

HAPPY BIRTHDAY, MICKEY! FEDERAL APPEALS COURT UPHOLDS THE CONSTITUTIONALITY OF THE COPYRIGHT TERM EXTENSION ACT

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Early this year, a Federal Appeals Court in Washington, D.C. upheld the constitutionality of the Sonny Bono Copyright Term Extension Act, which extended in 1998 the term of copyright in the United States by twenty years. Although the law was named after the late Congressman/singer who was killed in a skiing accident shortly before the law was passed, the law might better have been named for Walt Disney. That's because the Disney Company was a strong advocate of the law to extend the copyright in Walt's cartoon characters, including Mickey Mouse, who was scheduled to enter the public domain in 2003, to be followed soon afterwards by Pluto, Goofy, and Donald Duck, along with a host of other works such as the venerable song "Happy Birthday".

The new term of copyright, for works created after January 1, 1978, is the life of the author plus 70 years. For works made for hire, and anonymous and pseudonymous works, the term is 120 years from creation or 95 years from first publication, whichever occurs first. And for works created prior to 1978 whose terms have not yet expired, the term is now 95 years from first publication (or the date of registration if prior to publication). Thus, "Happy Birthday," which was composed in 1895 (as "Good Morning to All"), but not published until 1935, has had its copyright term extended until 2030. This represents a boon to its current owners, who collect about a million dollars a year in royalties, having bought it a few years ago for \$12 million. The price was based on the value of the expected royalties through 2010 but, with an additional twenty years of life, it is now clear that the new owners actually bought it for a song!

The court case challenging the constitutionality of the law, Eldred v. Reno, was brought by a variety of organizations and individuals who rely for their vocations and avocations on the use of works in the public domain. The court, in a 2-1 majority opinion written by Judge Douglas Ginsburg, rejected the plaintiff's arguments that the First Amendment and Copyright Clause of the Constitution constrains the Congress from extending the duration of copyrights, both those already in existence and those not yet created. 239 F.3d 372 (D.C. Cir. Feb. 16, 2001).

The Term Extension Act amended various provisions of the Copyright Act to extend the terms of all copyrights for 20 years. In part, the Congress was attempting to conform the terms of United States copyrights with those of copyrights governed by the European Union and other countries around the world which had already adopted longer copyright terms. The Act was the most recent in a series of congressional extensions of the copyright term, each of which has been made applicable both prospectively and retrospectively.

The Historical Background

In 1790, the First Congress enacted the first copyright statute, only one year after ratification of the Constitution, which authorized the Congress "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 first Copyright Act protected only books, maps and charts, and provided an initial copyright term of 14 years, followed by a renewal term of 14 years.

Not surprisingly, the First Congress offered no protection for computer software and databases, digital music, streaming video, and Internet websites, motion pictures, multimedia and other audiovisual works, and photographs and most types of two and three dimensional artwork and sculpture. Rather, copyright protection has been extended to these kinds of works incrementally over a period of more than 210 years, legislatively and judicially, so that today copyright protection is accorded to all "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Copyright Act, 17 U.S.C. §102(a).

During the 19th Century, the Congress enacted various statutes extending the scope of copyright protection. In 1909, the Congress revised and codified the copyright laws, doubling both the initial and renewal terms to 28 years each, for a total term of 56 years. Between 1962 and 1974 the Congress passed a series of laws that incrementally extended the term of copyrights, so that by 1976, the renewal term was extended to 47 years, for a total term for renewed works of 75 years.

In 1976 the Congress enacted a comprehensive revision of the copyright laws, changing the way in which the term of a copyright is computed to conform with the Berne Convention, a multilateral copyright treaty (which incidentally the United States did not adhere to until 1989), and with other international practices. Under the new act, the term of copyright was measured by the life of the author plus 50 years or, where there was no identifiable author, the earlier of 75 years from the year of publication or 100 years from the year of creation.

