Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 36
Number 1 *Symposium—Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*

Article 2

9-1-2002

Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional

Erwin Chemerinksy

Follow this and additional works at: https://digitalcommons.lmu.edu/llr

Part of the Law Commons

Recommended Citation

Erwin Chemerinksy, *Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 Loy. L.A. L. Rev. 83 (2002).
Available at: https://digitalcommons.lmu.edu/llr/vol36/iss1/2

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

BALANCING COPYRIGHT PROTECTIONS AND FREEDOM OF SPEECH: WHY THE COPYRIGHT EXTENSION ACT IS UNCONSTITUTIONAL

*Erwin Chemerinsky**

There is an inherent tension between copyright laws and freedom of speech. Copyrights restrict the ability of people to disseminate speech; when material is protected by copyright there are legal limits on who can circulate or sell it. The First Amendment seeks to maximize the dissemination of information. Put most simply, copyright laws create a cause of action, for money or even for an injunction, to publish speech. Any law that authorizes civil suits for speech activities infringes the First Amendment unless it is sufficiently justified.[1] As Melville Nimmer observed, the copyright statute, by punishing expression, "fl[ies] directly in the face" of the First Amendment.[2]

Copyright laws are permitted, even in a society that deeply values freedom of speech, because they are seen overall as enhancing expression. Authors and artists, to say nothing of publishers, often engage in speech because of the likelihood of profit. Without copyright protections, less speech would occur.

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. I want to thank David Swift for his excellent research assistance.

1. *See* New York Times v. Sullivan, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

2. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970).

A simple anecdote is illustrative. Several years ago, I wrote an *amicus curiae* brief for the Ninth Circuit in the *Napster* case,[3] arguing that applying copyright laws in that situation enhanced speech. Allowing distribution of copyrighted music without paying royalties would lessen the incentives for musicians, their producers, and distributors to engage in speech activities. My teenage son was furious at me for writing a brief against Napster. I tried to convince him otherwise through a simple example. I had just written a constitutional law casebook and frankly had the hope that it would help to pay for his and his sibling's college tuition. I asked my son what would happen if someone electronically scanned my book and put it on the Internet for anyone to download for free. Not only would we lose his college tuition, but authors in the future would have less incentive to write such books and certainly publishers would be less inclined to produce them.

This, of course, is not a new notion. Professor Nimmer expressed this, too, when he wrote: "In some degree [copyright] encroaches upon freedom of speech . . . but this is justified by the greater public good in the copyright encouragement of creative works."[4] Indeed, the Supreme Court described copyright law as "the engine of free expression" which provides the economic incentives for speech activities.[5]

The tension between freedom of speech and copyright is an issue now pending before the United States Supreme Court in *Eldred v. Ashcroft.*[6] *Eldred* involves the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA), which extends the terms of existing and future copyrights by an additional twenty years.[7] Material that otherwise would have been in the public domain, and thus subject to widespread distribution, will be protected by copyright laws for a significant number of years. The issue before the Supreme Court is whether this statutory restriction on speech violates the First Amendment.

3. *See* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

4. Nimmer *supra* note 2, at 1192.

5. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

6. Eldred v. Ashcroft, No. 01-618 (U.S. oral argument Oct. 9, 2002).

7. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, sec. 102, § 302, 112 Stat. 2827, 2827 (1998).

My thesis is simply stated: Copyright protections are tolerated under the First Amendment because they encourage speech. Extending copyright protections *after* the speech has occurred does not serve this purpose. Therefore, such extensions should not be tolerated under the First Amendment. Although I favor enforcement of copyright protections that existed when the work was created, because they were part of the incentive for the speech to have occurred, I oppose extension of copyrights after the speech occurred because extending copyrights has nothing to do with encouraging more speech.

