Facing the music:
The restoration of copyright

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In 2003, the United States Supreme Court held by a majority of seven to two in *Eldred v Ashcroft* [(2003) 123 S. Ct. 769] that the *Sonny Bono Copyright Term Extension Act* 1998 (US) was a constitutional exercise of congressional legislative power. First of all, it held that extension of the copyright term of copyright protection did not exceed the constitutional power of 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'. Second, it established that the exclusive rights granted by copyright law were compatible with the freedom of speech guaranteed by the First Amendment.

Nonetheless, there remains much lively debate over the impact of the *Sonny Bono Copyright Term Extension Act* 1998 (US) upon public welfare. As Parker Bagley and Renee Sekino comment:

> *Despite the Supreme Court's decision, the issue of copyright term extension is still a lively topic of debate, and not just within legal circles. Because of the internet and its direct involvement in the outcome of Eldred, the decision has touched the public consciousness more intimately than most intellectual property cases. Although the Eldred opinion was clear in its constitutional analysis of the* Copyright Term Extension Act, *it was noticeably silent on how the statute affects the public welfare. Thus, the Supreme Court has left the question of whether the* Copyright Term Extension Act *serves the interests of the public to be determined in the aftermath of Eldred. [Parker Bagley and Renee Sekino. 'Supreme Court sides with copyright holders in* Eldred v Ashcroft*', Entertainment Industry Litigation Reporter, 25 November 2003, Volume 15 (10).]*

Indeed, there remain a number of legal challenges on foot against the legality of the *Sonny Bono Copyright Term Extension Act* 1998 (US). The case of *Golan v Ashcroft* [(2004) No. 01-B-1854] has just been recently heard in the United States District Court of Colorado.

In this case, the conductor Lawrence Golan and other artists launched a constitutional challenge against the validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Uruguay Round Agreements Act* 1994 (US). The plaintiffs maintained that the *Sonny Bono Copyright Term Extension Act* 1998 (US) was unconstitutional because it violated the requirement that copyright be for 'limited times' under the Copyright Clause. They also argued that section 514 of the *Uruguay Round Agreements Act* 1994 (US) was unconstitutional because the restoration of copyright works does not promote progress as required by the Copyright Clause, abridges speech in violation of the First Amendment and violates due process by depriving the public of the free availability of public domain works.

Lawrence Golan is the director of Orchestral Studies, conductor, and Professor of Conducting at the University of Denver's Lamont School of Music. He has been forced by copyright law to avoid even considering for public performance whole classes of orchestral works from great American and foreign composers, including George Gershwin, Aaron Copland, Prokofiev, Dimitri Shostakovich, Igor Stravinsky, Jean Sibelius, and Maurice Ravel. The plaintiff Richard Kapp is the founder and conductor of the chamber orchestra Philharmonia Virtuosi, which performs at the Metropolitan Museum of Art in New York. He is also in charge of the recording label, ESSAY Recordings. The conductor claims that the copyright term extension and restoration will harm his capacity to perform and record works of classical music. The Symphony of the Canyons is a small, not-for-profit community orchestra that performs in Utah. The organisation cannot afford to pay for renting or performing a large amount of copyrighted music because of the rental fees. Plaintiffs Ron Hall and John McDonough are film lovers who preserve and distribute old movies and shows. They can no longer afford to preserve these old films, which may be soon be lost forever due to the decomposition of the film.

The plaintiffs are represented by Elizabeth Rader and Lawrence Lessig from Stanford Law School, Jonathan Zittrain and Charles Nesson of Harvard Law School, Edward Lee of Ohio State University, along with the Denver law firm of Wheeler Trigg & Kennedy. The lawyers comment upon the sweeping effect of the *Uruguay Round Agreements Act* 1994 (US) upon the public domain: 'Section 514 has resulted in the removal of thousands, if not millions of works, from the public domain'. They provide ample illustrations of the songs, motion pictures, paintings, books, literary works and photographs affected by the restoration:

> *The works claimed from the public domain for copyright restoration include, for example, several hundred paintings of Picasso; the collection of works by JRR Tolkien including* The Hobbit, The Fellowship of the Ring, The Two Towers, and The Return of the King; *Virginia Woolf's* A room of one's own; *several books by HG Wells; numerous educational and literary books including* Dante, George Orwell, Jane Austen Practising, Joseph Conrad, Robinson Crusoe, *and* The Wasteland; *hundreds of songs and sheet music, including such favorites by the Russian composer Serge Prokofiev as* Six Pieces from Cinderella, Romeo and Juliet, *and* Three Children's Songs for Piano; *a collection of photographs of the Beatles; and still photographs from the Japanese film* Godzilla. *These are just a few of the thousands of works claimed for copyright restoration.*

Moreover, the lawyers stress that the *Sonny Bono Copyright Term Extension Act* 1998 (US) has similarly harmful effects in preventing the natural progression of works into the public domain for a twenty year period. They observe: 'This radical depletion of the public domain severely harms not just Plaintiffs, but the very foundation of our democratic society. The wide availability of works envisaged by the Copyright Clause depends on the ability of authors, musicians, performers, and other artists to use freely works in the public domain for both the creation of new works and the further dissemination of the public domain works'.

