IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERIC ELDRED, et al., Applellants, v. JANET RENO, Appellee.	No. 99-5430

Thursday
October 5, 2000

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice

BEFORE:

THE HONORABLE DOUGLAS H. GINSBURG, Judge

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE KAREN LeCRAFT HENDERSON, Judge

APPEARANCES:

On Behalf of Appellants:

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C O N T E N T S

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

THE CLERK: Case No. 99-5430

ERIC ELDRED, ET AL.,

v.

JANET RENO,

Mr. Lawrence Lessig for Appellant and Mr. Alfred Mollin for Appellee.

ORAL ARGUMENT OF MR. LAWRENCE LESSIG

ON BEHALF OF ERIC ELDRED, APPELLANT

May it please the Court, the question in this case is whether the Framer's vision of a limited power to issue copyrights tied to a constitutional guarantee of a vibrant public domain continues to bind Congress.

Appellants in this case are individuals and organizations that depend upon the public domain for their livelihood, like the Disney Corporation with "Cinderella" or "Sleeping Beauty" or the "Hunchback of Notre Dame", some of these plaintiffs draw upon the public domain to create new and derivative works. Others recover out of print works and make them available to the public generally.

And finally, others restore old and decaying films and make them more widely available.

In 1998 Congress passed the Copyright Term Extension Act, extending the term of subsisting copyrights by 20 years and prospectively extending the term of future copyrights by 20 years.

This statute has harmed the Appellants. In an age when the Internet has made -- multiplied the opportunities that are available to produce new and derivative work it has extended the term under which an author's estate or it's assigned can control the access to copyrighted works.

And by extending the term of copyright for many works whose current copyright holder cannot be found, it has created essentially a publisher's blackhole. Where the cost of identifying current copyright holders are simply too great.

THE COURT: How is that handled today?

MR. LESSIG: That's the same problem that exists today, Your Honor but it is extended by virtue of the fact that the ordinary --

THE COURT: You have a long footnote detailing all of the steps one would have to take to trace the copyright. Find the heirs and so on, which would seem to be, as you say, almost to the same degree, at least a somewhat lesser degree of problem

today. Surely there are services that do that.

MR. LESSIG: There are services -- that's right Your Honor, but the fact is if the service is unable to find this copyright holder, given the effect of the Net Act, which was published -- passed also in 1998, this becomes a criminal offense if this is not identified to publish this material.

And so the Appellants in this case, including Higginson Book, for example, face the threat of criminal prosecution if they continue to publish works whose copyright holder cannot be discovered.

THE COURT: When did it become a criminal offense?

MR. LESSIG: The Net Act passed -- it passed in 1998. It makes it a criminal offense to publish, either electronically or not, works whose value is greater than a thousand dollars within a period of 180 days.

Plaintiffs challenged this act when it first came into effect in January 1999. The government moved for judgment on the Pleadings. We cross-moved for Summary Judgment. And the District Court, without a hearing or without oral argument,

granted the government's motions for judgement on the Pleadings.

Now the essence of the government's claim is that the challenge to the duration of a copyright act must be tested under rational basis review. If this is the standard, then we lose. But we do not believe that the authority of this Court or the Supreme Court supports this as the standard for reviewing a change in the Copyright Act.

Whether under the Copyright Clause or the First Amendment, Congress' extension of this monopoly on speech rights merits heightened review.

We'll argue first that under ordinary First Amendment review both the prospective and retrospective aspects of the CTEA are unconstitutional and second that the limited times and originality requirements of the Copyright Clause invalidate the retrospective aspect of the Copyright Term Extension Act.

Let me address the First Amendment first.

THE COURT: Could you just state the standard of review then?

MR. LESSIG: Well, we believe under the First Amendment the standard of review would be

ordinary First Amendment review for a content neutral regulation. It should be intermediate scrutiny as specified in O'Brien. And under the Copyright Clause, the question is whether this change comports with the requirements of originality and limited times.

The Court has not interpreted the meaning of limited times and we suggest the method has adopted when interpreting authors and writings should guide you in interpreting the meaning of limited times. But it has clearly held that the originality requirement is a constitutional requirement.

First, in the trademark cases and most recently adverted to in Feist. And under the holding of the originality requirement as a constitutional requirement and the definition of originality to not include works in the public domain. We think it's a natural -- it follows from that, that so too works that are simply having their copyright term extended cannot qualify as original for purposes of the Copyright Clause.

The government argues; however, under the First Amendment that there's a special First Amendment exception under the Copyright Act that so

long as Copyright protects only expression, there is not First Amendment issue to be raised. Now we submit there is no authority for this extraordinary claim of a copyright exception and the authority the government relies upon stands for a very different and wholly pedestrian point.

Every case the government cites is a case where the claimant demands a First Amendment right to use an otherwise legitimately copyrighted work.

In essence, the First Amendment right to trespass. Courts have rightly rejected that claim. But Appellants here are claiming something fundamentally different, we are not arguing we have the right to use an otherwise legitimately copyrighted work. We are arguing that this work is not legitimately copyrighted. That the copyright power, given the restraints of the First Amendment cannot extend to this kind of work.

Our claim is not that we have a special right to trespass, it's that this property cannot, under the First Amendment and the Copyright Clause, legitimately be considered property.

THE COURT: If you don't have a cognizable First Amendment right in using the work,

then why would you have any greater right in challenging the eligibility of the copyright?

MR. LESSIG: Your Honor, if we were challenging the right to use a work we would have no greater right to the general copyright. But as the posture of this case now stands we're making a facial challenge to a statute that's affecting the terms of copyrights generally.

THE COURT: But your interest in doing so is your First Amendment interest, correct?

MR. LESSIG: It's a First Amendment interest to get access to --

THE COURT: And we've been told you don't have a First Amendment interest in access to the works.

MR. LESSIG: Into a particular work, that's right. That's the meaning of this line of cases that says you don't have a First Amendment right to trespass. But it can't be that that holding converts to no ability to challenge for any First Amendment reasons the extensions of the Copyright Act.

THE COURT: Well suppose -- let's just revert to real property for a moment since it's less

challenging to the judicial mind.

If you don't have the right to trespass on my land, and you don't. You're saying you might nonetheless have a right to object to my putting up a fence. Now I suppose if the fence obscures your ancient rights, you do, but if the fence -- if that's not your objection, but rather it's the fence that keeps you out. Then you don't, because you don't have a right to come in.

MR. LESSIG: That's right.

THE COURT: What's the difference there?

