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The Dread of *Eldred v. Ashcroft*: Moving Image Archive's Copyright Nightmare

Copyright legislation and adjudication revolving around intellectual property are extremely intricate and complicated topics to research. The cause and effect of a specific case, a specific law or a specific clause in a law, are hard to trace. Each one is derived from the other, or dependent on a certain part of the other. The links between these various aspects creates a chain of copyright history. In the Supreme Court Case *Eric Eldred, et al. v. John Ashcroft, Attorney General* the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) was challenged. The oral argument was heard on October 9, 2002, yet there were many issues regarding copyright law dating from as far back as 1790 that were intertwined with this case and its outcome. Despite the fact that the Court held the Sonny Bono Copyright Term Extension Act as constitutional in a vote of 7-2, there were numerous implications that spread throughout society from this clearly stated decision. The consequences are especially dire when dealing with the moving image archiving community; by studying this historical instance of copyright dynamics, a plan for the future of moving image archives and their copyright-entrenched holdings can be obtained.

In light of all this, the background of the Copyright Act of 1976 is extremely important in order to understand *Eldred v. Ashcroft*. This act disregarded the requirement to renew a work's copyright after a short fixed term (Patry, 1640). It also extended the copyright term of a work until fifty years after the author's death, as opposed to the initial 14-year term with the option of a 14-year renewal. Previous to the Act's inception, copyright was an "opt-in system" where the owner of the copyright would need to publish the work with proper notice of copyright, telling very specifically who the owner of the copyright was and what the date of the copyright term's beginning was. If the owner of the copyright decided not to renew the work (or forgot about it), then the work would fall into the public domain. Being in the public domain would mean that any person could copy, publish, and redistribute the work to their heart's desire and no copyright would be infringed. After the Copyright Act of 1976, this was no longer the case. Copyright instead began not when it was officially published and registered by the owner, but at the onset of

creation. There was no longer the need for an owner of a copyright of a work to register their work, so it became increasingly hard to determine the copyright status of works. Onset of creation is never as clearly documented as a published and stated date.

The rights of translations and dramatizations of works were also changed. With the Copyright Act of 1976, these now fell under the broad category of the right of “derivative works”. Derivative works do include translations and dramatizations, but now also included other adaptations of a work. Previously a copyright owner could only control the performances of their work that were performed for commercial gain. In 1976, copyright owners were also granted the right to control any and all performances of their works. Thus, the Copyright Act of 1976 dramatically increased the scope of copyright law. It gave more control to the creator of a work, and it allowed more types of works to be copyrighted. In 1990 a test was compiled by Judge Pierre Leval, who serves on the US Court of Appeals 2nd Circuit, in order to determine whether or not a work was a derivative or transformative work. The Supreme Court used this test when deciding the case *Campbell v. Acuff-Rose Music* in 1994. On a very basic level the test made clear that republication of a work was not protected from a copyright owner’s rights, but that any use that added value to the original work was creative and therefore would be protected (Tushnet, 550). The case specifically concerned a commercial parody of Roy Orbison’s “Pretty Woman” (Acuff-Rose Music) by the rap group 2 Live Crew (Campbell). By following Leval’s test, the Supreme Court found that it was indeed a derivative work and therefore fell under the Fair Use category.

The Fair Use Doctrine was also instituted in Section 107 of the Copyright Law in the Copyright Act of 1976 (Tushnet, 542, 544). Fair Use was instigated in order to balance the newly increased power of copyright holders. Purely copying a full copyrighted work is less protected in Fair Use than are the derivative works and the works of criticism, which can be extremely problematic in the moving image archival profession. In order to preserve films for the future, an archive must make multiple copies of the original work. Many believe that Fair Use would not protect archives from a charge of infringement when making full copies of a work for preservation and study. Basically the Copyright Act of 1976 describes Fair Use as a non-infringing use of a copyrighted work. It names certain stipulations for the use: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (Tushnet, 544).

