COPYRIGHT'S FIRST AMENDMENT

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My students ask me who the Federalists are. I teach constitutional law; we read about the Federalists—people like James Madison and Alexander Hamilton and John Jay, publishing as "Publius," pleading with the citizens of the separate states to form a union by ratifying a strong, centralizing constitution. But then my students leave my class and are confronted with signs from an organization that lives in many law schools. This organization too calls itself, "the Federalist Society." These Federalists plead with the citizens of the United States—or at least with law students—to reform this centralized Union, by pushing back from the strong, centralized federal government that our nation has become. These federalists sport Robert Bork, or Alex Kozinski, as their heroes.

So my students ask, what is Federalism? The centralizing, or the decentralizing? The stronger federal government, or the weaker federal government? The party of Hamilton? Or the party of Frank Easterbrook?

I answer in a way that I am sure confuses. I say both. For it turns out that the hardest concept to convey, to law students at least, is this notion that the president now pushes—the idea of "just right." Not too much, not too little, but just enough. Just right. And, thus, if Federalists at one time pushed for something more, they are free at another time to push for something less. If it is a balance of power between federal and state authority that is right, then Federalists might well need to push in different directions as the balance changes.

Thus today, the same Federalists might need to push for less centralized power. Who could doubt that the framing Federalists would be terrified at the power that has been centralized in one government, anxious at the weakness of forces that would resist that centralized authority, and eager to find ways to restore the vitality of the other side? They would not recognize the government that they created; the presidency they created would seem to them like the monarchy they resisted; the Congress that they believed would jealously guard its power would seem, in its eagerness to vest its authority in an executive branch, cowardly; and the timid judiciary, that crown of their final days as a political party, barely able to mumble its

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equal status among generals and representatives, would seem bizarrely powerful, far beyond their initial imagination.

Of course, it may be that the Federalists' vision is out-of-date. It may be that the government we have become is far better than the government that we were. It may be that the balances they struck are balances we should let go. All that may be. But my point to the students is about consistency, not value. The Federalists could push for more then, and for less now, in reaction to what has become. And we, as students of what they did, in respect of what they did, should at least try to understand why they sought the balance that they did. Before we reject it, before we forget it, before we let ordinary political processes push us to something different, we should try to understand what they wanted when they built the federal government that they did—not too big, not too small, but just right.

This is the fifteenth Melville B. Nimmer Memorial Lecture. The series is a teenager—next year it will be allowed to drive. No doubt to some, my speaking in Melville Nimmer's name shows just how much a teenager the series has become. I represent the rebellious years, when the child is to reject his parents.

But I have never had an honor as great as I consider the honor to speak in Nimmer's name. For though I am a constitutional scholar first, I first came to understand copyright through an extraordinary essay by Melville Nimmer published thirty years ago in the *UCLA Law Review*, entitled *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*[1]

I had been told that this field of copyright law was filled with crazies. Not crazies in a negative sense (though no doubt there were a few of those), but crazies as in fanatics. Crazies as in those who could see no limit, or no balance, to the law that they were promoting. People who think that principle means never deviating; who believe that fidelity means perpetually pushing in a single direction. Crazies as in those who could not understand the consistency in two different generations of Federalists, as in those who would say, either you're for a more centralized government, or you're for a less centralized government. Balance, these people would say, is not my business.

Nimmer's essay erased that slander. I can still recall my admiration of the confidence with which this man who had devoted his life to this disci-

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

pline could move on both sides of the issue. On the side of more control, and then on the side of more freedom. In the direction of limits on access, and then in the direction of guaranteed access. Of the deep, and as it struck me, obvious balance that this law of copyright must strike. And of the deep and clearly obvious sense in which this essay, and hence this man, understood the significance of a constitutional balance.

There are few essays in the field of legal science that have had as profound an impact on the law as this—not just among academics, but among courts as well. And I take it that no one was surprised when the U.S. Supreme Court, just as this essay turned fifteen, embraced the central insight in Nimmer's analysis to explain the puzzle that Nimmer set himself to solve.

