TECHNICAL COMMUNICATION QUARTERLY, 20(1), 47–72

ISSN: 1057-2252 print / 1542-7625 online
DOI: 10.10.1080/10572252.2011.528321

Routledge
Taylor & Francis Group

Copyright, Free Speech, and Democracy: *Eldred v. Ashcroft* and Its Implications for Technical Communicators

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This article explains the Constitution's intellectual property provision and its goals, then deconstructs the Supreme Court's decision in *Eldred v. Ashcroft* as a means to unravel the pieces in the complex relationship among the constitutional provision, the First Amendment, and copyright. The article then considers how an understanding of the relationship of these elements can be helpful for considering the positions of technical communicators as both users and producers of intellectual products.

Like all other legal treatments in intellectual property, copyright derives from and is subject to the goals of the Constitution's intellectual property provision. This article explains the provision and its goals, then deconstructs the Supreme Court's decision in *Eldred v. Ashcroft* (2003) as a means to unravel the pieces in the complex relationship among the constitutional provision, the First Amendment, and copyright law. The article then considers how an understanding of the relationship of these elements can be helpful for considering the positions of technical communicators as both users and producers of intellectual products. I venture that this material is particularly important to technical communicators because they are likely to use and produce materials that may be protectable by both copyright and the First Amendment as a matter of course in their everyday work. First Amendment and fair use issues in *Eldred v. Ashcroft* highlight why technical communicators' differing kinds of work products might lead to differing legal treatment; some products may be protectable by the First Amendment and some may be protectable by copyright. Technical communicators will also have an interest in understanding the capacity for legal use of others' materials in their processes of developing workplace communications. In addition, they may find analysis of *Eldred v. Ashcroft* useful for considering the impact of their communication choices in supporting and participating in democratic interactions.

The U.S. Constitution's intellectual property clause, which applies to all forms of intellectual products even though it is often called the *copyright clause*, is much more than a structure for treating intellectual products. It is a complex and profound piece of thinking and an expression of the American national ideal. The intellectual property clause embodies hope in our nation as a strong, intelligent force for expanding understanding and knowledge, and it reflects the desire to enable egalitarian access to information to make possible the dialogic enterprise necessary for democracy.

The U.S. Constitution's intellectual property clause states, "The Congress shall have the power . . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries" (U.S. Const., art. 1, §8, cl. 8). The Framers of the Constitution created a structure in the intellectual property provision that prioritizes the advancement of learning and knowledge creation over its secondary, supportive purpose: to benefit the author. To provide a benefit to the author merely creates an incentive for authors to expend energy to create new work. Note that U.S. copyright differs greatly from that of moral rights, which is the adopted structure in European law, based on the concept that creators have an absolute right to benefit from their work and that their right comes from a special moral requirement.

U.S. law contrasts in its emphasis on supporting knowledge creation as a basis for societal interaction, intellectual growth and innovation, and democratic dialogue. In U.S. law, in addition to making authors' rights secondary and supportive of the broader goal to promote knowledge development, the Framers of the Constitution also inserted a time limit on authors' rights to control their work and fashioned a limited monopoly in control of creative products. The time limit and limited monopoly create a public domain of information, and, as a result, a basis of knowledge that is accessible to all citizens and enables democratic dialogue and exchange of ideas. This distinctive feature of the U.S. approach to copyright protection correlates directly with the need for access to information as a basis for supporting democratic dialogue. So, in one way, the provision highlights the importance of knowledge creation at the core of the U.S. enterprise by supporting authors' need to benefit from their work, and, in another way, by ensuring that knowledge will be available to its citizens as a basis for shaping the national society. By developing the intellectual property clause in this manner, the Framers of the Constitution acknowledged the more abstract nature of creative thought and ensured that abstract intellectual efforts are not treated as property that can be strictly controlled or owned by one to the detriment of another.

The Supreme Court made its understanding of the Framers' intention explicitly clear in *Williams & Wilkins Co. v. U.S.* (1973), noting, "Copyright is not primarily for the benefit of the author, but is primarily for the benefit of the public" (p. 1345). Thomas Jefferson himself stated that "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improve-

ment of his condition . . . . Inventions then cannot, in nature, be a subject of property" (as cited in Barlow, 1994). Democracy, free speech, self-actualization, and humanistic endeavors stem from this core in a mutually dependent interplay of support for the nation's principles. In essence, the concepts in the constitutional intellectual property provision constitute our democratic system. And the structure of the provision is such that limitations in the intellectual property clause enable free speech. Technical communicators are enabled by the democratic basis of intellectual property law in particularly important ways. Although in many ways they are affected by the law as are others who develop communicative products, technical communicators often play a unique part in creating work that affects other people. In the workplace, they often develop documents that lead or guide through instruction and documentation; they produce structures such as report forms for medical, insurance, and governmental treatment of the public that impact the way we interpret information that could affect our quality of life; and, as researchers, they develop work that analyzes and critiques the impact of any number of forms of communication, often drawing attention to communicative injustices that might not have been uncovered without their work. As educators, they influence developing communicators who will go on to do the same in their interactions within society. As such, the intellectual property provision has a dramatic impact on the work that technical communicators undertake, both as participants in organizations that further business interests and as individuals who participate in democratic interaction.

THE ROLE OF COPYRIGHT AND FREE SPEECH IN DEMOCRACY

The connection between free speech and support for creating intellectual work as well as for using that work provides a core for interaction that undergirds goals of democracy. And technical communicators, as well as other creative product developers, may extend their means of interacting in a democratic society to workplace venues. Even in exercising options for how they shape and form the creative work they generate, product developers express something about their employers, themselves, and sometimes even about the society of which they are a part. And a democratic government is possible only if its people have a voice and are able to express themselves. The classic works of Alexander Meiklejohn (1948) support the principle that free speech exists in the U.S. because it was necessary to make self-government possible (Werhan, 2009, p. 310). Thus, speech is central to the democratic effort. As legal scholar Balkin (2004) noted,

> The purpose of freedom of speech . . . is to promote a democratic culture . . . [which] is more than representative of institutions of democracy, and . . . more than delibera-

> tion about public issues . . . . It is about each individual's ability to participate in the production and distribution of culture. (pp. 3–4)

Legal scholars also make clear that the intellectual property provision operates on its connection to free speech. Patterson (1987) examined this relationship and its complexity in his challenging but well-considered work "Free Speech, Copyright, and Fair Use" using complex historical and legal analysis to argue that the Constitution's intellectual property clause also incorporates free-speech constraints. (I also argued in an earlier work [Herrington, 1998] that fair use and free speech have a correlative relationship in the framework of constitutional and statutory goals, and I still find this argument supportable.)