MR. LESSIG: There's no difference in the way you framed the question. But I believe a slightly different hypothetical would make the point. I don't have a right to enter your land because I don't have the right to trespass on your land. But if the power under which Congress grants you the land is expressly limited by the Constitution in some other way. Then the challenge that I'm making is to the violation of this limitation as it applies to the grant of land in the first place.

So it's not about my particular right to enter the land. Although, the fact that I'm harmed by the fact that I can't use these works that

otherwise should have fallen into the public domain is a sufficient nexus required to give us standing to raise this.

THE COURT: I don't see how that different hypothetical illuminates the situation. If the land grant is from the government for the purpose of operating a public university, and you're excluded from that university, do you have a basis for objecting to the land grant?

MR. LESSIG: Well, if the land grants were for example given to -- on the basis of racial discrimination and I'm challenging the racial discrimination in granting that land. I might not have the right to enter the university, but I certainly should have the right to challenge the racial discrimination that was made in making that land grant in the first place.

They're conceptually different and yet, because of the nexus that's required to demonstrate the standing we can raise that harm and ask for --

THE COURT: You've gotten to the problem -- the standing problem. If you don't have a right to enter the university how do you have a right to challenge the land grant that underlies the

university? What's the right of yours that's being violated to give you standing?

THE COURT: I, frankly, didn't understand why Mr. Mollin challenged your standing until now.

(Laughter.)

THE COURT: You've done a good job of making his case.

THE COURT: Well, it is clarifying. It does help, but go ahead.

MR. LESSIG: Well, Your Honor, the harm that we suffer here is that we don't have access to the public domain works. The authority that the government relies upon to show why we can't raise a claim about access to works is raised in a narrow context.

We have no authority for saying this is the only First Amendment interest that one has in any context. Right. So the access that we have here -- here's a separate way to think about it.

THE COURT: What's the source of your right to access? You may have harm -- excuse me. You don't have judicially cognizable harm when your access is defeated unless you have a right to that access. Now is the First Amendment your right to

that access or is something else your right to that access?

MR. LESSIG: Your Honor, this is an answer to the question, I assure you. We have -- we understand this limitation on the ability to raise this right to trespass as a compromise expressing the limited scope of the copyright term of a copyright. Copyright has a limited scope and that protects the rights for people to get access after -- around the edges of a legitimate copyright.

And that feeds the ultimate justification that the Court has given for copyright. Which is that it serves an engine of free expression. Now we're --

THE COURT: Yeah, but if your only harm is the same harm that is to the public generally, then you don't have a standing.

MR. LESSIG: No, that's right and in that --

THE COURT: And what we're trying to find, exploring here, is where your right comes from that is violated by the allegedly overreaching act of Congress that gives you justiciable harm for purposes of standing.

MR. LESSIG: That's right. But the second dimension that we assert that exists for a First Amendment right is when Congress' action cannot reasonably be said to be creating an incentive to produce speech by extending duration, that's a separate kind of harm. Now there is no holding or statement of any court that says that when the harm is about producing or restricting access on the dimension of duration, that we don't have success to this --

THE COURT: Now try this for me. Just try giving me a yes or a no to this.

Is the source of the right that you say gives you a justiciable interest, which has been harmed, the First Amendment?

MR. LESSIG: In this part of the argument it is, Your Honor.

THE COURT: Is there some other source of right that you say gives you standing?

MR. LESSIG: There isn't, but we are saying that there are two dimensions to this First Amendment --

THE COURT: There is or there isn't?

MR. LESSIG: With respect to the First

Amendment there are two dimensions of that harm.

THE COURT: With respect to your standings is there some other source of right than the First Amendment which gives you --

MR. LESSIG: Well, we have standing --

THE COURT: -- a justiciable protectable interest?

MR. LESSIG: Under the Copyright Clause, Your Honor.

THE COURT: Under the Copyright laws?

MR. LESSIG: Under the Copyright Clause. Our claim is that the extension retrospectively of the copyright term, here, harms our ability to get access in violation of the limited times provision and originality provision. And that was --

THE COURT: That would seem to me to be the source of your Lopez argument as to the invalidity of the act. But see what I'm still trying to explore is why you have standing to justically attack that Lopez argument.

MR. LESSIG: We have standing in just the same way that in United Christian Scientists they were standing to challenge an act which was restricting the ability for people to get access to

works of the Christian Science Church.

In that case, too, there's a First Amendment argument about the Establishment Clause and there's also a Copyright Clause argument about the ability for them to get access to this work -- taken from them in violation of the Copyright Clause. The standing there, too, was in both dimensions grounded upon the harm caused by the act of Congress.

Your Honor, I'd like to reserve some time.

THE COURT: Well, I have another question I wanted to ask you. We will give the time for rebuttal.

MR. LESSIG: Yes. Okay. Thank you.

THE COURT: Have you adopted any point -- any arguments that appear in any of these amicus briefs? Or maybe -- I don't remember -- there is more than one, but in any brief other than your own?

MR. LESSIG: Well, in particular, Mr. Jaffe's brief is a brief that makes textualist arguments that we believe are quite strong in this way.

THE COURT: Is there any place in which you have adopted them, in your briefs?

MR. LESSIG: We formally acknowledged them in our briefs. I don't believe we have, Your Honor, no.

THE COURT: Okay. So the -- because it seems to me, I don't know whether there's really any difference, but the verbal formulation that he advances under the necessary improper clause. Derived from the case is at least different in terms than the intermediate scrutiny or rational review.

MR. LESSIG: That he advances for justifying the act -- for challenging the act?

THE COURT: Yes.

MR. LESSIG: Yes. Well, it is different in the sense that it's emphasizing the propriety of the particular act and I believe we, too, are arguing about the propriety, but we wanted to focus on the very different types of inquiries that would exist under both questions we've raised.

One the inquiry under the First Amendment, which we think is governed by standard review. But second, as the Court has done in the copyright context inquiry about the specific meanings of this implied term "original" and also the expressed term "limited Times".

These two terms, we believe, have been interpreted in light of the purpose of the Copyright Clause and that's the source --

THE COURT: Well, there's some tangency -- yes, some tangency there because of his reliance on the John Deere case.

MR. LESSIG: That's right. And the Graham case.

THE COURT: Is that cited in your brief? I don't remember. Graham?

MR. LESSIG: The Graham case, yes it is Your Honor.

THE COURT: Yes, of course. It's a principal case. What did you want us to do with Schnapper?

MR. LESSIG: Well, there are two dimensions Your Honor. The Schnapper dimension with respect to the ability to -- what the government claims, the ability to rely upon the Purpose Clause we think is just in this reading of Schnapper.

