

NewsBreak Supreme Court Agrees to Hear Copyright Challenge Case

By George H. Pike*

On February 19, 2002, the United States Supreme Court (www.supremecourtus.gov) gave an unexpected Valentine's surprise to the copyright and publishing communities by agreeing to hear a challenge to the 1998 Sonny Bono Copyright Term Extension Act (CTEA.) The Act (available online at thomas.loc.gov) extended the terms of existing copyrights by 20 years and added the same 20 year extension to the term of all future copyrights. As a result of the Act, copyrighted material will not go into the public domain for at least 70 years and often well over 100 years.

The CTEA is being challenged in Eldred v. Ashcroft, as a violation of the Constitution's Copyright Clause (Article I, Section 8). This provision empowers 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." Eric Eldred is the founder and principal of Eldritch Press (www.eldritchpress.org), a non-profit website providing free access to online, public domain books. Eldred and the other petitioners, who include businesses and individuals who publish public domain content on the Web and in print, argue that the extensions violate the intention of the "limited times" clause by continually extending copyright protection. They further argue that the extended copyright terms defeat the promotion of Progress requirement of the Constitution.

Supporters of the CTEA argue that the "limited times" clause is intended to distinguish a limited time period from an unlimited time period and that although long, the current terms are within the powers granted to Congress by the Constitution. They also point out that the CTEA is necessary to bring U.S. copyright law into line with the European Union's copyright terms, giving U.S. copyright holders a level playing field in the global marketplace. Lastly, they contend that extending the copyright term is of benefit to "Science and the useful Arts" by enhancing the economic incentive for creativity.

Advocates on both sides of the issue are many. Eldred is represented by law professor Lawrence Lessig of Stanford's Center for Internet & Society, and Profs. Charles Nesson and Jonathan Zittrain of Harvard's Berkman Center for Internet & Society. Filing amicus (friend of the court) briefs in support of Eldred are a number of library associations, intellectual property and constitutional law professors and Internet advocacy groups. Amicus briefs supporting the CTEA were filed by publishing associations and authors' advocacy groups.

Like the Supreme Court's Tasini decision of last summer, the outcome of this case is likely to have a significant impact on access to and control of content on the Internet. The Internet's ability to provide mass access to content at a comparatively low cost is an ideal platform for making available the rich production of authors that is or otherwise would not be marketable for reasons of age, specialized interest or cost. Tasini's restoration to individual authors of the copyright control over their articles is once such source for this content. The movement of copyrighted works into the public domain is

another source for this content. It is no coincidence that many of the petitioners in Eldred v. Ashcroft are non-profit and boutique publishers who primarily make public domain works available through the Internet, as e-books or as low-cost print books.

A number of newspaper and other articles on the CTEA have pointed out that large media companies like Disney and Time Warner stand to significantly benefit from the CTEA. The copyright to the character of Mickey Mouse, for example, was to expire in 2003 and is now continued until 2023. Copyrights in the great movies, music and literature of the late 1920's and 1930's (such as *Gone with the Wind* on book and film, the songs of the Gershwin's, the novels of F. Scott Fitzgerald, and films like the *Jazz Singer* and *Frankenstein*) which would soon be moving into the public domain are now locked up until the next decade at the earliest.

While there may be legitimate reason to be concerned about the availability of those great works, there is greater reason to be concerned about the loss of pieces of our cultural history. Thousands of out-of-print books, journals, musical compositions, scripts and other "useful Arts" from the 1920's and 1930's risk being lost to time. The existing copyright holders—for legitimate reasons of cost or market—are not in a position to reprint or republish these works, but if in the public domain they could be made available on the Internet at minimal cost.

Pursuing copyright issues in the courts is only one mechanism being evaluated to strengthen the amount of content available through the Internet. In an upcoming column I will be looking at the still developing concept of the "copyleft". An intellectual work published under a copyleft agreement is made available in the public domain and can be freely copied, modified or adapted by subsequent users. However, those users agree that as a condition of their use, they in turn must make their modifications or adaptations freely available in the public domain as well, subject to the same continuing copyleft agreement. Copylefts have been a part of open source software development for some time. Recently, however, copylefts have been explored as a tool that authors and publishers can use to make certain their creative content on the Internet remains public. Copylefts may also provide protection for publishers of public domain content, ensuring that the content remains public notwithstanding any future use or adaptation.

The Supreme Court is will soon schedule oral argument in the Eldred v. Ashcroft case, and a decision is likely to be issued in the 2002-2003 term.

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