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THE MOUSE THAT ATE THE PUBLIC DOMAIN: Disney, The Copyright Term Extension Act, And *eldred V. Ashcroft*

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Unless you earn your living as an intellectual property lawyer, you probably don't know that the Supreme Court has granted certiorari in *Eldred v. Ashcroft*, a case that will test the limits of Congress's power to extend the term of copyrights. But while copyright may not seem inherently compelling to non-specialists, the issues at stake in *Eldred* are vitally important to anyone who watches movies, listens to music, or reads books.

If that includes you, read on.

Back in 1998, representatives of the Walt Disney Company came to Washington looking for help. Disney's copyright on Mickey Mouse, who made his screen debut in the 1928 cartoon short "Steamboat Willie," was due to expire in 2003, and Disney's rights to Pluto, Goofy and Donald Duck were to expire a few years later.

Rather than allow Mickey and friends to enter the public domain, Disney and *its* friends - a group of Hollywood studios, music labels, and PACs representing content owners - told Congress that they wanted an extension bill passed.

Prompted perhaps by the Disney group's lavish donations of campaign cash - more than $6.3 million in 1997-98, according to the nonprofit Center for Responsive Politics - Congress passed and President Clinton signed the Sonny Bono Copyright Term Extension Act.

The CTEA extended the term of protection by 20 years for works copyrighted after January 1, 1923. Works copyrighted by individuals since 1978 got "life plus 70" rather than the existing "life plus 50". Works made by or for corporations (referred to as "works made for hire") got 95 years. Works copyrighted before 1978 were shielded for 95 years, regardless of how they were produced.

In all, tens of thousands of works that had been poised to enter the public domain were maintained under private ownership until at least 2019.

So far so good - as far as Disney and its friends were concerned, at least. In 1999, a group of plaintiffs led by Eric Eldred, whose Eldritch Press offers free on-line access to public domain works, filed a challenge to the statute. Eldred argues that the CTEA is unconstitutional on two grounds: first, because the statute exceeds Congress's power under the Copyright Clause; and, second, because the statute runs afoul of the First Amendment by substantially burdening speech without advancing any important governmental interest.

Eldred lost before the district court and the D.C. Circuit. However, there is good reason to believe that he may yet prevail in the Supreme Court.

Column continues below ↓ **The CTEA Exceeds Congress's Copyright Clause Power**

Most likely to succeed is Eldred's argument that the CTEA exceeds Congress's power under the Constitution's Copyright Clause (Article I, Section 8), which provides that

The Copyright Clause does two things. First, it empowers Congress to "promote the Progress of Science and useful Arts." Second, the text of the Copyright Clause limits the means that Congress may adopt in exercising the enumerated power. Congress is limited to granting rights to authors for "limited Times" - there can be no perpetual ownership of intellectual property.

Clear thinking about the scope of Congress' Copyright Clause power requires careful separation of ends from means. The end - the enumerated power itself - is the promotion of progress, a fact the Supreme Court recognized in *Graham v. John Deere Co.*, where it held that the "qualified authority" that the Copyright Clause grants "*is limited to the promotion of advances in [science and] the 'useful arts'.*" In contrast, the copyright grant is not itself the enumerated power; it is merely the instrument through which progress may be realized.

Seen in this light, the CTEA cannot survive. Because already existing works cannot be created anew, extension of subsisting copyrights does not "promote progress." Congress is not empowered merely to provide copyright holders with an additional boon - that is not "progress", but corporate welfare.

This is the point on which the D.C. Circuit's opinion in *Eldred* should collapse. The lower court relied on prior circuit authority holding that the "promote . . . Progress" language does not restrict Congress's power. But that authority is palpably at odds with the Supreme Court's statement in *Graham* that the promotion of progress *is* the Copyright Clause power.

The D.C. Circuit leaned also on a snippet in the CTEA's legislative history asserting that extending subsisting copyrights would encourage preservation of older works. But if Congress really wanted to encourage preservation, it could simply have offered the *quid* of an extended copyright in exchange for the *quo* of the copyright holder taking steps to preserve the copyrighted work - for example, by digitizing it and depositing it in an electronic archive (such as the non-profit Internet Archive. There is no such *quid pro quo* in the CTEA; rather, the statute is a giveaway to content owners, a *quid pro nihilo.*

What About Future Copyrights?

