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Copyright extended despite small future financial gains

BY HENRY DINGER

Eric Eldred's quest to protect the public domain ended in disappointment on Jan. 15. On that day, the Supreme Court rejected his constitutional challenge to Congress' 1998 expansion of the term of U.S. copyrights.

Eldred runs Eldritch Press, a Web site that publishes literary texts whose copyrights have expired. His is one of many sites offering public domain texts free for the download. The Online Books Page at the University of Pennsylvania (**http://digital.library.upenn.edu/books/**), for example, is a wonderful labor of love (with a little help from the university) that contains links to thousands of books from ancient classics to the early 20th century.

Eldred challenged the 1998 Sonny Bono Copyright Term Extension Act. The CTEA extended the term of U.S. copyrights from 50 to 70 years after the author's death and applied that extension not only to new copyrighted works but also to works that had been under copyright for decades. Eldred's main argument was that the extension of the copyright term for existing works violated constitutional limits on Congress' power to establish copyrights.

Under the constitution, Congress has the power to "promote the progress of science by securing [to Authors] for limited times … the exclusive right to their … writings." Eldred argued that extending copyright terms for previously published works provided no incentives for the authors of such works but rather impeded the progress of science by delaying for 20 years the enrichment of the public domain by works by authors who died in the mid-20th century.

As Justice Stephen Breyer's dissent demonstrated, the economic incentive even to future authors of extending the life of the copyrights to 70 years after their death was trivial, literally small change.

No one really doubts why Congress extended copyright terms. While ostensibly to harmonize U.S. law with international norms of copyright protection and encourage the creation of copyrighted works, the impetus was an entertainment industry faced with the expiration of the terms of many valuable properties such as Mickey Mouse and the film "Casablanca;" the catchphrase employed by many opponents of CTEA was "Free the Mouse," referring to Mickey's incarceration in copyright prison.

The American entertainment industry makes a significant contribution to our foreign trade balance, not to mention the campaigns of members of Congress. In light of these factors, the more theoretical benefits of a vigorous public domain received short political shrift.

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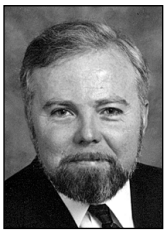

Henry Dinger

If these political factors explain CTEA, they do not altogether explain why the Supreme Court ruled as it did. The 7-2 majority deferred to the political branches of government and to the weight of historical precedent. "Life plus 70" is indisputably a limited term, even though as an economic matter the difference in value between life plus 70 and a perpetual term is pretty small. For that matter, the economic difference between the previous life plus 50 and perpetuity is pretty small, too. The choice among such limited terms is a matter for Congress, not the court.

As to term extension on existing works, the court bowed to history. In previous copyright term extensions, Congress applied the extended term to existing as well as prospective works. The majority concluded that "Congress' unbroken practice since the founding generation … overwhelms" the logical argument that it makes little sense to renew incentive for a completed act of authorship.

But advocates of the public domain found a slight silver lining in the court's ruling. Eldred also argued that the CTEA violated the First Amendment by tipping the balance between encouraging original speech and discouraging the republication of such speech too far in favor of the latter. The court rejected this argument, concluding that copyright law itself contains "built-in First Amendment accommodations." One of those accommodations is the fair use defense to infringement suits. Anyone can make fair use of copyrighted material for purposes of criticism, news reporting, teaching, research and certain other purposes.

The implication is that absent such accommodations, the court would take more seriously a First Amendment challenge to a copyright law. This will give opponents of the Digital Millennium Copyright Act some encouragement. The DMCA, also enacted in 1998, prohibits circumvention of copy protection technologies, even if the circumvention is intended to facilitate a fair use. Thus, a reviewer who circumvents a copy protection scheme to reproduce a limited portion of a new book in a review violates the DMCA, even though the use would not constitute copyright infringement. Lower courts have upheld the DMCA against constitutional challenge.

If something like the fair use defense is necessary to protect against the suppression of speech that constitutionally is entitled to be free, the constitutional battle over DMCA is far from over.

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