That puzzle was this: How is it that a constitution could protect "freedom of speech" from the abridgment by Congress, and yet give Congress the power to grant monopolies over speech?[2] What consistency could there be between the command not to control, and the power to give authors almost a century of control? What interpretation of freedom of speech made this control make sense? What understanding of this system of control—copyright—makes this constitutional freedom possible?

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[3] the Supreme Court gave us a theory. Or better, they gave us Nimmer's theory, now backed with the force of law. Said the Supreme Court, following Nimmer (and citing him twenty-seven times), this alleged contradiction was apparent, not real. Copyright did not *abridge* speech, because without copyright, a great deal of speech would not exist. Copyright, through its limited protection of authors, creates an incentive to produce speech that otherwise would not exist. It functions, as the Court said, as an "engine of free expression,"[4] fueling the creation of what otherwise would not be created.

Copyright does this, no doubt, by limiting some speech. But it limits some speech so that other speech might be created. Just as the Constitution itself limits democracy so that democracy might be more free, as Rebecca Tushnet has written, copyright limits some speech so that other speech might be produced.[5] Thus, there is no first amendment "abridgment" when the baseline is properly set. Nimmer, the Supreme Court said,

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2. The question was addressed by others as well, of course. *See, e.g.*, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

3. 471 U.S. 539 (1985).

4. *Id.* at 558.

5. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000).

shows us that if the baseline is the world that would exist but for the copyright protection, then the copyright protection does not abridge speech.

Nonetheless, for Nimmer and for the Court, this balance did not mean that copyright law was unconstrained by the First Amendment. There were instead still limits that had to be found in the scope that copyright could reach. These limits, Nimmer said, could be expressed in a "definitional balance."[6] So long as copyright protected expression only, and did not reach to protect ideas, then first amendment interests were satisfied.

This meant, as the Court held in *Harper & Row*, that at least in the ordinary case there would be no first amendment right to use the copyrighted works of others. There was, in other words, no first amendment right to trespass.[7] And thus, even if the *Nation* was correct that the excerpts they had stolen from *Time Magazine* were of historic importance (implicating matters at the core of first amendment protection), so long as the copyright did not try to protect the ideas or facts in the work, the copyright would not infringe the First Amendment.

Nimmer was not absolute about this point; nor, technically, was the Court, as the Court did not have to consider anything beyond the facts at issue in the case. Nimmer conceded that it was possible that in the right case, the right to trespass on certain copyrighted work would be guaranteed by the First Amendment. He offered the example of the photos from the My Lai Massacre, just fresh in the minds of a shocked America.[8] There was no way, Nimmer argued, to separate the "idea" in these photos from the "expression."[9] Sometimes the idea and expression were merged. And hence, as Nimmer wrote,

> To the extent that a meaningful democratic dialogue depends upon access to graphic works generally . . . little is contributed by the idea divorced from its expression. . . . It would be intolerable, if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. Here I cannot but conclude that the speech interest outweighs the copyright interest.[10]

My Lai, however, was an extreme case. In the ordinary case, the definitional balance would suffice. And it was this definitional balance that the Court embraced in *Harper*, settling firmly an understanding about how

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6. Nimmer, *supra* note 1, at 1186.

7. *See* Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 655 (D.C. Cir. 1994) (holding that there is no first amendment right to trespass in an abortion protester case).

8. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.10[C][2], at 1–85 (1978).

9. *Id.*

10. Nimmer, *supra* note 1, at 1197–98.

copyright is consistent with the First Amendment. This, the Supreme Court says, is its "balance."[11]

What would the Framers say of this balance now? Or better, not so much of the balance between idea and expression, but of the balance between what is now subject to state control and what is free? If we could turn our Federalist friends away from their obsession with the power of Congress over commerce,[12] or from their concern about Congress's tendency to commandeer[13]—if we, in other words, could get them to think about copyright for a moment, what would they think about how it has grown? Would they recognize what it has become? Would they be less concerned about it than they are about assuring states get to violate vested rights with impunity?