Part I of this Article briefly describes the Sonny Bono Copyright Term Extension Act. Part II explains why the District of Columbia Circuit decision was wrong in recognizing a categorical exemption from First Amendment scrutiny for copyright laws. Part III offers a framework for analyzing copyright laws under the First Amendment. Finally, Part IV argues that under this framework the CTEA is unconstitutional.[8]

I. THE SONNY BONO COPYRIGHT TERM EXTENSION ACT

The Copyright Act of 1909 created a copyright term of twenty-eight years, renewable once.[9] In 1976, Congress amended the copyright law to extend this time period. The 1976 Act provided that the basic term for copyright protections, for work created on or after January 1, 1978, was the life of the author plus 50 years.[10] The Act, however, said that for works made for hire and for anonymous or pseudonymous works, the copyright term would be seventy-five years.[11]

---

8. There is another major reason why the CTEA is unconstitutional: The Act exceeds the scope of Congress's powers under the Copyright Clause because that provision requires copyrights be granted only for "limited Times." Retroactively extended copyright terms are not limited. Although this issue is before the Supreme Court, and could be the basis for its decision, this Article focuses on the First Amendment issue presented in *Eldred v. Ashcroft*.

9. *See* Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (current version at 17 U.S.C. §§ 301-05).

10. *See* Copyright Act of 1976, Pub. L. No. 94-553, §§ 302-04, 90 Stat. 2572-76 (codified as amended at 17 U.S.C. §§ 302(a) (1976)).

11. *See id.* at § 302(c) (stating that a work's copyright term will be seventy-five years from the year of first publication, or 100 years from year of creation, whichever expires first).

The Sonny Bono Copyright Term Extension Act extends these terms, both retroactively and prospectively. For any work published before January 1, 1978, and still protected by copyright law on October 27, 1998, the Act extends the copyright term to ninety-five years.[12] For works created on or after January 1, 1978, if the author is a natural and known person, the copyright term will be the life of the person plus seventy years.[13] The term will be the shorter of ninety-five years from the year of first publication, or 120 years from creation, if the work was made for hire or the author is anonymous or pseudonymous.[14]

Simply put, the Act adds an additional twenty years to the terms of copyrights, both prospectively for works not yet created and retroactively for works already protected by copyright law. The result is that many works that would have become part of the public domain will continue to be protected by copyright law and thus have their dissemination restricted.

II. WHY THE DISTRICT OF COLUMBIA CIRCUIT WAS WRONG

The United States Court of Appeals for the District of Columbia Circuit rejected a First Amendment challenge to the Sonny Bono Copyright Term Extension Act.[15] The court held that copyright laws are immune from First Amendment challenge and scrutiny.[16] The court declared that "copyrights are categorically immune from challenges under the First Amendment."[17] The court stated: "[we reject their first amendment objection to the CTEA because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others."[18]

No Supreme Court decision has ever held that copyright laws are absolutely immune from First Amendment challenges. The leading Supreme Court decision concerning copyright and the First

---

12. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, sec. 102(d)(1)(B), § 304, 112 Stat. 2827, 2828 (1998).

13. *See id.* at sec. 102(b)(1), 112 Stat. 2827, 2827.

14. *See id.* at secs. 102(b)(3)(A)-(B), 112 Stat. 2827, 2827.

15. *See* Eldred v. Reno, 239 F.3d at 372, 375 (D.C. Cir. 2001), *cert. granted sub nom.*, Eldred v. Ashcroft 122 S. Ct. 1062 (Feb. 19, 2002).

16. *See id.* at 375.

17. *Id.* (quoting the holding of United Video v. FCC, 890 F.2d 1173, 1192 (D.C. Cir. 1989)).

18. *Id.* at 376.

