April 2003

Cases of Note -- Copyright -- Term Extension Passes Supreme Court

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Recommended Citation

Strauch, Bruce (2003) "Cases of Note -- Copyright -- Term Extension Passes Supreme Court," *Against the Grain*: Vol. 15: Iss. 2, Article 28.

DOI: <https://doi.org/10.7771/2380-176X.4038>

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other counter-offer. Until Largetown and Lake University both agree on the price and the terms, no contract has been formed.

Another important requirement for a contract is "consideration." Consideration consists of both parties giving up something that they are not required to give up, or doing something that they do not need to do. For example, Sally's agreement to pay \$35 constitutes consideration. Bob's agreement to give up his stereo constitutes consideration. In employment contracts, the organization agrees to pay money, and the employee agrees to perform work. These actions constitute consideration.

In order for a contract to be formed, there must be consideration on the part of both parties. This is why a mere promise is not enforceable as a contract. For example, suppose that Bob told Sally he would give her a stereo for her birthday. He does not ask for money from Sally. Since there is only consideration on one side, no contract has been formed. If Bob doesn't give Sally a stereo, she can't take him to court to obtain the stereo.

To illustrate the difference between entering negotiations and forming a contract, let's take a look at the following example. Let us assume that we have two libraries in adjacent communities, the Greentown Public Library and the Largetown Public Library. Both libraries decide to build new branches. Let us assume that the two towns have different bidding rules, so that Greentown is required to use an RFP and award contracts to the lowest bidder, while Largetown is allowed to enter into direct negotiations with any vendor on its pre-qualified list. (I am assuming that both libraries complied with all applicable rules and regulations, and that everything was done correctly.)

Greentown uses an RFP that specifies what type of work the library wants to have done and that details the requirements the library has for its new building. The lowest bidder is the XYZ Construction Corporation. One of the provisions in the XYZ bid specifies that even if the project is canceled for any reason whatsoever, Greentown will still have to pay 10% of the contract price. The director of the Greentown Public Library tells XYZ that the board will take 10 days to consider the document.

Largetown also wants to build a new branch, but it selects the contractor differently. Since Largetown has worked with XYZ Construction Corporation in the past, the library's leaders go directly to XYZ. They know exactly what they want and how much they want to spend, and so they create a document specifying that XYZ will build the branch within certain specifications, and for a particular price. The document specifies that even if the project is canceled for any reason whatsoever, Largetown will still have to pay 10% of the contract price. Largetown signs the document, and so does XYZ Corporation. Five days later, the state decides to cut the budget for local libraries. Both Greentown and Largetown are affected by the cuts, and are forced to cancel their branch-building projects. XYZ sues both Greentown and Largetown for 10% of the contract price, despite the fact that no work has been done and the contractor has spent no money. Who wins?

Because the two libraries used very different bidding procedures, the results would be very different. A "Request for Proposal" is exactly that—a request that the contractor enter into negotiations with the library. As such, the RFP does not constitute an offer that XYZ can accept. Instead, the proposal by XYZ was an offer that Greentown had not yet accepted. Therefore, there was no contract. Greentown would win, and XYZ would not be successful in its lawsuit.

Largetown, on the other hand, proposed that XYZ build a branch for a specific price. There were details as to the way in which the branch was to be constructed. Both the library and XYZ signed the document after it was presented to the contractor. The library made an offer to XYZ, and XYZ accepted its offer. As a result, a contract was formed. Therefore, XYZ will win its lawsuit, and the library will have to pay 10% of the construction fee as a penalty for not fulfilling the contract.

Conclusion

This article illustrates some of the requirements for the formation of contracts. There are several other issues that have not been covered, including the need for some contracts to be in writing if they are to be enforced. These issues will be the subject of a future article.

The formation of contracts is one of the most basic parts of our legal system, one that applies to every entity and every person. Yet we don't always think about the way we enter into or write a contract. In order to have a contract, there must be a "meeting of the minds." There must be an offer, followed by an acceptance. Once an offer is rejected, it can't be accepted later. A counter-offer constitutes both a rejection and a new offer. Without consideration by both parties, no contract has been formed. Both parties must give up something or do something that they are not required to do in order to create consideration. Contracts are truly the glue that holds society together; the "meeting of the minds" creates the tie that binds.