In Schnapper, what the Court said was that you didn't have the requirement to show that each particular work satisfied the purpose requirement.

It relies directly on Mitchell Brothers in the Fifth Circuit. Mitchell Brothers in the Fifth Circuit expressly says, and Jaffe argues this as well, that the purpose requirement restrains Congress, not particular requirements.

Now we believe that's clearly distinguishable from the kind of argument we're making here. But if it's not distinguishable, then we believe that the Feist case has clearly drawn Schnapper into doubt, because is Feist there clearly is a reliance upon the narrowing purpose of the Copyright Act.

And in both Graham and Bonito Boats the Court quite expressly states that the purpose is a limitation on the scope of the power in the Copyright Clause. This the only clause in the Constitution that grants power to Congress and simultaneously says what the purpose of that power must be.

THE COURT: Well, I guess there is still an undistributed middle here. In the sense that if the introductory phrased in the clause serves as a limitation and Schnapper tells us it's not to be -- Mitchell, actually as opposed to Schnapper, tells us it's not to be applied to each work.

It leaves open the possibility that it is to be applied categorically. And then what are the categories and one division of the categories is between prospective and retroactive application. Another would be by media when subjected that there's no incentive effect with respect to extension of copyright for works created long ago. The government comes back and says film restoration. And I think they might have added, from my limited personal knowledge, the problem of acidic paper. Books written on acidic paper and phonographic masters.

All of which are going to disappear if there is no economic incentive to rehabilitate them. But that still leaves open the question, is that a separate category or does it carry over to all works described in the extension?

How do we cut into this if -- is there a middle ground? Or is going have to be either Schnapper as the government reads it or John Deere as you read it?

MR. LESSIG: First of all, Your Honor I would suggest that you distinguish between incentives for creativity and incentives that subsidize

production. My reading of the authority and the framing intent of the Copyright Clause, is to clearly subsidize creativity and made an expressed decision by granting to authors, rather than publishers the decision to subsidize production.

And in particular, in the case in Graham, the Supreme Court explains that the background of the monopoly power that was granted in England, often granted monopolies to companies that have already produced something for the purpose of subsidizing it in the future. That's the production subsidy. And the Court distinguished our Copyright and Patent Clause from that tradition.

So I don't believe there is authority for the notion that Congress can exercise this monopoly power to subsidize production rather than creativity. Now the middle ground in Schanpper, it seems to me, is not to see Schnapper standing out there as a restriction independent of any of the terms. It is a way of understanding the meaning of the terms. That was the way it was used to bring out the implied term "originality".

There's, you know, obviously authors and writings don't say "original". And yet by looking at

the purpose to promote creativity the Court has seen originality as the essential expression of that, and I think the only way to understand that creative, active interpretation is to see it against the Purpose Clause. And so too in the limited times clause.

Now, you know, in a law review article we might speculate about a number of different dimensions we would like to cut this and this media dimension might be one, but again, only if you believe the justification is a subsidy for production. And I don't think, given the extraordinary anxiety the Framers had about monopoly rights, generally, and it's belief that they were narrowly carving an exception for the creative activity that you can view this grant of copyright authority to be a grant to subsidize film producers who want production --

THE COURT: If we were -- go ahead.

THE COURT: A distinguishing production from what?

MR. LESSIG: From the creative acts.

THE COURT: So are you saying creation and production are two different things?

MR. LESSIG: Yes.

THE COURT: So meaning production here is not the original creation, but some subsequent replication.

MR. LESSIG: A subsequent copy. That's right, copying of it.

THE COURT: Even though the act of what you're now calling production would be the only thing to preserve the work for anybody's use. It will not be available in the public domain, either, if the paper disintegrates or the original master is allowed to disintegrate.

MR. LESSIG: Well, that's their claim Your Honor, it's a factual claim. We deny it in particular because we have Appellants who do precisely this. We have Appellants who take work from the public domain that would be destroyed in the sense that you say, and turn it into work on the Internet, for example, or republish it as Dover Books does.

We also have film libraries, Movie Craft for example, that takes silent films and other films in the public domain --

THE COURT: Well, no -- I think you're

missing the point, because your answer begs the question in this sense. If the -- what we're hypothesizing or the government is and maybe I'm embellishing it -- is that there is an item, let's say a film master. Which before the copyright has expired will become unusable if they don't have any incentive, to let's say digitize it before it's too late.

The one who would like to republish it after it enters the public domain, won't have that opportunity, as you were suggesting, you know, putting the books on the Internet or something like that. Because the work will be gone during it's protected period.

MR. LESSIG: Right.

THE COURT: It used to be said, maybe it should still be, that many 20th Century authors will outlive their works because of the acidic paper.

THE COURT: And maybe it should be --

THE COURT: And so there just isn't going to be anything there posthumously for a publisher to reintroduce.

THE COURT: Which may be a blessing to later generations.

(Laughter.)

MR. LESSIG: I don't know what they are published on, Your Honor. But Your Honor the reason this hard to set -- to make clear is that we have to be clear which context you are asking the question. If you are asking the question in the First Amendment context then I think we have to really evaluate the incentives, as they allege, are as the world would make them. And we've had no opportunity to investigate and challenge to see whether there is substantial evidence there.

If it's in the context of the Copyright Clause, then it seems to me it's not a fact based inquiry, it's an inquiry into whether we believe that this kind of production, just subsidizing somebody --

THE COURT: And I was thinking at that point about the Copyright Clause.

MR. LESSIG: If that is considered original under Feist, then they get a copyright for the production of that. If it's not considered original under Feist, then I think the meaning of Feist is that that's not what the Copyright Clause extends to and Congress cannot simply expand the powers of the Copyright Clause merely because it's

extremely compelling to do it.

There's lots of ways Congress can help restore films, they can subsidize restoring of films, they can create tax incentives for restoring films, they can pay the --

THE COURT: So you're not denying the incentive effect and that it is more or less aligned with the incentives built into the Copyright Clause, you're simply saying it is not at the threshold -- it doesn't surmount the threshold to get into the Copyright Clause.

MR. LESSIG: Right. In the Copyright Clause you must show it's original and I think that's an important limitation on the scope of Congress' power, which the Court has embraced.

THE COURT: Take it back to Schnapper just a moment. If I recall it literally says that the Purpose Clause does not place a limit on Congressional power, am I misremembering? I can't give you the exact quotation.

MR. LESSIG: You know, you're right about it's literal interpretation.

THE COURT: If we are writing an opinion and we are bound by Schnapper as precedent, which we

are, I'm not sure that I understood you in your answer to Judge Ginsburg to say how we would we write that opinion that gets out from under the apparent precedent of that language?