Amendment is *Harper & Row v. Nation Enterprises.*[19] The Court held that a magazine could be held liable for publishing copyrighted material. The Court said that the First Amendment does not protect the right to publish speech owned by another.[20] An article in *The Nation* magazine contained 300-400 words from a 200,000 word manuscript written by former President Gerald Ford and that had been under contract for publication, in excerpt form, in *Time* magazine.[21] *Time* canceled its contract after *The Nation* article appeared.[22]

The Supreme Court held that the First Amendment did not protect *The Nation* from liability for copyright infringement. Justice O'Connor, writing for the Court, said that "in our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[23] The Court also rejected the argument that the publication should be considered to be "fair use" under the copyright law. Justice O'Connor said:

> In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.[24]

Nothing in *Harper & Row* states or even implies that copyright laws are inherently categorically exempt from First Amendment scrutiny. Quite the contrary, the Court in *Harper & Row* emphasized the relationship between freedom of speech and copyright laws.[25] *The Nation* magazine urged the Supreme Court to recognize a First Amendment exception to copyright law for news reporting that used copyrighted materials. The Supreme Court expressly rejected this argument and emphasized "the First Amendment protections already

19. 471 U.S. 539 (1984).
20. *See id.* at 560.
21. *See id.* at 539.
22. *See id.*
23. *Id.* at 558.
24. *Id.* at 560.
25. *See Harper & Row*, 471 U.S. at 554-60.

embodied in the Copyright Act's distinction between copyrightable expression and noncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."[26]

In other words, the Court upheld the application of the copyright law, and rejected an exception to it, because it saw copyright protections as protecting and advancing speech. Nothing in the opinion suggests that copyright laws are immune from First Amendment analysis or that they would be upheld if they were seen as unduly restricting expression.

Harper & Row is best understood together with other Supreme Court decisions that have allowed civil liability for speech so as to protect commercial value and encourage more speech. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that a state may allow liability for invasion of this right when a television station broadcast a tape of an entire performance without the performer's authorization.[27] A television station broadcast a fifteen-second tape of a circus county fair act where an individual was a "human cannonball" shot from a cannon into a net.[28] The Supreme Court held that the broadcast station could be held liable because it broadcast the entire performance without the plaintiff's authorization.[29] The Court noted, however, that the plaintiff would have to prove damages and noted that it was quite possible that "respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live."[30] The *Zacchini* Court emphasized that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."[31]

Both *Harper & Row* and *Zacchini* allowed restrictions of speech because the limitations were seen as enhancing speech overall by protecting the economic incentive for expression. Neither stated or implied a categorical exception to the First Amendment. Nor, of course, did either involve a retroactive extension of the protections accorded by copyright law or the right of publicity.

---

26. *Id.* at 560.
27. 433 U.S. 562 (1977).
28. *See id.*
29. *See id.* at 574-75.
30. *Id.* at 575 n.12.
31. *Id.* at 573.

The District of Columbia Circuit also justified its conclusion by invoking the idea/expression distinction. The court quoted its earlier decision in *United Video, Inc. v. Federal Communications Commission*:[32]

> In the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no [F]irst [A]mendment right to do so. Although there is some tension between the Constitution's copyright clause and the [F]irst [A]mendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.[33]

The extension of the term of the copyright law has little to do with the idea/expression distinction. When a copyright expires, both the ideas and expression contained within it become part of the public domain. A person is able to publish and disseminate the material, without permission from the copyright holder. Extension of the copyright law takes this right to speech away. The fact that the ideas within the work are not copyrighted does not diminish the speech that is lost as a result of the copyright extension. Phrased slightly differently, there is an enormous difference between what is allowed under fair use and what is allowed if material is no longer regarded as protected by copyright. The Copyright Term Extension Act means that material that otherwise would not be covered by copyright laws will be deemed protected for twenty additional years. This is a substantial loss of speech and neither the idea/expression dichotomy nor the fair use doctrine lessen the impact of the CTEA.

III. ANALYZING COPYRIGHT LAWS UNDER THE FIRST AMENDMENT

In the last twenty years, the Supreme Court has been clear that the starting point in free speech analysis is whether a law is content-based or content-neutral.[34] The Supreme Court frequently has declared that the very core of the First Amendment is that the government cannot regulate speech based on its content.[35] In *Police Dep't*

32. 890 F.2d 1173 (D.C. Cir. 1989).
33. *Id.* at 1191.
34. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980).
35. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

of Chicago v. Mosley, for example, the Court said: "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[36] In countless First Amendment cases, involving many different types of speech issues, the Court has invoked the content-based/content-neutral distinction as the basis for its decisions.