Endnotes

1. "Contracts." American Jurisprudence 2d at 24. According to *Words & Phrases*, "A 'contract' is the coming together of two minds on a thing done or to be done." [Quoting Charles R. Shepard, Inc. v. Clement Brothers Co., 177 F. Supp. 288, 290 (D.C.N.C.).] A contract is "a deliberate engagement between competent parties to do or to abstain from doing some act." [Words & Phrases, "Contract," quoting Federal Surety Co. v. Pitts, 29 S.W.2d 1046, 119 Tex. 330 (S. Ct. Texas)]
2. Am Jur 2d at 24.
3. Am Jur 2d at 26, quoting Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 104 N.W.2d 661.
4. Morrow v. De Vitt, Tex. Civ. App., 160 S.W.2d 977, 983.
5. Cronin v. National Shawmut Bank, 27 N.E.2d 717, 721, 306 Mass. 302.
6. "Request for Proposal." Encyclopedia of Business 2nd Edition v. 2 pp. 1526-1528 (Detroit: Gale Group, 1999).

Cases of Note

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Copyright — Term Extension Passes Supreme Court

Eric Eldred, Et al., Petitioners v. John D. Ashcroft, Attorney General, 123 S.Ct. 769; 2003 U.S. Lexis 751 (2003).

Petitioners were not pleased with the **Copyright Term Extension Act (CTEA)** which in 1998 tacked on twenty years to both existing and future copyrights. Pub. L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302,304).

Petitioners had to concede that attacking the new life-plus-70 as going beyond "a limited

time" would be an exercise in illogic. "Whether 50 years is enough, or 70 years too much is not a judgment meet for this Court." Brief for Petitioners 14. n1.

Instead they attacked the extension of the existing copyrights.

Ruth Ginsburg's clerks, writing for the Court, led off with the usual boilerplate of the Patent Clause of the Constitution, Art. I, §8, cl. 8, with says re copyright: "Congress shall have Power ... to promote the Progress of Science ...

by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings."

Then cited the 14-year term of the first copyright statute of 1790 noting that it applied to both existing works and those not yet published. Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124 (1790 Act).

Then still in the same paragraph noted the 1831 extension to 42 years and the 1909 extension to 56 years each time applied to existing and future works.

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Yes, it was all over with in one paragraph although the Court took 26 more Lexis pages to wind up.

The 1976 Act altered the timeline from the date of publication of the prior acts to the date of the work's creation giving protection from that moment to 50 years after the author's death. This was done to get us aligned with the **Berne Convention for the Protection of Literary and Artistic Works**, a then-dominant international standard.

Anonymous, pseudonymous, and works for hire got 75 years from publication or 100 years from creation, whichever came first. 1976 Act § 302(c).

CTEA now harmonizes with the European Union with a term of 70 years after author's death. 17 U.S.C. § 302(a). And for those anonymous et al. works 95 years from publication or 100 years from creation whichever comes first. Id. § 302(c).

And your author will note with a bit of mis-giving there will in the future be an awful lot of "harmonizing" with the EU regulations — the demand for which is the power that France (Le EU c'est moi) sees as its counterweight to American frontier free-market crudité and the inability of primitives from Paris, Kentucky, to read a French menu.

So, when is 70 years a limited time?

Petitioners argued that a time once fixed became forever fixed or else it wouldn't be "limited."

Which is not illogical. Continuous expansion at the whim of Congress means there is no fixed period that can be relied upon by publishers who want to print things in the public domain.

The Court turned to dictionaries to cite identical meanings of "limited" in 1785 and 1976. "Confined within certain bounds." **S. Johnson**, *A Dictionary of the English Language* (7th ed. 1785); *Webster's Third New International Dictionary* 1312 (1976).

And dodging the logic bullet ...

"[A] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Congress has historically granted the extension to existing copyright holders from the very first Act. The English **Statute of Anne**, 1710, provided copyright protection to books already composed and published as well as those not yet published.

And in some more neat history, **Justice Stevens**, who dissented every step of the way, noted the **British Parliament** rejected an amendment to the **Statute of Anne** that would have extended existing copyrights out of fear of a monopoly by English booksellers. This, however, was unique to England as until 1695 the **Stationers' Company** — an ancient London guild of printers and booksellers — held a government sanctioned printing monopoly. **M. Rose**, *Authors and Owners: The Invention of Copyright* 4 (1993).

There was no parallel in the U.S. where competition among printers, booksellers and publishers was fierce. The framers protected against the remembered British situation by authorizing Congress to grant copyright only to authors.

But swinging around to address logic ...

"Justice, policy, and equity alike forbid [that an] author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." 7 Cong. Deb. 424 (1831); accord Symposium, *The Constitutionality of Copyright Term Extension*, 18 Cardozo Arts & Ent. L.J. 651, 694 (2000) (Prof. Miller).