Let's begin by recalling the system of control that the Framers established. The first federal copyright statute was enacted in 1790. That act regulated the "printing" and "vending" of "map[s], chart[s, and] book[s]" for an initial term of fourteen years.[14] While in principle anyone could violate the exclusive right to vend, in 1790, there were only 127 printing establishments in the United States.[15] Copyright was not automatic; registration was required, and most of the early registrations were for scientific or instructional texts. Between 1790 and 1799, 13,000 titles were published in America, but only 556 copyright registrations were filed.[16] More than 95 percent of published work therefore fell immediately into the public domain—including, of course, 100 percent of foreign work. Our outrage at China notwithstanding, we should not forget that until 1891, foreign copyrights were not protected in America. We were born a pirate nation.

The vast majority of published work then was not copyrighted. The vast majority of the work that was copyrighted fell into the public domain after the initial fourteen-year term, and for the tiny portion that was copyrighted, or that was protected for more than fourteen years, the actual scope of the copyright protection was quite slight. Copyright did not protect derivative works; you could translate or adapt or abridge or set to song

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11. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).
12. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).
13. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).
14. Act of May 31, 1790, §1, 1 Stat. 124 (repealed 1831).
15. *See* ATLAS OF EARLY AMERICAN HISTORY: THE REVOLUTIONARY ERA, 1760–1790, at 68 (Lester J. Cappon ed., 1976).
16. *See* JOHN WILLIAM TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 141 (R.R. Bowker 1972).

copyrighted works, without the permission of the author. The monopoly rights that the 1790 statute granted were essentially protections against pirate presses. The message of the statute was simply this: Pirate presses, focus your energy on stealing from the British and French; leave Americans alone.

This limited monopoly right was not limited by accident. The Framers were well aware of the burdens of a more expansive right. England had only recently enacted the Statute of Anne,[17] which, to the great horror of the publishers who had introduced the act, was amended during its consideration to set a limited term on the protection of copyright. When that limited term was finally upheld by the House of Lords in the mid-eighteenth century,[18] an extraordinary amount of work fell for the first time into public domain. Shakespeare was finally free from the control of book publishers; anyone could reproduce his work and perform it, regardless of the monopoly interests of the publishers.

Americans looked to that freedom, and found its ideals to be the same as our own. The great evil in the Framers' mind, second only to the great evil of centralized, monarchical government, was the evil of state-sanctioned monopoly. And though they struggled over whether any power to grant monopolies should be vested in Congress at all, the power upon which they settled spoke volumes about the limitations it was to embrace: Unlike every other power-granting clause, this was the only power-granting clause that specified the means and purpose to which the power was devoted. Congress was not given the power simply to enact copyrights. Nor was it simply given the power to enact copyrights for limited times. Congress was given the power "to promote the Progress of Science" by granting, not to publishers, but to authors, "exclusive Right[s]" "for limited Times."[19]

Now as certainly as Congress has expanded the reach of its power under the Commerce Clause to regulate not just interstate commerce, but tons of intrastate commerce said to affect interstate commerce, Congress has expanded the reach of its power under the Copyright Clause. Indeed, in the two hundred and ten years since that first statute was passed, it is hard to reckon which power has expanded more, relative to its original scope. Copyright no longer is limited to maps, charts and books. It now

17. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

18. *See* Donaldson v. Beckett, 98 Eng. Rep. 257 (H.L. 1774), *overruling* Millar v. Taylor (1769) 4 Burr. 2303.

19. U.S. CONST. art. I, § 8, cl. 8.

touches practically any creative work reduced to a tangible form. It protects music and performances and architecture and certain design. It protects machines written in words—we call that software—and words written on machines—we call that the Internet.

And it protects these creative acts no longer for an initial term of fourteen years. It protects these creative works for the life of the author plus seventy years—which means, for example, in the case of an author such as Irving Berlin, a term that exceeds 140 years. It protects this work not contingently—not, that is, upon registration. It protects it, and all creative work, automatically—for a term that does not have to be renewed, for a life that exceeds the author's.

