

“FOR LIMITED TIMES”: THE SUPREME COURT FINDS THE COPYRIGHT TERM EXTENSION ACT CONSTITUTIONAL IN ELDRED v. ASHCROFT, BUT WHEN DOES IT END?

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“The Congress shall have Power ... 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 ...” [1]

INTRODUCTION

Before the enactment of the Copyright Term Extension Act, [2] (hereinafter “CTEA”) the United States had a copyright term of author's life plus fifty years, [3] or when there is no identifiable author, a copyright term of the earlier of seventy-five years from publication or one-hundred years from creation, [4] under the 1976 Copyright Act. This copyright term of the author's life plus fifty years put the U.S. in conformance with global standards under the Berne Convention [5] and the World Trade Organization (hereinafter “WTO”)’s Agreement on Trade Related Aspects of Intellectual Property Rights [6] (hereinafter “TRIPS”).

In 1993, however, a European Union directive extended the copyright term to the author's life plus seventy years. [7] The United States followed suit in 1998 with the Sonny Bono Copyright Term Extension Act, which, like the E.U. directive, extended the copyright term for an individual's works by twenty years, resulting in a term of the author's life plus seventy years. [8] It also extended the term for anonymous, pseudonymous, or works made for hire by twenty years, resulting in a term of ninety-five years from publication or 120 years from creation, whichever comes first. [9] The CTEA also applied retroactively, extending the term of existing copyrights. [10]

This retroactive extension of the terms of existing copyrights was challenged in *Eldred v. Ashcroft*, but the United States Supreme Court on January 15, 2003 held (in a seven to two decision) that this did not transgress constitutional limitations. [11] This article will examine the constitutionality of the CTEA, and will consider the question of when a limited time for a copyright term does end, under the U.S. Constitution. [12]

THE COPYRIGHT TERM EXTENSION ACT

Why did Congress extend the U.S. copyright term by twenty years in 1998? Congress's stated purpose was to “ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works.” [13] In addition, the extension would bring the U.S. copyright laws into conformity with the E.U. directive. [14] Another reason could have been that Disney's original copyright for Mickey Mouse would have lapsed into the public domain had the CTEA not been passed. [15] In fact, one newspaper's headline for the story covering the Supreme Court's decision on the CTEA read, “Justices Grant Disney Longer Copyright Protection.” [16]

The CTEA was not the first time Congress had extended the copyright term. The first copyright term under the U.S. Copyright Act of 1790 was only fourteen years, renewable for an additional fourteen years. [17] In 1831, Congress extended the term to twenty-eight years, renewable for an additional fourteen years. [18] Congress then extended the renewal period to twenty-eight years in 1909. [19] The 1976 Copyright Act aligned the United States with the Berne Convention, although the United States did not become a member of the Berne Convention until 1989. [20] The U.S. Copyright Act granted protection from creation of a work, [21] whereas the 1790, [22] 1831, [23] and 1909 [24] Acts granted protection from publication. While the 1790 [25] Act did apply to existing and

future works, and the 1831 [26] and 1909 [27] Acts applied to future and existing copyrights, and the 1976 Act's new copyright terms applied to all works not published by its effective date of January 1, 1978, regardless of when the work was created. [28] The CTEA applies to existing and future copyright [29] works whose copyright expired in 1997 and are now in the public domain. Works whose copyrights would have expired in 1998 received a twenty-year extension, even though the CTEA did not become law until October 27, 1998. The Supreme Court stated in 2003 that the retroactivity is constitutional. [30]

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Eldred, the plaintiff in *Eldred v. Ashcroft*, is a non-profit organization that distributes electronic books in the public domain on the Internet at their website free of charge. [31] Other plaintiffs include a company that reprints public domain out-of-print books, a vendor of public domain sheet music, a choir director who is a purchaser of this inexpensive music, and a company that preserves and restores old films that are not in the public domain, but needs permission to reprint from copyright holders who may be difficult to find. [32]

The plaintiffs filed suit against the U.S. Attorney General, challenging the CTEA's constitutionality under the Copyright Clause [33] and the First Amendment. [34] The district court in 1999 disagreed with the plaintiffs, and entered a judgment on the pleadings, holding that the CTEA's terms are limited and not perpetual, and that there are no First Amendment rights to use the copyrighted works of others. [35]

The plaintiffs appealed, and in a case of first impression for an appellate court, the Court of Appeals for the District of Columbia affirmed. [36]

