ELDRED V. ASHCROFT: HOW ARTISTS AND CREATORS FINALLY GOT THEIR DUE

In regards to copyright the U.S. Constitution states: "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."[1] *The intellectual property clause was added to the Constitution because of the recognition of the importance of balancing both an author's interest in protecting their creative works with the public interest in maintaining a method by which those same works could enter the public domain.*[2] *However, the ability to properly perform this balancing act has proven more difficult than anyone could have expected. A recent Supreme Court case has tipped the scales and given artists and creators their just due.*

Introduction

A notable and important copyright battle occurred in *Eldred v. Ashcroft*, a case that was just recently decided by the Supreme Court.[3] The case was brought by Eric Eldred, the owner of a public Web library, in direct retaliation for Congress' 1998 decision to enact the Sonny Bono Copyright Term Extension Act (CTEA).[4] The CTEA extended the copyright term from its previous life of the author plus fifty years to a new life of the author plus seventy year term.[5] Those who agreed with Eldred's side of the battle were numerous academics, educators, historians, and owners of Internet sites whose livelihood depended on exploiting public domain works. People who opposed Eldred's view were songwriters like Bob Dylan and Quincy Jones, the heirs of songwriters like Irving Berlin and George Gershwin, and movie studios like Disney.[6] This paper will explore the myriad reasons why the Supreme Court showed great insight in deciding to weigh in on the side of authors, artists, & creators. The 7-2 decision was a sound ruling for reasons in addition to Justice Ginsburg's argument that "the [CTEA's] protection . . . does not raise the free speech concerns present when government compels or burdens the communication of particular facts or ideas."[7] It was also an accurate ruling because, under either

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[1] U.S. CONST. art. I, § 8.
[2] *See* Robert P. Merges & Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 48-9 (2000).
[3] Eldred v. Ashcroft, 123 S. Ct. 769 (2003), *reh'g denied*, 123 S. Ct. 1505 (2003).
[4] *See* Christina Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 386 (2000).
[5] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).
[6] *Eldred*, 123 S. Ct. at 774.
[7] *Id.* at 789.

a natural rights or property theory, copyright deserves infinite protection. The ruling has furthermore strong foundations because the CTEA is within the boundaries of both Constitutional limitations and Congressional intent, and its addition of the fair use exception accomplishes many of the same objectives that would be realized by allowing the work to fall into the public domain.

CTEA's Arguments For Copyright Extension

When the Copyright Term Extension Act was initially being considered for enactment, the Senate Judiciary committee considered a variety of substantive and practical reasons as to why the extension of the act was not only beneficial, but also necessary. Music industry representatives had a unique interest in the CTEA and gave the majority of the testimony offered in support of its enactment.[8] Their interest stemmed from the arguments that songwriters are entitled to the copyright extension to protect their creative property.

First they demonstrated that copyright extension was essential to creating harmony between the U.S. copyright term and the term given to copyright owners in Europe after the European Council's directive in 1993.[9] Under the directive, European countries are only required to recognize the shorter of the copyright protection granted by the artist's {or 'producer's', or 'distributor's'} home country or the European Council.[10] This puts American authors and artists at a disadvantage, for as Don Henley testified, "the discrepancy in copyright terms would give Europeans "essentially a twenty-year free ride . . . they [could] use and abuse our works for free, while we have to pay for the use of theirs."[11] The CTEA was needed to curtail this possibility and prevent American songwriters from the unjust suffering that would be caused by the shortsightedness of the American copyright system.

The fact that artists and songwriters live significantly longer than they did when Congress last substantially altered the copyright term was important to the congressional decision to adopt the extension.[12] Life of the author plus seventy years is now necessary to provide the same level and extent of protection previously given under the former extension period, which has been rendered inadequate with the increase in life expectancy.[13] Many argue that new advances in technology have given longer life to works as well. Works that would have become

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[8] *See* Jenny L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. & ENT. L.J. 945, 972 (1996).
[9] *See* Gifford, *supra* note 4, at 387.
[10] *Id.* at 388.
[11] *Id.* (quoting *Copyright Term Extension Act: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995) (statement of songwriter Don Henley)).
[12] Gifford, *supra* note 4, at 389.
[13] *Id.*

commercially extinct in an earlier era are now the subject of almost unlimited exploitation.[14] Thus "as a result of technological advances such as videocassettes, cable television, the Internet, and digital imaging capability authors desire a longer term of protection so that they may enjoy the full financial benefits given to them as part of the 'bargain' in the Copyright Clause."[15] The CTEA is a systematic way of keeping the law abreast with present innovations and ensuring that intellectual property laws aren't significantly out-distanced by the incessant technological advances of modern society.

