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How I Lost the Big One

When Eric Eldred's crusade to save the public domain reached the Supreme Court, it needed the help of a lawyer, not a scholar.

By Lawrence Lessig

> *It is over a year later as i write these words. It is still astonishingly hard. If you know anything at all about this story, you know that we lost the appeal. And if you know something more than just the minimum, you probably think there was no way this case could have been won. After our defeat, I received literally thousands of missives by well-wishers and supporters, thanking me for my work on behalf of this noble but doomed cause. And none from this pile was more significant to me than the e-mail from my client, Eric Eldred.*
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> *But my client and these friends were wrong. This case could have been won. It should have been won. And no matter how hard I try to retell this story to myself, I can't help believing that my own mistake lost it.*

Eric Eldred, a retired computer programmer in New Hampshire, was frustrated that his daughters didn't seem to like Nathaniel Hawthorne. And in 1995, he decided to do something about it: put Hawthorne on the web. An electronic version with links to pictures and explanatory text, Eldred thought, would make this 19th-century work come alive.

It didn't work—at least for his daughters. They didn't find Hawthorne any more interesting than before. But Eldred's experiment gave birth to a hobby, and his hobby begat a cause. Eldred went on to build a library of public-domain works by scanning these works and making them available for free.

Eldred's library was not simply a copy of certain public-domain works. Just as Disney turned the Grimms' fairy tales into films more accessible to a 20th-century audience, Eldred put the works of Hawthorne, and many others, in a form more accessible—technically accessible—today. Like Disney, Eldred was free to produce new versions of works whose copyright had lapsed. Hawthorne's *Scarlet Letter* had passed into the public domain in 1907.

In 1998, Robert Frost's poetry collection *New Hampshire* was slated to pass into the public domain. Eldred wanted to post that collection in his free public library. But Congress got in the way. For the 11th time in four decades, Congress extended the terms of existing copyrights—this time by 20 years. Eldred would not be free to add any works published since 1923 to his collection until 2019. Under the new law, no copyrighted work would pass into the public domain until that year (and not even then, if Congress extended the term again). By contrast, in the same period, more than one million patents will pass into the public domain.

This was the Sonny Bono Copyright Term Extension Act, or CTEA, enacted in memory of the congressman and former musician. According to his widow, Mary Bono, Sonny Bono believed that "copyrights should be forever."

Eldred decided to fight this law. He first resolved to fight it through civil disobedience. In a series of interviews, Eldred announced that he would publish as planned, the CTEA notwithstanding. But because of a second law passed in 1998, the No Electronic Theft Act, his act of publishing would make Eldred a felon—whether or not anyone complained. This was a dangerous strategy for a retired programmer to undertake.

It was here that I became involved in Eldred's battle. I am a constitutional scholar whose first passion is constitutional interpretation. And though constitutional law courses never focus upon the progress clause of the Constitution, it had always struck me as different in an important way. Every other clause granting power to Congress simply says Congress has the power to do something—for example, to regulate "commerce

among the several states" or "declare War." But in the progress clause, the "something" is something quite specific—to "promote . . . Progress"—through means that are also specific—by "securing" "exclusive Rights" (i.e., copyrights) "for limited Times."

In my view, our constitutional system placed such a limit on copyright as a way to ensure that copyright holders do not too heavily influence the development and distribution of our culture. Yet, as Eldred discovered, copyrights have not expired, and will not expire, so long as Congress is free to be bought to extend them again. And while it is the valuable copyrights—Mickey Mouse and "Rhapsody in Blue"—that are responsible for terms being extended, the real harm done to society is not that Mickey Mouse remains Disney's. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that still have commercial value. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.

Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. For that tiny fraction, the copyright is a crucially important legal device. But even for that tiny fraction, the actual time during which the creative work has a commercial life is extremely short. Most books go out of print within one year. The same is true of music and film. Commercial culture is sharklike. It must keep moving. And when a creative work falls out of favor with the commercial distributors, the commercial life ends. Copyrights in this context do no good.

