Legally Speaking -- I got you babe!

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Questions & Answers
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QUESTION: The library wants to send out some long, long overdue reminders, let borrowers know that the maximum fine is only $2.00 per item, and encourage them to return the books. In order to catch their attention and set the tone, the library would like to use Shel Silverstein's "OVERDUES" poem (with its cartoon illustration) from A LIGHT IN THE ATTIC. Shel Silverstein is deceased, so the 1981 copyright must have transferred to someone else. Does the library write the publisher? Can it give permission? Or will the publisher just provide the name and address of the copyright holder?

ANSWER: The estate of Silverstein will own the copyright if he still owned it at the time of his death; thus, the copyright may be owned by his spouse, children, other heirs or someone else entirely to whom he bequeathed the copyright.

Or, prior to his death and even at the time of publication, he may have transferred the copyright to the publisher. In either event, it is much easier to contact the publisher for permission than to try to locate heirs. Publishers know if they hold the rights while heirs often do not know. And if the publisher does not own the copyright, it may be able to help locate the heirs.

QUESTION: Why is it okay for people to use quotes from others in their signature lines in email? Is it because it is brief, and not a full representation of someone's work?

ANSWER: Whether it is "okay" to use a quote in a signature line may depend on more than copyright law. For example, there may be institutional or company policies that prohibit attaching quotations to an email signature. Additionally, the user of a quotation should cite the source so there is no plagiarism problem.

For copyright purposes, short phrases, etc., are not copyrightable. Usually, however, a quotation comes from a longer work. If the work is in the public domain, using the quotation is no problem, of course. If it comes from a copyrighted work, one would apply the four fair use factors to determine whether using the quotation is permissible; the third factor, amount and substantiality used, is the most critical. So, a sentence quotation from a longer work likely is fair use. A one sentence quotation from a four line Halliwell may not be fair use.

Legally Speaking — I got you babe!
The Sonny Bono Copyright Term Extension Act & Eldred v. Ashcroft

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"Babe! I got you babe! I got you babe! I got you babe!"

What was Sonny Bono's greatest legacy? Was it his songwriting for Phil Spector and Lester Siegel, his hit "The Beat Goes On," his dynamic work with Cher, or his solo acting career? The answer is "None of the Above." Sonny Bono's greatest legacy is the way in which his name is forever linked with copyright law.

On October 7, 1998, the "Sonny Bono Copyright Term Extension Act" (also known as the "Copyright Term Extension Act", or CTEA) was passed by the House and Senate, and subsequently signed into law by President Clinton. This statute extends the term of copyright protection for all materials by 20 years. This statute is currently the subject of a Constitutional challenge in the U.S. Supreme Court.

Background of the Statute
Copyright law in the United States is based on Article I, Section 8, Clause 8, of the Constitution, also known as the "Copyright Clause." This portion of the Constitution states: "The Congress shall have Power ... 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 allowed works to be protected for 14 years, with the option of extending for another 14 years. The 1909 Act made the term 28 years. Since 1960, the copyright term has been extended 11 times. When the 1976 Copyright Act was passed, new copyright were granted for the life of the author plus 50 years, while works that were registered before 1978 (when the 1976 Copyright Act became effective) would be protected for 75 years.

By 1993, however, the music and entertainment industry began to press for longer terms and more protection for the content owners. The intense lobbying resulted in the 1998 passage of the Digital Millennium Copyright Act and the CTEA, as well as the ratification of the World Intellectual Property Organization treaty (WIPO). WIPO is a specialized agency of the United Nations which deals with intellectual property. The creation of WIPO had been one of the basic goals of the Clinton administration, and on October 21, 1998, the United States became the first nation to ratify the treaty. The passage of the Sonny Bono Copyright Extension Act and the Digital Millennium Copyright Act made possible the complete implementation of the WIPO treaties.

The Copyright Term Extension Act added an additional 20 years to the life of all copyrights, including those that were created before the Act was passed. After the new law was passed, copyrights created before 1978 are given a life of 95 years. Works created after 1978 are protected for the life of the author plus 70 years. Works for hire are also covered by copyright for 95 years.

The Eldred Challenge
The new law was challenged in the courts almost immediately after passage. Eric Eldred, the publisher of Eldritch Press, filed a lawsuit in the U.S. District Court for the District of Columbia. Eldred Press is a nonprofit publisher of Internet books and relies mostly on materials that are in the public domain. Eldred was assisted by students at the Berkman Center for Internet and Society at Harvard Law School.

Eldred claimed that "the new law is unconstitutional because . . . the U.S. Constitution . . . clearly states that the term for copyright be of 'limited times' . . . [T]he practice of continually extending copyright retroactively means that Congress, in effect, is granting copyright holders more than a limited term' . . . [This extension] limits access and therefore harms the public good . . . [The copyright term is] beyond any reasonable expectation of the life expectancy of an author, since few authors begin creating works until they are at least adolescents and since there are few, if any, authors who have lived to an age of 110 years." The District Court case gave no hint of the controversy that was to follow. The Justice Department opposed the lawsuit and asked for summary judgement on the grounds that the statute was based on a valid body of law. Some of the reasons that the Justice Department gave in support of continued on page 60
its motion are as follows:

- Need for Harmonization of Copyright Laws
- Providing Increased Resources To Stimulate Creation of New Works
- Preservation of Existing Works

The government's Motion for SummaryJudgement goes on to state: "Nothing in the Copyright Clause suggests that the Framers intended to impose some fixed, maximum period of years upon copyright protection. Indeed, to the contrary, the express language of the Copyright Clause, which authorizes Congress to provide protection for ‘limited times,’ makes clear that ‘the exclusive right shall exist but for a limited period, and that period shall be subject to the discretion of Congress.’"14