And it protects not just against pirate publishers. The scope of copyright now protects an extraordinarily broad derivative right. The right to translate some works, the right to perform, the right to adapt a play, or to make a movie—all these are rights that are now included within the originally sparse "exclusive right" that the Copyright Clause granted.

And finally, because it doesn't protect only against pirate publishers—because in 1909 the statute shifted its terms to speak of "copies" and not printing—and because the technology of copying has now exploded to cover just about anything anyone does with a computer, the reach of this regulation is no longer the 127 publishers that existed in 1790. The reach of this regulation on the right to speak extends to the millions who today use computers. This tiny regulation of a tiny proportion of the extraordinary range of creative work in 1790 has morphed into this massive regulation of everyone who has any connection to the most trivial of creative authorship.

Thus, while Justice Joseph Story could justify this power of Congress to grant monopolies, in the wholly pragmatic terms that he did,[20] one would be hard pressed to believe that Story could look to the existing expanse of rights and conclude the same. Whatever Story meant by "a short interval," it is hard to believe he would have thought it meant 140 years.

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20. As Joseph Story wrote about the copyright power:

> It is beneficial . . . to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject . . . ; [and beneficial] to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, at 402–03 (Carolina Academic Press 1987) (1883).

But our Federalist, remember, is not one-dimensional. This party that can include Kozinski and Hamilton is broad enough to understand the need for expansion, as well as the need for limits. The Federalist aims for balance; not every change is a challenge to balance. Indeed, some expansions may well be necessary to assure the preservation of balance. And no doubt, and as I certainly believe, much of the expanse in copyright over the past two hundred years was completely justified under a proper reading of the balance the Framers meant to strike. Though they did not protect music, it would be wrong for us not to protect music. The passion for Napster is wrong if it means that artists should not be paid. I realize there are those on the other side—those who note that while our system of protection has produced Britney Spears and Madonna, the Framers' system of non-protection produced Beethoven, and that maybe, therefore, the Framers were on to something—but I'm not on the side of free music if free music means that artists don't get paid. In my view the issue is not whether artists get paid; the issue is how. And Congress has been correct in its efforts to extend rights to assure artists get paid, so as to assure, in Nimmer's construction, a sufficient incentive to produce art.

Thus the mere fact of difference does not yet show that our modern copyright law has lost faith with the Framers'. But the size of the difference should at least guide us to ask: Would a Federalist, or more generally, a fidelitist—one committed to fidelity to the Framers' constitution—consider the full range of protection that now extends from the copyright power consistent with the balance the Framers struck? When fairly considered, would a fidelitist view the expansion of control like Chief Justice William Rehnquist viewed Congress's regulation of guns near schools?[21] Or would the fidelitist view this expanse of control as a proper extension of a still-balanced right?

I want to answer this question by following the practice of Nimmer of looking not just at one side of the balance, but at both together. And I want to do so in the context of perhaps the most dramatic change that Congress has made—and continues to make. This is the change in copyright's duration. How would a fidelitist, how would a Federalist, how would Nimmer work through this set of changes to the Framers' original balance?

Let's begin setting out the facts. I said that the Framers had an initial term for copyright that was fourteen years. That term could be renewed by the author for another fourteen-year term. That means the maximum term of protection initially was twenty-eight years.

21. *See* Printz v. United States, 521 U.S. 898 (1997).

In the first hundred years of federal copyright's life in America, Congress changed that term just once.[22] In the next fifty years, Congress changed that terms once again.[23] But in the last thirty-nine years, Congress has extended the terms of copyrights eleven times.[24] Nine of those eleven times were extensions of subsisting copyrights, in anticipation of the major change in the 1976 Act.[25] Two of those extensions were for both subsisting copyrights, and works not yet copyrighted.[26]

The most recent of this pattern of ever-expanding copyright terms is the Sonny Bono Copyright Term Extension Act of 1998—also known as the Mickey Mouse Protection Act. The aim of this act was to extend the term of copyright both prospectively—from the life of the author plus fifty to the life of the author plus seventy, or in the case of works made for hire, from seventy-five to ninety-five years—and retrospectively—to works subsisting under copyright, extending their term to a maximum of ninety-five years.