Yet for most of our history, they also did little harm. When a work ended its commercial life, there was no *copyright-related use* that would be inhibited by an exclusive right. When a book went out of print, you could not buy it from a publisher. But you could still buy it from a used bookstore, and when a used bookstore sells it, at least in the United States, there is no need to pay the copyright owner anything. Thus, the ordinary use of a book after its commercial life ended was a use that was independent of copyright law. The same was effectively true of film. Because the costs of restoring a film—the real economic costs, not the attorneys' fees—were so high, it was never at all feasible to preserve or restore film.

Digital technologies have changed that. It is now possible to preserve and offer access to all sorts of knowledge. Digital technologies give new life to copyrighted material after it passes out of its commercial life.

And now copyright law does get in the way. Every step of producing this digital archive of our culture infringes on the exclusive right of copyright. To digitize a book is to copy it. To do that requires permission of the copyright owner. The same holds for music, film, and every other artifact of our culture protected by copyright. The effort to make these things available to history, or to researchers, or to those who just want to explore is now inhibited by a set of rules that were written for a radically different context.

Constitutional law is not oblivious of the obvious. Or, at least, it does not need to be. In my view, a pragmatic court committed to interpreting and applying our framers' Constitution would see that if Congress has the power to perpetually extend existing terms, then the constitutional requirement that terms be limited has lost its force.

It was also my judgment that *this* Supreme Court would not allow Congress to extend existing terms. As anyone close to the Supreme Court's work knows, this court has increasingly restricted the power of Congress when, in its view, Congress overstepped the powers granted to it by the Constitution. The most notable example of this was the court's 1995 *United States v. Lopez* ruling, which struck down a federal law that banned the possession of guns near schools.

Since 1937, the Supreme Court had interpreted Congress's granted powers very broadly; so, while the Constitution grants Congress the power to regulate only "commerce among the several states" (aka "interstate commerce"), the court had interpreted

that power to include the power to regulate any activity that merely *affected* interstate commerce.

As the economy grew, this standard increasingly meant that there was no limit to Congress's power to regulate, since just about every activity, when considered on a national scale, affects interstate commerce. A Constitution designed to limit Congress's power was instead interpreted to impose no limit.

Under Chief Justice William Rehnquist's command, the court changed that in *Lopez*. The government had argued that possessing guns near schools affected interstate commerce. Guns near schools increase crime, crime lowers property values, and so on. In the oral argument, the chief justice asked the government whether there was any activity that would not affect interstate commerce under the reasoning the government advanced. The government said there was not; if Congress says an activity affects interstate commerce, then that activity affects interstate commerce. The Supreme Court, the government argued, shouldn't second-guess Congress.

"We pause to consider the implications of the government's arguments," the chief justice wrote. If anything Congress says is interstate commerce must therefore be considered interstate commerce, then there would be no limit to Congress's power. The decision in *Lopez* was reaffirmed five years later in *United States v. Morrison*.

If a principle were at work here, then it should apply to the progress clause as much as the commerce clause. And if it is applied to the progress clause, the principle should yield the conclusion that Congress can't claim the power to extend an existing term on a theory that puts no effective limit on its power.

If, that is, the principle announced in *Lopez* was a genuine principle. Many believed the decision in *Lopez* represented politics—a political preference for states' rights, gun ownership rights, and so on. But I rejected that view of the Supreme Court's decision. Shortly after the decision, I wrote an article demonstrating the "fidelity" of such an interpretation to the Constitution. The idea that the Supreme Court decides cases based upon justices' political preferences struck me as extraordinarily boring. I was not going to devote my life to teaching constitutional law if these nine justices were going to be petty politicians.

In January 1999, we filed a lawsuit on Eldred's behalf in federal district court in Washington, D.C., asking the court to declare the Sonny Bono Copyright Term Extension Act unconstitutional. We made two central claims: that extending existing terms violated the Constitution's "limited Times" requirement and that extending terms by another 20 years violated the First Amendment.

The district court dismissed our claims without even hearing an argument. A panel of the Court of Appeals for the D.C. Circuit also dismissed our claims, though after hearing an extensive argument. But that decision at least had a dissent, by one of the most conservative judges on that court, Judge David Sentelle, who said the CTEA violated the requirement that copyrights be for "limited Times" only.

