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Eldred v. Ashcroft: Challenging the Constitutionality of the Copyright Term Extension Act

- By Justice Joy Rillera*

George Gershwin's *Rhapsody in Blue* would have entered the public domain back in 1998 [1] when its copyright expired under the 1976 Copyright Act. [2] That same year, however, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA), [3] which added 20 more years of copyright protection for existing and future works [4]—and prevented *Rhapsody in Blue* from becoming public property until 2018. [5]

The CTEA makes United States copyright laws consistent with that of the European Union, [6] just as the 1976 Copyright Act made them consistent with the minimum copyright protections required by the Berne Convention, which the U.S. joined in 1988. [7] However, whether the CTEA is consistent with the U.S. Constitution is a matter of debate. In *Eldred v. Ashcroft*, the petitioners launched a constitutional challenge to the CTEA under the Copyright and First Amendment Clauses. They lost in both the district and appeals courts. [8] The U.S. Supreme Court granted certiorari [9] and agreed to review two issues: (1) whether Congress has the power under the Copyright Clause to extend retroactively the term of existing copyrights, and (2) whether extending the term of existing and future copyrights is "categorically immune" from challenge under the First Amendment. [10] Because the outcome of this case has far-reaching consequences, members of the academic, literary, art, and music communities have submitted numerous amici curiae briefs to aid the Court in its decision. [11]

This Note explores opposing arguments on the constitutionality of the CTEA under the Copyright Clause, which gives Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [12] Part I of this Note analyzes whether Congress violated the "limited Times" restriction by extending the terms of existing copyrights. Part II examines whether the CTEA promotes the "Progress of Science." [13] Finally, Part III highlights questions the U.S. Supreme Court must resolve to maintain the balance between the rights of the copyright holder and the interests of the public.

I. The Limited Duration of Copyrights

The "limited Times" requirement of the Copyright Clause prevents Congress from granting perpetual copyright terms. [14] While Congress has never enacted permanent terms, it has extended them eleven times in the past 40 years. [15] Petitioners in *Eldred* argue that while each extension has a fixed duration, the practice of expanding copyright terms for an infinite number of times is in effect an unlimited grant of copyrights. [16] Moreover, they assert that there must be a limit to the number of years Congress can extend a copyright term. [17] Otherwise, "[t]he Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300." [18] Petitioners conclude that this creates uncertainty about the expiration of copyright terms and that such uncertainty should be enough for the Supreme Court to conclude that Congress has exceeded its power in enacting the CTEA.

In response, the Government points out that nine of the eleven extensions in the past 40 years were in fact roughly one- or two-year extensions between 1962 and 1974. [19] These extensions were enacted to prevent copyrighted works from going into public domain while adoption of the 1976 Copyright Act was pending. [20] In the past 90 years, Congress has made only two ultimate extensions to copyright terms: the first was the 1976 Copyright Act and the second was the CTEA. [21] Furthermore, if the Supreme Court holds the CTEA unconstitutional, it might also have to hold the 1831, 1909 and 1976 Copyright Acts unconstitutional as well. [22] To complicate matters, holding the 1976 Copyright Act unconstitutional would put the United States in violation of its treaty obligations under the Berne Convention and result in potentially serious international consequences. [23]

II. Promoting the Progress of Science

According to Petitioners, the goal of the Copyright Clause is to "promote the Progress of Science" and the means to achieve this goal is by giving Congress the power to grant authors "exclusive Right[s]" for "limited Times." [24] The Progress of Science is promoted by the creation of new writings. [25] Thus, Congress may grant authors monopolies that are limited in duration in exchange for writings. [26] Moreover, such writings must be original, [27] a requirement

that the Supreme Court expounded in *Feist Publications v. Rural Telephone Service Co.*[28] Petitioners argue that works already in existence lack originality.[29] Therefore, Congress' grant of fixed term monopolies to existing works violates the Copyright Clause because such a grant does not promote the Progress of Science.[30]