But the relationship among free speech, the constitutional intellectual property provision, copyright, and fair use has become much more complex as a result of the Supreme Court's response to a 2003 case, *Eldred v. Ashcroft*, that created a new structure for understanding the balance provided in the Constitution's intellectual property clause. This case implicates the 1976 Copyright Act, which reflects the Framers' intention for supporting democratic dialogue as well as the need for balance to encourage author creation and contains a fair-use clause that explains and enables limitations on copyright holders' interests.

Although creators' rights are upheld as a means to incentivize knowledge development, they are nevertheless subject to limitations in fair use through federal statutory law and in free speech through the First Amendment. The sources of these limitations are dissimilar in nature: The source of fair use is statutory law, and the First Amendment's source is the Constitution. Fair use was created as a statutory guideline for effectuating the balance required to enable constitutional goals in the intellectual property clause, including support of education, a public domain, and free speech. The First Amendment provides a constitutionally constructed source of power to protect free-speech interests. The content to which these two legal structures are able to respond can be the same in some instances, but each applies somewhat differently than the other. Because fair use is a statutory rather than a constitutional creation, it has, until recently, been treated as an explanatory set of guidelines for interpreting authors' rights limitations set out in the Constitution's intellectual property provision. And because it is a creation in the 1976 Copyright Act, in the past it has applied only to conflicts in copyright. The First Amendment, of course, gathers direct constitutional power to protect speech and individual rights against governmental control. The fair use doctrine applies most directly to rights to use copyrighted work, although a right to speak through use can be supported, and the First Amendment applies most directly to rights to speak, although a right to use as a basis for speech also can be supported. This interplay between the First Amendment and fair use makes it possible for technical communicators to create new products in response to those of others as a means to represent themselves and their employers in the workplace. And, as a ba-

sis of support for critique, teaching, and democratic influence, technical communicators who research and educate are enabled by the relationship between free speech and fair use, which provides a foundation for the work they do. Understanding developments in the law that affect this foundation is important for those who depend on it.

EXAMINING FREE-SPEECH ISSUES IN *ELDRED V. ASHCROFT*

This complex interrelationship of elements that drive intellectual property law application has been recently interpreted by the Supreme Court's decision in *Eldred v. Ashcroft* (2003). Examining the Supreme Court's response to intellectual property issues in the case could be helpful for understanding the complexity of intellectual property law as it relates to free speech, and, ultimately, as it supports democratic interaction. An explanation of the issues in this case may also prove helpful for examining the roles of technical communicators as both creators and users of intellectual products, particularly as their work relates to their interests in speech and in interaction as citizens participating in national discourse. The implications of this case provide strong support for creative product development and protection for workplace writers, but technical communication educators may also find that the results of this case, although severely limiting access to the pubic domain, could ironically lead to even greater support for educational efforts made possible by its strengthening fair use, which supports the constitutional goal of furthering knowledge creation. With this in mind, I examine *Eldred v. Ashcroft* and deconstruct the Court's response; then I apply the results by analyzing its significance for technical communicators.

There is no doubt from the perspective of access advocates that the Supreme Court's response in *Eldred v. Ashcroft* not to disavow the 20-year copyright term extension was harmful to the public domain. This case was quite a blow against those who want greater accessibility to copyrighted works as a means to combat the encroachment of ever-extended product protection that developed in recent legislation. Moreover, the result of the Court's refusal to limit the congressional power that allowed legislators to enact the copyright extension led many to conclude that the Framers' intent to provide balance by way of the constitutional provision was undermined and that the Court allowed an unconstitutional law to stand. *Eldred v. Ashcroft* is rich with legal issues prime for examination and discussion, which in fact could lead to book-length examination of the case. But my focus in this work is on the Court's treatment of the First Amendment and fair use and its significance for technical communicators, even though examining fair use in conjunction with the First Amendment sometimes implicates other aspects of law.

Intense examination of the Court's treatment of the intellectual property clause in terms of free speech and First Amendment issues can render a deeper, if not more palatable, understanding of the Court's response. Leaving the copyright extension in place is, for access supporters, egregious in its unconstitutionality, but the Court's interpretation that the First Amendment is distinct from fair use can nevertheless be considered an acceptable reading. And, more important, the Court's new emphasis on fair use by way of its constitutionalization can actually provide a boon to a strong public domain. Thus, in this article, I discuss First Amendment and fair use issues tied to *Eldred v. Ashcroft* as a way to examine the overall function of the intellectual property provision for supporting democratic action. I then apply the results as a means to understand the roles of technical communicators' relationships with their work in a democratic society.

Eldred v. Ashcroft Background

A description of the case is this: Eric Eldred created a Web-based library of public domain works, providing links to explanatory texts and images to support the materials in the works themselves. He made his library available to the public for free. Eldred prepared to include Robert Frost's poem "New Hampshire," which was on the verge of entering into the public domain. In 1998, on the eve of the work's transition to public domain status, which would have made it legally available for public access, Congress passed the Copyright Term Extension Act (CTEA), extending the term of copyright another 20 years beyond the death of the author. This meant that no work published after 1923 could enter the public domain until 2019. As such, the CTEA extended the protection to "New Hampshire" for another 20 years. Nevertheless, Eldred included the Frost poem in his Web-based library.

The CTEA was initially developed as the Sonny Bono Copyright Extension Act, significant in light of his widow's testimony (among others') that Bono had believed that "copyrights should be forever" (Bono, 1998). Noted in Justice Breyer's dissent, as well, was congressional history indicating support for a copyright that would never expire (*Eldred v. Ashcroft*, 2003, p. 15). Eric Eldred made the decision to post the Frost poem in his Web-based library as an act of civil disobedience and, when challenged, eventually took his case to the Supreme Court to test the 20-year extension itself.

As I discuss in more detail later, it is significant that the CTEA was also supported as a means to "harmonize" with European law. Schwartz and Treanor (2003) argued,

> An initial legitimate basis for the CTEA, for example, was the harmonization of U.S. law with European copyright. Harmonization would allow American authors to take advantage of a reciprocity provision found in a European Union (EU) copyright directive; non-EU countries that matched Europe's "life of the author plus 70 years"

> term would be entitled to the same copyright protection as their European counterparts. Harmonization might also cause economic incentives "for American and other authors to create and disseminate their work in the United States." (pp. 2350–2351)

Both these issues had some bearing on the case conclusions, and they were noted by the Court in its decision.

