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Kahle v. Ashcroft Case Page

Summary

In this case, two archives ask the U.S. District Court for the Northern District of California to hold that statutes that extended copyright terms unconditionally — the Copyright Renewal Act and the Copyright Term Extension Act (CTEA)— are unconstitutional under the Free Speech Clause of the First Amendment, and that the Copyright Renewal Act and CTEA together create an "effectively perpetual" term with respect to works first published after January 1, 1964 and before January 1, 1978, in violation of the Constitution's Limited Times and Promote...Progress Clauses. The Complaint asks the Court for a declaratory judgment that copyright restrictions on orphaned works — works whose copyright has not expired but which are no longer available — violate the constitution. Share your experiences trying to use orphaned works **here**.

Updates

Kahle v. Gonzales now briefed to the Ninth Circuit

Kahle vs. Gonzales (formerly Kahle vs. Ashcroft) has now been briefed to the Ninth Circuit. **Appellants' brief**. **Government opposition**. **Appellants' reply brief**. We haven't received a date yet for oral argument. Read more about the case **here**.

posted on [Apr 12 05 at 11:11 AM] by [sprigman]

Opening Brief Filed

Today we filed the appellant's opening brief in the Ninth Circuit. The brief argues that, starting with the 1976 Copyright Act, Congress changed the fundamental nature of copyright from an opt-in to opt-out system. Therefore, under the rule of Eldred v. Ashcroft, the changes are subject to First Amendment review. **Download file**

posted on [Jan 19 05 at 4:23 PM] by [jennifer]

A setback in Kahle v. Ashcroft

So the district court has granted the government's motion to dismiss in *Kahle v. Ashcroft*. Here's the **order**.

We're going to fight on to the Ninth Circuit, which is where the game was bound to be decided anyway. More comments coming soon on the district court's order.

posted on [Dec 3 04 at 2:28 PM] by [sprigman]

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New oral argument date: Dec. 10

Oral argument on the government's motion to dismiss in *Kahle v. Ashcroft*, previously scheduled for Oct. 29, has been moved to Dec. 10. Stay tuned.

posted on [Nov 1 04 at 1:25 PM] by [sprigman]

Gov't files reply brief

Read it **here.**

posted on [Oct 14 04 at 2:22 PM] by [sprigman]

Plaintiffs file brief in opposition to government's motion to dismiss

The Internet Archive and the Prelinger Archive have filed their **opposition to the government's motion to dismiss** in *Kahle v. Ashcroft*, a case challenging the constitutionality of Congress's removal from the copyright laws of our traditional system of formalities (i.e., registration, notice, renewal). CIS's Larry Lessig, Jennifer Granick and Chris Sprigman represent plaintiffs. Here's the opening paragraphs of our brief:

> This case is about the speech-related harms caused when Congress radically changed the nature of American copyright law. For the first 186 years of our Republic, copyright laws established an "opt-in" system, one in which copyrights were secured only to those who took steps to claim them. In 1976 and 1989, Congress inverted this regime, transforming copyright law into an "opt-out" system, one in which rights are granted automatically and indiscriminately unless disclaimed.
>
> Under the principle articulated in *Eldred v. Ashcroft*, 537 U.S. 186, 221, 123 S. Ct. 769, 790 (2003), this radical change in a "traditional contour of copyright" requires First Amendment scrutiny. Plaintiffs in *Eldred* had asked the Court to apply ordinary First Amendment review to every change in copyright law. The Court refused that request. The government in *Eldred* had asked the Court to affirm the judgment of the Court of Appeals below, finding copyright "categorically immune from challenges under the First Amendment." *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). The Court refused that request as well. Instead, the Court anchored First Amendment review to the "traditional contours" of copyright protection. Laws that respected those "traditional contours," the Court held, would suffer "no further First Amendment scrutiny." But by implication, and as the government concedes, changes to those "traditional contours" would require "further First Amendment scrutiny."
>
> The changes to the U.S. copyright system at issue in this case profoundly affect copyright's "traditional contours." Indeed, as plaintiffs would show at trial, very few changes in the contours of copyright law could have as significant an effect on First Amendment values. If any alternation to copyright laws can be characterized as a shift in the "traditional contours of copyright," these can.
>
> In a series of statutes over a relatively short period of time, Congress shifted copyright from an opt-in to an opt-out regime, by removing from our law a core set of copyright

formalities. These formalities, including (1) registration, (2) notice, and (3) renewal (hereafter, "opt-in formalities"), were required of copyright owners for them to secure initial, and continued, copyright protection.