Concerning the plaintiffs' First Amendment argument, the D.C. Circuit stated that while the plaintiffs did have standing to pursue the First Amendment claim, the claim failed on the merits because the plaintiffs did not have a First Amendment right to use the copyrighted works of others. [37] The plaintiffs also argued that the CTEA violates the Copyright Clause's originality requirement, because it extends the terms of existing copyrights. [38] Again, the court of appeals disagreed, stating that the originality requirement is not at the time of copyrighting the work and need not continue to exist for the copyright to persist. [39] The plaintiffs' third argument on appeal was that the CTEA violates the "limited times" clause of the Copyright Clause, as it extends the term of existing works. [40] The appellate court agreed that this is not a threshold issue like the last, but since this does not grant permanent copyright protection, it does not violate the constitution. [41] Thus, the district court was affirmed. [42]

The United States Supreme Court granted certiorari to address two issues: first, whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and secondly, whether the CTEA's extension of existing and future copyrights violates the First Amendment. [43]

The Supreme Court answered in the negative to both questions in a seven to two decision, affirming the lower courts and upholding the constitutionality of the CTEA. [44]

Writing for the majority, [45] Justice Ginsburg stated that in enacting the CTEA, Congress acted within its authority and did not transgress constitutional limitations. [46]

Concerning the challenge under the Copyright Clause, the majority stated that the text, history, and precedent confirm that the Copyright Clause empowers Congress to prescribe limited times, [47] and even the petitioners concede that author's life plus seventy years is a limited time. [48] Extending the duration of existing copyrights is not beyond Congress's authority according to the majority. [49]

Concerning the petitioners' other Copyright Clause challenges, the majority similarly found no constitutional impediment to the CTEA's extension of existing copyrights. [50] Once again, petitioners argued that the "originality" requirement was violated, but the Court held that the originality requirement has no bearing on the "limited time" prescription. [51] Petitioners then argued that the CTEA's extension of existing copyright does not "promote the Progress of Science and useful Arts" because it does not stimulate new works. The Court, however, again stated that it is for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives,

and Congress has extended existing terms before. [52] The petitioners also argued that the extension fails to address the Copyright Clause's "quid pro quo". Congress grants the author an exclusive right for a limited term, but after that term, the work enters the public domain. [53] The Court stated that references to the quid pro quo typically occur in the patent context, and copyright gives the holder no monopoly on the knowledge or idea. [54] Thus, the majority concluded that the CTEA's extension of existing copyrights did not violate the Copyright Clause. [55]

Turning to the First Amendment challenge, the petitioners claimed that "the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment." [56] The Court disagreed on the grounds that the Copyright Clause and the First Amendment were adopted close in time, indicating that "in the Framers' view, copyright's limited monopolies are compatible with free speech principles." [57] Copyright law contains First Amendment protections in that it only protects expressions of ideas in tangible form and not ideas themselves, [58] and allows for the fair use defense "for purposes such as criticism, comment, news reporting, teaching ... scholarship and research." [59] The CTEA itself supplements First Amendment safeguards by allowing libraries, archives, and similar institutions to reproduce and distribute, display or perform copies of certain published works during the last twenty years of the copyright term for preservation, scholarship, or research if the work is not being exploited commercially and further copies are not available at a reasonable price. [60] In addition, a section of the CTEA entitled "Fairness in Music Licensing Act of 1998" exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television and similar facilities. [61] So, as the Court understood the Framers' instruction, Congress may determine the intellectual property regime that serves the Constitution, and the appeals court was affirmed. [62]

Justice Stevens dissented, stating that "the Court has quitclaimed to Congress its principal responsibility in this area of the law." [63] This dissent stated that the quid pro quo, for the purposes of encouraging new works and adding to the public domain, applies to copyrights as well as patents. [64] Justice Stevens stated that "a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights," and unless there is such a categorical rule, "Congress may extend existing monopoly privileges infinitum under the majority's analysis." [65]

Justice Breyer's dissent was much more sweeping. Justice Breyer questioned not only the retroactivity, but also "the longest blanket extension since the Nation's founding," which makes the copyright term virtually perpetual. [66] Justice Breyer noted that this new copyright period produces a term of protection that is worth more than 99.8% of all protection in perpetuity. [67] While Justice Breyer shared the Court's concern about second-guessing the authority of Congress, he disagreed that it intrudes on Congress's authority to find the CTEA unconstitutional based on the objectives of the Copyright Clause, the implausibility of incentive effect, and the failure of the CTEA to provide significant international uniformity. [68]

CONCLUSION

The U.S. Supreme Court in 2003 declared the CTEA, including its retroactivity, constitutional. The majority granted great deference to Congress on this issue. [69] This author finds it interesting that such a level of deference was accorded to Congress on this issue. However, the majority opinion does take a small jab at Congress by stating that they cannot second-guess congressional determination of this kind, "however debatable or arguably unwise they may be." [70]