MR. LESSIG: Your Honor, the meaning of the opinion is not its literal text taken out of -- taking this literal sentence, taken out of context. I genuinely believe that this opinion does not say that the Copyright Clause -- the Purpose Clause and the Copyright Clause has no effect on limiting Congress' power. I believe that --

THE COURT: And aside from writing that Mr. Lessig doesn't believe that.

MR. LESSIG: Well, you can say that --

THE COURT: How would I write the sentence in the opinion or how would one of my colleagues write the sentence?

MR. LESSIG: But Your Honor -- that's right.

THE COURT: That says we're not bound by the sentence and the presidential sense.

MR. LESSIG: That's right.

THE COURT: What's right? That's a question, it's not a statement. My questions keep

being right this morning.

MR. LESSIG: Well, no. The thrust of your question -- I think is, how are we going to write an opinion.

THE COURT: Yes.

MR. LESSIG: That properly deals with this opinion. And I think the way to properly deal with this opinion is to interpret it correctly.

Now look at Schnapper decided after Graham, which clearly states that the Purpose Clause is a limitation on the power that Congress has in the Copyright Clause. To interpret this Court as ignoring that clear authority from the Supreme Court, is to read into your behavior something less than good work. I don't read that into your behavior. It seems to

me --

THE COURT: That's a good point. The Court, of course, was relying heavily on the Fifth Circuit's opinion on Mitchell Brothers.

MR. LESSIG: And the Fifth Circuit --

THE COURT: Now the Court nowhere cites Graham, does Mitchell?

MR. LESSIG: That's right. No Mitchell

does cite Graham. I believe Your Honor, I would have -- I need to check that. But Mitchell is precise about that fact that the Purpose Clause does constrain Congress. Mitchell expressly states that the words of the Copyright Clause of the Constitution do not require that writings shall promote Science and useful Arts, they require that Congress shall promote those ends. So Mitchell doesn't stand for the proposition that there is no constraint from this clause, and it's completely sensible opinion in Mitchell. The case in Mitchell is whether an obscenity exception should exist for the copyright power, so that a judge should decide that this is obscene, and therefore it doesn't have the copyright power.

And the Court quite reasonably says this would be a mess if courts has to decide. And it would be a mess, as Mitchell says for very valid First Amendment reasons, because the Court would be in the position of trying to decide whether to grant copyright or not based on it's judgement in the abstract of whether something is obscene.

So to avoid that mess, the Court in Mitchell said it was completely reasonable for

Congress to decide, it would just say everything is copyrightable and therefore not bog the process down --

THE COURT: Why doesn't that carry over to the decision in the Congress to not distinguish between extant and inchoate works or future works?

MR. LESSIG: Well, this line is not a hard one to draw. There's existing copyrights whose term is being extended. That's an expressed section of the statute, which is quite simple to distinguish from works that have not yet been copyrighted or reduced to a tangible form, which is also being extended.

And what Congress can do, within some limits is prospectively extend the term. We argue about how far, but they can certainly do that. But the meaning of limited times, if it must be limited times to promote progress cannot be to create an incentive in dead people.

The one thing we know about incentives, is that you can't incent dead people and the retrospective extension here, which is now so great that the vast majority of those who get any benefit from this extension is clearly not to original

authors.

THE COURT: Thank you very much, Mr. Lessig. We'll give you five minutes for rebuttal.

MR. LESSIG: Thank you.

ORAL ARGUMENT OF MR. ALFRED R. MOLLIN

ON BEHALF OF JANET RENO, APPELLEE

May it please the Court, since the rational basis has been conceded, I'll try and focus on those aspects in which Plaintiff seeks more than a rational basis.

First of all the notion of originality, which seems to come everywhere in their brief. Originality in Feist, and I think it's worth reading just that. Originality is a constitutional requirement courts have defined crucial terms, authors and writing, in so doing the Court made it unmistakably clear that these terms, authors and writings, are presupposed degree of originality.

So where originality comes from as a constitutional requirement is the nature of the writing, the nature of the author. All right.

Feist makes pretty clear that that's not a difficult test. It's something that occurs at the moment of creation. At the moment of creation has it

been copied from something else. Right.

THE COURT: Now, taking that as a given then, you seemed to be, for at least the purpose of the argument, and I'm not asking you to go beyond purposes of the argument. The Purpose Clause seeming to require incentive for Congress to act, what incentive for the exercise of creativity can there be in the extension of the copyright term for a work that has already been created, in Feist terms?

MR. MOLLIN: Well, if one focuses simply on that work, on an individual work, obviously none. What is out there is out there and there can't be any incentive to bring it out.

THE COURT: Is that a concession that the extension is then invalid as to existing work?

MR. MOLLIN: Pardon me?

THE COURT: Is that a concession that the extension --

MR. MOLLIN: It is not.

THE COURT: Okay.

MR. MOLLIN: What it is that the -- that one must look at the system as a whole that Congress has created. And see whether in the context of the system as a whole this extension to subsisting

copyrights does encourage and does promote the progress of the Arts. Right.

It doesn't with respect to a particular individual.

THE COURT: That's what I was attempting to explore by the question. How does it, as to pre-existing works, as to which the Act purports to extend copyright protection. How does that provide incentive? And I'm not understanding you to be answering that. I may be missing something, but --

MR. MOLLIN: All right. That a system as whole, that protects the inducements that lead an author to write in the first place. That protects them from dilution, that protects them --

THE COURT: But we're not talking about dilution. We're talking about an extension, an expansion of protections.

MR. MOLLIN: An extension which --

THE COURT: The author wrote whatever he or she wrote, satisfied with the incentive of the term as it then extended, as it then existed. How does an extension of that term change the incentive for something that's already been created?

MR. MOLLIN: It changes the incentive for

people standing in the future. For potential authors now, it's Congress' finding that the last Copyright Act was inadequate to achieve its purpose. Its purpose was -- the purpose of the 50 year life plus 50 years, to give an author protection through his life and the life of the generation following. Right.

The Congress found that that wasn't achieved. That that goal fell short by what was done. So there was a correction of that goal to avoid the dilution, all right.

Of what, in fact, people felt they were offering to that author to create. So what the system as a whole does and it's not limited to this. It's limited in many, many ways, you know. It's articulated in many, many ways that Congress protects the grant that has been given from dilution from deterioration from going awry from unforeseen contingencies.

A kind of similar example is in the Digital Millennium Act where for the first time Congress prohibited the decryption of encrypted things, which prevent people from playing it without paying for it. That was given to subsisting

copyright holders as well. That didn't increase their incentive to go ahead and produce new works.

