Kahle v. Ashcroft write-up

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Original link

Here's a writeup I did of the Kahle v. Ashcroft argument in the style of a Wired News piece. Unlike my last parody of Wired News, this one actually got posted on wired.com, albeit only on one of their blogs. I hope to write a real post about this but I'm feeling too crummy to do it today.

SAN FRANCISCO, California—Acclaimed Stanford professor Lawrence Lessig and Internet Archive founder Brewster Kahle argued Monday that the changes in the Copyright Act should be subject to the scrutiny of the First Amendment. In the case *Kahle v. Gonzales*, argued here at the Ninth Circuit Court of Appeals, Brewster Kahle is arguing that he should be permitted to make "orphaned works"—works whose copyright holder can no longer be located—available for free on his website.

The case began after Lessig's loss before the Supreme Court in his previous suit, *Eldred v. Ashcroft*. Lessig argued that Congress's perpetual extension of the copyright act violated the Constitution's requirement that copyright only be granted for "limited Times". The Court disagreed, saying that Congress was allowed to modify copyright law as long as it didn't change the law's "traditional contours".

Now Lessig is back, arguing that Congress has done just that. For nearly two hundred years, he notes, copyright has been an "opt-in" system. Authors who wanted their work to be copyrighted had to mark it with a copyright symbol, file a registration with the Copyright Office, deposit a copy with the Library of Congress, and file a renewal if they wanted to receive the full term. All that changed with the sweeping 1976 Copyright Act, which made a work copyrighted as soon as it was "fixed in a tangible form".

Under the old system, according to Lessig, 93% of works went into the public domain before their term had expired. Now, 0% do.

Lessig argues that such a fundamental change — moving copyright from an opt-in to an opt-out system — constitutes a change in the law's "traditional contours" and thus, under the precedent set in *Eldred*, means the law must be examined by a Court to see if it violates the First Amendment.

The Government disagrees, insisting that the only "traditional contours" the *Eldred* decision refers to are the "fair use" provision of the copyright law, which allows for the public to make certain uses of copyrighted works, and the "idea-expression dichotomy", which means that ideas cannot be directly copyrighted, only their expression. The 1976 law did not change either of these.

The judges hearing the case asked Lessig to explain how this case differed from *Eldred*. "In *Eldred* the argument was about whether Congress could retrospectively extend the copyright law to keep Mickey Mouse out of the public domain," he explained. "This case is only about 'orphaned works' — works whose copyright holders can't even be tracked down to give permission." "Unlike Disney," the judge added.

The *Kahle* case is part of a multi-pronged strategy to deal with orphaned works. Congresswoman Zoe Lofgren (D-CA) has introduced a bill called the "Public Domain Enhancement Act". The idea, based on a *New York Times* op-ed published by Lessig shortly after his loss in *Eldred*, is that copyright holders will need to send $1 to the government after 50 years to renew their copyright. If they don't send the dollar, their works will go into the public domain. But even if they do, their name and address will be on file so others who wish to use the work will know how to contact them.

The US Copyright Office has also held hearings on the subject of "orphaned works", concluding in a hundred-page report sent to the Senate Judiciary Committee that "The orphan works problem is real." and "Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today."

Plaintiff Brewster Kahle founded the Internet Archive after selling his company Alexa to Amazon.com in the 1990s. The site, as Kahle often says, provides "infinite bandwidth and infinite disk space for infinite time" to freely-licensed works. Kahle wants to have his website provide orphaned works, just as libraries make available out-of-print books, but under current law would have to track down the copyright holder for every work.

The same problem plagues projects like Google's Book Search. Presently, Google must track down the copyright holder before making a book publicly available or face hefty fines. But since copyright terms are now so long, this means most out-of-print books will never be available, simply because their copyright holders are so difficult to find.

The Court is expected to rule on the case sometime next year.