The removal of formalities utterly changed the nature and reach of American copyright law. For 186 years of the American Republic, the purpose and effect of these opt-in formalities was to narrow the reach of copyright law to those works that had a continuing copyright-related interest. Given the limits that these opt-in formalities placed on the reach of the law, copyright burdened relatively few creative works, and hence burdened very few beyond commercial creators. The law thus left essentially unburdened archivists, preservationists, libraries, and non-commercial creators.

But by stripping out copyright's opt-in formalities, Congress has reversed this traditional pattern. Whereas copyright regulation before was the exception, now it is the rule. Whereas the burden of copyright before was effectively limited to works that had some continuing commercial viability, the burden of copyright now is spread broadly and indiscriminately to all creative works regardless of any continued commercial interest in the copyright. Whereas traditionally, the contours of American copyright law guaranteed that this regulation of speech was reasonably and effectively tailored to a viable commercial interest, today this regulation of speech burdens effectively all creative work, regardless of any continuing commercial interest in "Authors" to control its dissemination or use. Works today that have no continuing commercial use, but continue under the regulations of copyright, are effectively orphaned by the current regime.

These changes would have been significant at any time in our history. But they are especially burdensome now. Just at the time that digital technologies could enable an explosion in creative reuse of our culture, the burdens of an opt-out system of copyright make most reuse of orphaned work essentially impossible. Libraries and archives could use these digital technologies to make available an extraordinary range of our creative past. Yet the law now imposes burdens that make this reuse essentially impossible.

At trial, plaintiffs will introduce historical data showing the real-world effect of these changes in legal doctrine. Plaintiffs will show that under the traditional opt-in copyright system, a large share of published materials—perhaps as much as half—was never subject to copyright because rights-holders chose not to claim copyright. And even for those works that were copyrighted, more than 85% fell out of copyright after their initial term. *These data will thus demonstrate that the most significant determinant of copyright's reach, and hence, the most significant determinant of Free Speech values, were these opt-in formalities. There is therefore likely no other change in copyright law that would have as dramatic an effect on free speech interests.*

The government will file its reply on October 8, and a hearing in front of Judge Maxine Chesney (U.S. District Court, Northern District of Calif.) is scheduled for October 29. You can learn more about *Kahle v. Ashcroft* **here**. For those interested in the broader issues raised by the demise of mandatory copyright formalities, you may wish to take a look at an article by Chris Sprigman, ***Reform(aliz)ing Copyright***, that will be published later this

year in the Stanford Law Review.

posted on [Sep 8 04 at 9:14 PM] by [sprigman]

Government moves to Dismiss Kahle's Complaint

On June 23, 2004, the Government responded to the suit by filing a Motion to Dismiss. **Download file** The Government relies heavily on the Supreme Court's decision in *Eldred* and the recently-decided *Luck's Music Library* case in the D.C. District.

posted on [Jun 24 04 at 4:54 PM] by [Elizabeth]

Complaint

Amended Complaint filed March 30, 2004 in Kahle v. Ashcroft.

posted on [Mar 22 04 at 1:05 PM] by [Lauren]

Kahle v. Ashcroft FAQ

1. What's this case about?

It is about freeing our culture from unnecessary and harmful regulation. It is about a series of recent changes to copyright law that have failed to benefit copyright owners, but have instead created serious burdens on those who create culture in the digital environment.

Plaintiffs in this case — the Internet Archive and its Chairman, Brewster Kahle, and the Prelinger Film Archive (formally, Prelinger Associates, Inc.) and its President, Richard Prelinger — are filing suit seeking a declaratory judgment that the current system of unconditional copyright is unconstitutional.