It's something that would have destroyed the value of existing works, but it didn't induce them to do anything new. It didn't induce them to produce anything, it surely induced those --

THE COURT: I'm not sure that I understand what that has to do with the argument that you are making.

MR. MOLLIN: That the system as a whole protects people's works and the reward they have been given for them from deterioration and when you do that to someone who has a subsisting copyright, people are more comfortable to begin writing. People are more comfortable writing in a system, in which they know the government -- they can see the government has protected people in the past from dilution and they can count on that happening in the future.

And if you know the government is going to take care of you --

THE COURT: Would that mean that the Congress could constitutionally take works out of the public domain and reestablish copyright protection?

MR. MOLLIN: I think in terms of the originality argument, there's no --

THE COURT: Right. That work would seem to be a work which is about to -- whose copyright is about to expire in four years as compared to a work which has expired a year ago, would not seem to be intrinsically different in terms of any definition of originality --

MR. MOLLIN: Congress would not --

THE COURT: Would Congress be able constitutionally to go to the second. That is the one, which unlike Mickey Mouse has already lost its copyright protection, and take it back out of the public domain and reestablish its copyright protection?

MR. MOLLIN: We think that Congress, not only can do so, but in fact Congress has done so on a massive scale, involving millions of volumes. Right. And if one were to accept the Plaintiff's views of what --

THE COURT: Congress has taken things that were already in the public domain out and put them back in copyright? Is that correct?

MR. MOLLIN: Yes, Your Honor. The

Uruguay Round Agreements, which were completed in 1995, this applies only to domiciliaries of foreign countries, but the Agreement is with hundreds of countries.

And what it says is that people in those countries who have followed the copyright protection of their own laws, and have their own laws protecting them, but whose works have fallen into the public domain in this country -- all right.

Those copyrights are recovered. It's the term we use, recovered.

THE COURT: Could Congress without regard to any treaty power or any international relation simply with regard to domestic product, seize something that's in the public domain and reestablish its copyright protection? Could it do so constitutionally under the Copyright Clause?

MR. MOLLIN: It's not going to be barred by the Originality Clause, because a work when it's created and if it's created without copying something, if it's an intellectual product of the mind -- it's always this.

THE COURT: Would you say Congress could constitutionally do that?

MR. MOLLIN: Yes. All right. It wouldn't be prevented by that particular clause. It wouldn't be prevented by --

THE COURT: Would be prevented by anything else?

MR. MOLLIN: Sure.

THE COURT: What?

MR. MOLLIN: It's very hard to see how it would promote the Arts and Sciences to pull things back out --

THE COURT: Granted. Now, that granted. How does it promote the Arts and Sciences to extend the extant copyright on something that's six months newer than the one you said it would no promote?

MR. MOLLIN: Because, first of all these things are not in the public domain. There's not that kind of --

THE COURT: We know that. It's a given with my hypothetical.

MR. MOLLIN: And therefore one can correct the errors that have been made, right. And protect it from the dilution that it would otherwise receive without the kind of dislocation that would occur in the public domain.

THE COURT: That's not an answer as to why it would or would not provide any greater incentive to production than the one that might have been withdrawn.

MR. MOLLIN: The incentive for production, in general, is the system, right. And the system --

THE COURT: And you're saying that by protecting past creators, you're giving assurances to future creators that they might get -- not assurances, expectations that they might get further protection than what's now in the books and that would create a theoretically greater incentive by the system.

MR. MOLLIN: I don't think so --

THE COURT: I'm asking you why that same theory would not apply to withdrawing from public domain.

MR. MOLLIN: First, we're not saying greater protection. Right. We are saying keeping the what you've been given from dilution.

THE COURT: The reason why we're here is because Congress extended the protection. If there were not an extended protection we wouldn't be here.

That's what this statute is about, isn't it?

MR. MOLLIN: Congress corrected an error. There's a difference between that and adding on a benefit, right. It's correcting an error, all right. So in --

THE COURT: No.

MR. MOLLIN: Pardon me?

THE COURT: No, there isn't.

You asked me a question, which I don't have to answer. But the answer is no. There is not a difference between correcting an error by extending a benefit and extending a benefit. No, there is no difference.

I don't have to answer your question, you have to answer mine, I don't have to answer yours, but no there is no difference.

MR. MOLLIN: I would say that the difference between simply extending a benefit, is that extending a benefit can provide one with more than one originally had. Correcting an error just simply brings one back --

THE COURT: If the error is, in your view, that you didn't have enough protection to begin with, then it's extending a benefit. You're talking

about the motive now, not the difference in kind, leave that one alone.

MR. MOLLIN: But your question is why not do that, as well, to thing in the public domain?

THE COURT: Yes.

MR. MOLLIN: Because, I think, this is a judgement that Congress makes. I think there would be dislocation --

THE COURT: So you are said they could constitutionally do it. That's what I keep asking you and you keep saying, well, it wouldn't be prevented by this clause. I said, wouldn't be unconstitutional under some other clause?

MR. MOLLIN: It would not be violated by the Originality Clause. Once a writing has been created, and it's an original writing --

THE COURT: Is your answer that there's no constitutional infirmity to re-extending copyright protection to something that's in the public domain?

MR. MOLLIN: Insofar as concerns originality, there are other considerations to take into consideration.

THE COURT: That's what I thought I was trying to ask you awhile ago. Is, are there other

things that would make it unconstitutional for Congress to do that?

MR. MOLLIN: There might well -- it might well be --

THE COURT: What?

MR. MOLLIN: -- such a dislocation in the public domain that caused such havoc in the Arts, you know, with regard to things that have been --

THE COURT: For that matter might not make it a bad idea, but does it make it an unconstitutional idea?

MR. MOLLIN: It may make it questionable whether there is a rational basis connected between extending, you know, copyrights in that way and -- but these are judgement calls I think. They are judgement calls of what Congress wants to do, but this is surely the safest way to do that.

It's certainly the safest way to deal with correcting an error is to do it while it still is a work that hasn't gotten into the public domain. Where people haven't yet developed expectations or made products or developed businesses on the basis of these things. Right.

So this case is really not at all

originality. It doesn't have anything to do with whether -- how this work was created and whether it was at it's beginning an intellectual labor of the mind. Not copied from something and involving some degree of creativity. It's a limited times question, and a limited times question is again --

THE COURT: Are you saying then, that the question is the same as to existing works whose copyright is extended or as it is to not yet created works whose copyright will be longer. Are you saying that's the same question? That there's no constitutional difference in those two?