The Court has declared that "[c]ontent-based regulations are presumptively invalid."[37] In *Turner Broadcasting System v. Federal Communications Commission*, the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need to meet intermediate scrutiny.[38] Justice Kennedy, writing for the Court, explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[39] Justice Kennedy thus noted: "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[40] Hence, the Court endorsed a two-tier system of review. The Court uses "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[41] However, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[42]

The Court's concern is that the government will target particular messages and attempt to control thoughts on a topic by regulating speech.[43] As the Court recently noted, "[l]aws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than

36. *Id.* at 95.
37. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1982).
38. 512 U.S. 622 (1994), *aff'd*, 520 U.S. 180 (1997).
39. *Id.* at 641.
40. *Id.*
41. *Id.* at 642.
42. *Id.*
43. *See* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (for an excellent discussion of the rule of content-neutrality).

persuasion."[44] As the Supreme Court explained, content-based restrictions "rais[e] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[45]

How is it determined if a law is content-based? The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter neutral.[46] Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message.[47] For example, it would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in the park but anti-abortion demonstrations are not allowed.

Subject matter neutral means that the government cannot regulate speech based on the topic of the speech. A case from two decades ago, *Carey v. Brown*, is illustrative.[48] Chicago adopted an ordinance prohibiting all picketing in residential neighborhoods unless it was labor picketing connected to a place of employment.[49] The Supreme Court held this regulation unconstitutional. The Court explained that the law allowed speech if it was about the subject of labor, but not otherwise.[50] The Court said that whenever the government attempts to regulate speech in public places it must be subject matter neutral.[51]

Similarly, and more recently, in *United States v. Playboy Entertainment Group, Inc.*, the Court found that a law which regulated only sexual speech was a subject matter restriction and had to meet strict scrutiny.[52] A provision of the federal Cable Act prohibited "signal bleed" of sexual images; signal bleed occurs when people

---

44. *Turner Broad.*, 512 U.S. at 641.

45. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

46. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n , 460 U.S. 37, 45 (1983).

47. *See* Amy Sabrin, *Thinking About Content: Can it Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220-22 (1993).

48. 447 U.S. 455 (1980).

49. *See id.* at 457.

50. *See id.* at 460 n.4 (noting that the lower courts have interpreted the statute as embodying the requirement that the subject of picketing be related to the labor dispute).

51. *See id.* at 471.

52. 529 U.S. 803 (2000).

receive images from cable stations to which they do not subscribe.[53] The law required that cable companies either completely eliminate signal bleed of sexual images or that sexual programming be shown exclusively during late-night hours.[54] In finding the law unconstitutional, Justice Kennedy declared: "The speech in question is defined by its content; and the statute which seeks to restrict it is content based."[55] He explained that the law

> applies only to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent."[56] The statute is unconcerned with signal bleed from any other channels. . . . It "focuses *only* on the content of the speech and the direct impact that speech has on its listeners."[57] This is the essence of content-based regulation.[58]

The Court found that the law failed strict scrutiny because it was not the least restrictive alternative for achieving the government's interest.[59]

A law regulating speech is content-neutral if it applies to all speech regardless of the message. For example, a law prohibiting the posting of all signs on public utility poles would be content-neutral because it would apply to every sign regardless of its subject matter or viewpoint. In *Turner Broadcasting v. Federal Communications Commission*, the Supreme Court found that a federal law requiring cable companies to carry local broadcast stations was content-neutral because they were required to include all stations whatever their programming.[60] A law might also be content-neutral if it regulates conduct and it has an effect on speech without regard to its content. For example, a sales tax, applicable to all purchases including reading

53. *See id.* at 806.
54. *See id.* at 808.
55. *Id.* at 811.
56. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 505, 110 Stat 56.
57. Boos v. Barry, 485 U.S. 318, 321 (1988).
58. *Playboy*, 529 U.S. at 811-12.
59. *See id.* at 827.
60. 512 U.S. 622 (1994).

