



Eldred v Ashcroft: a US copyright case of ‘supreme’ significance

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In its current term, the United States Supreme Court is considering one of the most significant intellectual property cases in generations. *Eldred v Ashcroft* concerns the constitutionality of the United States Copyright Term Extension Act of 1998 (CTEA), which set the basic term of US copyright at life of the author plus 70 years, and extended the terms of all existing copyrights by 20 years.

The case presents the ultimate legal challenge to the viability of copyright law as it has existed to date, in the face of the development of digital technologies such as the Internet. On the one hand, Internet enthusiasts argue that this new technology demands that all the existing rules change, that ‘information wants to be free’. On the other, those representing creators and copyright owners argue that, without strong copyright protection, there will be no creative works – no ‘content’ – to fill the otherwise empty pipeline of the Internet.

In a strictly legal sense, *Eldred* involves two questions: First, whether the US Constitution allows for term extension for existing copyrights (as opposed to copyright for works not yet created). Second, whether term extension legislation must be strictly analysed under the Constitution’s First Amendment, which guarantees freedom of speech. In a broader sense, the case encapsulates a debate that has been ongoing for a decade over the role of copyright and creativity in the digital environment.

The CTEA

After the European Union issued a 1993 directive that harmonised copyright duration throughout the EU at life plus 70 years, US creators and copyright owners began lobbying Congress for a similar extension

of the US copyright term. Congress considered the matter for five years, during which time it held many hearings, and heard, in great detail, arguments for and against term extension.

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The arguments presented to Congress in favour of term extension included the following:

Greater life spans – Internationally-accepted theory holds that copyright duration should protect the author for his or her life, and the lives of two generations thereafter, to allow authors to take care of their families. The old life-plus-50-year term, which gained widespread international use at the end of the 19th century, met that need given the average life span at that time. With the increase in life expectancy today, and the fact that parents have children later in life, life-plus-70-years is the equivalent term.

Increased investment – Copyright term extension would encourage not only the creation of new works, but the investment in and preservation of culturally significant works. For example, movie studios invest in the preservation of old motion pictures, which would otherwise be destroyed by the degeneration of film stock, but only if they can be assured of a return on their investment.

Foreign trade – Term extension would be very beneficial for the US economy.

Firstly, because EU countries – the major foreign market for US copyrighted works – protect copyrights for the extended term, the US would lose out on 20 years of protection in Europe if we did not have the same term. Secondly, because the US balance of trade in copyrighted works is extremely positive – we get far more for foreign use of our works than we pay for our use of their works – the American economy would lose significant revenues and significant jobs if our copyright term was shorter.

Authors – Authors and their families, and not merely the businesses which invest in their creativity, would benefit from term extension. The typical royalty systems compensate authors and their families for the full term of copyright, and authors themselves so testified before Congress in support of term extension.

Recapturing copyrights – The term extension legislation would grant author’s families a new termination right so that they could recapture their copyrights from transferees for the extended 20 years of protection. That right would be inalienable and cannot be waived. Thus, the notion that the term extension would only protect corporate interests is flatly wrong.

Free expression – There is no conflict between copyright protection and the First Amendment. As Justice O’Connor wrote in a copyright case, ‘it should not be forgotten that the Framers intended copyright itself to be the engine of free expression’.¹ Both the idea-expression dichotomy and the fair use doctrine protect First Amendment interests fully.

Necessary extensions – All copyrighted works eventually go into the public domain, and the term extension legislation would not change that. The very first copyright statute – enacted in 1790 by the first Congress, which included the drafters of the Constitu-

tion – extended the term of existing copyrights. Subsequent copyright acts – in 1831, 1870, 1909, and 1976 – have extended the terms of copyright protection. Extension of existing copyrights is necessary to meet new economic and cultural demands and is as old as the republic itself.

The arguments presented to Congress against term extension included the following:

Corporate benefit only – Term extension would only benefit huge corporate interests rather than individual authors or their families.

New creations – The purpose of copyright is to encourage the creation of new works, and extending the term of existing works does not further that purpose.

Public domain – The ‘bargain’ of copyright is that intellectual property rights last for only a limited time, after which works go into the public domain. Term extension curtails the public domain, and thus prevents new works being created which build on previous works.