It is also interesting and ironic that while the majority mentions that a key factor in the CTEA's passage was a 1993 European Union directive instructing members to establish a copyright term of author's life plus seventy years, [71] and mentions a provision of the CTEA, the Fairness in Music Licensing Act of 1998, [72] as a supplement to traditional First Amendment safeguards, [73] the European Union challenged this provision successfully at the WTO. [74] On January 26, 1999 the European Union requested consultation at the WTO's Dispute Settlement Body over the Fairness in Music Licensing Act of 1998, enacted on October 27, 1998. The European Union claimed that this section, which allowed certain small businesses to play music without royalties, violated the WTO's TRIPS Agreement, which grants both royalties and the exclusive rights to the broadcast of published works. [75] On May 5, 2000, a panel at the WTO's Dispute Resolution Body agreed with the European Union. [76] The United States submitted a status report to the WTO on January 16, 2003 stating that the 108th Congress is organizing and preparing to resume work, and that the U.S. Administration will continue to engage the U.S. Congress on this issue with a

view towards finding a mutually acceptable resolution consistent with WTO rules. [77] Perhaps when finding a mutually acceptable resolution, Congress should reconsider retroactive copyright term extensions.

While respecting the majority's deference to Congress, this author agrees with Justice Stevens's dissent, which states that the "fact that the Court has not previously passed upon the constitutionality of retroactive copyright extensions does not insulate the present extension from constitutional challenge." [78] Will Congress once again extend the Copyright Term retroactively again in twenty years?. When exactly does "limited times" end?

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[1]. U.S. Const. art. I, § 8, cl. 8. On the issue of the copyright clause and the CTEA, see generally, Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum.-VLA J. L. & Arts 61 (2002), Dan T. Coenen and Paul J. Heald, *Eldred v. Ashcroft In One Act*, 36 Loy. L.A. L. Rev. 99 (2002).

[2]. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§101, 302-305 (2000).

[3]. 17 U.S.C. § 302 (2000).

[4]. 17 U.S.C. § 302.

[5]. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended at 17 U.S.C. § 116 (2000)).

[6]. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1C, Agreement on Trade Related Aspects of Intellectual Property, 15 Apr. 1994. The TRIPS Agreement was implemented in the U.S. on Dec. 8, 1994. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (amending 19 U.S.C. § 2411). *See generally*, Sue Mota, *TRIPS: Five Years of Disputes at the WTO*, 17 Ariz. J. Int'l. & Comp. Law 533 (2000) (examining the TRIPS Agreement and disputes decided by the World Trade Organization's Dispute Settlement Body pursuant to that agreement).

[7]. Council Directive 93/98/EEC, Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L290/9) (EC).

[8]. 17 U.S.C. § 302(a).

[9]. 17 U.S.C. § 302(c).

[10]. 17 U.S.C. § 302(a).

[11]. *Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751 (January 15, 2003).

[12]. U.S. Const. art. I, § 8, cl. 8.

[13]. S. Rep. No. 104-315, at 3 (1996). Congress also believed that the CTEA would provide a great benefit to the public domain by stimulating the production of new works and providing financial incentives for the preservation of existing works. *Id.* Congress also cited the unprecedented growth in technology which has enhanced the marketability of copyrightable works. *Id.* at 8.

[14]. Council Directive 93/98/EEC, Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L290/9) (EC).

- [15]. Robert S. Greenberger and Bruce Orwall, *Supreme Court Backs Law Extending Copyrights*, Wall St. J., January 16, 2003, at A3.
- [16]. Gina Holland, *Justices Grant Disney Longer Copyright Protection*, THE PLAIN DEALER, January 16, 2003, at C3. *See generally*, Dennis Harney, Note, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno*, 27 Dayton L. Rev. 291 (2002); Christine Qulhtos, *Congress' Green Monster: Copyright Extension and the Concern for Cash Over the Propagation of Art*, 12 DePaul-LCA J. Art & Ent. L. 109 (2002).
- [17]. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.
- [18]. Act of Feb. 3, 1831, ch. 16, §§ 1, 2, 4 Stat. 436.
- [19]. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1080.
- [20]. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended at 17 U.S.C. § 116 (2000)).
- [21]. 17 U.S.C. § 302(a) (2002).
- [22]. § 1, 1 Stat. at 124.
- [23]. § 1, 4 Stat. at 436.
- [24]. § 23, 35 Stat. at 1080.
- [25]. § 1, 1 Stat. at 124.
- [26]. § 1, 4 Stat. at 436.
- [27]. § 23, 35 Stat. at 1080.
- [28]. 17 U.S.C. § 302(a) (2000). For published works with existing copyrights, the 1976 Act gave a copyright term of 75 years from the date of publication. 17 U.S.C. §304 (2000).
- [29]. 17 U.S.C. §§101, 302-305 (Supp. 1999).
- [30]. *See Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751 (January 15, 2003).
- [31]. Eldritch Press, <http://www.eldritchpress.org> (visited Jan. 29, 2003). This site states, “[th]ese are free, accessible books. Read them and go in peace.” This site further states, “[e]verything at this site has now been placed in the public domain with a Creative Commons Deed (except two or three pieces copyrighted by others and used by permission).” *Id.* This site contains numerous classic literary and scientific works.
- [32]. *Eldred v. Reno*, 239 F. 3d 372, 374 (D.C. Cir. 2001).
- [33]. U.S. Const. art. I, § 8, cl. 8.
- [34]. U.S. Const. amend. I.
- [35]. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999).
- [36]. *Eldred*, 239 F. 3d at 373.

