

COMMUNICATIONS

Copyright law and roasted pig

Lawrence Lessig on *Eldred v. Ashcroft*

By Lawrence Lessig
October 22, 2002

In 1930, 10,027 books were published. Today, 174 of those books are still in print. What would it take to put the remaining 9,853 out-of-print books onto the Internet?

To most, this sounds like a question about technology: How could all those books be scanned? How many servers would it require? But to a lawyer, the question evokes a very different puzzle: who owns the rights to these out-of-print books? For though the copyright initially offered to the authors of these books should have expired in 1987, Congress has extended copyright terms again and again--from a maximum term for these works of 56 years, to 75 years, and now 95 years. On the current schedule, no work will pass into the public domain through copyright expiration until 2019--assuming Congress does not extend the existing terms again.

So for many of these works, you would need to find the copyright holder--not likely the authors, since they are sadly dead, but instead heirs, descendants, or, in some cases, corporations. How could you find them? Where would you look?

Well again, most practical people would think there must be a list somewhere--a registry of copyright holders, like a registry of deeds at the courthouse. It can't be that there are millions of monopolies out there without any record.

But as many lawyers know, no such list exists. The records are not kept. Thus, to track down the current status of the 9,853 creative works, you would have to hire an army of Sherlock Holmeses. And as Holmeses don't come cheap, no matter how easy it is to post 9,853 out-of-print books on the Internet technically, the lawyers' fees would make it practically impossible. Until the copyright expires, these works are trapped in a regulatory black hole.

In October, the U.S. Supreme Court heard arguments in the first case to challenge the practice of extending copyright terms, *Eldred v. Ashcroft*. The Constitution says that copyrights are to be "for limited Times." The framers initially set those "limited Times" to be quite short--14 years, renewable once. After a limited time, copyrighted work was to pass into the public domain--a lawyer-free zone where publishers and creators can draw upon creative work without fear of legal liability. This text, the challengers say, forbids the extension of existing terms. Just as a "limited edition print" would no longer be "limited" if the printer published new copies every time customers demanded it, so too a "limited" copyright term is no longer limited if Congress extends it every time some Mickey Mouse lobbyist asks.

I'm no neutral party. I argued the challenge before the Supreme Court; I, along with a gaggle of other lawyers, have volunteered time over the past four years to bring this challenge to a conclusion. I have very strong views about what the Constitution means. Soon enough, we'll see if I am right.

What is interesting about this case is not so much what the Supreme Court rules, but what it reveals about the wisdom in at least this part of the framers' plan.

We live in a time when many question our framers' values. Unimaginable threats force many to say that we can no longer afford the liberty they sought to protect. Yet here at least, the framers understood something very modern: they knew that the new always builds on the old. They understood the burdens of extended monopolies. They therefore crafted a regime that kept monopolies short--not because they were against copyright or authors, but because they believed that once copyright does its work, there's no further need to keep creative work regulated. The framers saw copyright as a way to induce new creativity. It was not to be a reward for favored creators.

But though only 2 percent of work 75 years old is currently exploited commercially, Congress's practice is to extend protection generally. It cannot see beyond this 2 percent--for among other things, the 2 percent includes Mickey.

The framers would never have allowed millions of monopolies for the benefit of just 2 percent; they would not have sacrificed the public domain to benefit a favored few. They had a bigger aim; their means were more focused. As the Supreme Court once said about a statute that banned all indecent speech so that children would not be exposed, we don't "burn the house to roast the pig." Exactly right--not even to save a mouse.

Lawrence Lessig is a professor of law at Stanford Law School.

Write to [Lawrence Lessig](#).

Gainers

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|------------------------|-------|
| Millennium Pharm | 5.86% |
| 7.41 | |
| Advanced Micro Devices | 5.33% |
| 5.53 | |
| Tpsa Telekom Polska | 4.92% |
| 3.03 | |

Decliners

| | |
|-------------------------|---------|
| Silverline Technologies | -13.24% |
| 0.19 | |
| Orascom Telecom Holding | -12.02% |
| 2.42 | |
| Net One Systems Co | -10.31% |
| 3765.17 | |