To help courts to determine whether a situation is Fair Use or not, there are four guidelines:

1. Is the use commercial or non-commercial (Fair use leans towards non-commercial)?
2. What type of a work is it- published, unpublished, fact, or fiction (Fair use leans towards unpublished, fictional works)?
3. How much of the work was actually used (Fair use is typically a portion of the work)?
4. Does this use affect the market for the copyright holder (either negatively or positively)?

(Patry, 1644)

Once these factors are considered, the court should be able to reasonably decide whether or not something infringed on an owner's copyright.

Fair Use was introduced in order to protect an individual's First Amendment Rights to freedom of speech. The First Amendment was created to prevent the government from controlling and stifling freedom of speech. It was made in order to encourage public discussion regarding government, society, and culture. The freedom of speech guaranteed not just the people's right to choose the government, but also the people's right to live democratically every day. Copyright law was made to protect and economically encourage the creators of a work that relies on the rights protected by the First Amendment to safely create without fear of censorship (Tushnet, 539). Yet Fair Use does not protect a moving image archive's decision to copy for preservation work. According to Fair Use, any filmmaker may make a derivative work of an old MGM musical, but an archive may not take that same musical and copy it multiple times in order to show future researchers and the general public. Why not? What part of Fair Use prevents that? Isn't preservation scholarship of a sort?

The background of the Sonny Bono Copyright Term Extension Act (CTEA) is also important to the understanding of the *Eldred v. Ashcroft* case. The CTEA stopped certain works from entering into the public domain in 1998 by adding twenty years to copyright terms. At the time of this act, the earliest that a work made after 1923 could fall into the public domain would be the year of 2018. The latest possible year that one of these works could fall in to the public domain is 2072 (Tushnet, 547). Due to the CTEA, the current copyright term for works that were created after December 31st, 1977 is 70 years after the creator's death. If the copyright owner is a corporation or other organization, the term is either 95 years from the date of initial publication, or 120 years from the date of initial creation—whichever of these comes sooner being the date that the work falls into the public domain (Patry, 1640).

Congresswoman Mary Bono, the widow of musical artist turned Congressman Sonny Bono, spearheaded the Sonny Bono Copyright Term Extension Act. When she spoke to Congress about the CTEA, Mary mentioned, “Sonny wanted the term of copyright protection to last forever”. While discussing the unconstitutionality of this proposal, she also offered the suggestion of extending the copyright term to “forever less one day”

(http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=1998_record&position=all&page=H9952).

This proposal would have been a detrimental blow to many moving image archiving institutions.

Interestingly enough, the CTEA was also known as the “Mickey Mouse Protection Act” as it received much support from the Walt Disney Company. While Sonny Bono and Walt Disney would be protected by these acts, many orphaned and lesser known and lesser commercially backed moving images would be lost.

Why is that? I think you need to expand here because I don’t intuitively understand why.

Eric Eldred was an Internet publisher of literary works in the public domain. His company, Eldritch Press began in 1995 and his website offered the literary versions to the public for free, and offered a forum in which scholars across the globe could discuss the works and even offer their own derivative works. Needless to say the CTEA threw a wrench in his professional plans, and the plans of many other people and companies. So Eldred and some of his supporters challenged the CTEA. He based his argument on the premise that the CTEA violated the “limited times” part of Article 1, Section 8, Clause 8 of the United States Constitution (also known as the Copyright Clause), and that it also violated the First Amendment (Tushnet, 547). In order to make their beliefs well-known the Berkman Center for Internet and Society’s website states that “Eric Eldred and we at the Berkman Center think the Sonny Bono Act robs the American public of the rich and diverse public domain guaranteed by the Constitution”

(<http://cyber.law.harvard.edu/openlaw/eldredvreno/>).