The third reason the Senate considered for advocating enactment of the CTEA was providing an incentive for creativity.[16] Sound evidence suggested that the CTEA would give copyright owners an additional reason to create, because greater protection for their works would help them reap the benefits of their finished works while working on newer creations.[17] It also showed that the security of knowing their works would be protected would allow the copyright owners to concentrate on other creative products.[18] Moreover, the knowledge that the products of their creative labor would support generations to come would foster their desire to undertake diligent creative endeavors in an effort to ensure the security of the future.[19]

Copyright Is Justified By 'Natural Rights' Or 'Property' Theory, Not 'Public Domain' Theory.

After the expiration of a copyright term, works fall into the public domain, and they can thereafter be used without the author's consent and without having to make a royalty payment.[20] Though most detractors of the CTEA consider the phrase "to promote the Progress of Science and useful Arts" as synonymous with an increase in the public domain, this is not necessarily accurate. Edward Samuels provides a great example of this lack of synonymy in his article *Eldred v. Ashcroft, Intellectual Property, Congressional Power and the Constitution: The Public Domain Revisited*,[21] when he gave the example of the Nobel Prize and Pulitzer Prize eligibility. To be a Nobel peace prizewinner your written work must be issued in print or published in another form and to be honored with a Pulitzer accolade your work must be done, published, or

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[14] *Id.*
[15] *Id.*
[16] *Id.* at 390.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *See* Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW'S LEGAL COMMENTARY (Mar. 5, 2002), *at* http://writ.news.findlaw.com/commentary/20020305_sprigman.html.
[21] 36 LOY. L. A. L. REV. 389, 396 (2002).

performed during the previous year.[22] Therefore these works still retain their public value and this value isn't diminished by the fact that the works won't enter the public domain in the near future. [23]

Not only does the public domain category not promote progress, it is also a contributor to a significant decline in the arts. Jack Valenti probably provided the best definition of the realization of the decline of the value of the public domain when he opined that:

> [W]hatever work is not owned is a work that no one protects and preserves. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. How does the consumer benefit from the steady decline of a film's quality?[24]

A good example of the possible decline that could occur is seen through analyzing what happened to Frank Capra's classic picture *It's a Wonderful Life*. The film had lapsed into the public domain for a short while in the 60's when the copyright owner failed to apply for a renewal of the copyright. The film became commonplace on every channel, regardless of bad editing, quality, or copying of the film.[25] The horrible conditions that the film eventually reached devalued the overall quality of the film, its desirability to consumers, and the public's enjoyment of the holiday classic.[26] Eventually, through some legal maneuvering by Spelling Entertainment and Republic Picture involving the original short story and the film's music, the work was[27] rescued[28]from the devastation of the public domain.[29] And it was *this* liberation that saved it and restored the film to its' original glory.[30] The reclaimed film was cleaned up, quality control was exercised over the video tape versions, and the print shown on television was a cleaner, sharper edition. This scenario is common in the entertainment industry with numerous films that require enormous amounts of time and money to preserve and restore in order to keep up with higher consumer expectations brought on by the advent of the DVD and Digital TV.[31]

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[22] *See* Edward Samuels, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: The Public Domain Revisited,* 36 LOY. L. A. REV. 389, 408 (2002).
[23] *Id.*
[24] Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?",* 52 FLA. L. REV. 989, 1000 (2000).
[25] Scott Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection,* 36 LOY. L.A. L. REV. 253, 273 (2002).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 274.
[30] *Id.*
[31] *Id.* at 275.

Moreover, there seems to be no guarantee that public domain works are easier to obtain financially or more available.[32] The opposite seems to be equally provable, because it has been demonstrated that the publishers are more reluctant to publish works that are in the public domain. [33]

The public domain actually discourages progress in the arts. Why should you create something new if you can just work off of something that someone has already done? Wouldn't it prove more financially secure for you to work on distribution and exploitation of proven works without having to pay royalties for them? Doesn't the prohibition on copying encourage new inventors to be more creative, invent new melodies, new characters, and new movies?[34] Considering the public domain's inadequacy as an instrument in which to measure the value of copyright, other ways in which to measure copyright, like a natural rights or property theory, could well be the superior view to adapt.

