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).
3 See id.
4 See id.
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, is dubious to those in favor of a strong public domain, such as
the plaintiffs. The second issue tackles the lower court’s holding that the
First Amendment is “categorically immune from challenge” by the CTEA.
Plaintiffs allege that the CTEA prevents free speech of works that would
otherwise be in the public domain, without promoting a legitimate government
interest. The exact date in which the Court will hear Eldred v. Ashcroft has
not yet been determined.

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. 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.” 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.

Those against the CTEA view the act as promoting businesses and wealthy
copyright owners as opposed to protecting American copyrights abroad. 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. 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.” The interest allegedly

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
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
15 See Eldred v. Ashcroft, 239 F.3d 372, 373-74 (D.C. Cir. 2001) (citing S. Rep. No. 104-
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
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ignored, therefore, is the public’s interest. In limiting enumerated Constitutional rights, the Framers sought to protect the public’s interest. A way of protecting the public’s interest is to expand the public domain by limiting the exclusive rights of copyright holders. Thus, the CTEA expands copyright law while compromising the public’s interest and the public domain.

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. Lead plaintiff Eric Eldred, for instance, depends on works in the public domain for maintaining and updating his free Internet library site. The other plaintiffs’ use of works in the public domain include distributing out-of-print books, sheet music, and preservation of old films. All of these plaintiffs suffered damages when Congress passed the CTEA in 1998. 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. 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. The court also denied the plaintiffs’ claim that the CTEA failed to meet the intermediate scrutiny test applicable for alleged First Amendment violations. Relying on the Supreme Court decision in Harper & Row Publishers, Inc. v. Nation Enterprises and their own decision, United Video, Inc. v. FCC, the court found that “copyrights are categorically immune from challenges under the First Amendment.”

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

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.
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.
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.* 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.

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." 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. 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. 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. 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." Indeed, the Constitution clearly states that the purpose of giving Congress an enumerated power is to promote the useful arts. The clause further asserts that exclusive rights should last for "limited Times." 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. 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. The extensions only benefit the likes of those who hold very valuable and profitable copyrights, like those of Walt Disney Company. 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

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.
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.
Copyright Clause’s express “limited Times” criteria. Citing the seminal patent case of *Graham v. John Deere Co.*, 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. 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. Accordingly, the CTEA does not apply to any works that are in public domain, but solely to already copyrighted works. Other circuit courts, however, have interpreted *Graham’s* holding to be applicable to the Copyright Clause.

Originality is another point of contention between the parties in *Eldred*, where the Petitioners claim that the CTEA does not meet the originality requirement and the Respondent claims that the originality requirement is not applicable. There is also a conflict, presumed only by the Petitioners, between the lower court’s holding and the 5th Circuit’s holding in *Mitchell Brothers Film Group v. Cinema Adult Theater*, which involves the Constitution’s limit on Congress to use the Copyright Clause to promote the useful arts and sciences. 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. The lower court would have come out the same with the substantive limitation requirement between the preamble and the rest of the clause. 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.
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.
2002] ELDRED V. ASHCROFT \textit{CHALLENGES THE COPYRIGHT TERM EXTENSION ACT} to “preserve” copyrighted works.\footnote{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.\footnote{72}

With regard to the First Amendment claim, both parties argue over the significance of \textit{Harper & Row} and other circuit court cases as pertain to \textit{Eldred}.\footnote{73} Under \textit{Turner Broadcasting System v. FCC}, the court must apply an intermediate scrutiny test when faced with a First Amendment concern.\footnote{74} The D.C. Circuit failed to do this.\footnote{75} Instead, the Court applied \textit{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.\footnote{76} The D.C. Circuit’s analysis, however, cites \textit{Harper & Row} to “explain[ ] how the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment.”\footnote{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.”\footnote{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.\footnote{79} is in direct conflict with the holding of the D.C. Circuit.\footnote{80} EchoStar, as pointed out by the Respondent, does quote the Court of Appeal’s decision in \textit{United Video v. FCC} enforcing that the First Amendment does not apply to copyrights.\footnote{81} \textit{United Video}, however, speaks to copyrighted works and not statutes.\footnote{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 \textit{Eldred} court that copyright statutes are immune from First Amendment challenges.\footnote{83}
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*. 