Eldred also co-founded and served on the board of the Creative Commons, a nonprofit company that provides free legal tools to promote the sharing and reusing of creative works. Those who supported him in the case used works in the public domain for commercial and non-commercial purposes. Some examples of these supporters were as follows: a commercial publisher of paperback books, publishers of orchestral sheet music, the American Association of Law Libraries and the College Art Association (Patry, 1641).

The group explained in their opening brief in *Eldred v. Ashcroft* that the CTEA's agenda to eliminate copyright renewal requirement while extending the copyright term time limit would severely deplete the public domain. They brought it to the court's attention that between 1923 and 1942, 3.5 million works were registered and that these works are being blocked from entering the public domain in order to protect the 77,000 works that they found during this time period that are "surviving works", or works that were considered important enough to be renewed by the copyright owner (Patry, 1640). The math, they stated, did not make sense. Eldred and supporters applied the *Turner Broadcasting System v. FCC* case to their argument. This decision required cable systems to carry a specific number of the local broadcast channels in order to preserve free broadcast channels that might never be seen if huge conglomerate cable systems chose to not carry them (Tushnet, 563). Eldred reckoned the free broadcast channels with himself and his associates, while the defendants were analogous to the cable systems. The key element in that case was that the government stepped in and required public access to information that was on its way to being swallowed by monopolies.

Also the supporters of Eldred asserted numerous issues they all would face in their professions due to the CTEA. Dover Publications had to put their plans on hold for twenty more years to publish specific books from the 1920's and 1930's they had intended to distribute (Patry, 1041). Also the Belgrave House publishing company was mentioned in order to show how certain books may be lost in the shuffle of the CTEA: the company's specialization was making e-books available to the public for fictional popular books that have since gone out of print and would otherwise be extremely difficult to obtain.

Moviestream, Inc. is the best example of how the CTEA affected the moving image archiving profession. This commercial company collects rare 16mm and 35mm films from the public domain, transfers it to VHS, and then sells the packaged copies to the public. The brief explained that Moviestream has many nitrate and acetate films that are rapidly decaying, which they are able to take the time and money to preserve once they fall into the public domain and rights issues no longer need to be negotiated and paid. With the passing of the CTEA, many of the films that they had planned for preservation were not going to be able to be preserved due to extension of their copyright term for another twenty years. Many of these films did not have twenty years of "life" left before they would deteriorate past the point of no return. Rick Prelinger and Brewster Kahle represented the Internet Archive, which offers an archive of moving images for entertainment and scholarly research, brought up other moving image issues. Some of

the images they use are in the public domain, but many of them are orphaned—no title, creator or owner being known for them. There is no way for the Internet Archive to reasonably find the copyright owner(s) of these orphaned films (Patry, 1641, 1642). They expressed that just because they cannot find the copyright owner, if there even is one, they do not wish to overlook and then lose the potentially copyright-problematic material.

The opposing argument was brought forth by the United States Government, which was represented by the Attorney General John Ashcroft (in the beginning the Attorney General was Janet Reno). Ashcroft was joined by a set of amici curiae (“friends of the court”) that included such companies with vested interests as the Motion Picture Association of America, the Recording Industry Association of America, American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Incorporated (BMI). The Motion Picture Associate of America is an organization representing the interests of major movie studios, while the Record Industry Association of America represents the major recording industry labels. ASCAP and BMI are the two major performance rights organizations for musical artists in the United States.

Eldred filed his complaint on January 11, 1999 in the US District Court for the District of Columbia. After the District Court rejected the arguments, the group filed an appeal to the Court of Appeals in 2000—the Court of Appeals upheld the District Court’s decision. So next, Eldred filed a petition for a writ of certiorari from the Supreme Court. The argument was heard on October 9, 2002 and was decided on January 15, 2003, almost four years to the day from the initial complaint. The counsel for the plaintiff Eldred was Lawrence Lessig, another founder and board member of the Creative Commons with Eldred. Solicitor General Theodore Olson argued the case for the US government. The Court membership consisted of Chief Justice William Rehnquist and Associate Justices John P. Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. The Supreme Court held that the 20-year retroactive extension of existing copyright terms did not violate the Copyright Clause or the First Amendment of the United States Constitution.