On October 27, 1999, Judge June L. Green disposed of the case by summaryjudgement for the government. According to the District Court opinion, “The Plaintiffs' first claim, that the CTEA violates the First Amendment, is not supported by relevant case law. The District of Columbia circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others. Therefore, the Court rejects Plaintiffs' First Amendment claim.”15 [Citations omitted] The court also found that "Congress has authority to enact retrospective laws under the copyright clause"16 and that “the retroactive extension of copyright protection does not violate the public trust doctrine.”17

Upon appeal to the Court of Appeals for the District of Columbia, a three-judge panel voted 2-1 to affirm the lower court decision that the case was without merit, holding that:

**CTEA is a proper exercise of the Congress's power under the Copyright Clause. ... Whatever wisdom or folly the plaintiffs may see in the particular “limited times” for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality. This is no less true when the Congress modifies the term of an existing copyright than when it sets the term initially, and the plaintiffs... do not dispute that the CTEA satisfies this standard of review.**

Although the majority of the judges voted to affirm the district court decision, the plaintiff did manage to convince one judge to write a dissenting opinion. **Judge David B. Sentelle** was concerned that “congressional power under the Commerce Clause... is subject to outer limits.”19 **Judge Sentelle** went on to write:

"It would seem to me apparent that this concept of ‘outer limits’ to enumerated powers applies not only to the Commerce Clause but to all the enumerated powers, including the Copyright Clause, which we consider today. ... I fear that the rationale offered by the government for the copyright extension, as accepted by the district court, is flawed because of the following reasons:"

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4. Naughton at 8.
10. CTEA.
16. District Court Opinion. This portion of the opinion is based on McClung v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).
17. District Court Opinion.
20. Court of Appeals Opinion at 28-29 (quoting Lopez at 556-57).

The copyright law professors include:

- Jessica Litman, Professor of Law at Wayne State University.
- Dennis Karjala, Professor of Law at Arizona State University.
- Laura N. Casonvoy, Director of the Law Library and Professor of Law at University of North Carolina.
- Keith Ackerman, Professor at the University of Oregon School of Law.
- Stephen R. Barnett, Professor of Law at the University of California at Berkeley.
- Ann Barlow, Assistant Professor of Law at the University of South Carolina School of Law.
- James Boyle, Professor of Law at Duke University.
- Dan L. Burk, Julius E. Davis Professor of Law at the University of Minnesota.
court and the majority, leads to such an unlimited view of the copyright power as the Supreme Court rejected with reference to the Commerce Clause. ...20

Judge Sentelle continued by stating that the Copyright Clause:

[E]mpowers the Congress to do one thing, and one thing only. That one thing 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 clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress. The means by which that power is to be exercised is certainly the granting of exclusive rights — not an elastic and open-ended use of that means, but only a securing for limited times. ... The Congress that can extend the protection of an existing work from 100 years to 120 years; can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly. This, in my view, exceeds the proper understanding of enumerated powers reflected in the [principle] of requiring some definable stopping point. ... The government has offered no tenable theory as to how retrospective extension can promote the useful arts ... [T]he means employed by Congress here are not the securing of the exclusive rights for a limited period, but rather are a different animal altogether: the extension of exclusivity previously secured. This is not within the means authorized by the Copyright Clause, and it is not constitutional.21

Disappointed by the ruling of the three-judge panel, Eldred requested a rehearing en banc by the entire Court of Appeals.22 This motion was denied on July 13, 2001.23 Eldred then filed a Petition for a Writ of Certiorari to the U.S. Supreme Court.24 On February 19, 2002, the Supreme Court announced that it would accept the case, and asked the parties to prepare briefs.25

In addition to the briefs filed by Eric Eldred and the Justice Department, several groups are filing amicus curiae briefs on Eldred's behalf. Groups that have filed or will file amicus briefs include:

- A joint brief filed by 21 copyright law professors26
- A joint brief from the Eagle Forum Education and Legal Defense Fund and the Cato Institute27
- A joint brief from the Progressive Intellectual Property Law Association and the Union for the Public Domain
- A brief from the College Art Association28
- A brief filed by the Internet Archive, a public non-profit organization formed to archive the Web and help build an “Internet Library”29

In working on their amicus brief, the library associations and the Society of American Archivists requested examples of ways in which the CTEA has had a negative impact on the scholarly community. These examples are necessary to show the Court the effects of the CTEA. The brief writers have requested that librarians, archivists, and historians provide them with specific examples of the following types of information:

- Titles of works that librarians or faculty members wanted that would have fallen into the public domain but are now covered by the additional extension, and
- Difficulties ... in obtaining permissions for older works and/or for those that are now covered by the 20-year extension; this could include difficulties in tracking owners or ownership information of older materials, expensive fees, and the like.31

Conclusion

In the last few years, the landscape of copyright law has changed considerably. The passage of the Sonny Bono Copyright Term Extension Act, or CTEA, has not only strengthened copyright terms, but also has brought together what had been in the public domain back under the protection of copyright law. This fall the U.S. Supreme Court will hear Eric Eldred's challenge to the CTEA. The real issue in this case is the intersection between copyright law and constitutional law, between First Amendment rights and intellectual property rights, and between the prerogatives of Congress and the “outer limits” of the enumerated powers in the Constitution. Copyright itself is always a matter of balancing competing interests. In Eldred v. Ashcroft, the Supreme Court itself will be doing the balancing. And whichever way the Court decides, copyright law will forever be linked with the name “Sonny Bono.”32

Legally Speaking Endnotes (continued)


32. "Request from ALA Washington Office," Posting of Linda Stith, blhedas@aal.org, to Kentucky Library Association Discussion List, <KLA-LIST@LSUVKYEUD>, Wed, 17 Apr 2002 08:29:31 EDT. (copy on file with author).