We asked the Court of Appeals for the D.C. Circuit as a whole to hear the case, but the court rejected our request to hear the case en banc. This time, Judge Sentelle was joined by the most liberal member of the D.C. Circuit, Judge David Tatel. The most conservative and the most liberal judges on the D.C. Circuit each believed Congress had overstepped its bounds.

It was here that most expected *Eldred v. Ashcroft* to die, for the Supreme Court rarely reviews any decision by a court of appeals. And it practically never reviews a decision that upholds a statute when no other court has yet reviewed the statute. But in February 2002, the Supreme Court surprised the world by granting our petition to review the D.C. Circuit opinion. Argument was set for October of 2002. The summer would be spent writing briefs and preparing for argument.

The mistake was made early, though it became obvious only at the very end. Our case

had been supported from the very beginning by an extraordinary lawyer, Geoffrey Stewart, and by the law firm he had moved to, Jones, Day, Reavis & Pogue. There were three key lawyers on the case from Jones Day. Stewart was the first; then, Dan Bromberg and Don Ayer became quite involved. Bromberg and Ayer had a common view about how this case would be won: We would only win, they repeatedly told me, if we could make the issue seem "important" to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and free culture; otherwise, the justices would never vote against "the most powerful media companies in the world."

I hate this view of the law. Of course I thought the Sonny Bono Act was a dramatic harm to free speech and free culture. But I was not persuaded that we had to sell our case like soap. In any event, I thought, the court must already see the danger and the harm caused by this sort of law. Why else would the justices have granted review?

I was, however, convinced that the court would not hear our arguments if it thought these were just the arguments of a group of lefty loons. I made sure that the briefs on our side were about as diverse as it gets, including both the economist Milton Friedman and Hal Roach Studios, which said the Sonny Bono Copyright Term Extension Act will, if left standing, destroy a whole generation of American film that is no longer commercially viable to sell. The same effort at balance was reflected in the legal team we gathered to write our own briefs. When the case got to the Supreme Court, we added three lawyers to the Jones Day team: Alan Morrison of Public Citizen, a Washington group that had made constitutional history with a series of victories in the Supreme Court on individual rights; my colleague and dean at Stanford Law School, Kathleen Sullivan, who is an experienced advocate before the court, and who had advised us early on about a First Amendment strategy; and, finally, former solicitor general Charles Fried.

Fried was a special victory for us. Every other recent solicitor general was hired by the other side to defend Congress's power to give media companies the special favor of extended copyright terms. Fried was the only one who turned down that lucrative assignment to stand up for something he believed in. He had been Ronald Reagan's chief lawyer in the Supreme Court. He had helped craft the line of cases that limited Congress's power deriving from the commerce clause. And while he had argued many positions in the Supreme Court that I disagreed with, his joining the cause was a vote of confidence in our argument.

The government, in defending the statute, had its collection of friends as well. Significantly, however, none of these "friends" included historians or economists. The briefs on the other side of the case were written exclusively by major media companies, congressmen, and copyright holders.

The media companies were not surprising. They had the most to gain from the law. The congressmen were not surprising either—they were defending their power and, indirectly, the gravy train of contributions that such power brought them. And of course it was not surprising that the copyright holders would defend the idea that they should continue to have the right to control who did what with the content that they had long controlled.

Those who represented the estate of Dr. Seuss (Theodore Geisel) argued that it was better to leave control of his work in the hands of his estate than to allow it to fall into the public domain, where people could use it to "glorify drugs or to create pornography." The Gershwin estate had a similar rationale for its "protection" of the work of George Gershwin. His estate refuses, for example, to license *Porgy and Bess* to anyone who does not use African-Americans in the cast. That's its view of how this part of American culture should be controlled, and it wanted this law to help it maintain that control.

This point is rarely made, but it has far-reaching implications, and it was a key theme of our brief. When Congress decides to extend the term of existing copyrights, it is making a choice about which speakers it will favor. Not only would upholding the

CTEA mean that there was no limit to the power of Congress to extend copyrights and further concentrate the market; it would also mean that there was no effective limit to Congress's power to play favorites, through copyright, with who has the right to speak.