Now, Rational Exercise of Legislature Authority, vel non?

I always wanted to say "vel non" in law class, but never had the nerve.

"It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... in order to give the public appropriate access to their work." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

That other dissenter, **Justice Breyer**, wanted a three-part test of constitutionality in copyright extension, and thank goodness the majority rejected that. Whatever you think of the result, the last thing we need is another of those infernal three prong deals.

Congress is in the business of making judgments like this and was concerned that disharmony with the EU would leave us out in the cold. Europe was taking life plus 70 for its authors, and if we didn't grant the same our authors wouldn't get it for our copyrights in the EU.

The Court cited **Perlutter**, Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts, 36 Loyola (LA) L. Rev. 323, 330 (2002) saying: "Matching the level of [copyright] protection in the United States [to that in the EU] can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-a-vis foreign rightholders."

Which of course we can read as protecting Euro Disney's right to Mickey Mouse because Steamboat Willy was about to drop into the public domain with a resounding KER-SPLASH that would ripple through the entire Disney Brand.

The Songwriters Guild, not wishing to be bound by the "limited times" of that silly old in-the-way Constitution, wanted **perpetual copyright(!)** after all. But leaving that debate aside, Congress just went along with Europe.

If they stuck their head in an oven would we ...?

Really Transparent Justifications for Shameless Pandering to Special Interests

Congress also noted increased longevity and the tendency of parents to have kids later in life. Authors would be encouraged to write more if they thought their children could be rewarded during the kids' lifetime. 141 Cong. Rec. 6553 (1995).

Does this statistically hold true among writers and artists or just among yuppie power

couples? Sure Britney Spears still claims she's a virgin at age 21, but Kurt Cobain had his kid pretty early. And anyhow, no one suggested a sliding scale of copyright term based on when artists had their kids. And, of course, no one would ever suggest rock stars quit paying to stuff cocaine up their noses and put the money in a trust fund.

Congress also cited a greatly increased commercial life of copyrighted works due to the explosion in media technology.

By which Congress seems to be Freudian slipping into an admission that copyright should last as long as a work is exploitable by the moguls who slipped them the campaign bucks. Which means around 2018 you can look for another extension.

With some wisdom, **Justice Breyer** said he couldn't figure how this would motivate artists. But the Court said Congress makes up its own mind. And anyhow Congress had heard from a whole roster of "artists" on the motivation subject: **Quincy Jones**, **Bob Dylan**, **Carlos Santana**, and **Don "The Eagles" Henley**.

Which strikes me as about as useful as asking Sonny Bono via ouija board if copyright extension would have made him feel more secure about Chastity's future and held his marriage together with Cher.

And the critics of the extension are really peeved that these hearings were done in stealth long before the opponents of CTEA knew what was coming down the pike.

And Congress brought in the Register of Copyrights, **Marybeth Peters**, to say authors needed additional income to live on while creating new works. The Court agreed with this, noting that **Noah Webster** and his family lived off the earnings of his speller and grammar while he was laboring twenty years over a dictionary.

Am I missing something here? Noah was alive. Under the modern rule of life-plus, copyright extension would have had no effect on his speller income.

Petitioners said Congress could just keep on extending copyright until it became unlimited or perpetual. The majority said this extension did not "cross a constitutionally significant threshold," but of course they weren't about to explain what that means. But the gist is Congress isn't doing this every week so it's not moving toward a perpetual copyright.

At least too rapidly.

Some Really Weak Arguments By Petitioners

Petitioners utterly fell apart here. They led off by arguing copyright extension doesn't take originality into consideration and cited *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991). This got disposed of in a hurry. *Feist* requires originality but has nothing whatsoever to do with length of protection.

Yes, I'm scratching my head over that one too.

Then they said extending the term doesn't "promote the Progress of Science" by stimulating new works, but merely adds value to exist-

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ing work. And the sole objective Congress is allowed to have is stimulating new works. The Court answered that Congress in creating a copyright "system" is promoting science.

Then they argued there was a quid pro quo imbedded in copyright law. Congress could grant exclusive rights but only in exchange for art. There must be an exchange. So Congress can't give more time without something in return from the artist.

Had I been sitting on the bench that day, I would have cutely queried okay, how about if Congress legislated that the artist give a peppercorn? But the Court did not treat it quite so dismissively as Justice Strauch would have.