2. What changes?

From the first U.S. copyright statute in 1790 until the Copyright Act of 1976, the U.S. had a conditional copyright system that limited copyright protection to those who took affirmative steps to claim it — by, for example, registering their copyright, marking copies of their work with copyright notice, and renewing their copyright after a relatively short initial period of protection. (The registration, notice and renewal requirements are often referred to as "copyright formalities").

Our tradition of conditional copyright stands in stark contrast to what we have today — an unconditional system that grants copyright protection whether or not an author desires it. Our current unconditional system grants copyright protection whether or not the work is registered, marked, or renewed. Formalities, where they have been retained at all, are voluntary and do not effect the existence or continuation of copyright. Protection is indiscriminate, and automatic.

3. Isn't this just Eldred v. Ashcroft all over again?

No. Or only to the pundits who don't read before they write. Eldred v. Ashcroft involved a challenge to the constitutionality of the Copyright Term Extension Act (CTEA), which

extended the term of both existing and future copyrights by 20 years. In 2003, the Supreme Court rejected these challenges. Eldred focused narrowly on the constitutionality of the CTEA's extension of the term of subsisting copyrights; the Court held that these extensions did not violate the First Amendment or the Progress Clause. Eldred did not deal at all with the constitutional implications of the shift from conditional to unconditional copyright.

4. Is Eldred relevant to this new case?

Interestingly, the Court in Eldred did say something that supports the claims plaintiffs are making in this new case. The Court held in Eldred that changes to the copyright laws that do not alter the traditional contours of copyright protection are unlikely to burden speech in a way that might offend the First Amendment. By implication, when Congress does alter the traditional contours of copyright protection — as it has by shifting copyright from a conditional to an unconditional system — the changes to the law should be subject to heightened scrutiny under the First Amendment to determine whether they impermissibly burden speech. For reasons explained in detail in the complaint, the shift from conditional to unconditional copyright creates significant burdens on speech that cannot withstand First Amendment scrutiny.

5. You're talking about the removal of copyright "formalities" like registration and renewal. That seems like such a minor issue. Why should I care?

The move from conditional to unconditional copyright has had a number of unintended consequences. It has failed to benefit authors. It has imposed burdens on free speech and the creation of culture — burdens which have grown as digital technologies like the Internet lower the non-copyright barriers to creating and disseminating culture. It has moved copyright much closer to a collision with the Constitution.

6. How does "unconditional copyright" create these problems?

Under our traditional system of conditional copyright, the overwhelming majority (as much as 90%) of published works were neither registered nor noticed, and thus passed immediately into the public domain, where they were freely usable by others without the need to ask permission. Of the minority of works that were registered and noticed, and therefore protected by copyright, over 85% were not renewed after a relatively short (28 years) initial period of protection. These works also passed into the public domain. Our traditional copyright rules thus kept a vast amount of creative work wholly free of the burdens of copyright regulation — a freedom, it should be noted, that was granted by an author's voluntary decision not to register his work. Even for the subset of works for which authors secured copyright, the conditional regime's registration requirement served to keep records of works for which copyright was claimed, and moved most protected work into the public domain after a relatively short initial term — again, by the voluntary decision of the author. Both the existence and duration of copyright regulation was effectively narrowed to just those works that the author or his assigns had a desire to protect.

7. How is today's copyright law different?

Under our current unconditional system, all works are automatically locked up — regardless

of the will of the author — for the full term of copyright, which has been lengthened substantially. The unconditional system also destroys the records of ownership that mandatory registration under the conditional system once provided. The combination of automatic and indiscriminate copyright, plus the absence of information about ownership, makes re-use of creative works practically impossible for many would-be users.

8. Can you give some examples of the harm you're talking about?

Just take a look at the experience of one of the plaintiffs in this case. The Internet Archive, in partnership with Carnegie Mellon University, the National Science Foundation, and the governments of India and China, have been working on the "Million Book Project," which, when complete, will offer free access to a fully-readable online library of one million digitized books. This is an innovative project that will use the low-cost distribution mechanism the Internet provides to increase public access to important works.