On the other hand, the Government argues that "*Feist's* originality requirement determines only whether a work is eligible for copyright protection; it has no relevance to the "limited Times" for which a work may be protected."[31] The D.C. Circuit Court of Appeals agreed, noting that "[o]riginality is what made the work copyrightable in the first place."[32] Once a work has satisfied the originality requirement, it need not satisfy it anew for its copyright to continue.[33] The Government also argues that application of the CTEA to existing works promotes the Progress of Science by increasing incentives for copyright owners to restore and disseminate their works.[34] Many older works have been fixed in perishable media. Advances in technology now allow older works that would otherwise be lost forever to be restored and distributed to the public.[35] This promotes progress because the public will be exposed "to expression that might otherwise be lost or remain secret."[36]

Various amici curiae briefs argue that the CTEA promotes the Progress of Science by stimulating the creation of new works because it provides capital for copyright holders to reinvest in the creation of new works as well as funding for scholarships, grants, and awards that promote the creation of new works.[37]

III. Balancing of Rights and Interests

While underlying copyright law is the notion that an author is the owner of his original expression, the framers of the Constitution also recognized that information must also be available to the public. Information is intangible.[38] Unlike cars or jewelry, it cannot be kept inside a garage or locked in a safe. Because information is intangible, it is also indivisible.[39] It will never be depleted no matter how many people use it.[40] If people were charged a fee to gain access to information, those who cannot or will not pay this fee will be deprived of its benefits even though sharing the information with them would not harm anyone else.[41] Thus, it is beneficial to the public for information to be free.[42]

The problem, however, is that it usually takes time, effort and money to generate information. Without compensation, only a few people would be willing to engage in extensive research, writing, or creative activity.[43] Many would prefer to free-ride on the few who choose to sweat and toil. The challenge is to provide authors and inventors incentives to generate information while making sure that the public gains access to this information.

By its language, the Copyright clause attempts to strike a balance between authors' rights to reap the benefits of their work and the public's right to gain access to it. The Supreme Court's role is to ensure this balance is preserved, but the task is not an easy one. The Copyright Clause's "limited Times" requirement prevents permanent monopolies of copyrights, but it does not provide guidance as to where the limit should be drawn. If, as Petitioners argue, Congress has the ability to extend copyright terms an infinite number of times, then that would be functionally equivalent to perpetual copyright terms. But to strike down every copyright term extension from 1790 would put the United States behind current international copyright laws. This would have devastating consequences. The United States would lose its competitive edge in intellectual property because the European Union and the members of the Berne Convention provide greater copyright protections for their copyright holders. Moreover, if the United States violates its treaty obligations, it may damage its international relationships with other countries.

Therefore, the line must be drawn somewhere in between. The Petitioners have suggested that it should be drawn between the 1976 Copyright Act and the CTEA. However, they do not suggest a convincing rationale for drawing the line there. They do not adequately explain why the 1976 Copyright Act is not unconstitutional and why the CTEA is. In fact, they even entertain the possibility that copyright term extensions after 1790 may be unconstitutional. Thus, it is for the Supreme Court to set a standard that prevents Congress from creating the functional equivalent of perpetual copyrights but still gives it flexibility to deal with the changes in this developing world.

The Supreme Court must also deal with the question of whether the CTEA promotes the Progress of Science in extending copyright in already existing works. There are, of course, considerations of fairness, uniformity and administrative ease. It would seem unfair to grant less copyright protections to works based simply on the fact that they were created before the extension of copyright terms. It would also be difficult, not to mention confusing, to keep track of when various works expire. This would create a degree of uncertainty that Petitioners were trying to avoid in the first place. There may be many ways to promote the Progress of Science, but the ultimate question is whether they are consistent with the Copyright Clause.

Conclusion

The CTEA is another example of Congress' attempt to balance the competing interests of copyright holders and the public. While the Supreme Court usually defers to Congress in the enactment of laws, it cannot do so when those laws are inconsistent with the U.S. Constitution. In *Eldred v. Ashcroft*, the Supreme Court must do the balancing act, and no matter how it decides on the issues before it, there will always be interests that will win and interests that will lose. Fortunately, interests shift, and those who appear

to be losers now, may eventually be winners in the end.

ENDNOTES

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[1] Gary Gentile, *U.S. Supreme Court to Hear Case Challenging Copyright Term Extension Act*, American Lawyer Media (Oct. 8, 2002), *at* http://www.law.com/servlet/ContentServer ?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1032128696205&t=LawArticle (last visited Jan. 2, 2003).