When Congresswoman Mary Bono spoke in favor of the act named after her late husband, she had this to say:

> Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [Motion Picture Artist Association President] Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress.[27]

While there is a lot one could say about this comment that is unfair, it is at least fair to say that it evinces in Congresswoman Bono a sense of what copyright should be that is different from the Constitution's command: "limited times." (After all, no matter how many days you subtract from

22. *See* Act of Feb. 3, 1831, §§ 1–2, 4 Stat. 436 (repealed 1870).

23. *See* Act of Mar. 4, 1909, § 4, 35 Stat. 1075, 1076 (repealed 1976).

24. These laws were: Pub. L. No. 105-298, 112 Stat. 2827 (1998); Pub. L. No. 94-553, title I, § 101, 90 Stat. 2573 (1976); Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); and Pub. L. No. 87-668, 76 Stat. 555 (1962).

25. *See* Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).

26. *See* Pub. L. No. 105-298, 112 Stat. 2827 (1998); Pub. L. No. 94-553, title I, § 101, 90 Stat. 2573 (1976);

27. 144 CONG. REC. H9952 (1998) (statement of Congresswoman Mary Bono).

"forever," it is still forever.) But the test of whether Congress's actions are faithful to the Framers' balance is not determined by the intent of a single Congressperson. The test of the statute, and the string of statutes that it represents, is whether it is consistent with the values that the Framers constitutionalized. Or more precisely, with the values as expressed in the constitutional text that the Framers gave us.

When the Bono Act was enacted, there were many with a strong view about its constitutionality. One of those most vocal was the founder of the web press, Eldritch Press: retired programmer Eric Eldred. Eldred had made it his life to convert as many public domain books into HyperText Mark-up Language (html) as he could. He had built an extraordinary collection already, and he was eager to be free to add more as more work fell into the public domain. But when the Bono Act was passed, the work he was preparing to add to his, and the world's, collection was put off for another twenty years. No material under copyright in 1997 would fall into public domain until 2019.

Eldred announced that he would commit an act of civil disobedience by publishing work that should have fallen into the public domain and that he would be willing accept the consequences. When a few of us at the Berkman Center explained the consequences—particularly in light of the recently enacted No Electronic Theft Act that would make his disobedience a felony,[28] Eldred agreed to a different course. With our help, pro bono, Eldred agreed to challenge the Bono Act, contra-Bono as it were, in the name, we believed, of the balance that the Framers had struck.

The core of our claim had two parts. First, that the Copyright Clause must mean something when it says terms must be limited; and that to understand what it means, you must read it in light of its purpose. Just as the Court has not read "authors" or "writings" in the abstract, permitting Congress to extend copyright to anything that might arguably be said to be an author or a writing, so too we argued that the terms "limited times" could not be read in the abstract, but must instead be read in light of the command that Congress exercise this power to "promote . . . Progress."[29]

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28. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (codified at 18 U.S.C. § 2311 (Supp. V 1999)).

29. U.S. CONST. art. 1, § 8, cl. 8. So, for example, though the Constitution nowhere speaks of "originality," the U.S. Supreme Court has read "Authors" and "Writings" to refer only to those authors and writings that produce original work—not facts, *see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), nor writings "already in existence," The Trade-Mark Cases, 100

And the simplest way to assure that the power only promotes progress is to require that the power only be used *in exchange* for progress. In exchange, that is, for producing something that has not already been produced. Thus, it is improper, under this reading, to extend the term of copyright to already existing works, since such an extension promotes nothing except the bottom line of (mainly) publishers.