Besides the sound justifications provided when the CTEA was originally being proposed, there are other reasons why the Supreme Court should enforce the CTEA in *Eldred v. Ashcroft.* Not the least of which is that the inherent nature of copyright – control over a product of one's own imagination and creativity - deserves the most protection possible. This protection could come from placing emphasis on copyright as a thing that one owns naturally, called the "natural rights" theory, or viewing copyright as property, and something that can be possessed and passed on in the same manner, the "property" theory.

In the case of copyright, an individual *creates* a unique work and after a certain time his creation passes out of the protection of copyright and into the public domain. Advocates of the CTEA point to the injustice caused by releasing into the public domain an individual's own work and creation, the results of his own labor, as a significant factor delineating why the extension should occur. They believe that one's own work should be his to enjoy and pass on to his heirs.[35] Supporters of this theory contend that in order to motivate genius and catalyze innovation you must give copyright owners the rights to the fruits of their labor, and they propose that allowing them control of their own works will encourage creativity in a way that nothing else could.[36] This theory is supported because of the belief that "nothing is more strictly a man's own than the fruit

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[32] *Id.*
[33] *Id.*
[34] *See Id. at* 272.
[35] *See* Edward Samuels, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: The Public Domain Revisited,* 36 LOY. L. A. REV. 389, 396 (2002).
[36] *See* Dennis Harvey, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno,* 27 DAYTON L. REV. 291 (2002) (quoting 1793 report which concluded that "nothing is more properly a man's own than the fruit of his study").

of his study" and "there [isn't] property more peculiarly a man's own than that which is produced by the labor of his mind."[37] This "natural rights" theory is one strongly supported as the correct way to view intellectual property instead of a "public domain" theory that places the greatest importance on the right of the public.[38] Moreover, some of the new changes and expansions in the breadth of copyright can be better explained through the natural rights theory.[39]

If based on a property theory, one could truly see the rightness in allowing the copyright owner to achieve the greatest maximum benefit possible for his work. Many copyright owners, including a number of famous songwriters, have expounded upon the injustice that occurs when not treating copyright as property. Defining copyrights as "valuable resource[s] to be passed on to their children and through them into the succeeding generation."[40] Quincy Jones and Bob Dylan in particular detailed the unnaturalness of the fact that their works and creative efforts, their legacies, would lapse into the public domain in the future, unlike land that if it had been cultivated and worked with the same dedication and diligence would have continued to pass down from generation to generation.[41] Shana Alexander, the daughter and heir of songwriter Milton Ager, stated that since in her family "intellectual property is the only property," it was "monstrously unfair that other recognized form of property – lands, business, and so on – can be handed down indefinitely . . . whereas the value of intellectual property under current copyright laws is arbitrarily cut off."[42]

Moreover, the property theory could be used to compare the eminent domain law to that of the copyright law.[43] The Takings clause from the Constitution ensures that someone is given adequate compensation for any property taken from his or her hands and obtained by the government, or "passing from private into public hands."[44] The rationale behind this law is said to be the desire to ensure that the government is making "uniform advances that benefit all members of society."[45] The same justification could be used to say that when taking away the copyright owner's property for public use, adequate compensation should be given. That

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[37] *Id.*
[38] Samuels, *supra* note 35, at 409.
[39] *Id.* at 395.
[40] Martin, *supra* note 25, at 274 (quoting 1995 hearings on § 483 before the S. Jud. Comm'n, 104th Cong., 1st Sess. (1995)).
[41] *Id.*
[42] *Id.*
[43] Richard A. Epstein, *Symposium:* Eldred v. Ashcroft: *Intellectual Property, Congressional Power, and the Constitution: The Dubious Constitutionality of the Copyright Term Extension Acts.* 36 LOY. L. A. L. REV. 123, 157 (2002).
[44] *Id.*
[45] *Id.*

adequate compensation shouldn't be the least amount of money it takes to recoup the losses, but instead the maximum benefit allowed.[46]

The CTEA Conforms With Both Constitutional Limitations And Congressional Intent.

The Supreme Court seemed significantly swayed by the fact that the CTEA seemed well in league with the goals of the Constitution. Copyright extension would not prohibit the growth of arts and sciences; on the contrary, it seems that pushing works into the public domain accomplishes this task more effectively. The CTEA simply asks for an extended period of time, not an infinite copyright term. As has been demonstrated, the proposed time period is not unusual.[47] The United States would be in league with European countries' time period and would save itself trade dollars.[48] Moreover, though the intellectual property clause states that the copyright term should be "for a limited time," it doesn't specify exactly how long that time should be. It only suggests that the American copyright system steer clear of the infinite term previously given in England.[49] Thus Congress has the authority to extend copyright to any amount but a perpetual one, and the courts should not have the authority to question the adequacy of the time period selected.[50]