Between February and October, I did little besides prepare for this case. Early on, as I said, I set the strategy. The Supreme Court was divided into two important camps. One camp we called "the conservatives." The other we called "the rest." In the first group we placed Chief Justice Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. These five had been the most consistent in limiting Congress's power. They were the five who had supported the *Lopez/Morrison* line of decisions, which said that an enumerated power—the only kind of power Congress has—must be interpreted in a way that makes it limited.

The rest were the four justices who had strongly opposed limits on Congress's power. These four—Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—had repeatedly argued that the Constitution gives Congress broad discretion to decide how best to implement its powers. In case after case, these justices had argued that the Supreme Court should defer to the legislative branch. Though I had personally agreed with these four justices' votes in most cases, they were also the votes that we were least likely to get in this one.

The least likely of all was Ginsburg's. In addition to her general view about deference to Congress (except where issues of gender are involved), she had been particularly deferential in the context of intellectual property protections. She and her daughter (an excellent and well-known intellectual property scholar) were cut from the same intellectual property cloth. We expected she would agree with the writings of her daughter: that Congress had the power in this context to do as it wished, even if what Congress wished made little sense.

Close behind Ginsburg were two justices whom we also viewed as unlikely allies, though possible surprises. Souter strongly favored deference to Congress, as did Breyer. But both were also very sensitive to free speech concerns. And we believed retrospective extensions raised important free speech issues.

The only vote we could be confident about was Stevens's. History will record Stevens as one of the greatest judges on this Court. His votes are consistently eclectic, which just means that no simple ideology explains where he will stand. But he had consistently argued for limits in the context of intellectual property. We were fairly confident that he would recognize limits here.

Oral argument was scheduled for the first week in October. I arrived in D.C. two weeks before the argument and was repeatedly "mooted" by lawyers who had volunteered to help in the case. To win, I was convinced that I had to keep the court focused on the idea that just as with the *Lopez* case, under the government's argument here, Congress would always have unlimited power to extend existing terms of copyright. I found ways to take every question back to this central idea.

In the moot before the lawyers at Jones Day, Don Ayer was skeptical. Don had served in the Reagan Justice Department with Solicitor General Charles Fried and had argued many cases before the Supreme Court. "I'm just afraid that unless they really see the harm, they won't be willing to upset this practice that the government says has been a consistent practice for 200 years. You have to make them see the harm—passionately get them to see the harm. For if they don't see that, then we haven't any chance of winning," he said.

He may have argued many cases before this court, I thought, but he didn't understand its soul. As a clerk for Justice Scalia, I had seen the justices do the right thing, not because of politics but because it was right. As a law professor, I had spent my life teaching my students that this court does the right thing, not because of politics but because it is right.

The night before the argument, a line of people began to form in front of the Supreme Court. The case had become a focus of the press and of the movement to free culture. Hundreds stood in line for the chance to see the proceedings. Scores spent the night on the steps of the court so that they would be assured a seat.

Not everyone has to wait in line. People who know the justices can ask for seats they control. (I asked Justice Scalia's chambers for seats for my parents, for example.) Members of the Supreme Court Bar can get a seat in a special section reserved for them. And senators and congressmen have a special place where they get to sit, too. Finally, of course, the press has a gallery, as do clerks working for the justices. As we entered that morning, there was no place that was not taken. This was an argument about intellectual property law, yet the halls were filled. As I walked in to take my seat, I saw my parents sitting on the left. As I sat down at the table, I saw Jack Valenti, the chairman of the Motion Picture Association of America, sitting in the special section ordinarily reserved for family of the justices.

When the chief justice called me to begin my argument, I began where I intended to stay: on the question of the limits on Congress's power. This was a case about enumerated powers, I said, and whether those enumerated powers had any limit.

O'Connor stopped me within one minute of my opening. The history was bothering her:

> Congress has extended the term so often through the years, and if you are right, don't we run the risk of upsetting previous extensions of time? I mean, this seems to be a practice that began with the very first act.