MR. MOLLIN: Yes. There's no constitutional difference between either the test or the way the Court approaches it.

In both cases the limited times question is a rational basis. Is extending the limited time or setting a limited time rationally connected with the promotion of the Arts?

THE COURT: But the true answer has -- or your explanation has to come back in different forms for the retrospect of a prospect of justifications. The promise you offer as a justification for the retrospective aspect.

MR. MOLLIN: Yeah, what I meant to say and maybe I didn't say it precisely enough, is that the standard of review, the test, is exactly the same. A rational basis.

THE COURT: Okay.

MR. MOLLIN: All right. The way that would work out --

THE COURT: Now taking -- lets' look at the promise of the rational basis. Are you advancing that as the actual documented purpose of the Congress, here. Or one of those intentionally counter-factual flights of fancy we're encouraged to indulge under Beech Communications?

So that if we can think of any state of affairs that would justify this otherwise seemingly bizarre product that's under review in any given case, then we're to uphold it?

MR. MOLLIN: We have a couple pages of legislative history on that matter and believe me we could fill up the brief with it.

THE COURT: Well, I know there was testimony.

MR. MOLLIN: Yes, there was testimony.

THE COURT: But is there anymore than

testimony?

MR. MOLLIN: There's testimony, there's congressional reports.

THE COURT: There are reports saying that?

MR. MOLLIN: Yes.

THE COURT: Is the word promise ever in there?

MR. MOLLIN: No. Not promise.

THE COURT: What's the closest word?

MR. MOLLIN: That we have failed to do what we have set out to do.

THE COURT: Okay. So we don't have to say that we are making it up entirely?

MR. MOLLIN: Not making it up at all.

THE COURT: Even though we are authorized to do so, apparently. Indeed required to do so and can be reversed for failure of imagination.

(Laughter.)

MR. MOLLIN: You don't have to make anything up, Your Honor. It's set forward clearly what these basis are. They are explained at great length and there's no doubt that when you consider the system as a whole, all right.

These are things which produce a system which encourages people to go forward and, you know, and produce in the Arts. People are more comfortable in a system in which they know unforeseen contingencies aren't going to wipe them out.

THE COURT: Is the standard of review for conformity with the necessary Improper Clause any different than it is than rational group relations -- rational basis?

MR. MOLLIN: No.

THE COURT: Even though it's in terms of being adapted to the purpose?

MR. MOLLIN: Well, this -- meaning here?

THE COURT: Pardon me? The Supreme Court has informed that standard -- necessary Improper Clause has meaning, right? Something that is insofar it's proper to adapt it to the identified purpose.

MR. MOLLIN: Yes. And we think that would be exactly the same thing that the rational basis between setting a limited term would have to be rational in terms of the purpose set forth in the preamble to the clause.

THE COURT: What did you want us to do with what the Court has to say in Graham about the

limitation imposed by the clause?

MR. MOLLIN: I don't think we disagree.

THE COURT: Let me get it fresh in my mind. At the outset it must be remembered that the Federal Patents power stems from a specific constitutional provision which authorizes Congress to promote the progress of useful Arts by securing for limited times our clause.

MR. MOLLIN: Yes.

THE COURT: This clause is both a grant of power and a limitation written against a backdrop of practices, statute of monopolies and so on. Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.

If we're engaging in rational basis review, isn't that review then limited by the necessity of producing a rational basis that is related to the stated constitutional purpose?

MR. MOLLIN: Yes.

THE COURT: The promise keeping isn't an obvious one.

MR. MOLLIN: Isn't what?

THE COURT: Is not an obvious one. One

could make an improvident promise. And keeping it may not be consistent with the Copyright Clause.

MR. MOLLIN: I -- but we think that the creation of a system, in which people have a guarantee that their efforts will in fact be rewarded and not be diluted by unforeseen contingencies. We think that is very directly connected to the progress of the Arts.

THE COURT: What are these unforeseen contingencies that we are talking about here?

MR. MOLLIN: Well, I think the Technological Age, for example, has made uniformity a much greater importance. And uniformity is extended to both subsisting and --

THE COURT: What does that have to do with --

MR. MOLLIN: The Technological Age?

THE COURT: The Technological Age and the supposed increase in need for uniformity have to do with the expectations of the copyright owner as to what his incentives were at the time he makes the production?

MR. MOLLIN: Well, I mean if you have --

THE COURT: For the life of me, I'm not

getting your logic there.

MR. MOLLIN: All right. Let's say that Bolivia has a protection period of five years, right. We had going into this 50, other countries 70. After five years in these days, Bolivia can put that up on the internet and it's flashed everywhere, the dilution of the 50 year --

THE COURT: Well, how does what Congress does here with reference to existing works, have anything to do with Bolivia's flashing it up on the Internet?

MR. MOLLIN: Because if it goes ahead and makes a protection and tries to draw Bolivia, with it's moral force into a union. Right. Into a union where they are adopting the same laws we are, then you're not going to have that problem.

THE COURT: Does the word attenuated have play any role in this argument, counselor?

(Laughter.)

MR. MOLLIN: I think, you know, to some extent there is an attenuation and if you focus on each one of them they don't sound like very big things. But what they are is the correction of errors and it's constantly going on. It's creating a

system in which there is confidence about --

THE COURT: Is that your best answer as to what the unforeseen circumstance is that is being corrected here? Was the Bolivian's five year protection doesn't exist in reality?

MR. MOLLIN: No. The other unforeseen that has been present, arguably in every extension, has been the increase in age. Right. Life expectancy.

THE COURT: What's the relationship, numerically, between the increase of age and between the last Copyright Act and in the extension in the new one?

MR. MOLLIN: I think there are two things that Congress mentioned. They mentioned the three year increase in life expectancy. It also mentioned a demographic trend toward marriage later in life. So that children --

THE COURT: What was the length of the extension involved here?

MR. MOLLIN: Twenty years.

THE COURT: Twenty years. And the life expectancy increase is three years over the same time frame? In fact, I think it's less than that.

MR. MOLLIN: Three years, but they don't say how much the demographic influence is. But presumably these are things that are increasing. Congress is certainly entitled to some prophylaxis so that it doesn't have to come back and revisit this thing ever three years. All right. And can set something up that in fact is going to --

THE COURT: What was the original protection under the first Copyright Clause?

MR. MOLLIN: Fourteen to fourteen.

THE COURT: Okay. Thank you.

THE COURT: So this is three years for average longevity and 17 years for later childbearing?

MR. MOLLIN: Well, I don't think that, Your Honor.

