



## **Put the Blame on Mickey – NOT**

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Eric Eldred blames Mickey Mouse for everything he doesn't like about American copyright law. Eldred blames Mickey & Co. for the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, holding that (1) Congress didn't have the right to pass it, (2) the public good is not served by it, and (3) individual authors aren't served, either. Eldred has persuaded the Supreme Court to entertain his arguments -- but Eric Eldred, his supporters, and his lawyers are wrong, and should not prevail. Here's why.

Some background: According to Article 1, Section 8, the purpose of copyright is "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 purpose of this limited monopoly is twofold: to encourage creativity by securing authors' property rights, and in doing so, to encourage the flowering of culture, which benefits everyone.

Copyright is a "bundle of rights", where each usage right can be transferred individually or collectively by the author to another individual or entity. Ideas cannot be copyrighted; only tangible expressions of ideas can. Copyright initially resides with the author. Authors control their rights by granting licenses to those who wish to use their works. It is through licensing rights that authors make their livings. This operation of the copyright law is what underlies all of our popular culture. Every book, photograph, drawing, movie, dance performance, song, or musical interlude is either currently covered by copyright, or was once covered by copyright and has passed into the public domain. At the root of Eldred, et al., v. Ashcroft is the question of how long authors may retain control over their copyrights.

The Copyright Act of 1790 set the copyright term for both existing works and new works at fourteen years. Congress extended the term in 1831, in 1909, and in the Copyright Act of 1976 (the current statute). In the 1976 Act, the term was set at the author's life plus 50 years. In enacting the CTEA, Congress extended the copyright term to the author's life plus 70 years. As in all prior statutes, the extended term applies both to new works and to existing works. Once the copyright term expires, all work goes into the public domain. Once a work enters the public domain, the public has the unfettered right to use it, and the work can never be subject to a copyright again.

In his petition for certiorari, Eldred argues that "Congress has adopted a practice that defeats the Framers' plan by creating in practice an unlimited term". The author's life plus seventy years is a limited term. During the term of copyright, he who would use the copyrighted work of another need only secure the owner's permission, and pay the price the owner demands. After the term expires, no permission or payment is necessary. Assuming an author continued to create from birth until death at the age of 120, "life plus seventy" would amount to no more than one hundred and ninety years. After that, works go into the public domain-- where they stay FOREVER.

Posthumous copyright protection of authors' works was publicly derided by one of Eldred's supporters. In a Los Angeles Times article, he commented, "...How much will my heirs earn 70 years after I'm dead from the work I'm about to make?' ... This is the Shirley MacLaine defense--'I

will create after I am dead." The real question is: How many authors only achieve fame after death? Copyrights may be the only property authors have to bequeath to their heirs. Even if one has protected one's copyrights during one's working life, carefully licensing so as to maximize the value to one's estate, the law limits the estate's ability to profit from those rights to seventy years postmortem—unlike any other property right, which has no time limitation upon its exercise by heirs. This goes back to the dual purpose of copyright; not solely to protect the authors' property, but to encourage a flourishing culture by allowing these works to become public property after a time. Imagine the uproar if such a time limit were applied to any other type of heritable property.

The author of the Los Angeles Times piece decried the extension of the copyright term as "a rich subsidy for the Walt Disney Co., which trembled at the approaching end to its monopoly on the use of Mickey Mouse". He was joined by a British newspaper, which published an article headed "Mickey Mouse threatens to block all ideas in future". Although the headline is an attention grabber, blaming Mickey & Co. is just another specious argument. So-called "corporate copyright" (or "work-for-hire") terms for published works were extended by the CTEA from 75 to 95 years from the date of first publication. There are two ways a work becomes a "work made for hire". Copyrights in work created by an employee during the regular course of employment default to the employer. Independent contractor creators-- "authors-in-fact"--may sign away their copyrights to specially commissioned work under "work-for-hire" contracts, making the commissioning party the "author-at-law" of the work. The author of the LA Times article holds that creators are "forced" to sign away their copyrights in order to work. The answer to corporate rights grabs -- which Graphic Artists Guild members deal with on a daily basis-- lies not with abridging copyright terms, but with procuring collective bargaining rights for independent contractor authors. Changes must be sought to the antitrust laws that permit the global conglomeration of multi-armed media companies while restraining individual authors from joining together to protect their copyright interests against such conglomerates.

This globalization of media companies plays a part in the government's argument. The 20 year extension under the CTEA matched US copyright terms to those of the European Union. Had Congress not extended the term for American authors, authors from abroad would enjoy superior protection for works published here in the US, because the copyright statutes of authors' domicile nations control under the Berne Copyright Convention. US authors would have suffered the disadvantage of the shorter US term for their works published in other countries.

The Graphic Artists Guild sees our government's push for "harmonization" of US copyright with European copyright as good news for independent contractor authors. There is no "work-for-hire" under Berne; there is protection for the "moral rights" of integrity, paternity, and attribution. The Graphic Artists Guild says US creators should take the government at its word and demand the additional protection that would be afforded by FULL compliance with Berne. Enact an amendment to the 1976 Act striking "work-for-hire" and granting full moral rights to all authors.

The Graphic Artists Guild believes that the public good is best served by vigilant protection of authors' copyrights. The Guild believes that artists and their heirs have earned the right to enjoy the fruits of the valuable intellectual property they create. The Guild believes that the rights of its members are best protected by the government's arguments in the case of *Eldred v. Ashcroft*. It is the Guild's hope that the Supreme Court will see *Eldred's* argument as just another assault against copyright by those who would use the work of others for their own benefit and profit, at the expense of those who actually create those works. It's an un-American argument against creators that the Guild cannot in conscience accept.