LEGAL UPDATE

ELDRED V. ASHCROFT CHALLENGES THE COPYRIGHT TERM EXTENSION ACT

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INTRODUCTION

The District of Columbia Circuit Court decision in *Eldred v. Reno* rejected the plaintiffs' claims that the Sonny Bono Copyright Term Extension Act ("CTEA") was unconstitutional under the First Amendment and an unlawful extension of Congress's power under the Copyright Clause.[1] The CTEA, passed in 1998, extended the duration of copyrights from life plus fifty years, to life plus seventy years.[2] In the case of corporate works, duration went from 75 years from publication to 95 years from publication, or 120 years from creation, whichever occurs first.[3] The CTEA also applies retrospectively to already copyrighted works.[4] Although the D.C. Circuit denied a rehearing as well as a rehearing *en banc*, the Supreme Court granted certiorari to the plaintiffs on February 19, 2002.[5] The Supreme Court's decision ultimately will affect all of those who use copyrighted materials, whether as copyright holders or consumers.[6]

Up for review in *Eldred v. Ashcroft* are two issues dealing with the constitutionality of CTEA.[7] First is whether the CTEA's retrospective extension of the term of already existing copyrights violates Congress's power under the Copyright clause of the Constitution.[8] By extending copyright terms retrospectively, the CTEA is the third in a line of numerous acts that changed the duration of the copyright after issuance of the copyright.[9] How this

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[1] 239 F.3d 372, 380 (D.C. Cir. 2001).

[2] Sonny Bono Copyright Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827.

[3] *See id*.

[4] *See id*.

[5] Eldred v. Ashcroft, 239 F.3d 372, 380 (D.C. Cir. 2001), *cert granted*, 122 S. Ct. 1062 (2002), *amended* 122 S. Ct. 1170 (2002).

[6] *See e.g.*, Linda Greenhouse, *Supreme Court to Intervene in Internet Copyright Dispute*, N.Y. TIMES, Feb. 19, 2002, *available at* http://www.nytimes.com/2002/02/19/national/19CND-RIGHTS.html (last visited Aug. 30, 2002).

[7] *See Eldred*, 239 F.3d 372.

[8] *See* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at i.

[9] *See id*. at 2 n.1 (citing Act of Feb. 2, 1831, §§ 1-2, 4 Stat. 36; Act of March 4, 1909 § 4,

retrospective extension promotes the arts and sciences, as mandated by the Constitution,[10] is dubious to those in favor of a strong public domain, such as the plaintiffs.[11] The second issue tackles the lower court's holding that the First Amendment is "categorically immune from challenge" by the CTEA.[12] Plaintiffs allege that the CTEA prevents free speech of works that would otherwise be in the public domain, without promoting a legitimate government interest.[13] The exact date in which the Court will hear *Eldred v. Ashcroft* has not yet been determined.[14]

COPYRIGHT TERM EXTENSION ACT

According to Congressional reports, the main purpose of extending copyrights for twenty additional years was to comply with the copyright standards set forth by the European Union.[15] Congress felt that the similarities between the copyright terms would facilitate trade between the United States and Europe, as well as "ensure adequate copyright protection for American works in foreign nations."[16] In direct contrast to the plaintiffs' claims set forth in *Eldred*, Congress also believed that an extended copyright term would benefit the public domain by providing an additional incentive to new works and monetary incentives to preserve existing works.[17]

Those against the CTEA view the act as promoting businesses and wealthy copyright owners as opposed to protecting American copyrights abroad.[18] Indeed, Walt Disney representatives lobbied openly and incessantly to get the CTEA passed before the expiration of Mickey Mouse's copyright and those of other iconic Disney characters.[19] The CTEA has come under considerable scrutiny as an Act that "serves the interest of no one except publishers that of (and other copyright holders) and their heirs."[20] The interest allegedly

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35 Stat. 1075, 1076).

