The Internet Archive:
the copyright term and orphaned works

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The case of *Kahle v Ashcroft* [(2004) C 04–1127 BZ] in the United States District Court of California is one of a number of constitutional challenges still underway against the *Sonny Bono Copyright Term Extension Act* 1998 (US).

The plaintiffs in this case include the Internet Archive and its chairman Brewster Kahle, and the Prelinger Film Archive and its president, Richard Prelinger.

The Internet Archive [http://www.archive.org/] hopes to build an 'internet library,' with the purpose of offering permanent and free access for researchers, historians, and scholars to works that exist in digital format. The Archive is currently working with the governments of India and China on the 'One Million Book Project', which is an effort to create a digital archive of one million books in fully-readable online text format. The Archive also operates the 'Internet Bookmobile' [http://www.archive.org/texts/bookmobile.php], a mobile internet bookstore that downloads, prints and binds public domain books for $1 each.

Prelinger Archives [http://www.prelinger.com/] aims to collect, preserve, and facilitate access to films of historical significance that have not been collected elsewhere, or made commercially available elsewhere. It provides stock footage to media and entertainment industries through its authorised sales representative. The collection contains a large number of ephemeral films.

Orphaned works

The plaintiffs were particularly concerned that the extension of the copyright term had resulted in the appearance of 'orphaned' copyright works. The complaint observes:

> *Some of these changes in the law have importantly strengthened the rights of creators to control and profit from the distribution of their works. That is the proper aim of copyright, with which plaintiffs have no quarrel. But because of the radically indiscriminate nature of the most-recent of these changes, the law has also produced an extraordinary 'orphan class' of creative work — work that the author has no continuing interest to control, but which, because of the burdens of the law, no-one else can effectively and efficiently archive, preserve, or build upon in the digital environment for a term now reaching half a century.*

The plaintiffs argue that the unnecessary increase in copyright regulation 'blocks the cultivation of our culture and the spread of knowledge'.

The plaintiffs were concerned about the removal of formalities from United States copyright law — such as the requirements of registration, notice, and renewal. Chris Sprigman from the Stanford Center for Internet and Society explains: 'From the first US Copyright Statute in 1790 until the *Copyright Act* of 1976, the US 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.' He observes: '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'.

The plaintiffs have four main arguments. First, the plaintiffs argue that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) are unconstitutional by virtue of the First Amendment. The plaintiffs assert that the removal of formalities — such as registration and renewal — have a number of unintended consequences:

> *By eliminating the renewal requirement, Congress eliminated the mechanism by which unnecessary copyrights can be removed. By eliminating the registration, deposit, and notice requirements, Congress has brought within the domain of copyright entire classes of work for which protection was never desired, and then compounded the damage to speech by removing the traditional means by which the owners of copyrighted material can be identified.*
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> *All of these changes burden speech. Eliminating the renewal requirement burdens the speech of plaintiffs by limiting their ability to exploit material no longer exploited by the copyright holder. Eliminating the registration and notice requirements burdens the speech of plaintiffs by extending copyright's domain to a large amount of work for which no protection is desired, while significantly increasing the cost of identifying the owners of creative work.*

Kahle draws upon the statement of the majority of the Supreme Court in *Eldred v Ashcroft* [(2003) 53 US 186] that 'when Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary'. He maintains that, by implication, where Congress has altered the traditional contours of copyright, First Amendment scrutiny is necessary. The plaintiffs maintain that such changes should be declared unconstitutional because 'they instead impose substantial burdens on speech without advancing the only legitimate interest the government might have — namely, to benefit the small minority of work that continues to have commercial value'.

Second, Kahle maintains that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) have violated the 'limited times' prescription of the Constitution by establishing copyright terms that are so long as to be effectively perpetual. He observes: 'The Court in *Eldred* did not, however, indicate the standard to determine whether a term is so long as to be effectively perpetual'. Kahle submits: 'At least with respect to work first published on or after 1 January 1964 and before 1 January 1978, and that has not been renewed, this term has become effectively perpetual. It if therefore not "limited" under the ordinary and obvious meaning that the Framers intended'. However, it is doubtful whether this argument will proceed given the Supreme Court ruling in *Eldred v Ashcroft*.

