Congressional Research Service

Report RS21179

Copyright Term Extension: Eldred v. Ashcroft

Robin Jeweler, American Law Division

February 14, 2003

Abstract. This report examines the U.S. Supreme Courts decision in Eldred v. Ashcroft. Plaintiffs/Petitioners challenged the constitutionality under the Copyright Clause of a law adding 20 years to the terms of existing and future copyrights. The law was upheld by both the U.S. district court and the court of appeals considering it. Among the questions before the Supreme Court was whether Congress may retrospectively extend the term of copyright for existing copyrights; and, what role and impact, if any, does the First Amendment have in determining the validity of a congressional extension of copyright terms.

Order Code RS21179
Updated February 14, 2003

Copyright Term Extension: Eldred v. Ashcroft

Robin Jeweler
Legislative Attorney
American Law Division

Summary

This report examines the U.S. Supreme Court's decision in *Eldred v. Ashcroft*. Plaintiffs/Petitioners challenged the constitutionality under the Copyright Clause of a law adding 20 years to the terms of existing and future copyrights. The law was upheld by both the U.S. district court and the court of appeals considering it. Among the questions before the Supreme Court was whether Congress may retrospectively extend the term of copyright for existing copyrights; and, what role and impact, if any, does the First Amendment have in determining the validity of a congressional extension of copyright terms.

On January 15, 2003, the U.S. Supreme Court handed down its decision in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), in which petitioners challenged the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA).[1] Passed in 1998, the Copyright Term Extension Act added 20 years to the term of copyright for both subsisting and future copyrights. By a vote of 7-2, the Court upheld the Act.

Background. *Copyright Terms.* In 1790, the First Congress created a copyright term of 14 years for existing and future works, subject to renewal for a total of 28 years. By 1909, both the original and the renewal term had been extended to 28 years, for a combined term of 56 years. Additional extensions were enacted between 1962 and 1974. When the current Copyright Act was enacted in 1976, Congress revised the format of copyright terms to conform with the Berne Convention and international practice. Instead of a fixed-year term, the duration of copyright was established as the life of the author plus 50 years. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the term was 75 years from the first publication, or 100 years from the year of its creation, whichever expired first.[2] CTEA added 20 years to the term of subsisting and

[1] P.L. 105-298.

[2] Different copyright terms may apply to works created before and after 1978. For more detail regarding the duration of copyright terms, *see* U.S. Copyright Office, Circular 15a, *Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection* at
(continued...)

future copyrights to bring U.S. copyright terms more closely into conformance with those governed by the European Union. Hence, the law currently provides a copyright for the life of the author plus 70 years, while an anonymous, pseudonymous, or a work made for hire endures for 95 years from publication or 120 years from creation.[3]

The plaintiffs/petitioners represented individuals and businesses that rely upon and utilize materials in the public domain. They included a non-profit association that distributes free electronic books over the Internet; a company that reprints rare out-of-print books; and, a vendor of sheet music who sells, and a choir director who purchases, music that is inexpensive because it is in the public domain.

The lower court held – without trial in a brief decision – in favor of the defendant, the U.S. Attorney General, finding no constitutional infirmity in CTEA.[4] The D.C. Court of Appeals, which affirmed the district court, observed that the case "marks the first occasion for an appellate court to address whether the First Amendment or the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights[.]"[5]

Issues. In an opinion written by Justice Ginsburg, the Court addresses two issues: First, whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and, second, whether the CTEA's extension of existing and future copyrights violates the First Amendment.[6]

Does the CTEA's extension of existing copyrights exceed Congress' power under the Copyright Clause? The Copyright Clause of the Constitution, Art. I, § 8, cl. 8 authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Court reviewed the history of Congress' creation and extension of copyright – and patents – going back to the First Congress and concluded that:

> History reveals an unbroken congressional practice of granting to authors the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.[7]

The Court found that CTEA's addition of twenty years to the term of existing copyrights is fully consistent with this historic practice. Hence, it rejected the petitioners' argument that the "limited Time" requirement requires a "forever fixed" or "inalterable" copyright term. Ultimately, the Court found that the unbroken congressional practice for over two

---

[2] (...continued)
[http://www.loc.gov/copyright/circs/circ15a.pdf].

[3] 17 U.S.C. § 302. *See also*, 17 U.S.C. § § 303, 304, 305.

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

[5] Eldred v. Reno, 239 F.3d 372, 373 (D.C.Cir. 2001).

[6] 123 S. Ct. 769, 777-78.

[7] *Id.* at 778.

centuries of applying adjustments to copyright term to both existing and future works "is almost conclusive."[8]

The Court then considered whether CTEA is a rational exercise of congressional authority under the Clause. It found that the Act falls squarely within the type of judgments that Congress typically makes and is well within its legislative domain. The Court noted that much of the impetus for the extension was a desire to harmonize U.S. copyright law with the practices of the European Union, the goal of which is to promote international protection of U.S. copyrights. In addition, the legislative history of the Act indicated a rationally-based judgment that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works. Although the Court felt compelled to defer to the legislative prerogative to implement the Copyright Clause, it did not endorse the wisdom of the extended term:

> In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA – which continues the unbroken practice of treating future and existing copyrights in parity for term extension purposes – is an impermissible exercise of Congress' power under the Copyright Clause.[9]

The Court then considered several "novel" arguments advanced by the petitioners, all of which they found to be unpersuasive. Namely, that permitting Congress to extend existing copyrights allows it to evade the "limited Times' constraint by creating effectively perpetual copyrights through repeated extensions; and, that Congress may not extend an existing copyright absent new consideration from the author. The Court dismissed the former with the observation that a "regime of perpetual copyrights" was not the situation before it.