[10] U.S. Const. art. I, § 8, cl. 8.

[11] *See e.g.*, Berkman Center for Internet and Society, Openlaw: Eldred v. Ashcroft, *at* http://eon.law.harvard.edu/openlaw/eldredashcroft (last modified Aug. 12, 2002).

[12] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at i.

[13] *See Eldred*, 239 F.3d at 375.

[14] Berkman Center for Internet and Society, Openlaw: Eldred v. Ashcroft, *at* http://eon.law.harvard.edu/openlaw/eldredvreno (last modified Aug. 12, 2002).

[15] *See* Eldred v. Ashcroft, 239 F.3d 372, 373-74 (D.C. Cir. 2001) (citing S. Rep. No. 104-315, at 7-8 (1996); Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9).

[16] S. Rep. No. 104-315, at 3 (1996).

[17] *Id.*

[18] *See e.g.*, Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and* Eldred v. Ashcroft, Findlaw's Writ, *at* http://writ.news.findlaw.com/commentary/20020305_sprigman.html (last visited Apr. 1, 2002).

[19] *See id.*

[20] L. Ray Patterson, Case Comment, Eldred v. Reno*: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 224 (2001).

ignored, therefore, is the public's interest.[21] In limiting enumerated Constitutional rights, the Framers sought to protect the public's interest.[22] A way of protecting the public's interest is to expand the public domain by limiting the exclusive rights of copyright holders.[23] Thus, the CTEA expands copyright law while compromising the public's interest and the public domain.[24]

ELDRED V. ASHCROFT

The plaintiffs in *Eldred v. Ashcroft* consist of various individuals whose livelihood depend on the availability of works in the public domain.[25] Lead plaintiff Eric Eldred, for instance, depends on works in the public domain for maintaining and updating his free Internet library site.[26] The other plaintiffs' use of works in the public domain include distributing out-of-print books, sheet music, and preservation of old films.[27] All of these plaintiffs suffered damages when Congress passed the CTEA in 1998.[28] The harm incurred by the plaintiffs is obvious. Without these works in the public domain, their quest to facilitate the distribution and maintain access of previously copyrighted works is thwarted.[29] For the next twenty years, Eldred, for example, cannot post any new works that are not currently in the public domain on his Internet site.

Before the D.C. Circuit, the plaintiffs argued unsuccessfully that the CTEA was outside of Congress's power and, as a result, unconstitutional under the Copyright Clause.[30] The court also denied the plaintiffs' claim that the CTEA failed to meet the intermediate scrutiny test applicable for alleged First Amendment violations.[31] Relying on the Supreme Court decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*[32] and their own decision, *United Video, Inc. v. FCC*,[33] the court found that "copyrights are categorically immune from challenges under the First Amendment."[34]

The plaintiff's second claim involved the originality requirement under the

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[21] *See id.*

[22] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 7-8.

[23] *See id.* For more of the importance of a rich public domain, *see* Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965 (1990).

[24] *See* Sprigman, *supra* note 18.

[25] *See* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 3.

[26] *See id.*

[27] *See* Eldred v. Ashcroft, 239 F.3d 372, 374 (D.C. Cir. 2001).

[28] *See id.* at 375.

[29] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 3.

[30] *Eldred*, 239 F.3d at 380.

[31] *See id.* at 375-76.

[32] 471 U.S. 539 (1985) (finding copyright infringement when a magazine published excerpts from a forthcoming publication).

[33] 890 F.2d 1173 (D.C. Cir. 1989) (holding that there was no proper First Amendment claim for commercial use of copyrighted works).

[34] *Eldred*, 239 F.3d at 375.

Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*[35] The court rejected their claim that a retrospective extension of copyrights is a violation of the originality requirement under *Feist*, because, according to the Circuit Court, those works already satisfied the originality requirement, and an extension of the copyright term does not necessitate the need to fulfill the originality requirement for a second time.[36]

The plaintiff's final claim focused on the Constitution's duration requirement of "limited Times" and the impact of the preamble of the Copyright Clause which stands to "promote the Progress of Science and useful Arts."[37] Their assertion is simply that the CTEA does not promote the progress of the useful arts and sciences, because the term of life plus seventy years was not decided upon using the preamble of the Copyright Clause.[38] For instance, if an author had written and published a book, expecting a copyright of life plus 50 years, there is no progression in the arts, no furthering of the public's interest, if that author gets 20 extra years.[39] The court, however, rejected this argument.

The dissenting opinion in *Eldred v. Reno*, written by Justice Sentelle, speaks to the plaintiffs' final claim which challenges the constitutionality of retrospectively extending copyright protection.[40] In response to the majority's assertion that Congress has the power to extend the copyright term as long as the copyright protection was not permanent, Justice Sentelle found that "there is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection."[41] Indeed, the Constitution clearly states that the purpose of giving Congress an enumerated power is to promote the useful arts.[42] The clause further asserts that exclusive rights should last for "limited Times."[43] If Congress continues to extend the copyright term to works already produced, the term "limited Times" loses significance in conjunction with copyright's purpose to promote progress.[44] Incentives to promote progress of the arts, which occur when copyright owners are given exclusive rights for a specific period of time, are not met when Congress extends a copyright owner's exclusive rights by twenty more years.[45] The extensions only benefit the likes of those who hold very valuable and profitable copyrights, like those of Walt Disney Company.[46] The public's interest, however, is compromised, in a situation in which the public's

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[35] 499 U.S. 340 (1991) (holding that facts are not original and hence uncopyrightable).

[36] *See Eldred*, 239 F.3d at 377.

[37] *Id.*

[38] *See id.* at 378.

[39] *See id.*

[40] *See id.* at 380 (Sentelle, J., dissenting).

[41] *Id.* at 382.

[42] U.S. Const. art. I, § 8, cl. 8.

[43] *Id.*

[44] *Eldred*, 239 F.3d at 381-82.

[45] *See id.* at 382.

[46] *See* Sprigman, *supra* note 18.

interest historically has outweighed the interest of companies when dealing with copyright in the Supreme Court.[47]

After the holding in *Eldred v. Reno*, the plaintiffs appealed for a rehearing and a rehearing *en banc* concerning the treatment of an amicus brief and, again, the constitutionality of the CTEA.[48] The Court of Appeals denied the plaintiffs' petition for a rehearing and a rehearing *en banc*.[49] The plaintiffs argued that the Court of Appeals incorrectly held that the amicus brief stated a different issue as the plaintiffs', thereby barring the amicus's valuable argument that the CTEA violates the Copyright Clause's preamble.[50] Justice Sentelle, now joined with Justice Tatel, again dissented, stating that the amicus brief introduced a new argument, not a new issue.[51] Moreover, the dissent is wary of the "limitless" power given to Congress concerning the duration of copyrights despite "express limitations" in the Constitution.[52]

THE SUPREME COURT

The Supreme Court granted certiorari on two of the issues proposed by the Petitioners in *Eldred v. Ashcroft*.[53] The first issue addresses whether the CTEA unlawfully expanded Congress's power under the Copyright clause of the Constitution in extending the term of existing copyrights.[54] Second, Petitioners challenge the lower court's holding that the First Amendment is "categorically immune from challenge" by the CTEA, for which they rely heavily on *Harper & Row v. Nation Enterprises*.[55] Although *Harper & Row* does involve some First Amendment limitations, the case is factually different from *Eldred* and is also in direct conflict with the 11th Circuit, according to the Petitioners' interpretation.[56]

The Supreme Court has held that the Constitution contains both express and implied limitations on Congress's power.[57] According to the Petitioner's brief, the CTEA in effect creates an "installment plan" that is incongruous with the

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[47] *See* Patterson, *supra* note 20, at 224. Patterson also argues that while the Supreme Court tends to serve the public's interests, lower courts consistently ignore the decisions and rules in favor of the publishers. *See id*. at 226.

