Free Mickey!
The copyright term and the public domain

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In a victory for corporate control of cultural heritage, the Supreme Court of the United States has rejected a constitutional challenge to the *Sonny Bono Copyright Term Extension Act* 1998 (US) by a majority of seven to two.

The statute was literally a 'Mickey Mouse' bill. It had been the result of intense lobbying by a group of powerful corporate copyright holders, most notably Walt Disney, which faced the expiry of its copyright on Mickey Mouse and other famous cartoon characters. The original sponsor of the bill, Congressman and composer Sonny Bono, who found fame working with Cher, wanted copyright to last forever. The legislation extended the term of copyright protection for copyright works from the life of the author plus 50 years, to the life of the author plus 70 years, in line with the European Union. It also extended the term of copyright protection for works made for hire, and existing works, to at least 95 years.

An electronic publisher called Eric Eldred launched a legal action against the constitutional validity of the Act, because he was concerned that he would be unable to publish books that had previously been in the public domain — such as Robert Frost's poems. First of all, Eldred argued that the extension of the copyright term went beyond the scope of the copyright power under the United States constitution. That clause provides that the Congress has the power to 'promote the Progress of Science... by securing for limited times to authors... the exclusive right to their respective writings'. Second, the electronic publisher maintained that the legislation violated the freedom of speech guaranteed under the First Amendment.

The majority of the Supreme Court rejected the arguments put forward by Eric Eldred. In the leading judgment, Justice Ginsburg opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection: 'Text, history and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present, and future'. She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable.

Justice Breyer and Stevens strongly dissented against the ruling — Breyer noting: 'The economic effect of this twenty-year extension — the longest blanket extension since the Nation's founding — is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science' — by which word the Framers meant learning or knowledge'.

The decision will undoubtedly benefit the private financial interests of corporations and heirs who own existing copyright works. Walt Disney will be able to milk further royalties from its collection of copyrights on its cartoons. However, the judgment will harm the public interest in the access to cultural heritage.

The statute will interfere with the activities of electronic publishers of public domain works — such as Eric Eldred's Eldritch Press, the Internet Archive, and Project Gutenberg. It will mean that literary works such as Robert Frost's *New Hampshire* poems, Margaret Mitchell's *Gone with the wind*, and HG Well's *The shape of things to come* will remain in private hands until at least 2019. The judgment will also harm the public performance of musical works. Music fees may prevent orchestras from performing early 20th century music — such as George Gershwin and Aaron Copland, as well as works of great foreign composers such as Igor Stravinsky, Jean Sibelius, and Maurice Ravel. Copyright estates will be able to control the interpretation of dramatic works. For instance, the Beckett estate will be able to enforce its strict interpretation of *Waiting for Godot* for even longer. The decision threatens the capacity of film archives to preserve cultural heritage — such as the Laurel and Hardy films. There will be a large number of 'orphaned films' that cannot be restored and distributed because their owners cannot be found.

It is inevitable that the decision will have an impact on Australian policy and law-making in the copyright arena. In the past, the Federal Government has rejected proposals to extend the term of copyright protection. The Intellectual Property Competition Review Committee investigated whether the copyright term should be extended, in accordance with the European Union and the United States of America. It could find no empirical evidence whatsoever to support such an extension of the copyright term. Accordingly, the Committee recommended that there was no justification to change the copyright term in the context of Australia.

There are strong economic reasons for the Federal Government to resist the siren calls to extend the term of copyright protection. Noble-prize winning economist Milton Friedman testified in the Supreme Court case that 'it is highly unlikely that the economic benefits from copyright extension under the *Copyright Term Extension Act* outweigh the additional costs'. He feared that the legislation would have a detrimental impact upon the welfare of consumers.

An anonymous pamphleteer from the United Kingdom captures this sentiment in a diatribe against the legislative push by booksellers to extend the copyright term for literary property in 1735:

> *'I see no reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers.'*

Hopefully, the Federal Government will take heed of this sad lament, and not impose a general tax on the public by extending the term of copyright protection.

The decision of the Supreme Court can be downloaded from the website: http://www.supremecourtus.gov/opinions/02pdf/01-618.pdf.

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