[37]. *Id.* at 375-376. The court cited *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 556 (1985), (where the U.S. Supreme Court found that copyright protects an author's expression, but not facts or ideas; which belong to the public at large and are protected by the First Amendment.); *Eldred*, 239 F. 3d at 375.

[38]. *Eldred*, 239 F. 3d at 376-377.

[39]. *Id.* at 377.

[40]. *Id.* at 377-378.

[41]. *Id.* at 378.

[42]. *Id.* at 380. *See generally*, Camila Alarean, Note, *Eldred v. Ashcroft Challenges the Copyright Term Extension Act*, 8 B.U. J. Sci. & Tech. L. 713 (2002); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. Intell. Prop. L. 223 (2001); Sue Ann Mota, *Eldred v. Reno - Is the Copyright Term Extension Act Constitutional?* 12 Alb L.J. Sci. & Tech. 167 (2001). The Court of Appeals denied rehearing and rehearing en banc. *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001).

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

[44]. *Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751 (January 15, 2003). On the constitutional issues, *see generally*, Erwin Chemerinsky, *Eldred v. Ashcroft*: Intellectual Property, Congressional Power, and the Constitution: Balancing Copyright Protections And Freedom Of Speech: Why The Copyright Extension Act Is Unconstitutional, 36 Loy. L.A. L. Rev. 83 (2002); Lawrence B. Solum, Congress's Power to Promote the Progress of Science: *Eldred v. Ashcroft*, 36 Loy. L.A. L. Rev. 1 (2002); Kevin D. Galbraith, Note, Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent, 12 Fordham Intell. Prop. Media & Ent. L.J. 1119 (2002); Patrick H. Haggerty, Comment, The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, 70 U. Cin L. Rev. 651 (2002).

[45]. Justice Ginsburg was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia,, Kennedy, Souter, and Thomas. *Eldred*, 2003 U.S. LEXIS 751 at *11.

[46]. *Id.* at *16.

[47]. *Id.* at *14-16. Justice Ginsburg examined the 1790, 1831, 1909, and 1976 Copyright Acts. In addition, this approach was in line with English practice at the time under the Statute of Anne. *Id.* at *14.

[48]. *Id.* at *14.

[49]. *Id.* at *16.

[50]. *Id.* at *23.

[51]. *Id.* at *19-20. The petitioners cited *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), wherein the Court stated that originality is the *sine qua non* of Copyright. *Feist*, 499 U.S. at 345. In *Eldred*, however, the Court stated that *Feist* did not touch on the duration of copyright. *Eldred*, 2003 U.S. LEXIS 751, at *20.

[52]. *Eldred*, 2003 U.S. LEXIS 751, at *20-21.

[53]. *Id.* at *21.

[54]. *Id.* at *22.

[55]. *Id.* at *23.

[56]. *Id.*

[57]. *Id.* Copyright spurs the creation and publication of new expression. *Id.*

[58]. 17 U.S.C. § 102(b) (2000).

[59]. 17 U.S.C. § 107 (2000).

[60]. 17 U.S.C. § 108(h) (2000).

[61]. 17 U.S.C. § 110(5)(B) (2000).

[62]. *Eldred*, 2003 U.S. LEXIS 751, at *24-25.

[63]. *Id.* at *33.

[64]. *Id.* at *25, *27.

[65]. *Id.* at *33.

[66]. *Id.* at *33.

[67]. *Id.* at *42.

[68]. *Id.* at *41.

[69]. *See id.* at *16, *18, *20, *22, *23 and accompanying text.

[70]. *Id.* at *18.

[71]. *Id.* at *12.

[72]. 17 U.S.C. § 110(5) (2000).

[73]. *Eldred*, 2003 U.S. LEXIS 751, at *24.

[74]. World Trade Organization, <http://wto.org>.

[75]. Request for Consultations by the European Communities and their Member States, *United States--Section 110(5) of US Copyright Act*, WT/DS160/1 (Feb. 4, 1999), <http://wto.org>.

[76]. Panel Report, *United States--Section 110(5) of US Copyright Act*, WT/DS160/1 (June 15, 2000), <http://wto.org>. *See generally*, **Mota**, *TRIPS*, *supra* note 6.

[77]. Status Report by the United States - Addendum, WT/DS/60/18/Add.11 (Jan. 20, 2003), <http://wto.org>.

[78]. *Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751, at *32 (January 15, 2003).

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