Eldred v. Ashcroft Legal Issues

The core legal question in *Eldred v. Ashcroft* was whether the CTEA, extending the term of protection for copyrighted works by 20 years, was constitutional. And this issue is of real significance to the nation. As Lawrence Lessig (2004), the lead attorney on Eldred's case, explained,

> In my view, our constitutional system placed such a limit on copyright as a way to ensure that copyright holders do not too heavily influence the development and distribution of our culture. Yet, as Eldred discovered, copyrights have not expired, and will not expire, so long as Congress is free to be bought to extend them again. (para. 11)

And as Lessig further noted, this limitation on the public domain, and thus a limitation on the basis of information for public participation in influencing culture, extends beyond those works with clear commercial value, such as the Frost poem, and makes currently unknown work unavailable as well. As a result, culturally valuable materials are likely to remain unexplored until their copyrights expire in 2019, unless, of course, in a historically consistent action, the copyright term is extended yet another 20 years, in which case these works would be untouchable much further into the future. As a result, technical communicators' access to materials that form a basis for new product development as well as those for teaching would be severely limited.

Case Focus on Congressional Power

As noted above, the Constitution's intellectual property provision clearly states that a copyright term must be limited. But the plaintiff's defense in the *Eldred v. Ashcroft* case focused primarily on questions regarding limits to congressional power rather than on what the Framers intended by the term *limited times*. So rather than asking whether Congress can create an extension to copyright that is so long that it is virtually unlimited, in defiance to the limited-times language of the intellectual property provision, council asked instead whether congressional power in the Constitution's intellectual property provision is limited by First Amendment review. Because the Court had maintained a history of decisions that

limited congressional power in which there was an overriding public interest, Eldred's council felt comfortable arguing that Eldred's case should be treated in the same vein of reasoning. As Lessig (2004) stated, he expected "that *this* [emphasis his] Supreme Court would not allow Congress to extend existing terms. As anyone close to the Supreme Court's work knows, this Court has increasingly restricted the power of Congress when, in its view, Congress overstepped the powers granted to it by the Constitution" (Lessig, 2004, para. 16).

Yet another potential question about the First Amendment's relation to copyright was whether it could limit copyright at all. Before the *Eldred v. Ashcroft* case came to the Supreme Court, the lower federal court of appeals had made a "categorical statement that cried out for Supreme Court review: the proclamation that copyright is categorically immune from First Amendment review" (McJohn, 2003, p. 99). The Court, in reviewing *Eldred v. Ashcroft*, did not affirm this proclamation, leaving the potential for First Amendment limitation intact, but decided that First Amendment pressure could not extend to congressional powers.

It is significant that Lessig, leading the *Eldred* plaintiffs, used the First Amendment as a basis for his argument. The *Eldred* plaintiffs argued that the copyright term extension restricted speech generally—in the Court's words, "that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment" (*Eldred v. Ashcroft*, 2003, pp. 710–711). The plaintiff's argument did not focus on speech with nonneutral content such as that of specific criticism or commentary but asserted instead that the First Amendment should impose a general restriction on Congress's power. In any case, it is essential to read First Amendment questions in context, not only to understand case issues but to scrutinize the First Amendment's application. In this case in particular, the First Amendment scrutiny required was particularly significant in framing the Court's holding.

The First Amendment exists to ensure that the government is inhibited from creating restrictions that limit public debate. It provides two levels of scrutiny (protection) for speech, the most well protected being content-based speech, and least stringently protected, content-neutral speech. Content-neutral regulations are those that do not target specific speech, parties who speak, or topics of speech but restrict speech generally, regardless of its content. The Supreme Court has stated that

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." (*Ward v. Rock Against Racism*, 1989, citing *Clark v. Community for Creative Non-Violence*, 1984)

Thus, for example, if restrictions are not shown to have a focused effect on a particular expression or source of expression, the government can inhibit the distribution

of flyers to prevent litter, or speakers may be restricted from speaking near hospitals as a means to inhibit harmful results of noise production.

In contrast, inhibition of content-based speech is scrutinized with much stricter standards, and the need for restriction must be proved to be extreme to allow government (or individual) interference. And, of course, it is this protection that allows educators in technical communication to conduct critical research, examining the impact of communicative actions and their function in society, and it forms the basis for arguments in favor of tenure and academic freedom across the full range of disciplinary inquiry, regardless of potential repugnance to others. According to Justice Brennan in *Texas v. Johnson* (1989), "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (p. 14). For example, a law that restricts criticism of an act of government would likely be nullified as unconstitutional; attempts to silence speech because its content is undesirable to the government, corporations, or individuals are also not generally supportable. Nevertheless, even content-based speech may be restricted if an overriding public interest is at stake, illustrated by the classic Oliver Wendell Holmes statement that a person cannot yell "fire" in a crowded theater and expect to be protected by the First Amendment (*Schenck v. United States,* 1919).

So, as an enabler of speech, the First Amendment supports access to information; a general, content-neutral restriction on access could be less stringently inhibited. But where content-based speech is concerned, the First Amendment is strictly enforced; attempts to restrict content-based speech are strictly scrutinized. And copyright functions generally to restrict speech but also encourages the creation of speech through new authorship. Thus, on the one hand, the copyright's structure functions as a general restriction on publishing and disseminating another's works—a content-neutral restriction. On the other hand, quoting another's work as a basis for criticism, or outright copying of another's work as a means for parody (by its nature, a content-based commentary), is allowable as a means to support speech as a basis of democratic interaction.

The *Eldred* plaintiffs argued that, by way of the First Amendment's support of neutral speech, Congress should be inhibited from creating the CTEA. Based on prior court decisions, it was clear that if Congress's choice to extend the copyright term was made to advance important governmental or public interests, its actions would be supportable. But as McJohn (2003) explained, the extension did not likely support governmental claims. He noted that "since the extension applied across the board to all copyrights, it would very likely burden more speech than necessary" (p. 102). As such, the Court could have decided the case based on its scrutiny of whether Congress supported an important governmental interest by extending the term of copyright by 20 years.