Unnecessary extension – Copyright term is long enough as it is. The overwhelming majority of copyrighted works have no commercial value, but would be tied up for another 20 years by term extension with no concomitant benefit.

Congress was convinced that term extension was in the public interest, and enacted the CTEA in 1998.

Legal challenges to the CTEA

Soon after enactment of the CTEA, a group of academics and Internet advocates, led by the Berkman Center at Harvard Law School, having failed in their opposition to term extension before Congress, sought to challenge the legislation in the courts. They found some Internet website operators who posted public domain materials to serve as plaintiffs, and argued that the CTEA damaged them by preventing them from posting materials which would have gone into the public domain but for the CTEA. The plaintiffs brought their suit against the US Government, seeking to bar enforcement of the CTEA. They claimed that the CTEA was unconstitutional, in that it violated the requirements and limitations imposed on Congress’s power to enact copyright legislation by the US Constitution, which is by its own terms the ‘supreme law of the land’.

The constitutional provision

The US Constitution grants Congress the power to establish copyright protection for ‘limited times’. According to the Constitution, ‘Congress shall have 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.’

Decisions below

The case was brought in the United States District Court for the District of Columbia. Judge June Green found that the CTEA was constitutional in a brief, four-page opinion. On appeal to the United States Court of Appeals for the District of Columbia Circuit, that decision was affirmed by a three-judge panel, with one judge dissenting.⁴ The plaintiffs petitioned for rehearing *en banc*. The petition was denied with both majority and dissenting opinions (two judges dissented).

The Supreme Court identified two issues to be decided: first, whether the US Constitution permits term extension for existing copyrighted works; and second, whether term extension conflicts with First Amendment free speech guarantees

In a surprise to many observers, the Supreme Court agreed to review the case. The briefs of the petitioners and their *amici curiae* were filed in June, the briefs of the respondent Government and its *amici curiae* were filed in August, the petitioners’ reply brief was filed in September, and the case was set down for oral argument on October 9 2002.¹

Issues before the US Supreme Court

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Term extension for existing copyrights

The petitioners claimed that, when applied to existing copyrights, the term extension did not satisfy the constitutional requirements that copyright be granted for limited times to authors for original works, for the purpose of serving as an inducement to create new works (‘to promote the Progress of Science and the useful Arts’, in the Constitution’s words). There could be no inducement to creativity, they argued, by extending the term of existing works. The courts below rejected the argument, noting that:

- the ‘originality’ requirement was obviously met for copyrighted works;
- the extension benefited authors and their families or, if they chose to transfer their rights, their assignees;
- a 20-year extension was itself a limited time; and
- determining what that limited time should be falls within congressional discretion.

More importantly, the courts said, ‘progress’ in ‘Science and the useful Arts’ was promoted not merely by an incentive to create new works, but also by creating an incentive to invest in, disseminate and preserve existing works.

The dissent in the DC Circuit focussed on the extension for existing works, and was cast in terms of the limits on congressional power: the Constitution’s copyright clause gives a purpose to Congress’s copyright legislation – to provide incentives for the creation of new works. That purpose, the dissent argued, limits congressional power to legislate and is not met when existing works’ terms are extended for those works have already been created. The Supreme Court granted review on this issue: whether the Copyright Clause of the Constitution allows for extension of existing copyrights.

First Amendment

The petitioners also claim that the legislation impermissibly interferes with their First Amendment right of free speech, by preventing copyrighted works from entering the public domain. The courts below rejected the argument, noting that there is no conflict between copyright protection and the First Amendment, because copyright protects the expression of ideas, but not the ideas themselves, and because the First Amendment guarantees only the free interchange of ideas. In the course of its decision, the DC Circuit

sweepingly held (citing one of its earlier decisions) that copyright legislation was ‘categorically immune from challenge under the First Amendment’, and the Supreme Court granted review on this question as well.

The oral argument

The argument for the petitioners was made by Professor Lawrence Lessig. He had been a clerk to Justice Scalia, but this was his first Supreme Court argument. Professor Lessig barely got a few sentences into his argument before being interrupted by Justice O’Connor, and there was a constant stream of questions thereafter, for the full time he was allotted.