material, might have a significant incidental effect on speech, but it is content-neutral.[61]

The question, therefore, is whether copyright laws should be regarded as content-based or content-neutral. In an important and influential article, Professor Neil Netanel makes a persuasive argument that copyright laws are content-neutral and thus only need to meet intermediate scrutiny under *Turner Broadcasting*.[62] Professor Netanel writes: "Copyright law stands outside this content-based rubric. Copyright's purpose is to provide an economic incentive for creation and dissemination of original expression. Its target is not the viewpoint, subject matter, or even communicative impact of the infringer's speech, but rather the infringement's deleterious impact on the copyright incentive."[63]

Professor Netanel is exactly right in his analysis. Professors Mark Lemley and Eugene Volokh came to an opposite conclusion and concluded that copyright laws are content-based because "[c]opyright liability turns on the content of what is published."[64] Although, of course, this statement is true, it fails to recognize that "content-based" is a term of art within the First Amendment analysis and has a specific meaning in that context. Under the Supreme Court's precedents described above, a law is content-based if its application depends on either the subject matter or the viewpoint of the speech. Copyright law does neither of these: it applies to all speech whatever its topic and whatever its ideology. As Professor Netanel explained: "But the fact that copyright law is content-sensitive does not mean that it is 'content-based' within the meaning of the First Amendment."[65]

Certainly, it is possible to imagine a content-based copyright law. Imagine that the law extended different degrees of protection or different terms of protection based on the topic of the speech or its

---

61. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439 (1991) (upholding the application of a general sales tax to cable television that was not applicable to newspapers because the tax did not suppress ideas and did not target a small group of speakers).

62. *See* Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 48, 54-59 (2001).

63. *Id.* at 49.

64. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998).

65. Netanel, *supra* note 61, at 48.

viewpoint. If the law provided less copyright protection for works about law than for books about science, or longer terms of protection for works praising the government than for works criticizing it, that would be content-based. General copyright statutes are properly regarded as content-neutral and thus should have to meet intermediate scrutiny.

A key question then becomes what is to be regarded as an "important" interest sufficient to meet intermediate scrutiny. In the area of copyright law, an important purpose is encouraging the creation of new works. The Copyright Clause itself, in Article I of the Constitution, states that "To promote the Progress of Science and useful Arts" Congress may "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[66] This language is crucial because it explains how the First Amendment and the copyright clause can be reconciled. If there is a conflict between these two provisions, then the First Amendment would have to trump because it modified the Constitution by subsequent enactment as an amendment. A tension does not exist so long as intellectual property law is used "to promote" creation and dissemination of works. In this way, the Copyright Clause enhances and increases speech.

For this reason, the Supreme Court has explained that copyrights exist to protect "original" works. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court declared: "Originality is a constitutional requirement."[67] When copyright protections are accorded to original works they provide an incentive for its creation.[68] Extending copyright protection for existing works does not offer such an incentive.

Thus, in evaluating copyright law, intermediate scrutiny is to be used and, more specifically, the question is whether the statute will likely have the effect of increasing the creation and distribution of speech.

---

66. U.S. CONST. art. I, § 8, cl. 8.

67. 499 U.S. 340, 346 (1991).

68. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 35 (2000) (restrictions of speech are permitted to encourage more speech).

IV. WHY THE COPYRIGHT TERM EXTENSION ACT IS UNCONSTITUTIONAL

Retroactively extending the term for copyrights does not offer an incentive for creating or distributing speech. The speech that benefits from copyright extension obviously already has occurred. But copyright extension limits speech by preventing expression that otherwise would occur. For this reason, the Copyright Term Extension Act should be deemed to fail intermediate scrutiny and thus to violate the First Amendment.

There are several responses to this conclusion. First, it could be argued that this unduly limited the goals of copyright law to just providing an economic incentive for speech. Copyright protection also serves another crucial purpose: upholding the moral rights of the creator of a work. The idea is that those who produce creative works deserve to be the ones to profit from them. The argument, then, is that copyright extension is warranted as advancing the moral rights of authors and artists.

