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CRS Report for Congress

Copyright Term Extension: Eldred v. Ashcroft

Robin Jeweler
Legislative Attorney
American Law Division

Summary

This report examines the D.C. Cir. Court of Appeals' decision in *Eldred v. Reno*, which is currently pending before the U.S. Supreme Court under the name *Eldred v. Ashcroft*. This case challenges 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 are whether Congress may retrospectively extend the term of copyright for existing copyrights; and, what role and impact does the First Amendment have, if any, in determining the validity of a congressional extension of the duration of future copyright terms.

On February 19, 2002, the U.S. Supreme Court agreed to hear an appeal in the case *Eldred v. Ashcroft*,[1] which challenges the constitutionality of the Copyright Term Extension Act (CTEA).[2] Passed in 1998, the Sonny Bono Copyright Term Extension Act added 20 years to the term of copyright for both subsisting and future copyrights. As the D.C. Court of Appeals observed, 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."[3]

Background. *Copyright Terms.* In 1790, the First Congress created a copyright term for existing and future works of 14 years, 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 with international practice.

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[1] Case below, *Eldred v. Reno*, 239 F.3d 372 (D.C.Cir. 2001), *cert. granted,* 122 S. Ct. 1062 (2002)(No. 01-618).

[2] P.L. 105-298.

[3] 239 F.3d at 373.

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.[4] CTEA added 20 years to the term of subsisting and 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 anonymous, pseudonymous, or a work made for hire endure for 95 years from publication or 120 years from creation.[5]

Eldred. The plaintiffs represent individuals and businesses that rely upon and utilize materials in the public domain. For example, 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.[6]

Issues. The Copyright Clause of the Constitution, Art. I, § 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 plaintiffs asserted three main arguments challenging the constitutionality of the CTEA: First, the Act fails intermediate scrutiny under the First Amendment. Second, in its application to preexisting works, the Act violates the "originality" requirement of the Copyright Clause. Third, by extending existing copyrights, the Act violates the "limited Times" requirement of the Clause. Additional questions of statutory interpretation and procedure are addressed.

Does the CTEA violate the First Amendment? Plaintiffs argued that extending the term of copyright protection results in an impermissible curtailment of their right to exploit materials that would otherwise be in the public domain. Specifically, they contend that there is insufficient governmental justification for the extension to overcome intermediate scrutiny under the First Amendment. The Court of Appeals rejected this argument summarily. It found that the plaintiffs lack any cognizable right to exploit the work of others and expounded upon the "idea/expression dichotomy" between the First Amendment and the Copyright Clause jurisprudence. The First Amendment protects expression of ideas, while the Copyright Clause protects the author's interest in *creative expression.* The fact that ideas are free but their particular expression can be copyrighted

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[4] 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 [http://www.loc.gov/copyright/circs/circ15a.pdf].

[5] 17 U.S.C. § 302. *See also,* 17 U.S.C. § § 303, 304, 305.

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

has been held to give adequate protection to free expression. The court concluded that "copyrights are categorically immune from challenges under the First Amendment."[7]

Does the CTEA violate the Copyright Clause requirement that copyrighted works be "original?" 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."[8] Plaintiffs argued that the CTEA's term extension violates the requirement that copyrighted subject matter be original when it extended the term of a subsisting copyright. Again, the Court of Appeals rejected the argument, reasoning that if Congress could not extend a subsisting copyright for want of originality "it is hard to see how it could provide for a copyright to be renewed at the expiration of its initial term – a practice dating back to 1790 and not questioned even by the plaintiffs today."[9]

Although the court rejected the plaintiffs argument, a corollary point in its discussion is of interest. The court interpreted originality as going to the subject matter of copyright, *i.e.* it is necessary for the issuance of a copyright, not to its duration. But the court acknowledged that the question whether works already in the public domain could be eligible for copyright is a wholly different question – one that was not before it. This question is, however, before a U.S. district court which is considering the constitutionality of 17 U.S.C. § 104A, which purports to restore copyright protection to certain materials that were already in the public domain.[10]

Does the CTEA term extension run afoul of the "limited Times" grant in the Copyright Clause? The plaintiffs argued that the preamble to the Clause operates as a limitation upon Congress' ability to extend the duration of copyright, particularly with respect to subsisting copyrights. Thus, if a term of 50 years is adequate "to promote the Progress of Science and useful arts," then 70 years exceeds a constitutionally permissible threshold. The Court of Appeals decisively rejected the contention that the preamble to the Clause limits the grant to Congress under it. Nor does the CTEA 20 year extension constitute a grant in "perpetuity." It concluded that "the CTEA is a proper exercise of the Congress's power under the Copyright Clause."[11]

The Dissent. In an opinion that may ultimately prove to reflect the concerns of some members of the Supreme Court, Judge Sentelle dissented from the majority's holding that the 20 year extension for existing copyrights is constitutional. In contrast to the majority, he views the preamble – the directive to promote the useful arts – as limiting congressional authority:

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[7] 239 F.3d at 375.

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

[9] 239 F.3d at 377.

[10] Golan v. Ashcroft, No. 01-B-1854 (D.Co.. filed Sept. 19, 2001). Section 104A was enacted pursuant to § 514 of P.L. 103-465, The Uruguay Round Agreements Act. It restores copyrighted status to certain foreign works which were in the public domain in the U.S., but not in their source country.

[11] 239 F.3d at 380.

> The [copyright] clause is not an open grant of power to secure exclusive rights. It is a grant of power to promote progress. ... The majority acknowledges that "[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause." However, there is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection.[12]

In short, retroactively extending subsisting copyrights does not, in his view, promote the useful arts. Nor does it secure exclusivity for a "limited" time in the absence of any parameters establishing the limitation.

Implications. *Eldred* is an important case, both for its precedential value interpreting the Copyright Clause and the policy implications for the duration of copyright terms. 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 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.*[13]

Critics of copyright term extensions argue that they are advocated by large corporate interests with an eye to profits and ever tighter control over protected works. They argue that the current terms exceed that necessary to encourage the creation of and permit creators to exploit the value from their work; instead, they argue, withholding material from the public domain diminishes the richness of the nation's cultural and intellectual life. Proponents of the extended terms contend that it brings U.S. copyright law into conformance with international law, European law in particular, which benefits international exploitation of U.S. copyrights. The decision of the U.S. Supreme Court will be based on a jurisprudential analysis of the appropriate manner of interpretation of the grant to Congress under the Copyright Clause.

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[12] *Id.* at 381-382. (Citations omitted.)

[13] 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.)