[48] Eldred v. Ashcroft, 239 F.3d 372 (D.C. Cir. 2001), *reh'g denied*, 255 F.3d 849, 850 (D.C. Cir. 2001).

[49] *See Eldred*, 255 F.3d. at 852.

[50] *See id*. at 850.

[51] *See id*. at 852 (Sentelle, J., dissenting).

[52] *See id*. at 854.

[53] *See Eldred*, 239 F.3d 372. The third issue that the Supreme Court chose not to address is whether the plaintiffs were unable to assert arguments from the amicus briefs. *See* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at i.).

[54] *See* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 10.

[55] *See id*. at 18.

[56] *See id*. at 19-20, 22.

[57] *See id*. at 7 (citing U.S. v. Lopez, 514 U.S. 549, 553 (1995); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000)).

Copyright Clause's express "limited Times" criteria.[58] Citing the seminal patent case of *Graham v. John Deere Co.*,[59] Congress's power is clearly limited by the introductory clause, which is contrary to the D.C. Circuit's holding that the introductory clause does not serve to limit Congress's power.[60] Respondents rebut by stating that *Graham* did not involve the extension of the copyright term, and involved material that was already in the public domain.[61] Accordingly, the CTEA does not apply to any works that are in public domain, but solely to already copyrighted works.[62] Other circuit courts, however, have interpreted *Graham*'s holding to be applicable to the Copyright Clause.[63]

Originality is another point of contention between the parties in *Eldred*, where the Petitioners claim that the CTEA does not meet the originality requirement[64] and the Respondent claims that the originality requirement is not applicable.[65] There is also a conflict, presumed only by the Petitioners,[66] between the lower court's holding and the 5th Circuit's holding in *Mitchell Brothers Film Group v. Cinema Adult Theater*,[67] which involves the Constitution's limit on Congress to use the Copyright Clause to promote the useful arts and sciences.[68] Respondents contend that there is no conflict, because the decision in *Schnapper* follows *Mitchell*'s holding that Congress is to decide what statutes are necessary and proper with regard to the Copyright Clause.[69] The lower court would have come out the same with the substantive limitation requirement between the preamble and the rest of the clause.[70] Furthermore, Respondents contend the CTEA helps artists, by being more "even-handed" in how long copyright terms last and by providing an incentive

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[58] *Id.* at 8-9.

[59] 383 U.S. 1, 5 (1966).

[60] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 10. The lower court stated that the introductory language "of the Copyright Clause is not a substantive limit on Congress' legislative power." Eldred v. Ashcroft, 239 F.3d 372, 378 (D.C. Cir. 2001) (quoting Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981)).

[61] Brief for the Respondent, Eldred v. Ashcroft, No. 01-618, at 22.

[62] *See id.*

[63] Reply Brief for the Petitioners, Eldred v. Ashcroft, No. 01-618, at 5-6.

[64] Petition for a Writ of Certiorari , Eldred v. Ashcroft, No. 01-618, at 4 (citing *Feist*'s holding that copyright protection extends to those works that are original as required by the Constitution).

[65] Brief for the Respondent, Eldred v. Ashcroft, No. 01-618, at 23. Respondent claims that Petitioner's analysis of *Feist* is incomplete, and that the CTEA's usage of "original" refers to works that passed the originality requirement when copyrighted. *See id.; see also Eldred*, 239 F.3d at 376-77.

[66] Brief for the Respondent, Eldred v. Ashcroft, No. 01-618, at 15.

[67] 604 F.2d 852 (5th Cir. 1979).

[68] *See* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 14.

[69] *See* Brief for the Respondent, Eldred v. Ashcroft, No. 01-618, at 18-19, 28.

