FREEING THE MOUSE

Mickey's fate rests with the U.S. Supreme Court

By Peter K. Yu

M-I-C. C stands for copyright. K-E-Y. Why? Because Disney likes it!—M-O-U-S-E.

This is the ending that Hollywood would write to the constitutional challenge to the Sonny Bono Copyright Term Extension Act in *Eldred v. Ashcroft*. But Hollywood does not control the final cut. On October 9, 2002, the United States Supreme Court will hear oral arguments in this case.

Dubbed the "Mickey Mouse Protection Act" by Stanford Law professor Lawrence Lessig, who represents the plaintiffs in the case, the Bono Act extends copyright protection in the United States for an additional 20 years. As with all prior copyright term extension legislation, the Bono Act applies to both future and existing works. Materials that are supposed to fall into the pubic domain will remain locked up for another 20 years.

In 1999 several publishers and users of public domain works challenged the Bono Act before the United States District Court for the District of Columbia. The case turned on the meaning of the copyright clause: "Congress shall have 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."

The plaintiffs argued that Congress exceeded its enumerated power by disregarding the "limited Times" requirement under the Copyright Clause. They also contended that the Bono Act violated the plaintiffs' free speech rights by preventing dissemination of copyrighted works that otherwise would have entered the public domain.

The district court held that Congress had not violated the "limited Times" provision because the life-plus-70 term is limited and within Congress's discretion. The court also rejected the plaintiffs' First Amendment argument by observing that "there are no First Amendment rights to use the copyrighted works of others."

On appeal the United States Court of Appeals for the District of Columbia affirmed the lower court's decision. Like the lower court, the appellate court did not find the Bono Act unconstitutional. It rejected the plaintiffs' argument that the term "limited Times" should be interpreted in light of the preceding phrase "To promote the Progress of Science and useful Arts." As the court reasoned, the plaintiffs' argument was inconsistent with prior case law holding that the introductory language of the Copyright Clause did not limit on congressional power.

With respect to the First Amendment claim, the court maintained that the plaintiffs' argument was foreclosed by *Harper & Row Publishers, Inc. v. Nation Enterprises*. In this case the Supreme Court stated that the idea-expression dichotomy in copyright law struck "a definitional balance" between the First Amendment and the Copyright Act by permitting free communication

of facts and ideas while protecting an author's expression. Based on that case, the court maintained that copyrights are "categorically immune" from First Amendment challenges.

The plaintiffs petitioned for a rehearing en banc, but the D.C. Circuit denied their petition. Earlier this year, the Supreme Court granted certiorari to hear the case.

Copyright has always been a balancing act. Creation requires time, effort, and money, and society needs to provide incentives for people to invest in the creative process. Without these incentives, many people would undertake other more remunerative endeavors. This is particularly true for those who invest hundreds of thousands, or even millions, of dollars in sound recordings and motion pictures.

However, creators also need a rich public domain from which to draw free building materials. Just imagine a school orchestra that could not train young musicians because it could not afford to pay royalties for playing Bach, Mozart, or Beethoven. Or imagine a writing workshop that could not train young writers because it failed to secure permission from the heirs of Jane Austen or Charles Dickens to reproduce chapters of their works.

Without classics and Renaissance literature, there would be no Shakespeare. And without *Romeo and Juliet*, there would be no *West Side Story*.

So far, the arguments on either side of the copyright term extension debate have been equally compelling. Critics of the Bono Act point out that Congress has extended the terms of existing copyrights 11 times in the past 40 years without requiring new creation in return. As they observe, besides failing to promote "the Progress of Science," the Bono Act does not satisfy the "originality" requirement pronounced by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*

Critics contend that copyright laws are not immune from First Amendment challenges. Because copyright law regulates speech, the *Eldred* plaintiffs and their amici argue that the Bono Act should be subject to a heightened standard of review as announced in *Turner Broadcasting System, Inc. v. FCC*, rather than the mere rational standard the Court generally uses to review economic regulation.