In 1998, the Congress enacted the Term Extension Act to add 20 years to the term of copyright. It was this statute that the plaintiffs challenged, filing suit against the Attorney General to declare the Act unconstitutional. Among the plaintiffs were a non-profit association that distributed free electronic versions of books in the public domain over the Internet; a company that reprinted rare, out-of-print books that have entered the public domain; a choir director and a vendor of sheet music, who respectively bought and sold music that is relatively inexpensive because it is in the public domain; and a company that preserved and restored old films and, to the extent that these works were not in the public domain, needed permission from their copyright holders (who were often hard to find) in order to exploit them.

After the suit was brought, the district court rejected the plaintiffs' arguments on the pleadings and dismissed their case in its entirety. On appeal, the plaintiffs renewed their claims that the Act violated both the First Amendment and the Copyright Clause of the Constitution quoted above. In particular, the plaintiffs contended that the Act was beyond the power of the Congress and therefore unconstitutional because it violated the First Amendment, violated the originality requirement of the Copyright Clause in its application to preexisting works; and violated the "limited times" requirement of the Copyright Clause, which was intended to "promote the Progress of Science and useful Arts."

The First Amendment

On the first point, the Court said that the decisions of the U.S. Supreme Court in Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1985), and of the D.C. Circuit in United Video, Inc. v. FCC, 890 F.2d 1173 (1989), barred the plaintiffs' first amendment theory. In Harper & Row, the Court held that a magazine's advance publication of excerpts from the memoirs of former President Gerald Ford infringed his copyright. In doing so the Court explained how the regime of copyright itself respects and adequately safeguards freedom of speech protected by the First Amendment: "[C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."

In the United Video case, the D.C. Circuit held that copyrights are immune from challenges under the First Amendment. There, the court rejected the first amendment aspect of the plaintiff's challenge by noting that "the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression."

The Constitutional Requirement of Originality

The plaintiffs' second challenge was based in part on the Supreme Court's decision in Feist Publications, Inc. v. Rural Telephone Service Co., in which the Court held that telephone listings compiled in a white pages directory were uncopyrightable facts because they lacked originality, a constitutional requirement under the Copyright Clause. The plaintiffs argued that the Term Extension Act unconstitutionally extended the term of copyright because the copyrighted work already existed and therefore lacked originality. The court rejected this argument, noting that originality is what made the work copyrightable in the first place. Since the work satisfied the requirement of originality in the first place, it does not have to continue to do so for protection to persist. If the Congress could not extend a subsisting copyright due to lack of originality, how could it provide for renewal of a copyright at the expiration of its initial term -- a long-standing practice dating back to the first Copyright Act in 1790 and not questioned even by the plaintiffs in its suit.

"Limited Times"

The plaintiff's final claim was that the Act violated the constitutional requirement that copyrights endure only for "limited times." This claim was based on the proposition that if the Congress were to make copyright protection permanent, then it clearly would exceed the power conferred upon it by the Copyright Clause. The plaintiffs further argued that the phrase "limited times" should be interpreted not literally but rather as reaching only as far as is justified by the preambled statement of purpose: If 50 years are enough to "promote Progress," then a grant of 70 years is unconstitutional. The court disagreed, rejecting the contention "that the introductory language of the Copyright Clause constitutes a limit on congressional power."

The court also rejected an argument that the Congress, or many successive Congresses, might in effect confer a perpetual copyright by stringing together an unlimited number of "limited times." The court noted that the Act was intended to match United States copyrights to the terms granted by the European Union, and that such harmonization has obvious practical benefits. This was thus "a powerful indication that the Act is a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual". The court noted further that courts have been deferential to the judgment of the Congress in copyright matters, citing the Supreme Court statement that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the appropriate public access to their work product" Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

With that, the court rejected all the plaintiffs' claims, and held that the Act was a proper exercise of the Congress's power under the Copyright Clause and not a violation of the First Amendment. The court thus affirmed the district court decision dismissing the plaintiffs' suit.

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