The first amendment claim was broader than the copyright clause claim because it challenged both the retrospective and prospective aspects of the Bono Act. But the core again was the retrospective extension, and the argument against it was grounded in the reasoning offered by *Harper & Row*: If the speech restrictions of the Copyright Clause are justified because of the speech-producing character of those restrictions—if the restrictions are valid because they fuel an engine of free expression—then a retrospective extension of copyright cannot be justified under this rationale. If we know anything about incentives, we know that no matter what you give Margaret Mitchell, she is not going to produce anything more. These restrictions are just restrictions—they do nothing to promote more speech. Thus under the First Amendment, too, they must fall.[30]

As I said, I am a constitutional lawyer, not a copyright scholar, which means I am an alien from the culture that Melville Nimmer helped define. But never did I realize just how alien I was until we began this lawsuit challenging the Sonny Bono Act. For this was not, in the eyes of the experts, just an unlikely lawsuit; it was not simply a difficult claim to make; this was a "crazy" challenge to "well-established law." The amicus brief that was filed against our claim in the district and Court of Appeals seethed with outrage at the ignorance that our claims betrayed. The mistakes were too numerous, the amicus wrote, to even list in a brief. There was no plausible ground upon which to base a challenge to Congress's plenary power.

And this was not the position of Hollywood alone. Even those supportive of our ultimate aim, those who had opposed the Sonny Bono Act in Congress (not congressmen, of course—no member of congress had the courage to question this extension—but law professors who had testified against the action), even our allies, in other words, thought we were nuts. When copyright law professors filed testimony in Congress against what

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U.S. 82, 94 (1879), nor at least with patents, work already in the public domain, *see* Graham v. John Deere Co., 383 U.S. 1, 6 (1966).

30. Plaintiffs argued that this conclusion is reached under intermediate first amendment scrutiny. *See* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).

would become the Bono Act, they self-consciously refused to make a constitutional argument.[31] Their considered view was that Congress was free to extend the term as it wished; their argument was that this extension was simply bad social policy. As one friend put it, "you are wasting your time on a cause that is nuts; you are just likely to be thought nuts yourself."

There are few things as invigorating as being called nuts, and when you are called nuts by people on both sides of a political divide, then you know you're on to something. You know something about what is taken for granted within a particular interpretive community. You know what has become unassailable.

And it is that—the unassailable—that I want to focus on right now. For my point in this story is not so much to convince you of the correctness of our challenge to the Bono Act. My aim is to get you to notice something odd about the character of the culture that copyright has become. My hope is to get you to see just a bit about how extreme our view of copyright has become; how unbalanced, how unmitigated. To show you how far we have come from the time—as Jessica Litman put it, "forty, thirty, even twenty years ago," when "it was an article of faith that the nature of copyright required that it offer only limited and porous protection to works of authorship."[32]

For the reason that *Eldred* is nuts, the reason it "will clearly fail," is that we have become used to an idea that was not our Framers'. We have become accustomed to thinking of the monopoly rights that the state extends not as privileges granted to authors in exchange for creativity, but as rights. And not as rights that get defined or balanced against other state interests, but as rights that are, like natural property rights, permanent and absolute. The "exclusive rights" clause has become the "intellectual property" clause. And though the founders never used that term, "intellectual property," though it is a creation of lawyers in the late-nineteenth century, to us, copyright and patents are clearly property rights, and clearly deserve all the absolute and permanent protection that ordinary property deserves.[33]

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31. *See* Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, at* http://www.public.asu.edu/~dkarjala/legmats/1998Statement.html (Jan. 28, 1998).

32. JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET 78 (2001).

33. *See* William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* (Sept. 4, 1997), http://cyber.law.harvard.edu/metaschool/fisher/growth.html.

No longer may one suggest that literary property should be treated differently from other forms of property. "If I may own Blackacre in perpetuity," then this modern view believes I should also be able to own *Black Beauty* in perpetuity.[34]

This view of the naturalness of intellectual property is not simply the construction of overly eager Hollywood lobbyists. Is it not simply the product of campaign contributions and insider corruption. The reality is that it reflects the understanding of ordinary people, too. The ordinary person believes, as Disney's Michael Eisner does, that Mickey Mouse should be Disney's for time immemorial. The ordinary person doesn't even notice the irony of perpetual protection for Disney for Mickey, while Disney turns out *Hunchback of Notre Dame*[35] (to the horror of the Victor Hugo estate), or *Pocahontas*,[36] or any number of stories that it can use to make new work. The ordinary person doesn't notice, because the ordinary person has become so accustomed to the idea that culture is managed—that corporations decide what gets released when, and that the law can be used to protect criticism when the law is being used to protect property—that the ordinary person can't imagine the world of balance our Framers created.