Justice Ginsburg wrote the majority opinion of the Court. The opinion gave a brief synopsis of United States copyright history, relying on previous copyright laws and term extensions from 1790 with the first copyright statute, to the present issue of the CTEA. Two other Supreme Court decisions were referenced: *United States v. Lopez* and *United States v. Morrison*. An interesting fact was brought up by

the Court that life expectancy had risen since the 1700's, so common sense dictates that therefore copyright terms should also be extended (<http://www.copyright.gov/docs/eldrdedo.pdf>). The major factor was that the Constitution only specified that a term limit be given—an actual numerical time limit was never provided. Thus Congress could make the copyright term limit 1,000 years and it would still be constitutional.

Justice Stevens wrote a dissent to the Court's decision. He cites the warnings of US founders such as Madison and Jefferson to avoid the dangers of monopolies. Justice Stevens compares copyright terms to a patent monopoly. As neither State nor Congress has the right to extend the life of a patent, then they also should not be able to extend the term of copyright and that the CTEA is invalid (<http://www.copyright.gov/docs/eldredd.pdf>). The second dissent by Justice Breyer makes the additional point that the CTEA does not protect the actual creator and initial copyright holder if it has been 50 years after their death (<http://www.copyright.gov/docs/eldredd1.pdf>). He also argues that “the economic effect of this 20-year extension...is to make the copyright term not limited, but virtually perpetual.”

After the Court's decision, a rehearing of the case was denied in 2003. Despite the negative outcome of its legal actions, the Berkman Center's website contains a message of hope to its supporters: “This case...[is] just the beginning of a broader movement to reassert the public side of the copyright bargain” (<http://cyber.law.harvard.edu/openlaw/eldredvreno/>). The website also includes a link to another page of its site regarding the similar case of *Golan v. Ashcroft*, also known as *Golan v. Gonzales*. Lawrence Golan led the plaintiffs in this case, filing the complaint on September 19, 2001. This complaint challenged the constitutionality of Uruguay Round Agreements Act (URAA), which took thousands of public domain materials of foreign origin, including moving images, and reinstated their copyright status. Currently the Tenth Circuit of the Court of Appeals has held that the URAA must go through First Amendment scrutiny, and when the government petitioned the Tenth Circuit for a rehearing, the Tenth Circuit refused as of January 2008 (<http://cyberlaw.stanford.edu/system/files/Golan+v.+Gonzales.pdf>).

Another related case is *Kahle v. Ashcroft*, currently known as *Kahle v. Gonzales*. The plaintiffs, led by the Internet Archive's Brewster Kahle and Rick Prelinger, sought to challenge the change in copyright law from an opt-in system to an opt-out system. The Ninth Circuit Court of Appeals rejected the arguments in January of 2007, and then in January of 2008 the Supreme Court denied the plaintiffs' petition for writ of certiorari (<http://cyberlaw.stanford.edu/case/kahle-v-gonzales>). All of the mentioned

related cases prove that the issues brought up through *Eldred v. Ashcroft* are still being addressed, specifically through members of the moving image archival community.

The general response from moving image archivists to the decision in *Eldred v. Ashcroft* is an outcry of disbelief. Many feel that the First Amendment is at stake, that this doctrine should be as equally important in protecting the right to make a derivative work, as it is to make a copy of a work. Copying does not necessarily have to have the normal negative connotation that is associated with the word when discussing copyright (Tushnet, 564). In an article written for the “Archival News” column of the *Cinema Journal* in 2002, Eric Shaefer and Dan Streible presented an abridged version of the amicus brief initially sent to the Supreme Court for *Eldred v. Ashcroft*. Not only did this focus attention on the court case within the cinema studies and moving image archival profession, it helped to show how *Eldred v. Ashcroft* applied to and affected film/video/audio preservation and the providing of access to moving images and sound collections to scholars, researchers, and the public.

