

MICKY MOUSE, PETER PAN, AND THE TALL TALE OF COPYRIGHT HARMONIZATION

The Supreme Court's ruling in *Eldred* won't bring the U.S. and the E.U. any closer.

By Peter K. Yu

When it comes to copyright, harmonization is a sometime thing. But you might not know that if you only read the majority opinion in *Eldred v. Ashcroft*. In a 7-to-2 ruling, the Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act. Dubbed the Mickey Mouse Protection Act by its opponents, the act extended the copyright term for 20 years, keeping Disney's Mickey Mouse out of the public's hands.

Writing for the majority, Justice Ruth Bader Ginsburg stated that the Court was not in a position to second-guess Congress's wisdom in extending copyright. The Court justified its ruling, in part, by citing the need to harmonize United States copyright law with that of the European Union. A key factor in passing the Bono Act, the court stated, was a 1993 E.U. directive, instructing member countries to extend the copyright term for 20 years.

Based on *Eldred*, one might assume that the Bono Act successfully harmonized U.S. copyright law with that of the E.U. Unfortunately, the opposite is true. As Justice Stephen Breyer points out in his dissent, the U.S. and the E.U. provide different copyright terms for a large number of works, including works made for hire, pre-1978 works, and anonymous and pseudonymous works.

Consider sound recordings. In the U.S., sound recordings are deemed works made for hire and are protected for 95 years. In the E.U. recordings are protected for only 50 years. Recently many sound recordings—including popular 1950s albums by such artists as Maria Callas, Ella Fitzgerald, and Elvis Presley—have fallen into the public domain in Europe. In response, the U.S. recording industry has been calling for stronger protection against the importation of (presumably cheaper) foreign-manufactured goods without the authorization of the copyright holder—called parallel importation.

As the recording industry points out, it does not matter whether the recordings are in the public domain abroad. As long as they remain protected in the U.S., any unauthorized importation of these recordings is piracy.

The U.S. copyright term doesn't match up with that of many other countries, including neighboring Canada. A recent dispute over the play *Peter Pan* demonstrates this disharmony. In 1904, Sir James Barrie wrote *Peter Pan*. Two decades later, Sir Barrie awarded the play's copyright to a famous children's hospital in London. A subsequent British statute extended the hospital's royalty rights in perpetuity.

British law notwithstanding, the play has fallen into the public domain in many countries, particularly those countries that are members of the Berne Convention. The Convention requires member states to protect an individually created work for a minimum term of the life of the

author plus 50 years. If this minimum term were adopted, the copyright in *Peter Pan* would have expired in 1987.

In Canada, where *Peter Pan* is currently in the public domain, J.E. Somma wrote the book *After The Rain: A New Adventure for Peter Pan*. The book was published in Canada and is sold on the Internet, available to British and U.S. customers. To preempt legal action in the U.S. by the British hospital, Somma filed suit in San Francisco in December 2002 seeking a declaratory judgment. While she claimed that the characters in *Peter Pan* are now in the public domain, the British hospital contended that the U.S. Copyright Act had extended the copyright protection for Peter Pan until 2023. The outcome of the suit is unclear.

The progress of copyright harmonization has been held back by the different backgrounds and traditions of European and American copyright law. While European copyright law was developed from an author's right (*droit d'auteur*) tradition, which covers both personal and economic rights, American copyright law emerged from a utilitarian tradition, which emphasizes economic rights.

The "moral rights" issue highlights these differences. In Europe, an author, as compared to a copyright holder, has a right to claim authorship of the work and to prevent the use of his or her name as the author of any work the author did not create. The author also has the right to prevent any intentional distortion, mutilation, or modification of the work if such action would damage his or her reputation. Similar protection is not available in the U.S., except in works of visual arts that exist in limited quantity, such as paintings, drawings, sculptures, and still photographic images.

The U.S. and the E.U. disagree over numerous other copyright issues, including database protection, fair use, the first sale doctrine, and protection against private copying in the digital environment. In light of these differences, one might wonder if *Eldred* will change the tone of the international harmonization debate. The Court in *Eldred* openly—and to some extent uncharacteristically—embraced the need to harmonize U.S. copyright law with that of the international community. However, in its ruling the Court also deferred to Congress on the issue.

This deference might make harmonization even more difficult. While Congress, on occasion, might harmonize its laws with that of the E.U. or the international community, most of the time it does not. Due to its strong interest in intellectual property goods, the U.S. generally offers stronger intellectual property protection than countries abroad. By giving Congress strong deference, the Court therefore encourages lower courts to uphold intellectual property statutes, even if they would isolate the country from the global community or if they violate international norms.

Case in point: the Fairness in Music Licensing Act, which exempts from royalties those restaurants, bars, and retail stores that use "homestyle" audio and video equipment to play broadcast music. In 1999, a WTO dispute settlement panel found the statute in violation of the United States' obligations under the TRIPs Agreement.

In the years to come, it will be interesting to see how international harmonization plays out. Will the United States change its laws in an effort to harmonize them with those of foreign countries? Or will other countries change their laws in an effort to harmonize them with American law?

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