At the very least, it is highly questionable whether this was the purpose of the CTEA.[69] That law seemed to be about allocating financial benefits; advancing moral rights did not seem to play any role in this. The reality, of course, is that the beneficiary of copyright extension is rarely the artist or author who created the work. The CTEA seemed all about protecting studios and publishers who have the copyright, not at all about upholding the moral rights of the creator.

Also, the moral rights argument has no stopping point. Any copyright protection advances these interests of speakers. The question is how to balance the moral rights of the producer of expression with the interests of the general public in the widest possible dissemination of speech. Copyright law does this when applied prospectively by giving authors and artists notice as to the protections that they will have. Retroactive extension is a windfall, benefiting

69. The Supreme Court has held that under both intermediate and strict scrutiny the focus is exclusively on the actual purpose of the legislature; a conceivable purpose is not sufficient. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (under intermediate scrutiny, the government has the burden of proof and the focus is on the actual purpose of the law); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (describing requirements for strict scrutiny).

one group—the copyright holders, who may or likely may not be the producers, at the expense of another group—those who want wider dissemination of the speech.

Second, it can be argued that copyright is really property, and government regulation of this property should be treated under the rational basis test used for other government economic regulations since 1937. From this perspective, copyright extension is like any other government regulation; it favors some economically over others.

The problem with this argument is that it ignores that the property involved are works protected by the First Amendment. The argument assumes that there are two distinct categories: property and speech. That is a false dichotomy. Copyright is all about safeguarding property that is speech. In this way, labeling the works as property changes nothing in terms of the appropriate content of First Amendment analysis. Nor should rational basis review be applied simply because the law is concerned with allocating economic benefits. A tax on newspapers is about economics, but still is highly suspect under the First Amendment.[70] Indeed, copyright extension functions much like a tax on the press. It imposes a new economic cost on those wanting to engage in speech activities; now there must be royalties if the speech is to occur at all (and even then might not be allowed).

Third, it can be argued that copyright extension is constitutional because it provides the resources for producers to engage in more speech activity. If major studios have longer copyright protections, they can reap additional profits from the copyrighted works. These funds then can be used to produce more speech. This argument is particularly attractive because it justifies copyright extension as consistent with the Constitution's purposes: increasing speech.

There are several problems with this argument. First, it is purely speculative. Those benefiting from additional years of copyright might use the funds that they gain for more speech or they might use it in an infinite number of other ways. There is no way to know. A studio benefiting from copyright extension might use the additional revenues for another movie, or it might profit the parent company, or

70. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (declaring unconstitutional a tax on the press).

be used for higher salaries and dividends. There is no reason to believe that it will lead to a substantial increase in speech. Actually, the inquiry is more complicated. Copyright extension only will lead to more speech if either it would subsidize speech that otherwise would not occur because it was not profitable or because, though profitable, was not able to attract sufficient capital. Probably such instances exist, but how often is completely a guess.

Second, there is no way to evaluate whether the speech that is gained by copyright protection exceeds the speech that is lost. Assuming that copyright extension by granting more profits to copyright holders will cause them to produce more speech, there still is the question of whether this outweighs the speech that is lost by removing works from the public domain. Indeed, those who could benefit economically without copyright extension—such as publishers and film distributors—are just as likely to use their profits for more speech. Therefore, there is no reason to believe that copyright extension will cause a net increase in speech compared to what would occur without the extension.

V. CONCLUSION

The Sonny Bono Copyright Term Extension Act is a law that gives an economic benefit to some, copyright holders, at the expense of others, those who would benefit from the material being in the public domain. By taking material from the public domain for twenty additional years, the Act is a substantial restriction on the freedom of expression. In *Eldred v. Ashcroft*, the Supreme Court should hold that the law violates the First Amendment.

Copyright law is consistent with the First Amendment when it exists to encourage the creation and distribution of more speech. Copyright extension does not serve that purpose because it applies only to speech that already exists. Accordingly, the Supreme Court should find that the law is impermissible and that Congress cannot retroactively extend the terms for copyrights.