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L. Ray Patterson
University of Georgia School of Law

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The U.S. Supreme Court Hears the Mickey Mouse Case

Editor's Note: Brock Professor Ray Patterson consulted and advised the counsel for Eldred *and was present for the arguments before the U.S. Supreme Court. Patterson's expertise in the area of copyright is well known. He recently co-authored an article on copyright in 1791, as the constitutional framers understood it, with the University of Houston Law Center's Professor Craig Joyce. Another newly authored work is "The DMCA: A Modern Version of the Licensing Act of 1662" in the* Journal of Intellectual Property Law (2002).

The case of *Eldred v. Ashcroft*, argued before the U. S. Supreme Court on October 9, 2002, is the most important copyright case since 1834, when the court decided its first, *Wheaton v. Peters*. In *Wheaton*, the court ruled that under the Copyright Clause of the U.S. Constitution only Congress can grant copyright for published works. In *Eldred*, the court will decide the scope of Congress' copyright power. May Congress grant, in the words of the Copyright Clause, copyright only for a "limited time[]" or may Congress extend the time already granted for existing copyrights? This is what Congress did in the Copyright Term Extension Act (CTEA), extending the term for all copyrights, present and future, for 20 years.

The CTEA is commonly referred to as the Mickey Mouse Copyright Protection Act, because the Disney Company was shortly destined to lose the copyright of its favorite child and allegedly curried favor with members of Congress to rescue Mickey from the horrible fate of falling into the public domain where he would be unprotected from mouse molesters. (This may be true, since members of Congress are known to suffer from a congenital defect known as "the 30-pieces-of-silver syndrome.")

But even if the motive for the CTEA is tainted, Congress did enact it, and the court must decide the case on its merits. No one, other than copyright holders, contends the statute is sound policy but the issue is congressional power. The problem the court faces in limiting that power is that in the past Congress, long before Mickey Mouse, had extended copyright terms, and, indeed, it did so in the 1976 Copyright Act. The court's problem is that if the CTEA is unconstitutional, the ruling might be precedent for holding the 1976 Act unconstitutional.

Fortunately, there are sound reasons for saying the unconstitutionality of the CTEA is not precedent for the unconstitutionality of the 1976 Act. First, all extensions of copyrights in the past have been made as part of a general revision of the copyright statute. The CTEA is the first independent statute to extend copyright terms. The importance of this point is that none of the prior extensions resulted in freezing the public domain, which the CTEA did as of its effective date. Under that statute, no copyrighted work will go into the public domain for 20 years. And, of course, if the CTEA is constitutional, Congress can repeat the scenario in 20 years and, given the unlikelihood of a cure for the 30-pieces-of-silver-syndrome, will probably do so.

This result could be viewed as merely an unfortunate consequence of bad policy, except for one thing: The Copyright Clause of the U.S. Constitution requires that copyright protect the public domain by limiting copyright protection to new (and original) works for a limited time. The first condition means that copyright cannot be used to capture works in the public domain, the second that all copyrighted works will go into the public domain.

In addition, the extension of copyright terms as part of a general revision of the copyright statute has generally been made as a matter of equity to avoid penalizing authors who would otherwise not have the benefit of the change in the law. These extensions can thus be viewed as an exercise of equitable power by Congress under the Copyright Clause. The CTEA is clearly an exercise and, arguably, an abuse of its legal power.

Finally, it should be noted that none of the prior extensions of the copyright term resulted in freezing the public domain, as does the CTEA. Prior to the 1976 Act, copyright was granted for two terms, and, to obtain the benefit of the second term, the copyright holder had to renew the copyright. Statistics show that only a small percentage of copyright holders in fact renewed their copyrights, which meant the impact of the extensions on the public domain was slight.

The ultimate point is the Copyright Clause is a limitation on as well as a grant of constitutional power. When Congress exceeds those limits, courts should so hold. One of the surprising things about *Eldred* is it is the first case ever to challenge the constitutionality of a copyright statute - a remarkable fact in view of the dozens and dozens of copyright statutes Congress has passed in over 200 years (since 1790) - and courts are not used to questioning Congress' copyright power. Thus, it may be well to note that just as Congress is bound by the Copyright Clause in enacting copyright statutes, courts should be bound by the clause in interpreting those statutes.

One final point, Mickey's emancipation does not mean Disney can no longer claim to be Mickey's progenitor and, arguably, at the age of 70 or so years, Mickey is entitled to emancipation. Otherwise, Disney might be charged with violation of the laws against animal cruelty.

-Brock Professor of Professional Responsibility Ray Patterson