But this question was not treated by the *Eldred v. Ashcroft* Court. Justice Ginsburg (*Eldred v. Ashcroft,* 2003), in producing the opinion for the Court, wrote,

"We granted certiorari to address two questions: whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights violates the First Amendment" (p. 198). The Court chose to examine the relationship between the First Amendment and the intellectual property clause and held that the limitations provided in favor of copyright holders (in neutral speech) are generally not subject to First Amendment review but, significantly, left an opening for claims that the First Amendment could restrict copyright based on content-specific First Amendment violations. (And, as I explain below, the Court also supported speech as well as use interests in its constitutionalization of fair use.) The Court stated,

> The Federal Constitution's First Amendment securely protects the freedom to make, or decline to make, one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. Although a Federal Court of Appeals spoke too broadly in the case at hand when the court declared copyrights categorically immune from challenges under the First Amendment, in both copyright infringement suits and declaratory actions concerning copyright, it is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns. (*Eldred v. Ashcroft*, 2003, headnote 9a–9b)

McGinty (2008) stated this in the positive when he explained that, under the *Eldred v. Ashcroft* decision, "The First Amendment is applicable to copyright laws with one important caveat: Copyright laws are only subject to First Amendment review if they go outside of the 'traditional contours' of copyright law" (p. 1116).

The Court's *Traditional Contours* Test

The Court found that the traditional contours of the intellectual property provision provided a proper mechanism for allowing copyright holders to benefit from their work while limiting holders' control by way of fair use. They reasoned that because the Framers of the Constitution created the First Amendment simultaneously with the intellectual property provision, allowing copyright to inhibit access while also supporting it through the First Amendment, the Framers did not intend for the First Amendment to limit copyright in application to neutral speech inhibitions. In other words, "Because copyright has been around since the time of the First Amendment [and the Framers did not note conflicts or limitations] and has been generally unchallenged, the First Amendment would not be interpreted to put limits on it" (McJohn, 2003, p. 107).

Using this test allowed the Court to rely on the fact that the intellectual property provision and the First Amendment were developed separately and concurrently and that the Framers therefore intended for copyright to retain some independence from First Amendment review. In the Court's view, "The Copyright Clause and

the First Amendment were roughly contemporaneous, so the First Amendment should not be read as limiting the powers granted under the Copyright Clause" (McJohn, 2003, p. 108). And, as Horowitz (2009) pointed out, "The Copyright Clause itself . . . is an expression of First Amendment values, and it ought to be enforceable as such" (p. 3).

Based on these explanations, there were reasonable grounds for the Court to find adequate public protections in the constitutional intellectual property provision. When the provision functions to support its goal of knowledge creation and preserves a balance that allows innovation while maintaining a robust public domain, its constitutionality is satisfied. And this reasoning is supportive of the kind of work done by technical communicators, who simultaneously produce work that must be protected if they are to benefit from their efforts to create but also benefit from protection for their speech, which allows access to democratic dialogue.

The problem in the *Eldred v. Ashcroft* case was not with faulty application of the First Amendment as much as it was with the 20-year extension that severely hampered means to maintain access to speech that enables a healthy public domain. Had the Court chosen to address that issue and had the plaintiffs stressed that issue over the question regarding congressional power, the Court's decision might have been very different. Instead, the Court stated,

> We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. As *Harper & Row* observed: "The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. (*Eldred v. Ashcroft*, 2003, p. 218–219, citing *Harper & Row Publishers v. Nation Enterprises*, 1985)

Many note that if the Court had applied a strict First Amendment scrutiny to the law itself, examining the effect of a 20-year copyright extension on speech rather than examining whether Congress had the power to legislate without First Amendment inhibition, the Court would have had grounds to find the CTEA unconstitutional (McJohn, 2003, pp. 101–102). But because the Court avoided the question of how much limitation is too much and focused only on whether Congress has the power to create a limitation, it was possible, then, to decide that the extension should remain. In essence, the Court did not decide the real issue of constitutional validity of the term extension itself and in a blow to access supporters, left the CTEA intact. So it is conceivable that the question may be answered in a case yet to come and, as Birnhack (2005) noted, "The Digital Millennium Copyright Act

('DMCA') might be such a situation" (p. 1309). Birnhack's statement is particularly significant because the Court did not completely close the door on First Amendment restriction to copyright. It stated,

> The CTEA . . . does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." 239 F.3d at 375. (*Eldred v. Ashcroft*, 2003, p. 221)

This statement creates an important open door.

IMPLICATIONS OF *ELDRED V. ASHCROFT*

The defeat for supporters of greater access notwithstanding, further analysis of the Court's decision in *Eldred v. Ashcroft* reveals that it created groundbreaking and important new directions for treating intellectual property issues that might conceivably render decisions favoring greater public access in the future. Given supportable reasoning and appropriate case situations, these changes could actually strengthen arguments in favor of access to intellectual products, even though the *Eldred* plaintiffs' First Amendment argument, as it was presented, was defeated. The most powerful of these changes is the Court's constitutionalization of the fair use portion of the 1976 Copyright Act, the statutory law that supports access and free speech in copyright. The decision to constitutionalize fair use might provide greater latitude of product use for technical communicators who produce educational software, for instance. And it provides a stronger argument for technical communication educators who use others' intellectual products for teaching purposes. In addition, it certainly adds strength to intellectual product access as a basis for speech (such as in parody) because the Court has provided fair use with the constitutional strength of the First Amendment. In essence, the Court has generated a second means of constitutional support for free speech instead of depending on the First Amendment alone.

The Court relied on the "traditional contours" test (McGinty, 2008, p. 1118) to follow the Framers' directives in the intellectual property provision itself to find safeguards for free speech and the necessary access that supports it. Employing the

idea–expression dichotomy, which makes clear that only expression of ideas and not ideas themselves are protected by copyright, as well as constitutionalizing fair use, allowed the Court to support the balance intended in the intellectual property clause. On this basis, in response to Eldred's complaints, the Court stated that "to the extent such assertions raise First Amendment concerns, copyright's built-in free-speech safeguards are generally adequate to address them" (*Eldred*, 2003, p. 221). And Ginsburg made it clear that

> the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . The fair use defense affords considerable "latitude for scholarship and comment," *Harper & Row*, 471 U.S., at 560, and even for parody, see *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994) (rap group's musical parody of Roy Orbison's "Oh, Pretty Woman" may be fair use). (*Eldred v. Ashcroft*, 2003, pp. 219–220)

As McJohn (2003) noted,

> *Eldred* placed great reliance on fair use as a built-in First Amendment safeguard in copyright law. Because copyright contained such safeguards as fair use and the idea/expression dichotomy, additional First Amendment scrutiny was unnecessary. *Eldred* thus rested the constitutional status of copyright on fair use. (p. 128)

(See McJohn's complete article [2003] for detail on the constitutionalization of fair use.) Other legal scholars put stock in an even broader extension of the Court's constitutionalizing imprint. Austin noted, "According to the very same logic that suggests that *Eldred* constitutionalized fair use and the idea-expression dichotomy, the Court may have also constitutionalized copyright's traditional contours, at least as an initial constitutional filter" (as cited in Ginsburg, Sprigman, Reese, & Austin, 2007, p. 272). And other legal scholars are already referring to *Eldred v. Ashcroft*'s constitutionalization of fair use as a matter of course (as used by Sprigman in Ginsburg, Sprigman, Reese, & Austin, 2007, p. 280; also see Reese, 2006).