Although the CTEA seems to conform to the congressional intent behind the intellectual property clause, it is important to note that the argument that Congress shouldn't extend copyright beyond its purpose was challenged by an extension in trademark law. Trademark law was traditionally in place to prevent one thing: consumer confusion about the source of goods in the market place.[51] A new addition to the law doesn't further the original intent of trademark law so much as it protects a much narrower class of people, the owners of famous trademarks.[52] The boundless protection in trademarks, almost a complete property right, was always justified by the benefits of protecting the public from confusion, but it broadened trademark law beyond any of its originally indented boundaries.[53] However, § 43(c) of the Lanham Act now grants famous mark owners a cause of action for dilution. Dilution is different than infringement of a trademark

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[46] *Id.*
[47] Gifford, *supra* note 4, at 387.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Taylor Wine Co. v. Bully Hill Vineyards, Inc., 569 F.2d 731 (2d Cir. 1978) (holding that injunction will only lie where there is likelihood of confusion).
[52] *See* Kristen Knudsen, *The Protection of James Bond and Other Fictional Characters Under the Federal Trademark Dilution Act,* 2 VAND. J. ENT. L. & PRAC. 13, 20 (2000).
[53] *Id.*

because all you need is a mark by a third party that causes the dilution of the distinctive quality of the "famous" mark. This differs from trademark infringement, which will only be successful after a finding of a likelihood of confusion between the marks. This new addition protects the owner's expenditure and his investment in his famous mark from false appropriation. Section 43 protects the famous mark without requiring proof of consumer confusion – the very danger trademark law was created to prevent.

The same may be done with copyright, for the introduction of dilution could be seen as truly "nullify[ing] the balance struck between copyright's broad protection and limited duration of exclusivity and trademark's narrow protection but unlimited duration of protection." [54] Intellectual property boundaries are constantly being expanded and if trademark can be, then copyright should at least be allowed that opportunity as well.

The Fair Use Clause Accomplishes Many Public Domain Objectives.

The fair use doctrine provides a number of exemptions to copyright protection, including use for commentary, parody, and news reporting. The doctrine protects many of the same principles and accomplishes many of the objectives that were meant to be accomplished by letting works fall into the public domain.[55] As demonstrated in *Campbell v. Acuff-Rose Music, Inc.*, fair use protects the rights of authors and allows transformative works to be created free of litigation.[56] In Campbell, 2 Live Crew parodied Roy Orbison's "Pretty Woman." This case was a shining example of a work that wasn't in the public domain which still managed to foster an entirely new transformative, creative work. This case and its application of the Fair Use provision show that copyright protection has limits and those limits help "ensure that the movement of works into public domain need not be expedited in order to prevent copyright owners from limiting access to existing works or preventing the creation of new works.[57] Moreover, the fair use exception has helped "gut the myth" that new creation can only be possible by allowing a work to fall into the public domain.[58]

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[54] *Id.* at 21 (quoting Michael T. Helfand, *When Mickey Mouse is as Strong as Superman*: *The convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623 (1992)).
[55] Martin, *supra* note 25, at 268.
[56] Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994).
[57] Martin, *supra* note 25, at 271.
[58] *Id.* at 270.

Those who supported the demise of the CTEA claim that the law created a monopoly of ideas.[59] But copyright explicitly provides no protection for ideas, only expression, and even this expression protection is further limited by the fair use provision of the Copyright Act.

Conclusion

When the Supreme Court agreed to hear the appeal of *Eldred*, they knew the decision would have enormous ramifications for the intellectual property community. A decision in favor of *Eldred* would have allowed him and others the opportunity to profit considerably on myriad older copyrighted works without having to pay anything for the exploitation, while a decision in favor of copyright holders would mean possibly billions more in royalties in the future. The Supreme Court chose to recognize and uphold the rights of copyright holders because of their fervent belief that the CTEA was not an erroneous misstep that exceeded congressional boundaries, nor an irreparable blight that would impair rights guaranteed by the Constitution. However, not only is the extension within Constitutional limitations and long overdue, considering that the European Council countries have had a similar statute for almost a decade now, but it is strongly substantiated by congressional intent, strongly supported by natural rights and property theories of copyright, and virtually essential to allowing copyright owners to obtain their just due. In effect, the Court realized that to remove this extension from Congressional authority and to find it disfavorable to the propagation of creativity, innovation, and the progress of arts and science in this country, would be to relegate the laws of intellectual property to towering monuments of mediocrity.

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[59] Knudsen, *supra* note 52.