Copyrights and The Constitution

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It seems self-evident that no individual should be allowed to own a law that all of us must obey. Laws and regulations are adopted, we hope, through the process of self-government, and citizens must enjoy the right to copy and restate the laws.
Over the past several decades, some private organizations have quietly assumed ownership over certain legal requirements, ranging from building safety codes to medical billing terminology. Their trick (some might call it a scam) has been to give drafts of regulations and codes to the government without charge, induce the government to require their use, and then make a profitable business out of selling copies of the regulations or codes to those who must comply.

The ownership of legal regulations is worth a lot of money. Senate Minority Leader Trent Lott estimated that the American Medical Association receives a reported $71 million a year in royalties and book sales by controlling the codes that are required for all health care billing.

The town governments of Anna and Savoy in Texas require compliance with building codes developed by the Southern Building Code Congress International (SBCCI). A retired pilot and operator of a non-commercial website, Peter Veeck, posted these safety requirements on his site after finding them difficult to access.

SBCCI asserted that it owned a copyright in the codes and litigated against Veeck to get him to remove them from his website. Veeck responded by arguing that legal requirements should not be owned by anyone.

The federal district court sided with SBCCI, which was supported on appeal by at least ten other groups that claim to own other regulations. The case ended up before the entire Fifth Circuit Court of Appeals, which ruled on June 7 in favor of Veeck.

Judge Edith Jones, who wrote the majority opinion in Veeck v. SBCCI, held that model codes enter the public domain to the extent that they become law, and laws, like facts, cannot be copyrighted. She applied an 1888 U.S. Supreme Court decision, Banks v. Manchester, which rejected a claim of copyright in the opinions of state courts.

Judge Jones noted that citizens must be free to recite the law, as Veeck did and as many others might do in quoting and criticizing complex legal requirements. Those who develop the codes can still reap financial gain by publishing their own commentary and annotations along with the codes.

Judge Jones concluded that denial of copyrights in legal requirements is entirely consistent with the Copyright Clause in the Constitution. Article I, Section 8, clause 8 states that the purpose is "To promote the Progress of Science and useful Arts."

Copyrights and patents are federally granted monopolies and thus very different from real property. Thomas Jefferson adamantly opposed state-conferred monopolies and even wanted to include a prohibition against them in the Bill of Rights.

It was, after all, a despised state-conferred tea monopoly that led to the Boston Tea Party, which helped spark the American Revolution. But James Madison and others persuaded Jefferson of the value of granting patent and copyright monopolies for limited times, and Jefferson served as our first patent examiner.

Colorful disputes over copyrights have continued throughout our history, and the U.S. Supreme Court this fall will hear a case which many think is the most important copyright case in decades. In Eldred v. Ashcroft, the Court will address the constitutionality of the Sonny Bono Copyright Term Extension Act, which was rushed through both Houses of Congress in a single day on October 7, 1998.

This law is informally known as the Disney Copyright Law because some consider it a billion-dollar federal handout to the Disney Company. It extended the copyrights on Mickey Mouse, Donald Duck, Pluto, Goofy, Winnie the Pooh and other cartoons and works scheduled to expire over the next several years.

The Copyright Clause in the Constitution is precise in stating that copyright and patent monopolies can be conferred by Congress "for limited times." The implementing law passed by the first Congress set the limited time at 14 years.

However, Congress has repeatedly extended the time of existing copyright monopolies. The Disney Law mocks the constitutional requirement of "limited times" by extending copyright protection to 95 years.

The Supreme Court agreed to consider whether this copyright extension is unconstitutional under the Copyright Clause and also whether it conflicts with the First Amendment rights of others to enjoy and use the material in the public domain after the limited time expires.

Judge Edith Jones' rolling back of copyright abuse in the Veeck decision may foreshadow a decision in Eldred which could cause a long overdue correction of congressional abuse of the Copyright Clause.

Since the rights of authors and inventors originate in the same clause in the Constitution, the Eldred decision could have a mighty impact on the issue of prescription drugs whose patents are about to expire. Could Congress vote an extension of patents on prescription drugs in order to give a windfall to certain pharmaceutical corporations and prevent others from manufacturing generic drugs to sell at a fraction of the price?