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HIGH COURT TO RULE ON CONGRESS' POWER TO EXTEND COPYRIGHTS

by

Kelly M. Slavitt

On October 9, 2002, the United States Supreme Court will hear arguments in *Eldred v. Ashcroft*, 112 S. Ct. 1062, 112 S. Ct. 1170 (2002), to review the U.S. Court of Appeals for the D.C. Circuit's ruling in *Eldred v. Reno*, 239 F.3d 372 (D.D.C. 2001), *reh'g denied*, 255 F.3d 849, that the Copyright Term Extension Act (Pub. L. No. 105-298, 112 Stat. 2827) ("CTEA") is unconstitutional. The CTEA extends copyright protection for works published before January 1, 1978 and still under copyright on October 27, 1998 to 95 years. For works created on or after January 1, 1978 the extension depends on the nature of the author (if a natural and know person, the term is life of the author plus 70 years, and if the author is a corporation or anonymous, the term is the shorter of 95 years from the first year of publication or 120 years from creation). Thus, works which would have begun to fall into the public domain in 1998 will now remain copyrighted until the end of 2018 at the earliest.

Eldred challenges whether Congress has the power under the Copyright Clause of the United States Constitution to extend retrospectively the term of existing copyrights, and whether a law that extends the term of existing and future copyrights is immune from challenge under the First Amendment. Resolution of these questions has the potential to generate a ruling which will change the scope of copyright law in the Internet age. A decision in favor of the plaintiffs could put more copyrighted works into the public domain. A decision in favor of the defendants could reaffirm traditional copyright principles, and in either case the Supreme Court could set limits on congressional power.

District Court Holding. The plaintiffs include Eric Eldred who runs a free Internet library offering publications that have entered the public domain. They challenged the constitutionality of the CTEA on the basis that it harms their ability to use works created before 1923 by extending the term of existing copyrights. The plaintiffs argued both that the CTEA violates the First Amendment, and that the retrospective extension of copyright protection is beyond Congress' enumerated powers under the Copyright Clause and thus violates the public interest doctrine. Under the Copyright Clause, U.S. Constitution Article I Section 8 Clause 8, Congress has the 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."

The United States District Court for the District of Columbia held for the defendants and found the CTEA to be constitutional. In one short paragraph, the District Court rejected the plaintiffs' First Amendment claim and held that because the works were copyrighted by others, the plaintiffs had no right to such copyrights and no First Amendment right to use the copyrighted works of others.

Kelly M. Slavitt is an intellectual property attorney in New York City. She is formerly of Skadden, Arps, Slate, Meagher & Flom LLP in New York City and of Allens Arthur Robinson in Melbourne, Australia.

The District Court also rejected, in four short paragraphs, the plaintiff's challenge to Congress' powers under the Copyright Clause. First, the District Court held that the defendant did not violate the "limited times" clause by extending the time period because Congress defines the scope of the grant of copyrights under its Copyright Clause power and Congress has the authority to enact retrospective laws under the Copyright Clause. Next, the District Court held that the defendant did not violate the "to authors" clause by retrospectively extending the term of existing copyrights because an author may agree to transfer or assign future copyrights conferred upon that author by Congress.

Finally, the District Court rejected the plaintiffs' argument in the alternative that the retroactive extension of copyright protection violates the public trust doctrine, which provides that States hold title to navigable and tidal waters within their boundaries in trust for their people, because this doctrine does not apply to copyrights.

Appeals Court Holding. On appeal, the Plaintiff-Appellants took a three-pronged attack on the CTEA's constitutionality: first, the CTEA violates the First Amendment in both its prospective and retrospective applications because it fails the intermediate scrutiny test; second, the CTEA violates the originality requirement of the Copyright Clause as applied to preexisting works; and third, the CTEA violates the "limited times" requirement of the Copyright Clause. Each of these arguments failed and the D.C. Circuit also found the CTEA to be constitutional.

As to the First Amendment argument, the Appeals Court agreed with the District Court that Eldred had no First Amendment right to use the copyrighted works of others. The plaintiffs argued the inapplicability of *Harper & Row Publishers v. National Enterprises*, 471 U.S. 539, 556 (1984), on the basis that it was the constitutionality of the statute itself (i.e., the CTEA) being challenged. *Harper & Row* held that the difference between the First Amendment and the copyright statutes was that the First Amendment protects the free communication of facts while the copyright statutes protect the author's expression. The Appeals Court dismissed this argument, stating that the "relevant question" under the First Amendment was whether the party has a First Amendment interest in a copyrighted work. On this basis, the Court held that works under the CTEA do because they fall under the "expression" part of the idea/expression dichotomy principle and are subject to fair use.

As to the Copyright Clause, the plaintiffs argued that because originality is a constitutional requirement for copyright, the CTEA can not extend a copyright on an existing work which is no longer original. The Appeals Court disagreed on the basis that originality is what made the work copyrightable in the first place so the requirement of originality has already been met, and because if Congress had not intended for subsisting copyrights to be extendable they would not have been providing for renewal terms since 1790.

The Appeals Court refused to analogize copyrights to other areas of intellectual property law — patents and trademarks — as the plaintiffs sought to do. To wit, the Appeals Court rejected application of a patent case which held that "Congress may not authorize existent knowledge from the public domain, or to restrict free access to materials already available," *Graham v. John Deere*, 383 U.S. 1, 6 (1966). It also refused to apply a trademark case holding that a trademark issuance was unjustifiable under the Copyright Clause because a trademark is "the adoption of something already in existence," and as applied to copyright a work can only be in the public domain if it is without a copyright. *Trademark Cases*, 100 U.S. 82, 94 (1879).

