FOUR REMAINING QUESTIONS ABOUT COPYRIGHT LAW AFTER *ELDRED*

By Peter K. Yu

Introduction

On January 15, 2003, the U.S. Supreme Court handed down its decision in *Eldred v. Ashcroft*, upholding the constitutionality of the Sonny Bono Copyright Term Extension Act ("Bono Act"), which extended the length of copyright protection for 20 years.

In a 7-2 decision, the Court explained why Congress did not exceed its enumerated power by enacting the Bono Act. The copyright clause of the Constitution empowers Congress "to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." Because the Court found that Congress had made a rational judgment to extend the copyright term for both existing and future works, it maintained that it was not in a position to "second-guess" the legislature's "wisdom," however "debatable or arguably unwise" it may be.

Justices Stevens and Breyer dissented. Justice Stevens found that ex post facto extension of the copyright term frustrated the goal of the copyright clause by transferring wealth from the public to copyright holders. Similarly, Justice Breyer declared that "[n]o potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter." In addition, as Justice Breyer noted, the Bono Act will pose serious harm to society:

> It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children.

Shortly after the Court published the *Eldred* opinion, strong reactions surfaced from both sides of the copyright term extension debate. While supporters of the Bono Act—many of whom are intellectual property lawyers and copyright holders—celebrated the decision as a vindication of an important interest in creative works, critics of the Bono Act lamented that the Court sold out to private corporations such as Disney.

Following these initial reactions, several questions remain, as technology lawyers ponder how the decision will affect their clients. Is *Eldred* really different from prior Supreme Court cases on copyright law? How will *Eldred* affect future constitutional challenges to the Digital Millennium Copyright Act (DMCA)? Will courts be more responsive to the needs for international harmonization in the future? Is *Eldred*—in Professor Siva Vaidhyanathan's words—"the Dred Scott case for culture"?

This article will address each of these questions in turn.

Prior Supreme Court Cases on Copyright Law

Eldred is neither ground-breaking nor different from prior Supreme Court precedents in the field of copyright law. In fact, the Court found it significant "that early Congresses extended the duration of numerous individual patents as well as copyrights." As Justice Ginsburg pointed out in her opinion, Congress's action was strongly supported by the text of the Constitution, the country's history, and precedents in the fields of both copyright and patent law.

The Court's holding also was strongly supported by recent precedents on copyright law. For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises,* a 1985 case involving the unauthorized publication of President Ford's memoirs, the Court declared 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. As a result, the Court did not find tension between copyright law and the First Amendment and held for the copyright holder.

In *Stewart v. Abend,* a 1990 case concerning the renewal provisions and the right to use a short story in Alfred Hitchcock's *Rear Window,* the Court stated: "The evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . . It is not our role to alter the delicate balance Congress has labored to achieve."

Likewise, in *Sony Corp. of America v. Universal City Studios, Inc.,* the famous 1984 Betamax case, the Court maintained: "It is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."

The only recent case that seeks to limit Congress's enumerated power in the copyright field is *Feist Publications, Inc. v. Rural Telephone Service Co.,* a 1991 case involving the copyrightability of telephone white pages. However, as the Court explained in *Eldred,* the *Feist* case "did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability. . . . The decision did not construe the 'limited Times' for which a work may be protected, and the originality requirement has no bearing on that prescription."

Future Constitutional Challenges to the DMCA

In *Eldred,* the petitioners argued that the Bono Act violated the plaintiffs' free speech rights by preventing dissemination of copyrighted works that otherwise would have entered the public domain. In response to this argument, the Court explained why it found the petitioners' argument unpersuasive.

The Court began by declaring that copyright law "contains built-in First Amendment accommodations." For example, the idea-expression dichotomy prevents copyright holders from monopolizing ideas, theories, facts, and concepts. The fair use provision allows the general public to use copyrighted materials under certain circumstances without the copyright holder's authorization. And the Bono Act contains an exception for libraries, archives and similar

institutions to reproduce, distribute, display or perform certain copyrighted works in facsimile or digital form for preservation, scholarship and research purposes during the last 20 years of the copyright term.