Justices O’Connor, Ginsburg, Souter, Kennedy, and Chief Justice Rehnquist all asked questions that revealed a considerable degree of scepticism about the bases for his arguments. Their questions included:

- Given that there has been a consistent history of term extensions from the very first US copyright act in 1790, and no such constitutional questions have ever been raised, how can this extension be unconstitutional? The Chief Justice noted the fact that prior term extensions never been challenged in the past may indicate that ‘perhaps most people, and perhaps everybody felt there was no basis for challenging them’.
- Does it not make sense to grant extension to *all* copyrights (as has always been the case in the past) rather than a piecemeal approach which would grant a longer term only to newly-created works?
- Whether we agree with the policy choice or not, is that not a decision for Congress, instead of the courts, to make?

It is fair to say that, on several occasions, the justices’ questions tied Professor Lessig up in theoretical knots. At one point, for example, he was forced to agree that, if his reading of the Constitution held, the 1976 Act was unconstitutional. On this possibility, Justice Breyer commented that ‘the chaos that would ensue would be horrendous’.

It is also fair to say that, from the tenor of the questions, the justices had little sympathy for his First Amendment argument; he barely got a handful of questions on it, and they centred around the theme that, if his reading of the copyright clause was wrong, the First Amendment challenge must fall as well (as one justice remarked, they were, after all, drafted by the same people!).

Chief Justice Rehnquist indirectly addressed the issue – first raised in the dissenting opinion of the court below – of whether the Supreme Court would use the occasion to cut back on Congress’s power, as it had done in recent commerce clause cases such as *United States v Lopez*. Professor Lessig argued that this extension was different from others because the Founders who drafted the Constitution had only the printing of books in mind as the means of dissemination of works, whereas we now had the Internet available; the Founders, he claimed, would not have extended copyright term had they known of the existence of this new, unfettered medium. The Chief Justice said that even in commerce clause cases that argument was faulty – as he put it, the Founders didn’t know about steamboats or railroads, but there is no doubt that the commerce clause applies to them. Rather, he noted, the commerce clause (and, by analogy, the copyright clause) is a general grant of power, which Congress is ‘free to run with’.

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Solicitor General Theodore Olson argued the case for the constitutionality of the CTEA. The Solicitor General is the Justice Department attorney charged with, among other things, representing the United States before the Supreme Court, and his long experience arguing Supreme Court cases was apparent. He was well into his argument before he was interrupted by questions. He was most closely questioned by Justices Breyer and Stevens.

Justice Breyer presented economic questions: the thrust was that, if copyright is a balancing between the benefits to the copyright owner and the benefits to the general public, his assessment was that the

term extension was worth billions to copyright owners, but what was the concomitant benefit to the public? From an economic perspective, he asked, isn’t a term of life plus 70, or even life plus 50, the economic equivalent of a perpetual term? Olson’s answer was no, and that these assessments of benefits are for Congress to make, not the courts.

Justice Stevens asked repeatedly how the constitutional purpose of ‘Progress of Science and useful Arts’ (*ie*, progress in culture) was enhanced by granting a term extension to works already created, for the authors had already created the works and there could be no further incentive for their creation. The Solicitor General responded that progress in culture was not merely achieved by giving inducements to creators to create, but also by giving inducements to investors to invest, to disseminate, to preserve, and the like.

Professor Lessig had reserved three minutes for rebuttal, and, as would be expected, elaborated along the lines of questioning Justices Breyer and Stevens had pursued.

Lawyers are loath to quote odds, and it is widely recognised that predictions based on oral argument are nothing more than guesswork.² The Supreme Court usually takes several months to hand down a decision; it likely will reach one in early 2003. ■

Endnotes

1. Approximately 40 briefs were filed. Among those filed on the side of the US Government, and supporting the CTEA, was a brief filed by the author of this report on behalf of sixteen distinguished symphonic and concert music composers.
2. The petitioners evidently have some doubts of success: Amy Harmon, ‘An Uphill Battle in Copyright Case’, *New York Times*, October 14 2002 (“My sense is that the case could be in trouble,” Charles Nesson, the co-director of the Berkman Center for Internet & Society at Harvard Law School, said afterward at a lunch reception. “They saw the problem, but they didn’t necessarily buy our solution.”).

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