[70] *See id.*

to "preserve" copyrighted works.[71] No evidentiary references are cited to support these theories aside from the holding in the lower court, which cites no further evidence in support.[72]

With regard to the First Amendment claim, both parties argue over the significance of *Harper & Row* and other circuit court cases as pertain to *Eldred*.[73] Under *Turner Broadcasting System v. FCC*, the court must apply an intermediate scrutiny test when faced with a First Amendment concern.[74] The D.C. Circuit failed to do this.[75] Instead, the Court applied *Harper & Row*, which the Petitioners view as a case applicable "to deflect a purported First Amendment right of access to otherwise legitimately copyrighted material" and not to a challenge of a federal statute.[76] The D.C. Circuit's analysis, however, cites *Harper & Row* to "explain[ ] how the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment."[77] The Respondent follows the holding of the Court of Appeals that the works applicable to the CTEA are copyrighted works, making them subject to fair use, and hence "obviates further inquiry under the First Amendment."[78] Why exactly the fair use doctrine of copyrighted works prevents any First Amendment claims remains unclear. Furthermore, the Eleventh Circuit's *CBS Broad., Inc. v. EchoStar Communication Corp.*[79] is in direct conflict with the holding of the D.C. Circuit.[80] *EchoStar*, as pointed out by the Respondent, does quote the Court of Appeal's decision in *United Video v. FCC* enforcing that the First Amendment does not apply to copyrights.[81] *United Video*, however, speaks to copyrighted works and not statutes.[82] The Eleventh Circuit, and more recently the Fourth and Second Circuits, have applied the intermediate scrutiny test to copyright statutes, thereby conflicting with the *Eldred* court that copyright statutes are immune from First Amendment challenges.[83]

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[71] *See id*. at 30-33.

[72] Eldred v. Ashcroft, 239 F.3d 372, 379 (D.C. Cir. 2001).

[73] *Cf.* Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 18-19.

[74] 520 U.S. 180, 189 (1997) ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

[75] 239 F.3d at 375-76.

[76] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 19.

[77] *Eldred*, 239 F.3d at 375.

[78] *Id*. at 376.

[79] 265 F.3d 1193 (11th Cir. 2001).

[80] Petition for a Writ of Certiorari, Eldred v. Ashcroft, No. 01-618, at 22-23.

[81] Brief for the Respondent in Opposition, Eldred v. Ashcroft, No. 01-618, at 22-23.

[82] Reply Brief for the Petitioners, Eldred v. Ashcroft, No. 01-618, at 4-5.

[83] Eldred v. Ashcroft, 239 F.3d 372, 376 (D.C. Cir. 2001).

CONCLUSION

In granting certiorari to *Eldred v. Ashcroft*, the Supreme Court has chosen to address the complicated and pressing copyright issues surrounding the CTEA. Life plus seventy years may not seem too different from life plus fifty, but the CTEA truly complicates how much power Congress has in determining whether there is a limit in "limited Times." Petitioners argue that there is a difference; that the CTEA is an unlawful extension of Congress's power to promote science and the useful arts. In doing so, the CTEA deprives the public domain from obtaining new works and thwarts the livelihoods of the people in positions analogous to the Petitioners. Conversely, Respondents refute the claim that there was an over-extension of Congressional power. Congress, in passing the CTEA, did exactly what it has done before and failed to violate the Copyright Clause.

How the Supreme Court will resolve the First Amendment issues present in *Eldred v. Ashcroft* will also affect subsequent copyright claims. Apparently, there is split between the courts of whether copyright merits an intermediate scrutiny test. Without this test, subsequent copyright legislation that burdens the freedom of speech would be held constitutional even without a government interest. This makes way for special interest groups that tend to have their own interests in mind, instead of the constitutional interest to promote the useful arts and sciences. With these two main concerns in mind, it is evident that those interested in where copyright law is heading, and those that have an interest in a rich public domain, will be watching for the Supreme Court's decision in *Eldred v. Ashcroft*.