The Million Book Project isn't focused on commercially successful books — those are available at bookstores. The project will include a number of books in the public domain — those that are free of copyright protection and thus usable without the need to obtain permission. But many books fall into a nether region. These are works that are not commercially viable and therefore not widely available to the public, but are nevertheless subject to continuing copyright protection. The Internet Archive wants to include many of these books, which we refer to as "orphan works," in the Million Book Project, but current law makes that very difficult.

9. How does current law create "orphan works?"

Works that have no continuing copyright value don't attract the interest of commercial publishers. They nonetheless remain subject to copyright-related burdens (i.e., the necessity of clearing rights) that prevent organizations like the Internet Archive from archiving them, preserving them, or making them widely accessible for study and creative re-use. Under our traditional regime of conditional copyright, these works would have been filtered out of the copyright system — many of these works would never have been registered, or, if registered, never renewed. But under today's unconditional system, there is no filtering mechanism to separate these works from commercially viable works that legitimately are the focus of copyright.

So if the Internet Archive wants to include an orphan work in the Million Book Project, it must obtain permission from the work's owner. But figuring out who the owner is, and how to contact him, is difficult and expensive (especially in the absence of a reliable registry). Thus far, the difficulty of identifying rights-holders and clearing copyright under current copyright laws has largely limited the Million Book Project to government documents, old texts, and books from India and China, where copyright laws are less burdensome.

10. If unconditional copyright is so bad, why did Congress pick it?

It is important to note that the shift from conditional to unconditional copyright happened relatively recently — the process began with the Copyright Act of 1976, which eliminated the registration and notice requirements, and cut back on the renewal requirement, and culminated in the 1992 Berne Convention Implementation Act, which removed what was

left of the renewal requirement. These changes happened because the U.S. wanted to adhere to the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention is the most significant international treaty governing copyright, and it includes a provision prohibiting member states from imposing copyright formalities on the works of authors from other member states.

11. Why is it important to file this lawsuit now?

The move to unconditional copyright came just at a time when digital technologies like the Internet could enable the archiving, preservation and reuse of content at a level never imagined before. For 186 years, American law limited the grant of copyright to those authors who claimed the need for copyright protection. But because of the indiscriminate nature of copyright today, the burden of copyright regulation extends to work whether or not the author or other rightsholder has any need for continuing protection. That unnecessary burden blocks the cultivation of our culture and the spread of knowledge.

12. So what are you asking the court to do?

The plaintiffs in this case, the Internet Archive and its Chairman, Brewster Kahle, and the Prelinger Film Archive (formally, Prelinger Associates, Inc.) and its President, Richard Prelinger, are filing suit seeking a declaratory judgment that the current system of unconditional copyright is unconstitutional. Plaintiffs contend, among other things, that unconditional copyright creates unreasonable burdens on speech in violation of the First Amendment, and creates effectively perpetual copyright terms in violation of the Progress Clause (the provision in the Constitution that grants Congress power to legislate with respect to copyrights and patents).

13. If you win, how could copyright law change?

There are many ways Congress could change the copyright law back to a conditional system and still remain in compliance with the Berne Convention. One way would be to re-impose formalities for all works of U.S. authors — these are most works published in the U. S., and Berne doesn't prohibit signatory nations from imposing formalities on their own authors. Another would be to pass the **Public Domain Enhancement Act**, which would impose a tiny renewal fee designed to move unused copyrighted work into the public domain. The PDEA also wouldn't violate Berne, because it would apply only to works of U. S. authors.

14. What's the relationship of this case to the **PDEA**?

Of course if the PDEA were passed, that might moot the necessity of this case. But so far, we have not seen substantial support in Congress for the PDEA, which makes necessary our resort to the courts.

14. Who can I contact if I want to learn more?

Email Chris Sprigman, Fellow at the Center for Internet and Society, at Sprigman-at-stanford.edu, or call him at 650-725-9451.

posted on [Mar 22 04 at 10:29 AM] by [Lauren]

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