NewsBreak: **Supreme Court Affirms Copyright Term Extension Act**
By George H. Pike*

On January 15, 2003, the United States Supreme Court (www.supremcourtus.gov) released its much anticipated opinion upholding the 1998 Sonny Bono Copyright Term Extension Act (CTEA). The Act extended the term of existing copyrights by 20 years, and also provided for longer terms for future copyrights, at least 70 years and in some cases well over 120 years.

The Act had been challenged by Eric Eldred, the founder and principal of Eldritch Press (www.eldritchpress.org), a non-profit website providing free online access to public domain books. Eldred was joined in the challenge by other several businesses and individuals who publish public domain content on the Web and in print, and was supported by librarian and educator groups. Collectively, they argued that the Act was beyond the scope of Congress' legislative power, that it violated the "Limited Times" provision of the Copyright Clause, and that it violated the Free Speech clause of the First Amendment.

In a lengthy opinion authored by Associate Justice Ruth Bader Ginsburg and endorsed by seven of the Court's nine members, the Court firmly rejected all of Eldred's arguments. Addressing the first of Eldred's challenges, the Court found a long history of Congressional extensions of copyright and patent terms, as far back as the earliest acts of Congress. Those extensions often applied equally to both existing and new copyrights on the grounds that "an author who has sold his work a week ago (not) be placed in a worse situation" than one who sells his work a week later. Having found none of those prior extensions beyond Congress's power, the Court declined to decide differently for the CTEA.

The Court also found additional Congressional support for the CTEA in harmonizing United States and European Union copyright terms, and in "demographic, economic and technological changes" affecting copyrights. This support, while perhaps "debatable or arguably unwise" according to the Court, was still within Congress' legislative prerogative.

The Court then rejected Eldred's claim that the Act violated the U.S. Constitution's Copyright Clause, which secures copyrights and patents for "limited times" as part of the promotion of the "Progress of Science and Useful Arts". The Court declined to find that the CTEA amounted to a perpetual copyright, noting that there were other similar long-term practices in law, such as 99-year leases. The Court also found that the extension of copyright protection did not require a new original creation in exchange for the extension. Promotion of progress, the Court said, was achieved by encouraging creators to serve public ends by securing copyright rewards for their efforts, including any extensions that may be enacted.

When the Court agreed to hear Eldred's argument that the CTEA violated the Free Speech clause of the First Amendment, a flurry of excitement went through many copyright watchers. The relationship between the Copyright Clause and the First Amendment had been subject to intense debate and mixed decisions from the courts for a number of years. Eldred argued that the continuing extension of copyright kept works from the public domain and restricted their free use. These restrictions inhibited the free flow of and access to information that is an acknowledged part of free speech. An answer in the affirmative could have clarified the debate and had great implications for those who sought to use copyrighted information as elements of new expression.

The Court found, however, that copyright law contained "built-in" First Amendment accommodations. These included the protection of only expression, not underlying facts and ideas; the availability of those facts and ideas for continuing exploitation even when they are published in a copyrighted work; and the availability of fair use as a means for accessing copyrighted expression in certain circumstances. The purpose of copyright, the Court said, was to be the "engine of free expression."

The Supreme Court's decision, like the underlying Act, has been seen as a major victory for large-scale commercial copyright holders such as Disney and Time Warner, who's creations like Mickey Mouse and the great movies and compositions of the 1920's and early 30's, are now protected until the year 2020 and beyond. Whether or not these commercial enterprises should be entitled to this victory will continue to be debated. However, there remain serious concerns that lesser works that have limited availability and commercial value will be the victims of the Act.

No one should seriously expect Mickey Mouse to be lost to history, and it may not be unreasonable for Disney to be entitled to continue its control over a character that they have invested a great part of their history to maintain. But what about historical works, photographs and images that are part of our history but are outside the commercial mainstream, or for which the copyright holder has long since died or been lost to time? Justice Breyer's dissent in Eldred expressed these concerns in pointing out that only about 2% of copyrights over 55 years old retain commercial value. Similarly, Breyer outlined several instances where the man-hours required to locate copyright holders lead to the abandonment of critical preservation, documentary and archival projects.

Perhaps now that the CTEA issue is resolved, efforts can be made to seek solutions to these challenges. A system of continuing tracking and verification of current copyright holders over the full 70 to 120 year life of the copyright could be developed. This would ensure ready access to copyright holder data for researchers and preservationists seeking permission to use copyrighted works. Amendments to the Copyright Act can provide safe harbors from liability for certain uses of older, unverified copyrights. Disney need not be concerned as they will certainly keep their copyrights verified. But those who seek to preserve history need the opportunity to do so for the benefit of us all.

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