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SPECIAL REPORT

## Case puts copyright in public spotlight

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Washington — Eric Eldred publishes books with expired copyrights on the World Wide Web for free. In 1997, he expected several books to enter the public domain. When they didn't, a law professor persuaded him to sue the U.S. government.

At first glance, this is dull case law. But when *Eldred v. Ashcroft* reached the United States Supreme Court Wednesday, it had the atmosphere of a Star Wars premiere. Young software programmers in crisp suits camped out before sunrise to get into the gallery, beating a lineup that wrapped around a street corner hours before the hearing began. Media access was on a rare "reservations-only" system, with reporters crammed behind curtains and pillars to fit them in. When an old man in a bow tie arrived at a side door, he was asked if he was there for the Eldred case. His reply: "who isn't?"

Intellectual property law is not supposed to be this popular. But thanks to *Eldred v. Ashcroft*, the movement to limit or curtail copyrights and patents has moved out from the fringe and into the mainstream.

At issue is the Copyright Term Extension Act (CTEA) of 1998. To its fans, the CTEA is the Sonny Bono Copyright Extension Act, introduced by the dead congressman's wife (who now holds his seat) as a tribute to his singing career. To its critics, the CTEA is the "Mickey Mouse Protection Act," designed in the backrooms of Congress by the Disney Corp. to retain ownership of its earliest cartoons.

As the world's largest exporter of intellectual properties, the U.S. has lobbied trading partners to offer strong copyright and patent protection. Congress couldn't help but notice an inconsistency: U.S. life-plus-50-years protection for authors and creators was actually weak compared to Europe's life-plus-70.

So, using its Constitutional power to "promote the progress of Science and the useful arts" with copyrights "of limited times," Congress matched Europe's standard with the CTEA. But it also did something it had done with every previous copyright law: it extended all old copyrights by the same 20 years, depriving Mr. Eldred of new material.

In the process, the CTEA added an estimated \$6-billion (U.S.) in royalty value to properties such as the Dr. Seuss books.

As U.S. Solicitor-General Olsen told the Court, Congress has always extended the old copyrights so it wouldn't have to enforce two copyright regimes. No one ever challenged the idea that retroactive extensions promoted arts and sciences.

No one, that is, until Stanford Law Professor Lawrence Lessig persuaded Mr. Eldred and others to file their suit. Mr. Lessig is best known as the controversial "special master," in *United States v. Microsoft*. Now, as the media-savvy author of books such as *The Future of Ideas*, Mr. Lessig has emerged as the leading critic of today's information economy. Mr. Lessig argues that current intellectual property laws are strangling innovation, not spurring it.

Meanwhile, Canada's recent throne speech promised "better copyright protection for new ideas and knowledge." This can only mean reforms similar to those in the U.S., of which the CTEA is but a part,

critics say.

After Wednesday's U.S. hearing, somebody is likely to ask why. As Justice Breyer mockingly argued, "not only can I not imagine an American who would be moved to create by another 20 years at the end of the road, but I cannot imagine a European who would either," he said. "Who are these people that are going to be moved by that incentive?"

But quibbling over 20 years extra protection misses the point. The real argument - inside and outside the Eldred hearing - is not about copyright's length, but the nature of copyright itself.

As Justice Souter put it, Mr. Lessig and his allies want a direct, "causal connection" between the incentive of copyright and the creations it encouraged. But, Justice Souter asked, wasn't it plausible that the CTEA's retroactive copyrights were part of a "general scheme that overall tends to induce creation?"

Mr. Lessig's supporters see the "general scheme" as a dangerous problem, not an inducement. And they see Mr. Eldred as part of a larger struggle in the marketplace to protect "free culture" from that scheme.

"Hackers hack, but to balance it out, we need political action too," said Kevin Broton, an open source programmer who waited for hours to see the case. "I'm here because I'm worried that the way things are going, open source programming will be illegal in the years to come," he said.

In the United States, lower courts have upheld tough new intellectual property laws repeatedly. Mr. Eldred's case was denied twice before it reached the Supreme Court. If Wednesday's hearing is any guide, deference to Congress has more to do with the trend than enthusiasm for the law. Justice O'Connor bluntly told the hearing that while the CTEA was probably constitutional, she could agree that "in terms of policy, it flies in the face of what the Framers had in mind."

On its constitutional merits, Mr. Lessig may lose *Eldred v. Ashcroft*. But, measured as "political action" of the sort that Mr. Broton is looking for, Mr. Lessig has already won more than the Court will ever give him. While copyright-dependent industries spend their time lobbying lawmakers and filing lawsuits, a Stanford Law professor is outflanking them by turning intellectual property consumers and producers into a court of public opinion.

The aftermath of Wednesday's hearing underlined the contrast. A crowd of reporters spent 10 minutes interviewing Mr. Lessig and Mr. Eldred. Then, one reporter spoke out in frustration, wondering why she couldn't find anyone to speak in favour of the CTEA. The media did get someone on the record - but only because Mr. Lessig was kind enough to point to Congresswoman Bono, standing silently among the spectators.

Mr. Eldred isn't likely to change the information economy as we know it. But his case is the first serious, lawful attempt to reverse the growth of intellectual property law in the industrial west in more than a century. Mr. Lessig's supporters are already working on sequels to Wednesday's premiere. And like most American stories, it likely won't be long before this one finds its way into the Canadian market, critics say.

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