The Court stopped short of deciding whether a balance to protect speech would require First Amendment application, but the Court did imply that it would be applicable. In addition, by rejecting the "dubious statement by the court below that copyright was categorically immune from First Amendment scrutiny" (McJohn, 2003, p. 108), it made clear that pre-*Eldred v. Ashcroft's* First Amendment operation was still intact. First Amendment protection of nonneutral content-based speech is also intact, evidenced by the Court's clear support of speech protection in parodies (*Campbell v. Acuff-Rose Music, Inc.*, 1994; Dorfman & Mattelart, 1984; *Mattel, Inc. v. MCA Records, Inc.*, 2002; *SunTrust Bank v. Houghton Mifflin Co.*, 2001).

Beyond the *Eldred v. Ashcroft* Court's constitutionalization of fair use, lower courts have also expanded the case's reach by including transformation as a basis to allow uses of copyrighted works that might not have earlier been allowable (such as *Bill Graham Archives v. Dorling Kindersley Publishings*, 2006; *Veeck v. Southern Building Code Congress International*, 2002). Commonly supported transformative works include speech-based efforts, such as parodies, critical commentaries, and other forms of judgment of original works. (But defining the boundaries of transformation sufficient for fair use protection is complex. For more extensive treatment, see Rife [2007].)

Impact of the Constitutionalization of Fair Use

Beyond a more palatable reading that the *Eldred* decision did not eviscerate the First Amendment, it is encouraging to supporters of a robust public domain that the Court created a formidable change by constitutionalizing fair use. Despite that fair use has currently been expanded by the addition of Transformation as a means to allow access, in the past, fair use has not been impermeable to attack (McJohn, 2003, p. 98). But the *Eldred v. Ashcroft* Court expanded the power of fair use beyond a set of statutory guidelines for allowing access to copyrighted works to a constitutional mandate to uphold free-speech rights as well as those that enable education and knowledge advancement. The *Eldred v. Ashcroft* decision "firmly grants fair use constitutional status, by making it a basis for the constitutionality of copyright law in general. Fair use may now also play a greater role in protecting expressive interests with respect to use of copyrighted works" (McJohn, 2003, p. 98). Before the *Eldred v. Ashcroft* decision, fair use was a weak reflection of the First Amendment's separate and more powerful means to protect speech rights; the power of fair use to protect speech and support education was relatively limited and because "the fair use doctrine has always been notoriously difficult to define, . . . the continuing viability of fair use ha[d] come into question" (McJohn, 2003, p. 129). But after *Eldred v. Ashcroft* and its constitutionalization of fair use, speech as well as use can also be constitutionally protected, resting "the constitutional status of copyright on fair use" (McJohn, p. 129).

In addition, it is important to understand that the Court did not limit the First Amendment's power over copyright by choosing not to apply the First Amendment's strict scrutiny to content-neutral regulation. Instead, the Court simply refused to expand it. The Court had

> never examined the full bounds of Congress's power under the Clause. Thus, the *Eldred* Court was not facing the application of constitutional principles in a new fact setting. Rather, it was interpreting constitutional questions that the Court had never squarely addressed. (McJohn, 2003, p. 98)

Significantly, the constitutionalization of fair use allowed a means to emphasize the constitutional basis for use already in the intellectual property clause. Constitutionalizing fair use clarified its legitimacy and promoted it as a means for limiting copyright. Furthermore,

> Under *Eldred*, such copyright doctrines as fair use and the idea/expression dichotomy are not simply details of copyright law. Rather, they are necessary for copyright law as such to be constitutionally permissible. In that case, they must represent bed-rock policy of copyright law. (McJohn, 2003, pp. 135–136)

CONSTITUTIONAL BALANCE

At the core of the conflict between copyright restrictions and fair use access in the intellectual property provision are the changing pressures on how to maintain balance that provides space for creation and protection of new works and simultaneously preserves a structure that supports democratic interaction by way of ensuring a public domain and supporting speech. The *Eldred v. Ashcroft* Court's response to this question was to aid the balance by constitutionalizing fair use but refusing to examine the imbalance created by the CTEA when it severely hampered the public domain. And the Court's arguably harmful decision that First Amendment scrutiny does not limit Congress's power provided a benefit, as it "opened the door to First Amendment review of copyright laws. Now it is the law that if a copyright law goes outside of the traditional contours of copyright law, then First Amendment review will apply" (McGinty, 2008, p. 1140). That, coupled with the constitutionalization of fair use leaves the public with free-speech support from both sources, now both on the basis of constitutional empowerment, the most powerful source of law in the U.S. legal system.

Reconciling Contradictions

How could the Court allow an extreme restriction that creates strong author control through product protection, while also strengthening fair use, and therefore access, by constitutionalizing it? The answer could lie in the function of these two seemingly appositive responses, and it is significant in light of technical communicators' roles as producers of both industry commodities and, as academics, of critical commentary. Some background might be helpful to elucidate the contextual influences that legal scholars believed were present at the development of the CTEA. Authors of a *Harvard Law Review* article (Harmonizing Copyright's Internationalization, 2008) state that "there is widespread feeling among many copyright scholars that Congress has unabashedly ceded to the lobbying pressures of the copyright industries and steadily cut into the heart of the public domain" (pp.

1798–1799). In addition, these same legal scholars note that pressures to internationalize U.S. law through "harmonization" with European law to make it possible to secure the TRIPS (Trade Related Aspects of Intellectual Property Matters) Agreement also strongly influenced the Court to recognize

> this new internationalization of copyright: the legislation at issue was upheld as rational in part because it harmonized U.S. law with E.U. law and because the Court did not want to interfere with Congress in the realm of copyright lest the United States be too constrained to "play a leadership role" in the . . . evolution of the international copyright system. (Harmonizing Copyright's Internationalization, p. 1800)

Significant for technical communicators, whose job is to innovate, the result, as legal scholar Birnhack (2005) explained, is a strengthened focus on product development. He pointed out that

> copyright, of course, did not disappear with the advent of the WTO [World Trade Organization] and TRIPS, but it did change dramatically. The new copyright regime is no longer a law of the public and for the public, but rather, a law of business, for businessmen and investors. We now have a global copyright (G©) regime. This is a shift in the essence of copyright law, which goes hand in hand with the ongoing commodification of information and the dramatic expansion of copyright law that has taken place in developed countries over the past decade. (p. 492)

Harris (2004) also pointed to greater commodification of intellectual products, where the U.S. "has sought an international intellectual property regime that advances private interests" and noted that the TRIPS Agreement resulted in increasing "revenue [which] flowed back to countries exporting intellectual property, particularly the United States" (pp. 99–101). These developments could affect workplace technical communicators broadly by supporting some in efforts to produce and market products globally. But this aspect of the change in emphasis also has potential to limit technical communication educators who wish to access copyrighted materials produced in their lifetimes for research and teaching.

