Themehelp v. *West* [1996] Q.B. 84) refused to enjoin the beneficiary of a credit unless it is also possible to enjoin the paying bank directly: *Group Josi Re* v. *Walbrook Insurance Co. Ltd.* [1996] 1 W.L.R. 1152; *Czarnikow-Rionda Sugar Trading Inc.* v. *Standard Chartered Bank London Ltd.* [1999] 1 All E.R. (Comm) 890. As neither of the established exceptions to the autonomy principle, which apply in cases of fraud or illegality, provided any basis for enjoining the paying bank in *Sirius*, it was wrong to suggest that the claimant could have been enjoined.

Thirdly, it is instructive to examine what the position would have been if the bank had paid the claimant in breach of the "letter of acceptance". As there were no equivalent restrictions upon presentation in the credit itself, the bank would have been authorised to pay against presentation of conforming documents, entitling it to reimbursement from the defendant. The effect of such an authorised payment would have been to discharge the defendant's liability to the claimant under the retrocession agreement. The claimant would, therefore, have had a good defence to any claim by the defendant to recover the proceeds of the letter of credit from it: *Barclays Bank Ltd.* v. *W.J. Simms* [1980] 1 Q.B. 677. It is submitted that, if the defendant could not have enjoined the beneficiary from drawing on the credit, as suggested above, and could not have recovered the proceeds of the credit, once paid, from the claimant, there was little basis upon which it could deny the claimant's entitlement to the escrow monies. Given that the defendant retained a damages claim for breach of the "letter of acceptance" and given that it was open to the defendant to restrict the circumstances in which the beneficiary could draw upon the credit by amending the credit itself, such a conclusion does not appear to involve significant unfairness to the defendant.

When the House of Lords eventually hears the appeal in this case, it is to be hoped that their Lordships will take the opportunity to reassert the fundamental importance of the autonomy principle.

CHRISTOPHER HARE

COPYRIGHT TERM: WHO'S TAKING THE MICKEY?

COPYRIGHT does not last indefinitely. However, the appropriate term for copyright protection has always been a matter of heated debate. Macaulay's appraisal of the English scene is, perhaps, the most famous. In 1841 he described copyright as "a tax on readers for the

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purpose of giving a bounty to writers" and objected to a proposed extension of its term on the grounds that "my hon. and learned friend doubles, triples, quadruples, the tax, and makes scarcely any perceptible addition to the bounty" (*Hansard, Parliamentary Debates* (3rd series), 56 (1841) 350). Very similar arguments have recently been heard by the United States Supreme Court in *Eric Eldred, et al.* v. *John D. Ashcroft, Attorney General*, 123 S.Ct. 769 (2003).

The 1998 Copyright Term Extension Act (CTEA) extended the term of US copyright protection for both future and existing works by 20 years. The usual term is now the author's life plus 70 years: this applies to works not published by the CTEA's effective date. Works published before this date with subsisting copyright were granted a term of 95 years from publication. The petitioners, all of whom had some interest in works falling into the public domain, argued that Congress had exceeded its powers. The first objection was based on the Constitution's Copyright Clause: Article 1, § 8, cl. 8. This grants Congress power "[t]o 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". The petitioners admitted Congress' right to set the term for newly-created works, but resisted the application of the new term to existing works. They argued that this practice of granting extensions would allow Congress to dodge constitutional authority by stringing together an unlimited number of "limited Times". Secondly, the petitioners challenged the CTEA on First Amendment grounds, arguing that copyright operated as a form of speech regulation, by preventing material from falling into the public domain. Both arguments were rejected by the majority, led by Justice Ginsburg, although two powerful dissenting judgments signal the significant disquiet engendered by copyright's now very considerable duration.

The first English copyright statute, the Act of Anne 1710, guaranteed protection to newly-published works for a mere 14 years. The term was increased in 1814, in 1842, and again in 1911. Since 1995, EU Member States have been required to adopt a term of the author's life plus 70 years. Early American law reflected its English model. The 1790 Copyright Act provided for an initial federal copyright term of 14 years from publication. Further increases followed in 1831, 1909, and 1976. How could the CTEA's additional increases be justified, particularly given the comparatively limited term of patent protection?

