Extended copyright curtails creativity: How the Copyright Term Extension Act limits writers

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Abstract

This research focuses on the Copyright Term Extension Act (CTEA) of 1998 and argues that the perpetual extension of the copyright term curtails creativity in that it withholds works from entering the public domain even though these works no longer benefit the creator. The Eldred v. Ashcroft (2003) court case is analyzed in regard to this problem. The conclusion of the court case maintains that the CTEA is constitutional, and Eldred lost his case. However, the researcher finds the arguments made in the court case significant in our understanding of the current standing of copyright law.

Keywords: copyright law, public domain, creativity, intellectual property

Villains forbear—illustrious prince, let none Attempt th’ ent’prize, reserv’d for me alone. (Cervantes 891)

In the quote above, Cervantes tells readers to let “Don Quixote rest in the grave” and warns future authors not “to write with his coarse, awkward, ostrich quill, the deeds of my valiant night; a burden too heavy for his weak shoulders, and an undertaking too great for his frozen genius” (Cervantes 891). Ironically, many authors have interpreted this statement as a challenge and have written works of their own that imitate the tales of Don Quixote de la Mancha, such as The Life and Adventures of Sir Lancelot Greaves, The Female Quixote, Arthur Mervyn, The Coquette, and others. According to current copyright laws, Don Quixote is in the public domain, which, according to the Merriam-Webster dictionary, is “the realm embracing property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to appropriation by anyone.” Therefore, Don Quixote is actually legally available to be copied and imitated. Whether Cervantes would have wanted this or not remains unanswered, but it can be argued that Don Quixote has inspired authors to create new works that borrow from this original text.

The problem at hand is that the current copyright law in the United States are hindering creativity because of its extension of terms due to the Sonny Bono Copyright Term Extension Act (CTEA). The CTEA serves to impede the freedom of speech granted by the Constitution’s First Amendment by creating a chilling effect that has muffled the mouths, or rather the “ostrich quills,” of many prospective authors who wish to borrow from previous texts to create their own. I concur with the plaintiffs of the Eldred v. Ashcroft case, in which a complaint was brought to the Supreme Court stating that the CTEA is unconstitutional in regard to the Copyright Clause and the First Amendment. However, because the CTEA has already been ruled constitutional, I argue that the CTEA needs to be the final extension of copyright terms because old works should enter the public domain in order to allow authors the ability to create new works from them.

Background of copyright law

Copyright law is a fickle creature with many shaded areas of gray. Even professionals in the field can get confused by copyright at times: “working within that realm [of copyright law] every day doesn’t mean it gets all that much easier. It’s intriguing . . . and exacting. And in fact, the further you delve into the area, the grayer it can appear” (qtd. in Dierking). What is clear is what copyright does and does not protect. According to a student media website, copyright is a property right that “protects literary works, sound recordings, works of art, musical compositions, computer programs and architectural works, provided that the work satisfies certain requirements” (“Student Media Guide” par. 12). The first requirement is that the work must be original and creative in such a way that it is not simply like a listing in a telephone book, but rather has shown some artistic value involved in the work’s creation. The second requirement is that the work must be “fixed in any tangible medium of expression,” meaning an idea is
implemented using paper, web, video format, etc. (“Student Media Guide” pars. 13-14).

What copyright does not protect are “[s]logans, titles, names, words and short phrases, instructions, lists of ingredients and familiar symbols of designs, [which] are generally ineligible for copyright because they lack the necessary originality and creativity necessary to distinguish them from ideas they represent” (“Student Media Guide” par. 15). So ideas and facts are not copyrightable, but the certain way of expression of those ideas and facts are copyrightable (“Student Media Guide” par. 16). For example, the character Mickey Mouse is copyrighted, so any work resembling Mickey Mouse in any way would be subject to copyright litigation from the Walt Disney Company. However, the idea of a cartoon mouse in general is not copyrighted and can be used freely. “Copyright only protects the execution of an idea but not the idea itself. So the character of Mickey Mouse, such as the personality traits as well as the physical characteristics such as the ears are copyrightable, but not the idea of the mouse…Jerry is a very different character from Mickey,” said Patent Attorney Steve Schlackman, referring to MGM’s Jerry Mouse from the cartoon Tom and Jerry.

Although the specifics of what copyright does and does not protect have been fairly solid throughout time, copyright terms have had a long and fluctuating history that Michael Birnhack, Assistant Professor at the University of Haifa, Israel, calls a “judicial ‘chain novel’ that has been in the writing for the past three decades,” a term coined by legal philosopher Ronald Dworkin (Birnhack par. 1; Reuters par. 1). According to the Student Press Law Center, before the CTEA, works were originally under copyright for as long as fifty years after the death of the owner, but the CTEA added twenty years retroactively so that it became seventy years after death of the owner, ninety-five years after publication, or one hundred twenty years from creation, whichever comes sooner. And as of 2016, “any work published before January 1, 1923…is now in the public domain” (“Student Media Guide” par. 37).