The Supreme Court's holding in *Eldred v. Ashcroft*, coupled with directive pressures from corporate lobbyists to harmonize U.S. law with European law to support trade, underscores a focus on intellectual products as commodities, consistent with the Court's reading in *Eldred v. Ashcroft* that the traditional contours test for the intellectual property provision was to provide authors with benefits in their products, balanced against the need for public accessibility. The Court supported its decision by claiming that it maintained the required balance because on the one hand, the Court decided that First Amendment limitations would not reach to congressional powers in the intellectual property provision (allowing CTEA and thus the act's harmonization for TRIPS to remain intact) and, on the other hand, it constitutionalized

fair use, which, coupled with recent expansion of fair use transformation, significantly expanded the power to protect intellectual product use and free speech.

A generous understanding of the Court's actions acknowledges that allowing CTEA to remain intact required the Court to provide a stronger power in fair use to maintain the Framers' structure of balance, and the Court was guided through the traditional contours test to maintain balance as an important aspect of the intellectual property provision. But I offer that the Court's actions indicate something else that can also be of value in considering the position of technical communicators as both creators and users.

It is possible that the Court exerted a commodity-based reading in the traditional contours test. Coupled with courts' general enlargement of fair use that allows transformation to create new products from other works, it could be argued that this particular expansion in fair use is based on efforts to encourage innovation (however faulty, in my view, as the constitutional provision actually emphasizes knowledge creation rather than product creation as the goal of the progress clause). (See Waltersheid [2004, pp. 329–333] and Karjala [2002] for discussion of the meaning of "progress" in the intellectual property provision.) A true balance of support for innovation as well as that for free speech and access undergirds a democratic process and is meaningful to those in technical communication, who, both in the workplace and in academia, depend on free speech to support authorship and innovation that enable interaction in the democratic process.

Balancing Free Speech and Copyright

Although there are many that might suffice, two cases—*Harper & Row v. Nation Enterprises* (1985) and *Bill Graham Archives v. Dorling Kindersley Publishings* (2006)—illustrate how free speech and intellectual product use is balanced in circumstances that reflect the Court's traditional contours reading of the intellectual property provision. In *Harper & Row v. Nation Enterprises*, the publisher was to release former president Gerald Ford's memoir, which included commentary on his decision to pardon Richard Nixon. *The Nation* published 400 words of verbatim quotes from the book, eliciting a copyright infringement suit from Harper & Row. The Court decided that, although *The Nation* used 400 words of a 500-page book written by a public figure who was speaking about particularly politically charged issues of critical importance to the public, the use was still a copyright infringement, noting that the author's expression maintains protection, even when he is a public figure, and pointed to the extensive investment of effort, time, and funds from both the author and publisher, who were on the eve of publishing the work for public consumption. The Court stated that "by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas" (*Harper & Row v. Nation Enterprises*, 1985, p. 25).

Bill Graham Archives v. Dorling Kindersley Publishings (2006) contrasted broadly to *Harper & Row v. Nation Enterprises.* In this case, the Court decided that the defendant did not infringe copyright when he copied Grateful Dead poster images in their entirety and reproduced them in smaller format in his book, *Grateful Dead: The Illustrated Trip.* As the Supreme Court did in *Campbell v. Acuff-Rose Music, Inc.* (1994), the 2nd Circuit Federal Court determined that Kindersley had sufficiently transformed the work (added "something new, with a further purpose or different character, altering the first with new expression, meaning, or message" [*Campbell v. Acuff Rose Music, Inc.*, 1994, p. 579]) to be determined a fair use. The court treated Kindersley's reproductions, which were accompanied by commentary, as speech and allowed his use of the images on that basis but emphasized the transformative nature of the use.

In addition, in a range of cases, in particular regarding parodies, the Supreme Court provided support for use as speech—when the use and speech content are merged—illustrating the Court's broad protection for use as a part of content-based and transformative speech (Lawrence, 1989; *Campbell v. Acuff-Rose Music, Inc.*, 1994; *Mattel, Inc. v. MCA Records, Inc.*, 2002; *Suntrust Bank v. Houghton Mifflin Co.*, 2001). Although free-speech issues in intellectual property are sufficiently entangled with multiple aspects of law, making clear guidelines for speech protection illusive, the message in these cases among others, characterized in broad strokes, is that copyright's fair use applies to use of copyrighted works, supporting content-neutral free-speech protections (and education) in addition to applying to nonneutral content-based speech; the First Amendment applies to speech, providing protections for specific nonneutral content. In addition, the Court indicated obliquely that it would support creation of original work over the use of the work of others (*Eldred v. Ashcroft*, 2003, headnote 9a–9b). The Court has emphasized originality as a basis for First Amendment protection, consistent with the concept that individual speech garners greater protection than does commercial speech. In addition, if the speech is not original, it is more difficult to make a claim of representation of the speaker (exercising a free-speech right) rather than mere repetition of another's representative words. Nevertheless, as the parody cases demonstrate, there are instances where original copyrighted works based on use of another's copyright can be protected as nonneutral speech. Both workplace and academic technical communicators with interests in using other's works as a basis for offering speech that leads to participation in the democratic process may find that support for their actions depends on their ability to claim authorship in potential participatory speech.