This modern, ordinary view, is far from our Framers'. When they chose not to protect copyright in perpetuity, it was not because they did not love property; nor was it because they were budding communists. It was instead because they believed in the power of the Enlightenment, and Protestant as they were, they believed enlightenment happened when culture was not controlled by the church. Their idea was that ideas and stories and culture would be free—as quickly as the law could set them free. That "a short interval" in Story's world[37] meant just that: a short interval.

More surprising than the fact that we have moved from the Framers' view, however, is how far we have moved from even Melville Nimmer's. For what I found most striking about the reaction to the arguments that we made in *Eldred* was that if we were nuts, if our arguments betrayed ignorance about what copyright meant, if we were advancing a fundamentally illegitimate view of the nature of Congress's power, then so too was Melville Nimmer nuts, thirty years ago this month.

For I had learned why the Bono Act was unconstitutional not from high theorists in constitutional law, but from the deep and subtle understanding of a man who loved the law of copyright—Nimmer. It is in his essay that the constitutional argument against the Bono Act is first

34. Nimmer, *supra* note 1, at 1193.
35. HUNCHBACK OF NOTRE DAME (Walt Disney Pictures 1996).
36. POCAHONTAS (Walt Disney Pictures 1995).
37. *See supra* note 19.

sketched. (At about the same time, Justice Stephen Breyer, then–Assistant Professor Breyer, was sketching the economic argument against it.[38]) After sketching his "definitional balance" between the first amendment interest and the copyright interest, Nimmer went on to consider the First Amendment as it applied to retrospective extensions of copyright. And in as sensible and direct a way as possible, this "nut" concluded: "Neither of the reasons previously posited justifying first amendment subordination to copyright can justify this extension of an existing copyright term. . . . [Therefore] I can but conclude that a serious question exists as to the constitutional validity of the proposed extension, given the countervailing interest in free speech."[39]

If we in the *Eldred* case are nuts, then I am happy to be nuts in the way that Nimmer was. If we are ignorant about the nature of the copyright power, I am happy to be ignorant in the way that Nimmer was. And if we ultimately are proven wrong about the nature of the constitutional limitations on Congress's copyright power, then I am happy we are wrong in the company of a scholar as subtle and right as Nimmer.

But that still leaves unresolved just why it is the world has moved so far from where Nimmer was just thirty years ago. For if anything, to the extent Nimmer's analysis hangs upon first amendment law, changes in that law should only have strengthened his analysis. When Nimmer wrote, his understanding of the scope of first amendment interests was Alexander Meikeljohn's: The First Amendment is about encouraging deliberative democracy and not much else.[40] But since that time, the Supreme Court has made clear that the first amendment interests are even broader than this; that they extend to commercial, as well as non-commercial speech; that they even reach hate speech thought to destroy the possibility of deliberation. The First Amendment has only grown in the thirty years since Nimmer penned his essay, so why is it the restrictions on Congress's copyright power have shrunk?[41]

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38. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

39. Nimmer, *supra* note 1, at 1194–95. Melville Nimmer then goes on to reach a similar conclusion under the Copyright Clause. In both contexts, he concludes that Congress's power is constrained not to extend copyright for existing works.

40. *See* A. MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

41. *See, e.g.*, Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. (forthcoming Oct. 2001).

In a two-to-one decision released in the middle of February, the D.C. Circuit rejected a challenge to the Bono Act.[42] In rejecting the first amendment challenge to the Bono Act, the Court held that "copyrights are categorically immune from challenges under the First Amendment."[43] Why? Well, because *Harper & Row* had held that there was a "definitional balance" between copyright and the First Amendment, and that therefore there was no possibility to raise a first amendment challenge so long as copyright protected expression only. Never mind that no court had ever made that universal claim; never mind that the source for *Harper & Row*'s definitional balance—the essay by Nimmer—had plainly understood the definitional balance to apply to challenges to particular copyrights, not to a change in the statute generally (for again, in the same article, Nimmer concludes that retrospective copyrights face a first amendment problem). Instead, an impatience with the very idea that there might be a problem with unlimited congressional power pervades the court's opinion.