She was quite willing to concede "that this flies directly in the face of what the framers had in mind." But my response again and again was to emphasize limits on Congress's power:

> Well, if it flies in the face of what the framers had in mind, then the question is, Is there a way of interpreting their words that gives effect to what they had in mind? And the answer is yes.

There were two points in this argument when I should have seen where the court was going. The first was a question by Kennedy, who observed,

> Well, I suppose implicit in the argument that the '76 act, too, should have been declared void, and that we might leave it alone because of the disruption, is that for all these years the act has impeded progress in science and the useful arts. I just don't see any empirical evidence for that.

Here follows my clear mistake. Like a professor correcting a student, I answered,

> Justice, we are not making an empirical claim at all. Nothing in our copyright clause claim hangs upon the empirical assertion about impeding progress. Our only argument is, this is a structural limit necessary to assure that what would be an effectively perpetual term not be permitted under the copyright laws.

That was a correct answer, but it wasn't the right answer. The right answer was to say that there was an obvious and profound harm. Any number of briefs had been written about it. Kennedy wanted to hear it. And here was where Don Ayer's advice should have mattered. This was a softball; my answer was a swing and a miss.

The second came from the chief, for whom the whole case had been crafted. For the chief justice had crafted the *Lopez* ruling, and we hoped that he would see this case as its second cousin.

It was clear a second into his question that he wasn't at all sympathetic. To him, we were a bunch of anarchists:

> Well, but you want more than that. You want the right to copy verbatim other people's books, don't you?

I responded as follows:

> We want the right to copy verbatim works that should be in the public domain and would be in the public domain but for a statute that cannot be justified under ordinary First Amendment analysis or under a proper reading of the limits built into the copyright clause.

Things went better for us when the government gave its argument; for now the court picked up on the core of our claim. Scalia made this comment to Solicitor General Theodore Olson:

> You say that the functional equivalent of an unlimited time would be a violation [of the Constitution], but that's precisely the argument that's being made by petitioners here, that a limited time which is extendable is the functional equivalent of an unlimited time.

When Olson was finished, it was my turn to give a closing rebuttal. Olson's flailing had revived my anger. But my anger still was directed to the academic, not the practical. The government was arguing as if this were the first case ever to consider limits on Congress's copyright and patent clause power. Ever the professor and not the advocate, I closed my argument by pointing out the long history of the court's imposing limits on Congress's power in the name of the copyright and patent clause; the very first case striking a law of Congress as exceeding a specific enumerated power was based upon the copyright and patent clause. All true. But it wasn't going to move the justices over to my side.

As I left the court that day, there were a hundred points I wished I could remake. There were a hundred questions I wished I had answered differently. But one way of thinking about this case left me optimistic.

The government had been asked over and over again, What is the limit? Over and over again, it had answered there was no limit. The solicitor general had made my argument for me; in those rare moments when I let myself believe that we may have prevailed, it was because I felt this court—in particular, the conservatives—would feel itself constrained by the principles that they had established in cases like *Lopez* and *Morrison*.

The morning of January 15, 2003, I was five minutes late to the office and missed the 7 a.m. call from the Supreme Court clerk. Listening to the message, I could tell in an instant that she had bad news to report. The Supreme Court had affirmed the decision of the court of appeals. Seven justices had voted in the majority. There were two dissents.

A few seconds later, the opinions arrived by e-mail. I took the phone off the hook, posted an announcement of the ruling on our blog, and sat down to see where I had been wrong in my reasoning. My *reasoning*. Here was a case that pitted all the money in the world against *reasoning*. And here was the last naïve law professor, scouring the pages, looking for reasoning.

I first scoured the majority opinion, written by Ginsburg, looking for how the court would distinguish the principle in this case from the principle in *Lopez*. The reasoning was nowhere to be found. The case was not even cited. The core argument of our case did not even appear in the court's opinion. I couldn't quite believe what I was reading. I had said that there was no way this court could reconcile limited powers with the commerce clause and unlimited powers with the progress clause. It had never even occurred to me that they could reconcile the two by *not addressing the argument at all*.