THE COURT: The Pablo Picasso/Strom Thurmond Provision.

(Laughter.)

MR. MOLLIN: I don't know how Congress proportioned it. I don't what they thought about the demographic trends.

THE COURT: How did Strom Thurmond vote on this? Do we know?

(Laughter.)

MR. MOLLIN: They may well have also looked at the fact that this is a constantly increasing this, right. And let's set something far enough so that it is a stable law and we don't have to come back in five years and readjust it because it has gone up another three years.

THE COURT: So, insofar, that's the rational, the thousand years is out? Or even 200 years is out?

MR. MOLLIN: On this record that would certainly be irrational.

THE COURT: This is more like a requirement that an instrument -- would there be a distribution of this, this is before --

THE COURT: Lives in being close to 21 years.

THE COURT: Yes, that sounds more -- so there is some limit to it. Even if it's somewhat plastic.

Judge Henderson?

Thank you very much Mr. Mollin.

REBUTTAL OF MR. LAWRENCE LESSIG

ON BEHALF OF ERIC ELDRED, APPELLANT

Your Honors my colleagues beat up on me and told me not to raise this argument. That it was a professor's argument and no one gets it, but I have to focus on originality once again. Page 57 of the government's brief, the government says the United States' flag is in the public domain.

It is not subject to copyright because it is not original. They said that because the Supreme Court in Feist, quoting Harper, says in describing, it says, copyright does not prevent subsequent users from copying a prior authors work and those constituent elements that are not original -- for example, facts. He mentions some other things, or materials in the public domain.

Now it is the case that the government, I believe, in their brief had asserted that material in the public domain could not be removed. The Uruguay Agreement did remove material from the public domain. That has not been challenged yet.

THE COURT: Has it been ratified?

MR. LESSIG: It was ratified, Your Honor. So there's a question about whether Congress has this power.

THE COURT: And at this point it has not

been challenged?

MR. LESSIG: It's not been issued a caveat, that's right.

THE COURT: And the federal government's power, under that one, is that expected to invoke the treaty power or some other power?

MR. MOLLIN: It clearly has to invoke the treaty power. That's the only excuse for doing something which the Court has expressly said in the context of the Patent Clause, you cannot do.

THE COURT: The issues are going to be quite different, if and when that's challenged than the issues here.

MR. LESSIG: That's right. If this is only under the domestic powers, the Court said in Graham, Congress cannot, with respect to the patent power, remove objects form the public domain. And we submit for exactly the reasons the question suggested, although it was a question, Your Honor.

There's no difference between the limitation with respect to the public domain and limitation with respect to existing works.

THE COURT: Aren't we told, with regard to the Uruguay Round, though that the protection

afforded under U.S. law was dependent on continuous preservation of the copyright abroad?

MR. LESSIG: That's my understanding as well.

THE COURT: So it's not a wholesale confrontation with requirement of no importation.

MR. LESSIG: That's right, that's right. As to the sufficient incentive, this argument that somehow if the government is a promise keeper, people will have sufficient incentives to continue to write.

First, what's striking about this argument is the other half of this equation is completely invisible because the Constitution expressly envisions the construction of a public domain. And where's the promise with respect to the public domain.

There, too, my clients have depended upon the promise of the government to allow material to fall into the public domain and that promise has not been kept.

But secondly, if we can just hand wave this substantial incentive, it depends once again in what context we are trying to raise this question. If it's in the First Amendment context then they can

make their assertions about incentives, but we should have an opportunity to show that that's not based on substantial evidence according to intermediate review. If it's in the Copyright Clause context then the fact that they point to some incentives in not sufficient to get around the limitations --

THE COURT: Your reference now, and earlier, to sufficient opportunity to show. Is that a procedural argument that this shouldn't have been decided by Summary Judgement at all?

MR. LESSIG: It was decided, Your Honor on a motion -- a judgment of the Pleadings.

THE COURT: Yes.

MR. LESSIG: It should not have been decided on that basis given that we had made assertions about the plausible grounds that Congress could have been relying upon in granting its extension. We don't believe it's plausible --

THE COURT: So your not asking us that this is invalid, your just asking us to return it for further proceedings in the District Court to determine if it's invalid?

MR. LESSIG: At a minimum, under the

First Amendment Clause we are asking for that.

THE COURT: Nevermind, which one are you asking for?

MR. LESSIG: Well, Your Honor when I read it, it's hard for me to see how any District Court could conclude that this passed the intermediate scrutiny test. But I'm willing to be proven wrong and -- but I believe I should have that right to have that argument in District Court.

We've asked precisely in the briefs for this Court either to hold this under the intermediate scrutiny as insufficient --

THE COURT: In your conclusion you ask for the forgoing reasons, the District's Court decision should be reversed, the Copyright Term Extension Act declared unconstitutional, the enforcement of the Non-Electronic Theft Act against person whose infringement of a copyright would not have happened but for the CTEA's enjoined and then they awarded costs.

I don't find anything in there about us sending it back for further proceedings. Is that --

MR. LESSIG: Your Honor --

THE COURT: I'm rather taken by surprise

at this line of argument. That's twice you've alluded to it and it's not what you say here.

MR. LESSIG: I believe Your Honor, in fact we do say in the brief that at a minimum we should have an opportunity to make this showing. In the reply brief I didn't really express this --

THE COURT: Your conclusion requests nothing about this.

MR. LESSIG: I'm sorry I couldn't hear you.

THE COURT: Your conclusion request nothing about this.

MR. LESSIG: Right. That might be the case Your Honor.

THE COURT: It is the case, I just read it to you.

MR. LESSIG: The conclusion is the case, that is the case Your Honor.

THE COURT: All right.

MR. LESSIG: All right. Let me just mention two other points. As to the error issue, Your Honor there is no plausible basis --

THE COURT: I want o go back to that for just a moment. If your argument is that the District

Court erred as a matter of law on a question of law and if the only evidence you talk about is not the kind of evidence we use in adjudication, but what you say is the evidence before Congress of its decision, I don't see what we could possibly be sending it back for.

Our review is that same as the District Court's. What could come before the District judge that couldn't come before us?

MR. LESSIG: Well, Your Honor the government in their briefs in this Court did not assert that this passed intermediate scrutiny. They did not make that argument and because they didn't make that argument in reply, we didn't believe we were in a position to be making the argument for them when arguing against them about that.

So we didn't frame it in that structure in the reply brief. But certainly we believe that the same evidence could be reviewed by this Court, but we would like an opportunity to argue about that evidence instead of arguing about what standard should be governing this. Whether it's the intermediate standard or some special rule.

