the front lines of the real culture wars” to be found at www.willfulinfringement.com (2006).