Ginsburg simply ignored the enumerated powers argument. Consistent with her view that Congress's power was not limited generally, she had found Congress's power

not limited here. Her opinion was perfectly reasonable—for her, and for Souter. Neither believes in *Lopez*. But what about the silent five? By what right did they get to select the part of the Constitution they would enforce? We were back to the argument that I said I hated at the start: I had failed to convince them that the issue here was important, and I had failed to recognize that however much I might hate a system in which the court gets to pick the constitutional values that it will respect, that is the system we have.

Breyer and Stevens wrote very strong dissents. Stevens's reasoning was internal to the law: He argued that the tradition of intellectual property law did not support this unjustified extension of terms. He based his argument on a parallel analysis of the law of patents. (So had we.) But the rest of the court discounted the parallel—without explaining how the very same words in the progress clause could come to mean totally different things depending upon whether the words were about patents or copyrights. The court was content to let Stevens's charge go unanswered.

Breyer's opinion, perhaps the best opinion he has ever written, did not focus on the Constitution. He argued that the term of copyrights has become so long as to be effectively unlimited. We had said that under the current term, a copyright gave an author 99.8 percent of the value of a perpetual term. Breyer said we were wrong, that the actual number was 99.9997 percent of a perpetual term. Either way, the point was clear: If the Constitution said a term had to be "limited," and the existing term was so long as to be effectively unlimited, then the extension is unconstitutional.

These two justices understood all the arguments we had made. But because neither believed in the *Lopez* case, neither was willing to push it as a reason to reject this extension. The case was decided without anyone having addressed the central argument that we had carried from Judge David Sentelle. It was *Hamlet* without the prince.

Defeat brings depression. They say it is a sign of health when depression gives way to anger. My anger came quickly, but it didn't cure the depression.

It was at first anger with the five conservatives. It would have been one thing for them to have explained why the principle of *Lopez* didn't apply in this case. That wouldn't have been a very convincing argument, I don't believe, having read it made by others, and having tried to make it myself. But it at least would have been an act of integrity. These justices in particular have repeatedly said that the proper mode of interpreting the Constitution is "originalism"—starting by understanding the framers' text, interpreted in the original context, in light of the original structure of the Constitution. That method had produced *Lopez* and many other "originalist" rulings. Where was their "originalism" now?

My anger with the conservatives quickly yielded to anger with myself. For I had let a view of the law that I liked interfere with my view of the law as it is.

Most lawyers and law professors have little patience for idealism about courts in general and this Supreme Court in particular. Most have a much more pragmatic view. As I read back over the transcript from that argument in October, I can see a hundred places where the answers could have taken the conversation in different directions, where the truth about the harm that this unchecked power will cause could have been made clear to this court. Kennedy in good faith wanted to be shown. I, idiotically, corrected his question. Souter in good faith wanted to be shown the First Amendment harms. I, like a math teacher, reframed the question to make the logical point. I had shown them how they could strike down this law of Congress if they wanted to. There were a hundred places where I could have helped them want to, yet my stubbornness, my refusal to give in, stopped me. I have stood before hundreds of audiences trying to persuade; I have used passion in that effort to persuade; but I refused to stand before this audience and try to persuade with the passion I had used elsewhere. It was not the basis on which a court should decide the issue.

Would it have been different if I had argued it differently? Would it have been different if Don Ayer had argued it? Or Charles Fried? Or Kathleen Sullivan?

The image that will always stick in my head comes from an editorial that ran in *The New York Times*. While the reaction to the Sonny Bono Act itself was almost unanimously negative, the reaction to the court's decision was mixed. The press coverage that attacked the decision did so because it left standing a silly and harmful law. That "grand experiment" that we call "the public domain" is over, the paper said. When I can make light of it, I think, "Honey, I shrunk the Constitution." But I can rarely make light of it. We had in our Constitution a commitment to free culture. In the case that I fathered, the Supreme Court effectively renounced that commitment. A better lawyer would have made them see differently.

Lawrence Lessig is a professor at Stanford Law School and is the author of Free Culture (forthcoming from the Penguin Press), from which this article is adapted.