[2] 17 U.S.C. § 101 et seq. The 1976 Copyright Act became effective in 1978. *Id.*

[3] Pub. L. No. 105-298, 112 Stat. 2827.

[4] The CTEA extended the terms of all copyrights as follows:
(1) For a work created in 1978 or later, to which an individual author holds the copyright, the [CTEA] extends the term to the life of the author plus 70 years.
(2) For a work created in 1978 or later that is anonymous, or pseudonymous, or is made for hire, the term is extended from 75 to 95 years from the year of publication or from 100 to 120 years from the year of creation, whichever occurs first.
(2) For a work created before 1978, for which the initial term of copyright was 28 years, the renewal term is extended from 47 to 67 years, thereby creating a combined term of 95 years. 17 U.S.C. §§ 302(a), (c) and 304.

[5] Gentile, *supra* note 1.

[6] Eldred v. Ashcroft, 239 F.3d 372, 374 (D.C. Cir. 2001).

[7] Brief of Amicus Curiae Edward Samuels in Support of Respondent, 2002 WL 1798859, at *20 (2002).

[8] *See Eldred*, 239 F.3d 372.

[9] Eldred v. Ashcroft, 534 U.S. 1160 (2002).

[10] Brief for Petitioner, 2002 WL 1041928, at *i, *Eldred*, 239 F.3d 372.

[11] *See* Eldred v. Ashcroft, 534 U.S. 1126 (2002).

[12] ARTICLE 1, § 8, CL. 8, UNITES STATES CONSTITUTION.

[13] Science here means artistic creativity. Brief for Petitioner, 2002 WL 1041928, at *15. "At the time of the framing, the term "science" did not have our contemporary meaning. Instead, 'science' meant 'knowledge' or 'learning.'" *Id.* at *16 n. 4.

[14] *Eldred*, 239 F.3d at 377.

[15] Brief for Petitioner, 2002 WL 1041928, at *18.

[16] *Id.* at *18-*19.

[17] *Id.*

[18] *Id.* (citing *Eldred*, 239 F.3d at 382 (Sentelle, J., dissenting).

[19] Brief for Respondent, 2002 WL 1836720, at *9, *Eldred*, 239 F.3d 372.

[20] *Id.*; Brief of Amicus Curiae Edward Samuels in Support of Respondent, 2002 WL 1798859, at *2-*3 (2002).

[21] Brief for Respondent, 2002 WL 1836720, at *9.

[22] *Id.* Petitioners distinguish the 1790 Copyright Act as the first grant of *Federal* copyrights and is, therefore, not an extension of copyright terms. *See* Transcript of Oral Argument, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-618.pdf (last visited Jan. 2, 2003).

[23] Brief of Amicus Curiae Edward Samuels in Support of Respondent, 2002 WL 1798859, at *2-*3 (2002).

[24] Brief for Petitioners, 2002 WL 1041928, at *20-*21, *Eldred*, 239 F.3d 372.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] 499 U.S. 340 (1991). "The sine qua non of copyright is originality." *Id.* at 345.

[29] Brief for Petitioners, 2002 WL 1041928, at *20-*21.

[30] *Id.*

[31] Brief for Respondent, 2002 WL 1836720, at *23, *Eldred*, 239 F.3d 372.

[32] Eldred v. Ashcroft, 239 F.3d 372, 377.

[33] *Id.*

[34] Brief for Respondent, 2002 WL 1836720, at *34-*35.

[35] *Id.*

[36] *Id.* at *35.

[37] Brief of Amici Curiae of the Nashville Songwriters Association International (NSAI) in Support of Respondent, 2002 WL 1808587, at *23; Brief of Amicus Curiae of the Motion Picture Association Of America, Inc. in Support of Respondent, 2002 WL 1836658, at *11; Brief of Amicus Curiae of the Recording Artists Coalistion, 2002 WL 1836669.

[38] PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 6 (4th ed. 1999).

[39] GOLDSTEIN, *supra* note 38, at 7.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See generally, Macaulay, Speech Delivered in the House of Commons, 5 February 1841*, PROSE AND POETRY 731, 733-737.