Economic incentives lie at the heart of modern intellectual property, and copyright is no exception; the copyright industries

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now represent perhaps 5% of the GDP of developed nations. But moral claims and idealism have always been prominent in the list of justifications for copyright. Even the anti-monopolistic Macaulay was willing to admit "the necessity of giving a bounty to genius and learning". It has generally been agreed that this should take the form of a property right inheritable by the creator's heirs. Overt patronage, whether state or private, is no longer an acceptable method of stimulating creativity. An extended protection period ensures that success is not dependent on instant popularity. Since copyright law is less fierce than patent law in terms of what it prevents, a considerable difference in their terms is defensible.

However, one potent criticism of the copyright regime is that the length of protection offered does not increase proportionately the incentive to produce. Entrepreneurs calculate short-term returns and will not pay creators significantly more for a longer term. Nevertheless, the entrepreneur may enjoy a significant windfall if a work enjoys enduring success, without any obligation to revisit the bargain with the creator. The CTEA became widely known as the "Mickey Mouse Extension Act", following Disney's extensive lobbying efforts in its support. Billions of dollars in revenues were at stake. The Mickey Mouse character, copyrighted in 1928 as Steamboat Willie, would otherwise have entered the public domain in 2003. A "Free the Mouse" campaign was mobilised to oppose the Act: Mickey's iconic silhouette was depicted behind bars, a poignant symbol of the valuable property locked away from the public as a direct result of the CTEA. The colossal benefits flowing to high-profile copyright holders were one focus of criticism. Another key concern was the likely chilling effect on educational and non-commercial uses of copyright works. Tracing the holders of low-value copyrights is burdensome work, often impossible. Such works will remain inaccessible until their copyright expires—outside the public domain but not commercially exploited. Digital technologies would facilitate access to such works, for educational or archival purposes perhaps. But without relevant permissions they remain in a state characterised in Justice Breyer's dissent as "a kind of intellectual purgatory". Extension of copyright in such circumstances seemed to him to be a failing of a constitutional kind.

However, the majority in *Eldred* protested that "Justice Breyer's stringent version of rationality is unknown to our literary property jurisprudence". Nor did the majority accept that permitting Congress to extend existing copyrights would allow evasion of the "limited Times" constraint—and thus perpetual copyright—by way of repeated extensions. Earlier Acts had proceeded in the same way, and the Court was not persuaded that the CTEA crossed a

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constitutionally significant threshold. Nevertheless, although rejecting the petition, the Court found a way to acknowledge the force of the petitioners' arguments, at least in the context of legislative policy:

> we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.

Concerns therefore remain. Copyright law must address the legitimate needs of the public domain. The question of balance ought not to be left to the market, nor to legislation crafted by lobbyists. If major copyright proprietors appear to be fat cats taking the mickey out of the public, they must one day expect to hear the mouse roar.

CATHERINE SEVILLE

THE ORIGINALITY DEBATE IN COPYRIGHT LAW—THE CANADIAN PERSPECTIVE

ONE of the most hotly contested issues in the law of copyright concerns the standard of originality for factual compilations. In the very recent decision of *CCH Canadian Ltd.* v. *The Law Society of Upper Canada* (2004 S.C.C. 13), the Supreme Court of Canada was called upon to decide, *inter alia*, the issue as to whether copyright subsisted in the plaintiff publishers' compilation of reported judicial decisions as well as in other closely associated subject-matter such as headnotes, case summaries and topical indices. Agreeing with the result reached by the Federal Court of Appeal as regards this specific issue (see [2002] 4 F.C. 213), the highest court in Canada decided this question in the affirmative. In the process, the court took advantage of the opportunity once again to express its views on the much-debated subject of originality and, more importantly, to clarify for the future what the appropriate threshold for originality ought to be in Canada.

McLachlin C.J., in giving the judgment for the Supreme Court, acknowledged the long-standing judicial divide between the position taken in England (and in other Commonwealth jurisdictions) on the one hand, and that in America on the other (para. [15]). The English approach to originality was, in her Honour's view, consistent with the "sweat of the brow" standard, which standard was apparently "too low" (para. [24]). In contrast, the American test of "creativity" reflected a much higher and more exacting

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