The argument set forth above deals only with the CTEA's grant of retroactive extensions. Eldred advances another, somewhat more doubtful, Copyright Clause argument that applies to future extensions. The argument is that Congress's repeated extensions (the CTEA is but the latest of 11 acts that have stretched the copyright term from 14 years to beyond 100 years) have rendered meaningless the stricture that exclusive rights may be granted only for "limited times."

Eldred also advances a First Amendment challenge: both subsisting and future copyright extension, Eldred argues, substantially burden speech by foreclosing use of expression that would otherwise be available in the public domain, while advancing no important government interest. Lining the pockets of generous campaign contributors is not, Eldred maintains, a legitimate - let alone important - government interest.

But although the CTEA may be struck down, Disney and its fellow media giants will inevitably be back in Congress pushing a substitute bill. Accordingly, it is worthwhile to consider briefly why copyright extension is bad policy, as well as bad law.

When copyright expires, works are said to "fall into" the public domain, where they are usable without charge or need of authorization.

The linguistic convention by which works "fall" when they enter the public domain is revealing: immanent in the phrase is the notion that a work is debased when no longer copyrighted. Perhaps it

is this view that allows statutes that shrink the public domain to gain widespread support.

But disparagement of the public domain is out of step with our constitutional history, with the economics of information markets, and with the real way in which art, literature, and music are produced in our culture.

The Framers, Viewing Intellectual Property As Monopoly, Sought To Constrain It

The Framers of our Constitution viewed inventions and expression not as "property", but as public goods to which exclusive rights may be granted purely as a means of incenting production. Thomas Jefferson expressed the then-dominant view with characteristic felicity in an 1813 letter:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me . . . .
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> Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.

Correspondence between Jefferson and Madison regarding the drafting of the Copyright Clause evidences the same concern: both men classify copyrights and patents as "monopolies" sufferable only for limited periods, and only for the purpose of incenting invention.

We Don't Know How Much Incentive Is Enough, And How Much Is Too Much

First, the creation of exclusive rights involves a difficult trade-off between *creation* and *dissemination*. To the extent that a piece of expression enjoys a market value, its price is likely to be higher if it is subject to copyright, as the copyright owner will be entitled to limit or eliminate competition in the provision of that expression to others. At the margin between life plus 50 and life plus 70 - which is the margin in which the CTEA operates - the proponent of a longer term should be prepared to show that the social value of the additional incentive outweighs the harm caused by another two decades of supra-competitive pricing and consequent reduced dissemination of valuable copyrighted work.

That is no mean task, not least because, as Professor (now Justice) Breyer observed in *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,* it is not clear that the promise of exclusive rights is a necessary prod to artistic creation:

Authors in ancient times, as well as monks and scholars in the middle ages, wrote and were paid for their writings without copyright protection. Taken as a whole . . . the evidence now available suggests that, although we should hesitate to abolish copyright protection, we should equally hesitate to extend or strengthen it.

What was true in ancient Greece and Rome and in medieval Florence is equally true today in Brooklyn's DUMBO - painters paint, and writers write, for reasons other than the size of the royalty check. But even if you assume that exclusive rights do make some difference, there was no attempt back in 1998 (nor has there been since) to justify the CTEA's 20-year extension. Of course, $6.3 million in campaign contributions can make up for quite severe deficiencies in the data.

Artists Depend On A Rich Public Domain

If we know little about the utility of longer copyright terms, there is abundant evidence regarding the vital importance to the progress of our culture of a robust stock of public domain works.

Most artists, if pressed, will admit that the true mother of invention in the arts is not necessity, but theft. And this is true even for our greatest artists. Shakespeare's *Romeo and Juliet* (1591) was taken from Arthur Brooke's poem *Romeus and Juliet* (1562), and most of Shakespeare's historical plays would have infringed Holingshead's *Chronicles of England* (1573). For the third movement of the overture to *Theodora*, Handel drew on a harpsichord piece by Gottlieb Muffat (1690-1770). Passages of both works are compared at this very interesting web site.

Cultural giants borrow, and so do corporate giants. Ironically, many of Disney's animated films are based on Nineteenth Century public domain works, including *Snow White and the Seven Dwarfs*, *Cinderella*, *Pinocchio*, *The Hunchback of Notre Dame*, *Alice in Wonderland*, and *The Jungle Book* (released exactly one year after Kipling's copyrights expired).

Borrowing is ubiquitous, inevitable, and, most importantly, good. Contrary to the romantic notion that true genius inheres in creating something completely new, genius is often better described as opening up new meanings on well-trodden themes. Leonard Bernstein's reworking in *West Side Story* of *Romeo and Juliet* is a good example.

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