

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

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UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAR 15 2004

GREGORY C. LANGHAM
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Civil Action No. 01-B-1854 (BNB)

LAWRENCE GOLAN,
RICHARD KAPP,
S.A. PUBLISHING CO., INC., d/b/a ESS.A.Y RECORDINGS,
SYMPHONY OF THE CANYONS,
RON HALL, d/b/a FESTIVAL FILMS, and
JOHN McDONOUGH, d/b/a TIMELESS VIDEO ALTERNATIVES INTERNATIONAL,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant.

ORDER

This case is before me on Defendant, John Ashcroft's Renewed Motion to Dismiss, filed pursuant to Fed. R. Civ. P. 12(b)(6), on the grounds that Plaintiffs' First Amended Complaint fails to state claims upon which relief may be granted.

Oral argument would not materially assist in the determination of the motion. After consideration of the motions and the case file, I GRANT Defendant's Renewed Motion to Dismiss as to Count 4 of Plaintiffs' Amended Complaint, and DENY the motion as to Plaintiffs' remaining Counts 1, 2 and 3.

I. Background

Plaintiffs, who consist of artists or purveyors of art material, filed a complaint seeking declaratory and injunctive relief regarding two "recent expansions" of the Copyright Act on the basis they are unconstitutional. Specifically, Plaintiffs assert that the Sonny Bono Copyright Term Extension Act of 1998 (the "CTEA"), Pub. L. No. 105-298 (*amending* 17 U.S.C. §§ 301-304), and § 514 of the Uruguay Round Agreements Act (the "URAA"), Pub. L. No. 103-465 (*amending* 17 U.S.C. §§ 104A, 109(a)), unconstitutionally remove from, or staunch the flow of,

literary and artistic works into the public domain.

After Plaintiffs filed their initial Complaint, and Defendant filed a responding Motion to Dismiss, the United States Supreme Court granted certiorari to review *Eldred v. Reno*, 239 F.2d 372 (D.C. Cir. 2001), which addressed the constitutionality of the CTEA. As a result, and over Plaintiffs' objection, I stayed these proceedings until the Supreme Court's decision in that case was announced.

On January 15, 2003, the Supreme Court announced *Eldred v. Ashcroft*, 537 U.S. 186 (2003). In response to that decision, Plaintiffs filed a First Amended Complaint on April 16, 2003. Defendant then filed the Renewed Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, at issue here, on April 30, 2003.

II. Analysis

Under the Copyright and Patent Clause of the United State Constitution, Congress is granted the power and the limitation "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." U.S. Const. Art. I § 8, cl. 8.

The CTEA, passed in 1998, enlarged the existing copyright term for a period of twenty years. For example, it expanded the basic copyright term to the life of the author, plus seventy years, as opposed to the fifty year time period that was in place previously. *See* 17 U.S.C. §302(a).

Section 514 of the URAA restores copyright protection to original works of foreign origin whose authors lost their copyrights for failure to comply with specific U.S. copyright formalities that have since been repealed. *See* 17 U.S.C. §104A(h)(6)(C)(I). Copyrights restored by the URAA are reconstituted for the remainder of the period that should have been granted had the work been protected from its inception. *See* 17 U.S.C. §104A(a)(1)(B).

Under Fed. R. Civ. P. 12(b)(6), a district court may dismiss a complaint for failure to state a claim upon which relief can be granted if it appears beyond doubt that the plaintiff can

plead no set of facts in support of his claim which would entitle him to relief. *See Coney v. Gibson*, 355 U.S. 41, 45-46 (1957). A claim may be dismissed either because it asserts a legal theory not cognizable as a matter of law or because the claim fails to allege sufficient facts to support a cognizable legal claim. Fed.R.Civ.P. 12(b)(6); *Morey v. Miano*, 141 F.Supp.2d 1061, 1062 (D.N.M., 2001).

In evaluating a Fed. R. Civ. P. 12(b)(6) motion to dismiss, “all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party.” *Wildwood Child & Adult Care Food Program, Inc. v. Colorado Dept. of Public Health and Environment*, 122 F. Supp.2d 1167, 1170 (D. Colo., 2000).

A. The CTEA Claim [Count 4]

Count 4 of Plaintiffs’ Amended Complaint alleges that, as a result of the CTEA, the average copyright term is now 95 years – a term that is “staggeringly long” – causing harm to Plaintiffs, who relied on the previous copyright terms, as well as to the public. Plaintiffs contend that the requirement in the Copyright and Patent Clause that copyright terms be “limited” is more restrictive than a requirement that the term be “fixed,” and that the CTEA’s expansion results in a period of protection that grants the author 99.8% of its economic value, and only .2% of its value to the public. Plaintiffs further argue that the framers of the Constitution would have viewed the life-plus-70-year term as “effectively or virtually perpetual” in light of the economic realities and the fact that the term “limited” is more restrictive than that the term “fixed.”

However, I agree with Defendant that Plaintiffs’ CTEA claim is foreclosed by the Supreme Court’s holding in *Eldred v. Ashcroft*, *supra*. In *Eldred*, the Supreme Court ruled, on the Petitioners’ claim that Congress exceeded its authority under the Copyright and Patent clause, that the CTEA did not violate the constitutional requirement that copyrights endure for “limited Times.” Although the Petitioners in *Eldred* did “not challenge the ‘life-plus-70-years’ timespan

itself,” *id.* 537 U.S. at 193, the Supreme Court approved the Court of Appeals determination – when addressing the argument that Congress evaded the “limited Times” constraint by creating effectively perpetual copyrights through repeated extensions – that “a regime of perpetual copyrights ‘clearly is not the situation before us.’” *Id.* at 209 (*quoting Eldred v. Reno*, 239 F.3d at 379). In support of this determination, the Supreme Court noted that Copyright Extension Acts in 1831, 1909, and 1976, “did not create perpetual copyrights, and neither does the CTEA.” *Id.* at 210.

Furthermore, the Supreme Court specifically rejected the argument made by Justice Breyer in his dissent, and advanced by Plaintiffs here, that the “economic effect” of the CTEA, which allegedly creates a copyright term worth 99.8% of the value of a perpetual copyright, makes the term “virtually perpetual.” *Id.* at 209 FN. 16. The Supreme Court indicated that “[i]t is doubtful that those architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar.” *Id.*

The Supreme Court in *Eldred v. Ashcroft* held that the extension of the copyright term in the CTEA was constitutional, in that it was not effectively or virtually perpetual, despite the fact that the Petitioners there did not directly challenge the time-span provided for in the CTEA. Consequently, I conclude that Plaintiff’s legal arguments challenging to the time limitation in the CTEA is foreclosed by the *Eldred* decision and, as such, Plaintiffs have asserted a legal theory not cognizable as a matter of law which should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

B. The §514 URAA Claims

1. Violation of the Copyright and Patent Clause [Count 1]

Plaintiffs’ Amended Complaint also alleges that §514 of the URAA violates the Copyright and Patent Clause because, they assert, once a work goes into the public domain Congress cannot remove it from free use by granting a restored copyright. Plaintiffs’ argument is premised on the requirement in the Copyright and Patent Clause that copyright laws “promote