As to the second argument under the Copyright Clause, the Appeals Court again agreed with the District Court that the CTEA does not violate the "limited times" clause by extending the copyright protection time period. The plaintiffs argued that because the Supreme Court has applied the phrase

“promot[ion of] the progress of science and useful arts” in the preamble of the Copyright Clause to the terms “authors” and “writings,” it should also be applied to “limited times.” Consequently, the argument continued, extending the term of copyright protection beyond a “limited” time does not “promote the progress of science and useful arts” and is unconstitutional. The Appeals Court rejected any application of the preamble to the Copyright Clause as limiting Congress’ powers by citing *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 948 (1982), which rejected the argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.

The Appeals Court devoted an entire section of its opinion to rebutting arguments made by the dissent. The dissent first argued that *Schnapper* is wrong and that the preamble of the Copyright Clause does in fact limit Congress’ power, a point with which the majority disagreed. The majority further noted that even if it hypothetically agrees with the dissent that its previous decision was erroneous, the dissent’s argument nevertheless failed under a “necessary and proper” clause standard because the CTEA is an “appropriate” means “plainly adapted” to “promot[ing] Progress of Science and useful Arts.”

Next, the dissent argued that Congress’ extending the term of subsisting copyright beyond a “limited time” does not “promote Progress” as required under the Copyright Clause. The majority disagreed on the basis that preserving access to works that would otherwise disappear “promotes progress” just as stimulating the creation of new works does. Further, the majority reiterated that Congress has the right to set the duration of intellectual property protection.

Supreme Court Brief Additional Arguments. Eldred and the other petitioners’ brief argues that the Appeals Court holding that copyrights are “categorically immune” from First Amendment scrutiny was erroneous because *Harper & Row* did not support such a holding. They attempt to distinguish the Appeals Court holding that the First Amendment protects the free communication of facts while the copyright statutes protect an author’s expression (i.e., the idea/expression dichotomy) by arguing that this principle is irrelevant to the First Amendment interests protected by limitations on the duration of copyright.

The petitioners then go on to argue that because copyrights *are* subject to First Amendment scrutiny, intermediate scrutiny is the appropriate level of review for this content-neutral regulation of speech which bars the unauthorized use or dissemination of copyrighted works. Under such a standard, the petitioners argue, the CTEA is unconstitutional because it is not narrowly tailored to an important governmental interest.

The government’s brief relies on its previous arguments as well as the holdings in the lower court cases. The bulk of its brief argues that the application of the CTEA to existing works, and not just future works, is a necessary and proper exercise of Congress’s power to ensure authors are treated with fairness and given incentives to create.

The government also addresses the possibility that the Court would overturn *Harper & Row* and accept the petitioners’ argument for the applicability of a heightened level of intermediate scrutiny. The government argues the CTEA would pass constitutional muster even if intermediate scrutiny is applied because the government has an interest in ensuring that copyright holders receive the benefits of their copyright and the only restriction on speech is on the “manner” of conveying the message.

Policy Criticisms of the CTEA. Proponents of the CTEA note that in the past 40 years that Congress has extended existing copyright terms 11 times, and this most recent extension is no different. Opponents argue that the intent of the Framers in 1790 when copyrights lasted a mere 14 years was not to give a long-term monopoly to copyright holders.

The arguments of critics are numerous. Opponents of the CTEA say the long extension term of the

CTEA resulted from intense lobbying by a group of powerful corporate copyright holders, including Disney, which faces the expiration of its copyright in Mickey Mouse in 2003. Other critics argue the CTEA is necessary to keep U.S. companies competitive against European Union businesses which benefit from longer copyright terms.

Opponents further argue that the CTEA is harming small companies and professors. Small companies which rely on works in the public domain assert that they are being constrained — films from the 1920s and 1930s which used film — destroying lead nitrate are being irrevocably lost because the cost of restoration is too high; the available repertoire for small orchestras shrinks as the public domain shrinks because they can not afford the prices for copyrighted works; and books published in 1930 are overwhelmingly out of print and/or the authors of which are expensive to track down. Professors argue that the law is preventing them from publishing electronic resources and teaching courses online because while classroom-based courses often use copyrighted material under a "fair use" exemption, the law does not make such material available to online instructors.

Conclusion. In theory, a copyright should last only long enough to give people an incentive to create and innovate. What was it about *this* copyright term extension, which has been mockingly analogized to the officials in the Super Bowl moving the goal posts in the last seconds of the game, that will have the Supreme Court hearing oral arguments next month?

The answer may be that the Framers could not predict either the Internet or corporations whose main asset would be intellectual property. The Internet allows easy access to creative works at minimal cost: not only can a new creator put his new works up for very minimal publication cost, but works in the public domain can be easily located and "re-created" for the minimal cost of accessing the Internet. Further, the Internet makes the world a smaller place such that copyright owners must remain competitive on a global scale, and copyright laws must keep pace with each other from country-to-country. And corporations, which must answer to shareholders and have grown in both number and breadth, must maximize profits (and thus shareholder returns) which copyright term extensions allow corporations to do by reaping royalties and licensing fees for longer periods of time.

The impact of the Supreme Court declaring the CTEA unconstitutional is difficult to measure. Early Mickey Mouse depictions would no longer belong exclusively to the Walt Disney Company, although Disney would continue to be able to protect Mickey Mouse under trademarks law because a trademark has no time limit and will continue as long as the trademarked work is being used. Thousands of copyrighted works, including early films, would be available in the public domain which digital archives could help preserve for future generations. And the lead plaintiff, Eric Eldred, is reportedly planning to create a "copyright conservancy" where authors can donate their works for public use.