In March 2004, Justice Lewis Babcock of the United States District Court of Colorado considered the motion from the United States Attorney General John Ashcroft to dismiss the action. His Honour considered the arguments of the plaintiffs that the framers of the Constitution would have viewed extension of the copyright term to the life of the author plus seventy years as 'effectively or virtually perpetual' in light of economic realities. Justice Babock held that the Supreme Court of the United States had effectively dealt with such issues:

> *The Supreme Court in* Eldred v Ashcroft *held that the extension of the copyright term in the* Copyright Term Extension Act *was constitutional, in that it was not effectively or virtually perpetual, despite the fact that the Petitioners did not directly challenge the time-span provided for in the* Copyright Term Extension Act. *Consequently I conclude that the Plaintiff's legal arguments challenging to the time limitation in the* Copyright Term Extension Act *is foreclosed by the Eldred decision and, as such, Plaintiffs have asserted a legal theory not cognizable as a matter of law.*

His Honour agreed with the Attorney-General that the claim relating to the *Sonny*

Bono Copyright Term Extension Act 1998 (US) was foreclosed by the decision in *Eldred* v *Ashcroft*:

Nonetheless, Justice Babock held that the constitutional challenge to section 514 of the *Uruguay Round Agreements Act* 1994 (US) could proceed. His Honour held: 'Plaintiffs claim that section 514 of the *Uruguay Round Agreements Act* violates the Copyright and Patent Clause because Congress cannot pass a copyright law that removes works from the public domain, is not legally foreclosed'. Justice Babock also accepted that the restoration of copyright raised different issues about freedom of speech from the extension of copyright: 'Plaintiffs assert, however, that section 514 of the *Uruguay Round Agreements Act*, alters the traditional contours of copyright protection — in that it modifies the basic principle that works in the public domain are not copyrightable, and it alters the first sales doctrine — and thus, First Amendment scrutiny is appropriate under Eldred'. His Honour also accepted that the plaintiffs could raise arguments about the substantive due process of retroactive legislation: 'Plaintiffs assert that their right to due process under the Fifth Amendment has been violated because section 514 of the *Uruguay Round Agreements Act* violates the Copyright and Patent Clause because Congress cannot pass a copyright law that removes works from the public domain, is not legally foreclosed'.

The prospects of the legal action taken by Lawrence Golan against section 514 of the *Uruguay Round Agreements Act* 1994 (US) are good.

The conductor has a strong argument that the retroactive nature of the legislation is contrary to the findings of previous United States Supreme Court precedents. Nonetheless, the United States Government could make a decent case that section 514 of the *Uruguay Round Agreements Act* 1994 (US) was justified by the need for compliance with its obligations under the Berne Convention and the TRIPS Agreement.

As part of the free trade agreement with the United States, the Australian Federal Government has agreed to a prospective extension of the copyright term from life of the author plus fifty years to life of the author plus seventy years. Understandably, the Government was nervous about implementing a retrospective extension of the copyright term. Therefore, there was no restoration of copyright, for material which had already fallen into the public domain.

Nonetheless, the plight of Lawrence Golan will no doubt have some resonance for conductors, performers, musicians, and orchestras in Australia. Leader and artistic director of the Australian Chamber Orchestra, Richard Tognetti, has told of an altercation with the son of Hungarian composer Bela Bartok, Peter, who prevented the orchestra from performing an arrangement of his Fourth String Quartet:

> *I'm very, very frustrated that I'll be old by the time I can play it in the States and Europe. I'm upset because I do believe that we have done his father's music justice and the composer had begun an arrangement himself, planning to call it Symphony for Strings. This estate is getting in the way of performances of the music. Bartok's music isn't as widely known as it ought to be and, furthermore, this serves to expand the very limited string orchestra repertoire. [Sue Williams. 'Family pain', Australian Financial Review, 6 November 2003, p28.]*

Richard Tognetti comments: 'It's an interesting concept that estates are not about ensuring quality performances, but rather about maintaining the artist's original form'. [Sue Williams. 'Family pain', *Australian Financial Review*, 6 November 2003, p28.] He concludes 'I am a strong believer in allowing works in all art forms to evolve unencumbered by such prosaic institutions as estates. The legacies of Shakespeare, Mozart or Renoir have not suffered from a lack of estates.' Unfortunately, artists such as Richard Tognetti will face greater burdens from copyright estates because of the prospective extension of the copyright term in Australia. ■