With respect to *quid pro quo* or "new consideration," the petitioners argued that the public receives nothing in exchange for the term extension, which violates the intent of the preamble to the Clause to "promote the Progress of Science and useful Arts[.]" Although the Clause itself does not explicitly require "originality" in a copyrighted work, the requirement is implicit by virtue of granting protection to the works of "Authors and Inventors." The U.S. Supreme Court has called originality the "*sine qua non* of copyright[.]"[10] Plaintiffs argued that the CTEA's term extension does not promote originality, but merely increases the value of work already created. And, it violates the requirement that copyrighted subject matter *be original* when it extended the term of subsisting copyrights. With respect to the Clause's charge to Congress to "promote" originality and creativity, the Court found that the constitutional command is satisfied by establishing a "system" of copyright. With regard to the requirement that copyrighted material be original, the Court found there to be no nexus between the originality requirement for *granting* a copyright and the *duration* of the copyright term.

---

[8] *Id.* at 785. (Citation omitted.)

[9] *Id.* at 782-83.

[10] Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 345 (1991).

The Court also rejected any similarity between the *quid pro quo* behind the grant of patent and copyright. In exchange for the monopoly grant supporting a patent, the inventor discloses to the public information regarding an invention with substantial utility. In contrast, [f]or the author seeking copyright protection, ... disclosure is the desired objective, not something exacted from the author in exchange for the copyright."[11]

Is CETA a content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny appropriate for regulation under the First Amendment? Although the Court acknowledged that the D.C. Circuit Court of Appeals "spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment,'"[12] it nevertheless affirmed the Court of Appeals holding. The Court observed that the proximity in time between the Framers' adoption of the Copyright Clause and the First Amendment evidences their compatibility. Both the "idea/expression dichotomy" and the "fair use" defense are "built-in First Amendment accommodations."[13] The idea/expression dichotomy precludes the grant of copyright to ideas and facts, only to a form of expression of them. And the fair use defense allows the public to use copyrighted expression in certain circumstances, such as criticism, comment, news reporting, teaching, scholarship or research.[14] The Court concluded that when Congress has not altered the traditional contours of copyright expression, further First Amendment scrutiny is unnecessary.

The Dissent. Justices Breyer and Stevens filed dissenting opinions. Justice Breyer's dissent is premised on the contention that CTEA's 20-year extension is essentially an economic regulation that has the practical effect of making the copyright term "virtually perpetual." Because the monopoly grant inherent in copyright *does* have an effect on free dissemination of speech, Justice Breyer would apply more rigorous scrutiny to the law's rationality. Finding that the law bestows only private, not public benefits; that it undermines the expressive values that the Copyright Clause embodies; and, that it cannot be justified by any significant Clause-related objective, he concludes that it "falls outside the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress."[15] He concludes that "this particular statute simply goes too far."[16]

Unlike Justice Breyer's economically-based finding that CTEA goes "too far," Justice Stevens based his dissent on a legal analysis which is at odds with the majority. He concludes that *any* extension of an existing copyright exceeds Congress' authority under the Copyright Clause. With respect to the history of Congress' "unbroken pattern" of applying copyright extensions retroactively, he asserts that "the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate

---

[11] 123 S. Ct. at 787.

[12] *Id.* at 789-90.

[13] *Id.* at 788.

[14] 17 U.S.C. § 107.

[15] 123 S. Ct. at 813-14.

[16] *Id.* at 813.

case."[17] The constitutionally-mandated *quid pro quo* for the grant of a limited copyright monopoly is public access through the public domain. Therefore, an extension of an existing copyright is, in his view, merely a "gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest."[18]

Implications. *Eldred* is an important case, both for its precedential value interpreting the Copyright Clause and the policy implications for the duration of copyright. The power of a copyright holder to control protected material is great. It grants the owner exclusive right to control reproduction, distribution, performance, display, and adaptions of the protected work. The right to control adaptions is in and of itself a broad right. It permits the holder to extend his reach to works that do not merely duplicate the original but borrow critical elements from it. It was the right to control adaptive works that lead the estate of Margaret Mitchell to challenge publication of a parody of *Gone with the Wind* entitled *The Wind Done Gone.*[19]

Critics of copyright term extensions contend that they are advocated by large corporate interests with an eye to profits and ever tighter control over protected works to the detriment of the public. They argue that because it already extends beyond the life of the author, the current term exceeds that necessary to encourage creation and permit creators to exploit the value of their work. Rather than promoting creativity, withholding material from the public domain diminishes the richness of the nation's cultural and intellectual life. The decision of the U.S. Supreme Court in *Eldred* indicates that challenges to the wisdom of copyright term duration will be addressed in the Congress, not the courts.

[17] *Id.* at 797.

[18] *Id.* at 793.

[19] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (The court lifted the lower court's injunction against publication and distribution of *The Wind Done Gone* finding that it was unlikely that the plaintiffs would overcome the defendant's fair use defense to infringement.)