Free Mickey Mouse! The battle for the public domain

Colette Ormonde, ALIA copyright advisory service

What do Adolf Hitler, George Orwell and Margaret Mitchell have in common? They are authors whose works are in the public domain in Australia, but restricted in the United States. Australian law protects books and other textual works for fifty years after the death of the author. This gives the creator a chance to pass on the benefits of his or her effort to loved ones.

In 1998, the Disney Corporation, concerned that in 2003 their favourite rodent would pass out of corporate guardianship and into the public sphere, successfully lobbied Sonny Bono, former entertainer turned politician, and President Bill Clinton, to support a legislative change, the *Copyright Term Extension Act*, which extended protection to 70 years after the death of an author and, in the case of 'corporate authors', from 75 to 95 years.

Before corporations could lock up creativity for eternity a disparate group galloped to the rescue.

This cast included: Eric Eldred, an electronic publisher of American classics like Nathaniel Hawthorne; Laura Bjorkland, who ran a tiny Massachusetts publishing company which focused on genealogy texts and out-of-print histories; and Lawrence Lessig, a law professor, first at Harvard now at Stanford, who agreed to take on their case pro bono.

They were joined by lawyers and students from Harvard Law School and the Stanford Law School Center for Internet and Society, five library associations including the peak body American Library Association, and other public interest and publisher groups.

A professor of economics at the University of California, Berkeley, Hal Varian, calculated that there would only be a few cents difference in royalties if the 50 year term were extended to 70 years.

The supporters of Eldred maintain, therefore, that the practical effect of the Act benefits not authors or small publishers but large corporations, some of which were buying up creative 'stock' to control. The underlying purpose of copyright law, to reward individual effort and creativity for a limited time and then allow works to accumulate in the 'creative commons', is subverted or lost. For the overwhelming majority of authors, royalties dwindle after five to seven years of publication, so that an extension of copyright term does not give an incentive to create new works.

The principle argument is based on the copyright clause of the US constitution, which states that copyrights be limited in duration and that they 'promote the progress of science and useful arts'. The Eldred brief also uses first amendment arguments.

The content companies assert that an extension of copyright increases creative incentive, brings the US into line with European countries (regarding the 70 year rule only), brings economic benefit to US business and takes into account the fact that people live longer now.

The *Eldred case* clawed its losing way through the US court system and two Presidential administrations, first as *Eldred v. Reno* and now as *Eldred v. Ashcroft*, winning against the odds permission to argue before the US Supreme Court.

Its chances may have been improved by another case being brought against the present US Attorney-General. Last year two American orchestra conductors, one of whom, Lawrence Golan, was also a professor of music at the University of Denver, filed suit against the US government regarding s514 of the *Uruguay Round Agreements Act* (URAA).

This law went beyond the Sonny Bono extensions of copyright. The US government claimed the power to re-impose copyright protection to foreign works formerly in the public domain. The government argued in this case that it was immune from first amendment scrutiny.

One of the plaintiffs, New York conductor Richard Kapp, found that the URAA pushed costs for sheet music of composers like Stravinsky, Shostakovich and Prokofiev from less than $US100 to $US1000. These costs were only for renting, so thousands of dollars were due to the copyright owner each time orchestras wished to perform the music.

Small community music and arts groups were dramatically affected by this law and, equally, were not in a position to sue large companies.

On 8 October, the US Supreme Court heard argument in *Eldred v. Ashcroft* and its decision is expected before Easter 2003.

The constitutional arguments are not applicable in Australian law, but our lawmakers have already considered and rejected an extension of copyright terms.

This is why *Gone with the Wind*, *Mein Kampf* and the major works of Orwell, including *1984*, are all available electronically at the website of Project Gutenberg of Australia, http://www.gutenberg.net.au but not at the parent Project Gutenberg, the oldest electronic book site on the internet (it began in 1971).

However the importance of these US laws is that they will influence future international agreements and trade. The decision of the United States Supreme Court is, therefore, of considerable interest to us.

The crosscurrents of political pressure, legal argument, the clash of private and public interests, the perversion of the fundamental intention of a law designed to reward and encourage creation and the strong personalities involved provide plenty of lines for a movie. But it probably won't be made by Disney. ■