By contrast, proponents of copyright term extension argue the Bono Act is no different from Congress's other efforts to modify copyright term. In all these instances, the extension has been applied evenhandedly to both future and existing works—partly due to equity reasons. Because the copyright clause does not distinguish existing works from future works, Congress can extend copyright protection retroactively to all existing works.

Moreover, as proponents contend, Congress has special competence over fact-finding, and it is not for the Court to substitute its judgment for Congress's. The *Eldred* plaintiffs and their amici had their opportunity to lobby against the extension, but they lost their battle in the political process.

In stark contrast to the critics, proponents of copyright term extension argue that the Bono Act will be beneficial to the public by attracting capital into the copyright industries, thus providing revenues for investments in future works. The Bono Act will also create incentives for copyright holders to make a substantial investment in restoring, digitizing, and disseminating works that already exist and in creating derivative works.

Indeed, as proponents observe, the push to extend copyright began in Europe, not Hollywood. The EU Copyright Term Directive requires all European Union member states to extend their copyright terms to life of the author plus 70 years and to reduce protection to authors from those countries with shorter terms. By increasing the copyright term, the Bono Act therefore will create parity between U.S. and EU authors. It also will facilitate greater harmonization of copyright laws in the international community.

In light of these arguments, it is very difficult to predict how the Court will rule in *Eldred*. While prior legislative practice and judicial decisions strongly support Congress's action, the case presents a rare opportunity for the Court to limit Congress's legislative power by interpreting the meaning of the Copyright Clause. Recently, the Court has shown great interest in the enumerated power doctrine, and it would not be surprising if the Court further develops this doctrine in *Eldred*.

Regardless of its outcome, *Eldred* will have a significant impact on future development of copyright law.

First, the case will demarcate the boundaries of Congress's power to enact copyright legislation. *Eldred* will tell Congress what it can and cannot do. If the retroactive provisions of the Bono Act are constitutional and are subject to only rational review, Congress will likely be more aggressive in helping copyright holders protect their creative works. By contrast, if the provisions are unconstitutional or are subject to a higher standard of review, other provisions of the Copyright Act, including the restoration provisions of the Uruguay Round Agreements Act, will likely be challenged.

Second, because *Eldred* implicates both copyright law and the First Amendment, it will affect future lawsuits involving issues in these two areas. Examples would include challenges to the Digital Millennium Copyright Act and to any database protection legislation, if enacted, as well as lawsuits involving the fair use privilege and the first sale doctrine.

With the advent of the Internet and increasing convergence between copyright and communications law, the Court's reasoning in *Eldred* will likely be very important. If the Court were to uphold the Bono Act, the decision might invite lower courts to further adjust the existing copyright scheme in an effort to offset the effects of a longer copyright term.

Third, *Eldred* will affect two recent trends in copyright law. The first trend concerns constitutionalization. Over the years, the copyright discourse has become increasingly grounded in constitutional arguments. Over-constitutionalization of copyright law could create a cloud of uncertainty and unpredictability and might eventually take away incentives for people to invest

in the creative process. Against that backdrop, it will be interesting to see whether the *Eldred* Court is open to the plaintiffs' constitutional arguments.

The second trend concerns harmonization. Greater harmonization promotes certainty and predictability and allows people to take advantage of opportunities created by the information revolution and the global economy. However, harmonization is not always desirable, especially when countries have needs and interests that are different from those of the international community. Even if the government finds harmonization in its national interest, it still has to decide whether to remodel its laws in the images of others' or to induce others to follow its lead.

Finally, like the MP3 and Napster litigation, the *Eldred* litigation has increased the public awareness of intellectual property issues. In the past copyright law was considered a complicated issue that was of primary interest and concern to IP lawyers, legal scholars, and technological developers. Today, members of the public see it as something that affects their daily lives.

In this climate of heightened public awareness, Mickey Mouse is no longer a mere icon of popular culture. Rather, he is a symbol of corporate greed and a cause for public domain activists. This development is sad and unfortunate, but is entirely understandable. Perhaps, it will take quite a while before we can return to enjoy the show.

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