The same for the copyright clause claim. The D.C. Circuit held that the preamble to the Copyright Clause is no limit in any way on Congress's power under the Copyright Clause (even though the Supreme Court has said it is plainly a limit in the context of patents).[44] And thus, Congress was free in perpetuity to extend the terms of copyright, so long as forever was taken one step at a time. As Peter Jaszi puts it, "perpetual copyright on the installment plan."[45]

A single dissenter offered a different view. He too had no patience for the first amendment claim. His sole ground for resisting Congress's power was an analogy to the Federalists' resistance of congressional commerce power. As in those cases, the issue here, Judge David Sentelle wrote, is how to interpret the scope of Congress's copyright power to respect the limit on that power that the Framers obviously believed it would have. The issue is not what Hollywood's view of the power should be, nor what Europe's view of the power should be. The issue is what the Framers believed the power should be. The reading the government offered had no "stopping point," Judge Sentelle wrote.[46] The Framers, however, had a stopping point in mind. Thus, following the Supreme Court's practice in *United States v.*

42. *See* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).
43. *Id.* at 375.
44. *See* Graham v. John Deere Co., 383 U.S. 1, 6 (1966).
45. *Copyright Term Extension Act of 1995: Hearing on S.483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Prof. Peter Jaszi), *available at* 1995 WL 10524355.
46. *Eldred*, 239 F.3d at 381 (Sentelle, J., dissenting).

Lopez[47] and *United States v. Morrison*,[48] Judge Sentelle argued that the court must adopt a line. The line he would draw, as plaintiffs had argued, was against the extension of subsisting terms.

The Framers' view was balance. Limited protections, a vibrant public domain. And a public domain not filled just with facts, or elements of copyrighted works; rather, a public domain filled with the stories themselves.

That vision is threatened. As we move into the Internet Age—as ordinary people can become publishers, as more and more want to use the material around us to make new and derivative work, as we use the technology to share content, or enable others to get access—there is a countermovement. Though the initial code of cyberspace constructed a space where control was difficult, technologies for perfect control of content in cyberspace are being deployed; and law to back up those technologies of control has already been passed. Just as the moment when the creative potential of artists and innovators is greatest, the technologies that control the resources of that creativity are also at their peak.

As this struggle plays out, there are two visions of the future. One in which the most significant aspects of our culture remain perpetually in the control of a relatively small number of corporations—the publishers of our day. And the other, where these elements of our culture, after "a short period" fall outside of exclusive control, free for anyone to take and use as they see fit.

The first vision may well prevail. But it is our job as lawyers to make certain that we all understand the change this vision represents. Not just the change from the view of men who wore wigs two hundred years ago; but a change from the view of a man whose sense of balance and respect for the values of copyright defined the field just a generation ago.

If there are to be no limits, then those who would defend such a regime need to defend the change; they need to show us, as a culture and as a tradition, why this new vision of state protection is better than the old.

Let them try; but I do not think I am alone in believing the wisdom of an early time dominates the power of this modern view. Nor am I alone in believing that just because one resists unlimited copyright, one is also resisting copyright.

Just as my students learn that Federalists at one time can push for stronger central government, and at a different time push for weaker central government, consistent with a vision of balance between federal and state authority, so too can a constitutional lawyer—even one whose work will

47. 514 U.S. 549 (1995).
48. 529 U.S. 598 (2000).

never match the work of the man we honor tonight—resist the expansion of copyright at one time, and support its growth at another, all in the name of balance. This lesson of balance, however, means nothing if it is a lesson only lawyers understand. And it is our challenge to find the way to teach this lesson to more than just those committed to constitutional fidelity.

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