The Court did not stop there, however. Much to the disappointment of public domain activists, it rejected the petitioners' "copyright bargain" theory, the originality argument, and the allegation that Congress sought to achieve a perpetual term on an "installment plan." (The petitioners argued that the Bono Act was invalid under the Constitution because it failed to provide the quo for the copyright holder's quid. They also claimed that the Act violated the "originality" requirement pronounced by the Supreme Court in *Feist*.)

As the Court explained: "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." After all, the Bono Act "does not oblige anyone to reproduce another's speech against the carrier's will"; instead, it protects authors against unrestricted exploitation of their original expressions.

Although the Court eventually "recognize[d] that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment,'" the case undoubtedly would create substantial difficulties for future constitutional challenges to the DMCA.

Nonetheless, the opinion also offers hope for DMCA litigants. At the end of its opinion, the Court suggested that further First Amendment inquiry may be necessary "when . . . Congress has . . . altered the traditional contours of copyright protection." As Yale Law Professor Jack Balkin wrote in his blog, the DMCA is constitutionally suspect under *Eldred*, given the fact that the statute takes away such traditional public interest safeguards as the idea-expression dichotomy and the fair use privilege.

International Harmonization of Copyright Laws

In *Eldred*, the Court openly embraced the United States' need to harmonize its copyright law with that of the European Union. As the Court observed, "a key factor" in the passage of the Bono Act was the 1993 European Union Copyright Term Directive, which instructed member states of the European Union to extend copyright term protection for an additional 20 years.

Notwithstanding this observation, it would be far-fetched to expect courts to be more responsive to the needs for international harmonization in the future. After all, European and U.S. copyright law originated from different backgrounds. 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 emphasized primarily economic rights.

By virtue of these differences, the United States and the European Union have strong disagreements over such copyright issues as moral rights, the protection of databases, fair use,

the first sale doctrine, the work-made-for-hire arrangement, and protection against private copying in the digital environment.

Even in the area of copyright duration, the two trading partners disagree as to how long copyright should protect sound recordings. While the European Union protects sound recordings for only 50 years, the United States protects similar works—as works-made-for-hire—for 95 years.

In the years to come, it will be interesting to see how international harmonization concerning sound recordings will play out. Interestingly, the U.S. recording industry already has called for stronger protection against parallel imports, lest there be a mass importation of "public domain" recordings from Europe.

The "Dred Scott Case for Culture"?

Theoretically, when a constitutional challenge fails before the Supreme Court, the only course of action left behind is to overturn the statute by enacting a constitutional amendment. However, in reality, it would be virtually impossible to overturn the Bono Act by a constitutional amendment, given the fact that a supermajority is needed to enact a constitutional amendment and that the wording of the Constitution was intended to be broad and vague so as to provide flexibility.

Nonetheless, we should not forget about the momentum created by the *Eldred* litigation and the public domain movement. Regardless of how disappointing the decision one would find, *Eldred* might not be the "Dred Scott case for culture." After all, the case, as the Court stated in the opening sentence, is about whether Congress has power to prescribe the duration of copyrights. It is not about whether the public can use copyrighted works during the prescribed period.

Copyright always has been a balancing act. Indeed, the public interest safeguards—such as the idea-expression dichotomy and the fair use privilege—are just as important as the grant of the right itself. Thus, any change in one area of the copyright system easily could be offset by an opposite change in another area of the system. For example, increased copyright protection could be offset by an expanded reading of the fair use provision or the miscellaneous exemptions contained in the Copyright Act. In fact, some lower courts—especially those sympathetic to the *Eldred* cause—might be willing to adjust the existing copyright scheme in an effort to offset the effects of an extended copyright term.

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

As political support grows, legislative proposals that place a heavier emphasis on the public domain might surface. Indeed, this type of proposal already appeared in Congress. Most recently, Congressman Richard Boucher introduced the Digital Media Consumers' Rights Act in

an effort to restore historical balance in copyright law and to ensure proper labeling of copy-protected CDs.

Finally, some citizens might consider civil disobedience in the name of justice (or in the name of poor Mickey, who—as noted by a humor columnist—is denied sex, drugs, and cigarettes by its copyright holder). Nonetheless, regardless of how sympathetic we are to the *Eldred* cause, civil disobedience would not be sound advice from a technology lawyer. That's why we have *Eldred* in the first place.

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