The Student Press Law Center also details a kind of loophole to copyright law infringement. Using the example of Mickey Mouse once again, if someone were to create an animation of a character named Rickey Rouse who had small ears, a low-pitched voice, and a terrible habit of swearing, the animator would more than likely get off scot-free. This is because “copyright law gives parodies and spoofs a fair share of breathing room [on two conditions].…First, the parody must be obvious…Second, the use must reproduce no more of the work than the minimum necessary to conjure up the original in the audience’s mind” (“Student Media Guide par. 53). So, if an artist simply Photoshopped a fez hat onto Mickey Mouse’s head, this technique would not be considered a parody, and the artist would not be protected if the Walt Disney Company were to sue the artist for copyright infringement.

The Disney Company is well known for being intense litigators when it comes to their copyrighted material. In a response to an artist who asked a question as to whether or not he could sell his paintings of Disney characters to his friends, Copyright Infringement Attorney Mario Sergio Golab replied in a comment stating, “No you cannot paint, offer for sale, sell, or otherwise tinker with a Disney character, at least it is illegal without an express license from the Walt Disney company.” Intellectual Property Law Attorney Oscar Michelen concurred:

Would Disney find out if you are just selling them among your friends—probably not. But if they did they will issue a cease and desist letter and even maybe bring litigation as they are fierce protectors of their marks. We represented a party planning company that was contacted and nearly sued by Disney for using their characters at birthday party events.

In fact, the Walt Disney Company is so strict in regard to their copyrighted work that there is a theory going around among critics and researchers alike that the CTEA and previous copyright term extensions came about solely due to the urgings of Disney lobbyists.

The CTEA and Disney

Copyright term extensions are not new phenomena. In a way, Dworkin was not very far off when describing America’s copyright history as a novel:

In America’s original copyright system, protection only lasted for 28 years. By the mid-20th century, Congress had doubled the maximum term to 56 years. Then, in 1976, Congress overhauled the copyright system. Instead of fixed terms with a maximum of 56 years of protection, individual authors were granted protection for their life plus an additional 50 years, an approach that had become the norm in Europe. For works authored by corporations—Hollywood blockbusters, for example—copyright terms were extended to 75 years. (Lee par. 4)

After the CTEA, copyright was then extended for another twenty years (Lee par. 5). It is difficult to say whether the new copyright extension was made to help creators or harm the public. Senator Hank Brown wrote a minority report for the Senate Judiciary Committee in 1996 that stated: “To suggest that the monopoly use of copyrights for the creator’s life plus 50 years after his death is not an adequate incentive to create is absurd. Denying open public access to copyrighted works for another 20
years will harm academicians, historians, students, musicians, writers, and other creators who are inspired by the great creative works of the past.” However, the majority of Congress did not share Brown’s view.

In fact, the extension of the copyright law was not truly challenged until Eric Eldred, a publisher of works in the public domain, brought a complaint to the court. After repeated failures, Eldred climbed the judicial ladder to reach the Supreme Court. Eldred had the help of Larry Lessig, Roy L. Furman Professor of Law and Leadership at Harvard Law School and previous professor at Stanford Law School, who decided to take on the case pro bono publico (School). He is the creator of Creative Commons, “an ambitious project through which he hopes to establish a giant repository of works unfettered by restrictive copyright laws,” and avid advocate of a rich public domain (Levy). Lessig probably jumped at the chance to represent Eldred because the court case made history. Eldred v. Ashcroft was the first legal challenge to the copyright term extensions in over two hundred years (Eshgh). Lessig was also quite aware of what he was up against.

In an interview done by The Washington Post, Senator Brown commented, “The real incentive here is for corporate owners that bought copyrights to lobby Congress for another 20 years of revenue—not for creators who will be long dead once this term extension takes hold.” The facts match up. According to Schlackman, there has been a trend of copyright extensions in direct correlation with the copyright term expiration date of the Walt Disney cartoon Steamboat Willie. The CTEA saved Mickey Mouse from falling into the public domain because there was only five years left for Steamboat Willie’s copyright to expire. “That pushed Mickey’s copyright protection out to 2023,” Schlackman said. Lessig pointed out the irony of the Walt Disney Company lobbying to protect its own copyrights when it has scoured the public domain to create its own works. “[N]o one can do to Disney as Disney did to the Brothers Grimm,” Lessig jested in an interview (Levy).

The new expiration date for Steamboat Willie is nearing yet again. Law professionals and scholars are foretelling another term date extension to come up very soon. “In 5 years or so, we can probably expect to see stories about proposed changes to copyright duration, once again. It is unlikely that a company as strong as Disney will sit by and allow Steamboat Willie to enter the Public Domain,” Schlackman said. Others concur with Schlackman. “If Hollywood and their allies want to do this, they’re going to have to start doing it now,” said Chris Sprigman, a legal scholar at New York University, during an interview (Lee). The Washington Post has high hopes for public domain advocates: “One advantage opponents will have this time around is better arguments and evidence. Public debate over the last extension has stimulated increased academic research into the economics of the public domain, and as a result, we know a lot more about the costs of longer copyright terms than we did 20 years ago” (Lee). Eldred and Lessig have stirred up public sentiment in regard to the issue of copyright extensions. All one can do now is wait to see what happens next.

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