All in all, there are some major questions that the Supreme Court’s decision in *Eldred v. Ashcroft* raises. The first is, what does this ruling mean for the future of the moving image archival community? It mainly brings up the same problems archives were dealing with before, only it keeps the momentum of preservation and access from moving forward, leaving archives stagnant in their inability to assume Fair Use or in fear of impending copyright litigation. For example, it may be difficult for an archive to find the owner of the copyright of a work, and if they never find one they may choose not to do any preservation work, never knowing whether this material is in the public domain or not. Or if the copyright owner is actually found, the money and time that it would take for an archive to license or get permission from the copyright owner to copy for preservation may not be considered worthy of the time, resources and attention of the archive in the long run. If the owner was found, he/she may want to get all they can get out of this “lost” asset of theirs that they never realized existed (Patry, 1640). Unfortunately the cultural value of an object or artifact may then not be affordable financially by small institutions. A main problem for moving image archives is that many copyright owners and lawyers intimidate archivists by confusing the interpretation of the Fair Use Doctrine. The threat of being sued hangs in the air so much that the risk seems too high to be worth it. This misuse of copyright creates a monopoly for the copyright holder (Patry, 1658). It also serves as a deterrent to preservation activity and loss of historically and culturally important material.

The second question is what should the plan be for moving image archives in light of this case? Most importantly, archives need to be educated in copyright and legal issues regarding their collection. Section 107, or the Fair Use Doctrine, basically states that the courts can allow an unspecified amount of copying to be done of a work without permission of the copyright holder. It is a very malleable defense and its broad scope cannot only be vague, but inclusive (Patry, 1645). If an archivist learns how they may be able to use the fair use defense for the copying of whole works without getting the permission of the copyright owner, then they may measure their risks and choose to preserve and copy confidently. The risk evaluation is key to the fair use defense, for there must be set limits to fair use. Since the Fair Use doctrine is so broad and open, moving archivists should be aware of past and current litigation, court rulings, and other archives' experiences in order to make the best judgment in evaluating risk and fair use for their institutions. Yet while being aware, archivists should not be too wary: the less moving image archives use Fair Use and take slight risks, the less and less the public benefits. Despite the possible further problems that researching the copyright owner of a moving image may bring to light, an archivist should do so themselves or outsource the job of trying to find the copyright owner; that search effort should be well documented regardless of who is making the effort. If a copyright owner is not found after an exhaustive and verifiable search, then the archivist should comfortably copy a work under fair use (Patry, 1650). In dealing with the over claiming of copyright, archivists can rely on the doctrine of copyright misuse. If an archivist believes that they are copying a work under the Fair Use Doctrine and are bullied by a copyright holder in order to attain a fee for that use, then the archivist has double the doctrine on their side in the very hypothetical scenario of a necessary judicial decision (Patry, 1658). If an archivist can prove with practical evidence that the copyright holder used copyright misuse and that the archivist used fair use, then the archivist is safe from any legal repercussions.

Through the study of historical examples of the intricacies of copyright law, development of a strategy for the future of moving image archives and their collections is crucial to the longevity of the content and medium. In the moving image archiving community, the consequences of not being prepared to play the copyright "game" is particularly high risk. Although the archival community in the Supreme Court Case *Eric Eldred, et al. v. John Ashcroft* seems to have lost that particular battle, there were numerous inferences that were suggested by its outcome on how to react to the copyright laws. While the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) was challenged in the early 21st century,

copyright laws from the eighteenth, nineteenth and twentieth century were united to trace and interpret the modern day copyright issues. The causality of copyright issues is each dependent and derivative of the other—they are complexly related. The connections from the past, present and future of copyright law and precedent are all important in understanding and analyzing a case or an act initiated in the modern day period. While difficult, the study of intellectual property rights' legislation and adjudication are also extremely important to ensure that moving image archives operate as freely as possible under the existing interpretation of the various laws.

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