

## **Copyright Protection For Orphan Works: *Kahle v. Gonzales*, 9th Circuit, January 22, 2007**

by Karen E. Hansen

Can parties make out-of-print books available on the Internet? According to the Ninth Circuit Court of Appeals, they can't unless they abide by copyright law.

The recent case *Kahle v. Gonzales* focused on changes in copyright laws over time, and challenged the constitutionality of the present-day rules. Plaintiffs in this case were Internet activists who argued that the shift from an "opt-in" to an "opt-out" copyright system placed a significant burden on free speech that cannot withstand First Amendment scrutiny. The case also addressed the important issue of using orphan works, which are copyrighted works whose owners are difficult or impossible to locate in order to obtain permission for using them.

Prior to 1978, the number of orphan works was fewer under the "opt-in" copyright system. Protection was limited, requiring affirmative steps by owners to register their work. Copyright holders were then required to renew their rights within a certain timeframe, or ownership passed into the public domain.

A subsequent shift to the "opt-out" system granted copyright protection to works whether or not an author desired it. Current laws offer automatic copyright protection, which is granted whether or not a work is registered, marked, or renewed. Furthermore, the Copyright Renewal Act of 1992 (CRA) and the Copyright Term Extension Act of 1998 (CTEA) eliminated the renewal requirements for works created between 1964 and 1977. The result was a dramatic increase in the average copyright term and a corresponding drop in the number of works currently entering the public domain.

Due to the automatic grant of copyright protection, many works are never officially registered, assigned, or licensed. The lack of such records often makes it difficult, if not impossible, to track down the rightful owners of many copyrighted works.

In *Kahle v. Gonzales*, the plaintiffs all provided (or intended to provide) online access to orphaned works in the form of out-of-print books, which are not commercially viable or readily available to the public but are nonetheless subject to continuing copyright protection. However, the overwhelming difficulty and expense of locating the owners of the orphan works has impeded the plaintiffs' ability to reproduce the books in electronic form.

The plaintiffs sought review of the CRA and CTEA, alleging that the change from an "opt-in" to an "opt-out" copyright system mandated First Amendment review because it altered the traditional contours of copyright protection. They drew their argument from the U.S. Supreme Court's 2003 decision in *Eldred v. Ashcroft*, which suggested that such changes in copyright law should be subject to heightened scrutiny under the First Amendment to determine whether they impermissibly burden speech.

The Ninth Circuit's decision in *Kahle* followed the ruling in *Eldred*, essentially holding that orphan works are still protected under the "opt-out" copyright regime. The Court determined such requirements were not unconstitutional under the First Amendment.