And so that's why we believe we should be

in a position if that's --

THE COURT: What argument could you make on remand that you can't to us?

MR. LESSIG: Well, the issue that's got to be resolved by the court below is whether Congress could of reasonably relied upon substantial evidence. That's the standard that comes out of --

THE COURT: That's not a fact question.

MR. LESSIG: That's right. It's --

THE COURT: That's not a finding -- that's a question of law and I'm at a loss and I'm really as I say, taken by surprise. I looked just now at the conclusion of your reply brief and it has the same paragraph as your blue brief.

It says nothing about remand for further proceedings.

MR. LESSIG: Right. The remand is not because the Court is more appropriate to do it, this Court could just as well make those judgements on the basis of what has been presented in the record.

THE COURT: I'm not sure why we're not obligated to if your correct, as to opposed to simply able. I'm not sure why we're not obligated to.

MR. LESSIG: It just seems like a much

tougher job, Your Honor and I wanted to --

THE COURT: We're up to tough jobs counselor.

(Laughter.)

THE COURT: There has been at least one case I'm familiar with where, which we've passed for District Court's view in the first instance on a matter of law, because of the complexity.

MR. LESSIG: It seemed to me the same procedure the Supreme Court adopted in Turner. Turner I set the standard and then said the District Court must consider the facts, which were exactly the same type of facts. What Congress could have reasonably believed and come to the judgement and then had to go back up to Turner II before the court could affirm that particular finding.

THE COURT: It's sufficiently unusual that we know the few instances it exists.

THE COURT: And we've carved out an exception for you, but we said that we were carving out the exception and we further admitted that it was because we didn't want to have to do that.

MR. LESSIG: And finally, Your Honor, on the question of error and incentives. It is not

plausible to believe that the things that have been pointed to are sufficient to explain the extension that has been granted for works that were being copyrighted in 1923.

If it is a matter of incentive then, again, we don't think this is proper under the Copyright Clause analysis. It's been 30 years, Your Honors since Melville Nimmer outlined the retrospective extension violating the First Amendment values implicit to the Copyright Clause.

And 30 years since Justice Bryer in his fallible state as a law professor outlined the very clear incentive reasons why there's no plausible incentive by retrospective incentives. This is not about creating incentives. It's about an opportunity to use the copyright power for something it was not designed to do, which is to reward and protect monopolies. That was precisely what this clause was written against.

And we believe the practice of the Court in interpreting authors and writings, strictly according to the purpose of the clause should be followed with respect to limited times.

And if you follow that practice and you

accept the responsibility of creating a justiciable and manageable standard. And the simplest way to apply that standard is to say no retrospective extensions. That forces no hard judgements in the future. It's a prophylactic, simple way of understanding plain language as in limited terms and limited times.

In one shot they create the incentives and if they need to create other incentives later, there are plenty of other ways other than the monopoly power granted to them in an extraordinary limited way and that's --

THE COURT: Well, what do with the Act of 1790?

MR. LESSIG: 1790 is accomplishing two things at once. The 1790 Act did ratify existing copyrights as present copyright, but the purpose --

THE COURT: And extended them in case of those states that had lesser limits.

MR. LESSIG: That's right. But the purpose of that extension at that time was both to create incentives and also nationalize the copyright practice.

THE COURT: Uniformity is --

MR. LESSIG: I'm sorry?

THE COURT: Uniformity.

MR. LESSIG: Within the United States.

THE COURT: Because there was value in uniformity within a single market and that single market has now become broader than our national borders.

MR. LESSIG: That's right, Your Honor. And the question of the transitional nature of the 1790 Act is I think a difficult one.

THE COURT: You would admit of an exception for new constitutions?

MR. LESSIG: Every new constitution gets this transition. That's right, Your Honor. That's a well known rule.

(Laughter.)

THE COURT: You know we take with special deference, the implicit interpretations of the First Congress?

MR. LESSIG: Yes, we do. Although, I don't think this is a clear interpretation of the power of the Court under the Act. Again, this is a term which is expressly set at 14 years. We now have a term in the case of Irving Berlin that is 140

years. This is a Congress that is clearly concerned about limiting the scope of copyright. It covered the printing of maps, charts, and books.

Copyright now includes not just the printing of all of these objects, but also control over derivative works. The scope of this protection has increased significantly.

Now under the reasoning --

THE COURT: As of the production of such works --

MR. LESSIG: That's right. Because of the prospective incentive, we're not questioning that this has had an effect. But we are questioning whether this is crowding out the second side of the Copyright Clause balance, which is the protection of the public domain. That's the only thing that's constitutionally required.

Congress has no obligation to pass a Copyright Act. They do have an obligation if they pass the Copyright Act to protect the public domain. That's the meaning of the Limited Times Clause here.

Now if there were a repeated set of interpretation, actions by Congress around this time,

with the Framers. Then under the authority of the Supreme Court this would require some special attention. But we have one change by Congress in the first 100 years of the copyright term and one change again in the next 50 years of the copyright term.

And since I was born we've had 11 changes retrospectively of the copyright term and two prospective changes.

THE COURT: You wouldn't contend there's a causal effect there between your birth --

(Laughter.)

MR. LESSIG: Well, Your Honor I'm beginning to feel guilty and this explains my work on this case.

THE COURT: I think that period coincides with a great increase in longevity and much more -- a greater increase in the technological extensions of intellectual property.

MR. LESSIG: Well, as to --

THE COURT: You didn't cause that either.

MR. LESSIG: I'm working on the second one Your Honor.

THE COURT: No, now you'd think he was the Vice President.

(Laughter.)

MR. LESSIG: As to longevity, as we argued in our brief, if you take account after the longevity of people over the age of five is not changing substantially. We have specific numbers and the recent period is 2.3 years.

THE COURT: Let's just go back to one last thing and then we'll give you a final opportunity -- and that -- on the 1790 Act you were saying uniformity did play -- or a need for uniformity played a role there.

The Framers apparently, or those in the First Congress apparently did consider retropsectivity within their power. What do we say to get rid of it?

MR. LESSIG: Well, it's uniformity under a conception, not necessarily improper, I believe about a transitional constitution.

No, I don't think it makes sense to read that as stating some constitutional rule. As to the extent that there were constitutional rules stated by our Framers in the 1790 to 1800 period, many of them have been questioned by subsequent courts. But I don't think we have to be need to be that direct

about questioning the acts of this Congress.

THE COURT: Thank you very much Professor Lessig and Mr. Mollin. The case is submitted.

(Whereupon, the proceedings were concluded.)