THE ROLE OF AUTHORSHIP

The *Eldred v. Ashcroft* Court's decision to protect authors' rights to their products over the need for content-neutral First Amendment access, relying instead on a

constitutionalized fair use, made it clear that authors would have strong copyright protection for their products as commodities and innovations. Likewise, the Court retained protection for authors who create nonneutral speech, in the speech itself, both by constitutionalizing fair use in copyright and by leaving intact First Amendment protections for nonneutral speech outside copyright. Regardless of intention, in making these choices, the Court also emphasized the role of authorship in free speech. Where authorship is representative—either by copyrighted work or by content-based speech itself—the author's speech is protected. So when the *Harper & Row v. Nation Enterprises* (1985) Court (1985) emphasized that "the Framers themselves intended copyright to be an engine of free expression," it also emphasized the author's representation of himself or herself through the products created. Given a basis of actual authorship of intellectual products, this analysis could leave free speech intact while expanding innovation, providing the balance that the Framers created in the constitutional provision. Unfortunately, the balance breaks down with the legal fiction of corporate authorship in work for hire, in which a corporation controls the copyright to work created for the company but is not an actual author with expanded free speech and representational rights. (For detail on work for hire, see Herrington [1999a; 1999b].) And this could be significant for technical communicators who work in settings in which they produce works for hire: works for employers who usually control choices in content and in how those materials are created. Those who create works for hire would likely have no personal expectation of protected speech for the works that they create. They could not maintain claims to the copyrights in these works, and they would be unlikely to maintain a claim of authorship that might allow the works to be considered protectable speech. Arguably, authorship issues underlie the *Eldred v. Ashcroft* case.

Conceptualizing the treatment of authorship in the mix of copyright and free speech may help clarify aspects of the law and provide a means for characterizing technical communicators' positions as creators in the multiple roles they play in the workplace. At times, they create original, even expressive, works such as images, graphic presentations, advertising copy, and other forms of communication that are clearly representative of viewpoints and are creative efforts of those who develop them. At other times, technical communicators may do rote-level work, compiling reports of others or filling in the blanks of forms and thus providing no original content. And much of the content produced in the workplace may not be clearly categorized as either creatively authored or rote. Creating a set of well-developed instructions, for instance, might involve extended innovation, both in content and technological structure, but a standard set of instructions might also involve a mere repetition of what has been previously written. The significance for technical communicators is the need to be aware that authorship not only enables protection of original work but also may lead to First Amendment speech support.

Notwithstanding the CTEA's 20-year extension on copyright protection, the structure in the intellectual property clause could maintain a strong internal means of support for free speech if the authored work (which is the subject of copyright) is nonneutral content-based speech. For example, most of the scholarly work we produce as educators in technical communication is content-based speech. We analyze societally affected communications and critique their sources, effects, and potential meanings for our students, for workplace technical communicators, or for society at large. The research we do is authored and thus representative of us as creators. The First Amendment would most likely protect the content of these works, and if others' copyrighted works were used, fair use would most likely allow their use as well. Once scholarly work in technical communication is published, it then becomes the basis for further response and new commentary—new speech—and fair use can then again allow the next commenter's use of the work to form a ground for response. On this basis, the Court's claim in *Harper & Row Publishers v. Nation Enterprises* (1985) that copyright itself as a mechanism for free expression could be well maintained. One author would speak by creating a work of personal representation, and another, by way of fair use, could access it to create a response. This interaction creates a core interchange that forms the base for democratic interaction.

But supporting speech in copyright is problematic when copyrighted works are corporate commodities rather than representations of individual authors. In the same vein, technical communicators' ability to participate in democratic interaction is enabled or hampered by the roles they play as creative developers, roles in which they may participate fully as authors representing their ideas but may not participate as those who produce rote materials that have little or no representative quality for them as individuals. Authorship can allow technical communicators to participate in producing speech that leads to democratic interaction supporting self-actualization.

As do all citizens, technical communicators participate in society's interactions, and by conversing with each other, speaking to political representatives, and voting, they interact within the democratic structure. But they are unique in their roles as producers of communicative materials that may reach or affect large numbers of readers, viewers, and users. For instance, technical communicators who are responsible for creating instructions for government tax forms affect almost all citizens at least once a year during tax filing time. And technical communicators also present information regarding national medical interests in response to societal interests such as the H1N1 virus or to other issues of national interest. It is possible that their authorship of these materials may allow them to influence society and, by doing so, further participate in the process of democratic interaction. But their potential for participation in democratic interaction may depend, after *Eldred v. Ashcroft*, on the legal characterization of "author," the character of the authored work, and the potential for influence provided by a technical communicator's responsibilities as a content handler and communicator.

Technical communicators who engage in corporate authorship and who create works for hire develop commodities of trade. Because copyright law provides the legal fiction of corporate authorship, the actual author or authors who provided all intellectual input in developing the product are not treated as authors under the law. As such, under work-for-hire, not only do authors not retain rights of control over their intellectual products, significantly, works for hire do not represent them as individuals. Therefore, these products are treated as commodities rather than as speech for purposes of their creators' First Amendment protection, and as the *Eldred v. Ashcroft* Court made clear, the First Amendment does not automatically protect neutral speech in copyright law. Regardless, when a commodity is considered content-based nonneutral speech, fair use and First Amendment speech protections can apply. So if technical communicators author work that is content based, even if it is commercial (and subject to greater scrutiny), speech protections could follow. For instance, those who have created social networking sites have had a broad effect on the general public's access to shared communication over a broad range of topics. The creative choices made in enabling ease of access and palatability to users, authored per copyright law and arguably protectable under First Amendment law, have allowed innovation to support democratic participation by providing a means of interaction to thousands of users.

Eldred v. Ashcroft hints at the need for original authorship to obtain First Amendment protection. If the constitutional provision operated as the Framers intended, providing balance between authors' rights as an incentive to produce and users' rights as an enabler of speech and interaction, then the equivalent First Amendment goals to support democracy would also be undergirded in the balance of the copyright clause. A question for technical communicators is whether their workplace creations lead to the kind of authorship that provides protection for the documents they create, either through authorship in copyright or representative speech under the First Amendment. Simply asked, do technical communicators create commodities or representative works of authorship?

IMPLICATIONS FOR TECHNICAL COMMUNICATORS

The broader question for technical communicators is whether they reach the ability to self-actualize and participate in the democratic process by providing instances of speech in the workplace. If a self-employed technical communicator creates a workplace product that contains a form of content-based speech—such as a creative structure for technological or information access by all citizens like that for making legal choices under Lessig's Creative Commons Web site—the likelihood is relatively high that it could be protected as speech. However, as noted above, if the authorship is corporate and the technical communicator produces a work for hire, the likelihood is lower that the technical communicator as an indi-

vidual would gain speech protection. And where technical communicators produce work that is developed with a team or repurposed from previously created materials, the potential for speech protection may also be lower. Actual, rather than corporate, authorship is tied to speech when the work represents the individual who created it, but individual authorship does not guarantee that the speech is protectable. And as the decision by the *Eldred v. Ashcroft* Court demonstrated, copyright focuses on intellectual products as commodities rather than as products of speech. When technical communicators merely move knowledge from space to space in the course of working for their employers, they have little claim to the kind of substantive authorship that could lead to protection for speech. In general,

> The discourses created by technical communicators have not been considered authored discourses; the technical communicator may be a transmitter of messages or a translator of meanings, but he or she is not—or at least not until now—considered to be an author. (Slack, Miller, & Doak, 1993, p. 13)

Analogous to comments by Slack et al., I venture that the lack of legal author status inhibits technical communicators' power.