Third, the plaintiffs claim that the *Sonny Bono Copyright Term Extension Act* 1998 (US), the *Copyright Renewal Act* 1992 (US), and the *Berne Convention Implementation Act* are unconstitutional for failing 'to promote Progress'. Kahle comments:

> *In sum, in moving from a conditional to an unconditional copyright system, Congress has failed to promote progress, and thus has acted beyond the scope of its power under the Progress Clause. In particular, extending the term of works that are not filtered by the formalities of a conditional copyright regime — in light of the extraordinary opportunity cost that has arisen as the internet has removed non-copyright barriers to creation, preservation, and dissemination of creative works — is beyond the power of Congress.*

Finally, the plaintiffs contend that the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Copyright Renewal Act* 1992 (US) are unconstitutional to the extent that they extend the term of copyrights that have not and will not be renewed. This

ground of complaint echoes the legal action in *Golan* v *Ashcroft* [(2004) No. 01–B–1854].

This legal action is perhaps unlikely to succeed — especially as few countries require formalities for copyright protection because of international treaties. Nonetheless, the argument that the copyright term extension creates a new class of 'orphaned' copyright works is an important one, which needs to be addressed.

The *Public Domain Enhancement Bill*

In response to such concerns about 'orphaned' works, Democrat Representative Zoe Lofgren introduced the *Public Domain Enhancement Bill* 2004 (US) into Congress in June 2003. She observed:

> *The public domain has always been a vital source for creativity and innovation. But with the advent of the internet, it is now more important than ever. No longer are out-of-print books or forgotten songs automatically sentenced to the ash-heaps of our cultural history. The emergence of digital technology and the world wide web has created a way to reawaken these hidden treasures, and has empowered more and more of us to become creators in our own right.* [Statement of Congresswoman Zoe Lofgren (Ca–16th) upon introduction of *The Public Domain Enhancement Act*, 25 June 2003, *http://zoelofgren.house.gov/iss_pubdomain_statement.shtml*]

The co-sponsor of the Bill, Republican John Doolittle added: 'Opening access to historical works for restoration and rehabilitation is essential toward ensuring that classics will be appreciated and cherished for future generations to come.' [Representatives Lofgren and Doolittle announce the *Public Domain Enhancement Act* to address the need for copyright reform, 25 June 2003.]

The Bill seeks to amend the *Copyright Act* 1976 (US) to allow abandoned copyrighted works to enter the public domain after fifty years. It requires the Register of Copyrights to charge a fee of $1 for maintaining in force the copyright in any published US work. It requires the fee to be due fifty years after the date of first publication or on 31 December 2004, whichever occurs later, and every ten years thereafter until the end of the copyright term. It terminates the copyright unless payment of the applicable maintenance fee is received in the Copyright Office on or before its due date or within a grace period of six months thereafter. It deems any ancillary or promotional work used in connection with the maintained work, such as an advertisement for a motion picture, also to be maintained in force.

The legislation has been supported by such organisations as the American Library Association, the Association of Research Libraries, the American Association of Law Libraries, Public Knowledge, the Internet Archive, the San Francisco Center for the Book, and the Electronic Frontier Foundation.

However, Jack Valenti and the Motion Picture Association of America have opposed the *Public Domain Enhancement Bill* 2004 (US). Rich Taylor, a spokesman for the copyright owner group, maintained that consumers are not necessarily better off when copyrighted works lapse into the public domain:

> *Especially in the case of movies, those works are more available for public consumption when their owners have an economic incentive to preserve and market them. Once those works fall into the public domain, those incentives are removed and consumers end up being the losers.* [Brian Krebs. 'Bill seeks to loosen copyright's grip', *The Washington Post*, 25 June 2003.]

The legislation has been referred to the Subcommittee on Courts, the Internet, and Intellectual Property for further consideration.

In light of the extension of the copyright term in Australia, there is a need for a serious contemplation of the model of the *Public Domain Enhancement Bill* 2004 (US). There needs to be a mechanism to deal with the creation of a large number of 'orphaned' works under the United States–Australia Free Trade Agreement. ■