The Court said okay there was a "this for that" element in copyright law. But given the history of past extensions, any artist reasonably assumes that creation of a work will receive in exchange a term of protection plus any addition to the term that Congress chooses to grant.

In n21 the Court observes that when artists assign all rights to big music companies the standard contract reads "including without limitation, copyrights and renewals and/or extensions thereof." 5 M. Nimmer & D. Nimmer, *Copyright* § 21.11[B], p. 21-305 (2002).

Then they said CTEA needs strict scrutiny review as a First Amendment issue. The Court said copyright and free speech were adopted real close together time-wise. The Framers must have figured limited monopolies wouldn't bother free speech too much.

"The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558.

Further, free speech is protected under copyright law by the idea/expression dichotomy that keeps facts in the public domain and by the fair use defense. 17 U.S.C. §§ 102 (b) and 107.

Title II of CTEA, Fairness in Music Licensing Act of 1998, added to this by allowing restaurants and small businesses to play radio music without paying performance royalties. 17 U.S.C. § 110(5)(B).

Restaurants and bars lobbied heavily, of course. And kicked in campaign contributions.

CTEA also allows libraries and archives to reproduce copies of published books "during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research" provided someone isn't at that time exploiting the thing commercially and the library can't get copies at a "reasonable price." 17 U.S.C. § 108(h).

Which sounds like a big mess. But it was a crumb from the table that libraries got. And proof that the library lobby is utterly useless.

A Final Stab at Logic

Perhaps Petitioners too easily gave up the notion of 70 versus 50 being "meet" for the Court.

With an unlimited collection, no matter how far you go, a mathematician would always find one more member. So it is not limited. This is the basic notion of infinity. Counting numbers — integers — are typical examples of an infinite set. You can get to a zillion and still go one more.

The Induction Principle says if you have some starting value and then have a mechanism by which from any one value you can produce the next value, then the process goes to infinity.

By misusing the Induction Principle you can do a lot of illogical reasoning such as showing all men are bald.

Questions & Answers — Copyright Column

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QUESTION: *When shareware or freeware has been downloaded from the Internet, is it copyright infringement to "beam it" to a colleague's Palm Pilot?*

ANSWER: There is a difference between shareware and freeware which is pretty important in this instance. Freeware generally means that it is free of charge and free of restrictions on the use of the software. Therefore, duplicating it by sending a copy to someone's Palm Pilot would not be infringement. There is a possibility, however, that there are restrictions included in some click-on license agreement that accompanied the software on the Web. Further, the terms "freeware" and "software" are often used interchangeably even though there is a difference.

Traditionally, shareware means that the software is protected by copyright but that the copyright owner makes it available for you to examine. If you decide to use the software, then you are supposed to pay for the copy. Sending a copy of this software to someone violates the copyright holder's reproduction right. The most important thing, however, is to pay attention to any online license when you download the software.

QUESTION: *When filling an interlibrary loan request, what information regarding copyright does the lending library need to include?*

Well, that's not true, Strauch, you're saying. Okay, if a man has zero hairs on his head would he be bald? Of course. Then if he had one hair would he be bald? Yes. How about three?

The fallacy is in applying the technical mathematical principle of well defined sets to something not well defined like baldness.

Now let's go to copyright. The purpose is to encourage creativity. The exact criterion of what encourages an artist is not defined. It's just accepted as a good thing.

Would one year's protection encourage him? Yes, it would. How about two years? Yes, that too.

By adding each additional year, he is equally encouraged, so it could go on infinitely. At least until his death when he can no longer be encouraged.

No, I didn't really write this bit. It was dictated by Steve Comer, Ph.D., member of the Citadel's Math Brain Trust. And I probably garbled it. I have no left brain.

ANSWER: Under section 108 of the Copyright Act, every copy reproduced, under any of the subsections, must include the notice of copyright contained on the work as detailed in section 108(a)(3). This provision was amended by the Digital Millennium Copyright Act to add language about what a library does when the work being reproduced does not contain the notice of copyright.

QUESTION: *What are the pros and cons of a blanket license from the Copyright Clearance Center for a non-educational but non-profit organization?*

ANSWER: The benefits of a CCC blanket license is that all in-house copying from library materials covered under the license is protected. It eliminates the necessity of keeping records for per-transaction copying on which royalties are due. Another benefit is that tables of contents services, where the library reproduces copies of the tables of contents from publications and distributes them within the organization, are exempted. The organization no longer has to seek permission from individual copyright holders. The only negative is that the library may not then rely on fair use for copying since a percentage of fair use copying is already included in the license.

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