In a more literal sense, workplace technical communicators' efforts often extend to the development of business products rather than to those that would allow speech and self-actualization. For instance, it could be difficult to make a claim for protected speech in a form-based document such as an accident report. Nevertheless, as a number of authors have pointed out, technical communicators participate broadly in shaping society through the work they do. And post-*Eldred v. Ashcroft*, this may be of even greater importance than ever before. Grabill and Simmons (1998) noted that risk is a socially constructed concept and that technical communicators participate in affecting how it is understood and applied where the technical communicator risk analyst can provide a space in which affected citizens are able to participate in decision-making processes in response (p. 437). In addition, Smith (2000) reminded us that public policy itself is developed through technical communication. And as Diehl, Grabill, Hart-Davidson, and Iyer (2008) pointed out, writing, as an invisible form of work, is actually an important form of community-based knowledge work that acts as "contemporary civic rhetorical activity" (p. 416).

Although Ding (1998) asserted that technical communicators may have little autonomy or voice in deciding how to develop work they create (p. 136), Slack et al., (1993) explained a more complicated structure in which technical communicators' workplace actions can be characterized, depending on the kind of actions they undertake: through transmission (p. 16), translation (pp. 19–20), or articulation (p. 25). If technical communicators merely transmit information, their influence on that information is low and insignificant; when their tasks involve translation of information, they have greater potential to influence the communicative products

they develop; and when they are able to articulate the products they develop, they gain the potential to create knowledge and the possibility for claims of authorship arise.

I would argue that technical communicators participate in shaping society any time they offer original viewpoints, methods, technologies, or materials that affect the way we work. If a technical communicator, in the course of workplace activity, creates a means to understand choices in health care with a simple structure that is accessible across the broad spectrum of users around the nation in a system that is inexpensive and already technologically accessible, he or she will have an astounding impact on society. When technical communicators extend their work beyond moving information from one space to another and developing products under the direction of employers and instead go beyond to authorship of knowledge such as that described above, the likelihood that they will have created protectable speech increases, and it follows that the likelihood that their creative actions will comprise a democratic effort increases as well. If technical communicators act in ways that affect individuals' means of access to information important to the nation, whether that material is a work for hire or is individually or jointly authored, they will have the potential to aid democratic effort by others. But where a technical communicator authors his or her own speech, such as that created by academics, and participates in societal commentary, he or she is able to participate in democratic interaction itself. As Hart-Davidson, Bernhardt, McLeod, Rife, and Grabill (2008) noted upon examination of the roles of technical communicators in project management, when technical communicators can employ *phronesis* "as a means to guide decision making about the creation of knowledge, the arrangement of information, the selection of tools, and the design of work practices associated with the making of texts," it enables a focus on work that furthers the "good of the community" rather than on the text itself (p. 10). Thus, technical communicators' engagement in phronesis underscores their ability to interact in societal development. When this is carried out through choices in product development, they also can retain the kind of control that leads to authorship, which in turn, allows participation in shaping the society through product creation. And those who create either works for hire or products that are individually authored may also shape the directions of democracy through influence. For instance, a technical communicator who can make a choice to use plain language to ensure that a communication is accessible to readers or to use difficult linguistic structures to eliminate the range of readers who might comprehend it makes a choice in accessibility. Where the document is important to a community, such as a set of rules for applying for housing refinancing in a time limit, a technical communicator's choice could have a broad impact. A post-*Eldred v. Ashcroft* age with the CTEA still in place leaves the public domain severely limited. In light of the *Eldred v. Ashcroft* Court's emphasis on commodification of intellectual products, it may be more important than ever that technical communicators are aware of the potential effect of their critical choices in

product development as a means to participate in shaping society through workplace activity, even as they consider opportunities for creating protectable speech from original authorship.

CONCLUSION

When technical communicators develop products of knowledge to which they can claim authorship, they also have potential to claim fair use in others' works and First Amendment protection for their own work as speech. And creating speech provides a means to participate in democratic interaction. But in an age when the Supreme Court is emphasizing intellectual product development as commodification, technical communicators who create intellectual products in the workplace, particularly if those products are works for hire, may find their authorship dubious and their ability to produce protected speech limited. The more emphasis there is on protecting information and intellectual products as commodities, the less likely creators are to influence the democratic process through authorship. But by using knowledge to develop communication processes, technical communicators have the capacity to influence civic interaction as a whole and, even without authorship, to influence democratic interaction.

Today it is more likely that technical communicators, who have special access to communication development that can affect vast numbers of users, readers, and viewers, are able to influence society through critical analysis and rhetorical expression in choices for how they create products rather than choices in which products they create. Technical communicators who influence product development or rhetorical treatment of communication and do so on the basis of knowledge work, even without producing legally protectable speech, may influence the democratic process nevertheless. In a time when intellectual products are less likely to be treated as speech that might otherwise influence democratic action, making use of societal influence through other means may be especially advantageous. Thralls and Zachry (2004) pointed out that technical communicators are more than just information carriers. Instead, technical communication "represents a shaping force in the unfolding story" (p. 11). And it is this shaping potential that may be most important, post–*Eldred v. Ashcroft*.

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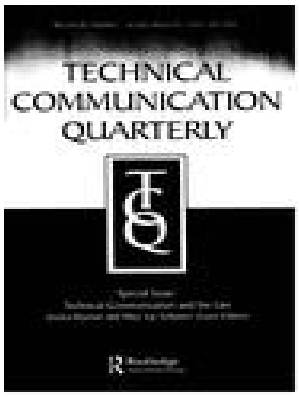

Author: Herrington, TyAnna

Title: Copyright, Free Speech, and Democracy: Eldred v. Ashcroft and Its Implications for Technical Communicators

Source: Tech Commun Q 20 no1 Ja/Mr 2011 p. 47-72

ISSN: 1057-2252

DOI: 10.1080/10572252.2011.528321

Publisher: Taylor & Francis Group, LLC

325 Chestnut Street, Philadelphia, PA 19106