

Copyright and Digital Preservation

A presentation for
InterPARES 2
by
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Presentation Outline

- Terms
- International Treaties
- National legislation
- United States – DMCA
- U.S. case law
 - *Eldred v. Ashcroft* – Copyright term extension
 - *Kahle v. Gonzales*– Orphan works

Copyright Terms

- Fair use / fair dealing
- Moral rights
 - False attribution
 - Derogatory treatment
- Economic rights

International Agreements and Treaties

- Berne Convention, 1979
 - 156 signatories
 - Duration of copyright: life of author + 50 years
- World Intellectual Property Organization (WIPO), 1996
 - 53 signatories
 - Complements Berne; includes digital works

International Agreements and Treaties

- WIPO delegations from Brazil and Argentina
- Declaration: “The functions of WIPO should not only be to promote [...] harmonization of intellectual property laws, but to formally embrace notions of balance [etc]”
- Call for moratorium on treaties and standards that “expand and strengthen monopolies and restrict access to knowledge.”

Copyright status quo: Australia

- Copyright Act of 1968, with Digital Agenda Amendments from 2000, Section IX.6.195AT(5):
- “Anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of the work.”

Canada

- Under III.30.1 of Copyright Act Chapter C-42:
 - Libraries and archives permitted to make preservation and replacement copies
 - At discretion of the institution (or individual archivist or librarian)

Hong Kong & Singapore

- Archives and libraries are allowed to make copies for preservation
- Furthermore:
 - HK: computer programs and computer-generated works are not protected by moral rights = even less legal risk
 - Singapore: NO restriction on derogatory treatment for any works

United Kingdom

- Under Section 1.3.42.1-2 of the Copyright, Design and Patents Act of 1988:
- Archivists are allowed to make preservation copies
- Moral rights do not apply to computer programs and computer-generated works

United States

- Digital Millennium Copyright Act (1998)
- “Section 108 permits up to three copies, which may be digital, provided that digital copies are not made available to the public outside the library premises. In addition, the amended section permits such a library or archive to copy a work into a new format if the original format becomes obsolete.”

From Circular 92 (2003)

In addition...

- Section 1201 of DMCA:

Establishes “an ongoing administrative rule-making proceeding to evaluate the impact of the prohibition against the act of circumventing such access-control measures.”

As part of this process, in December, 2002:

- The Internet Archive petitions to the US Copyright Office that Section 1201(a)(1) of the DMCA is preventing archivists from archiving software and digital works
- IA request exemption from: “Literary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.”

The Internet Archive

- Over 300 terabytes of data = more than 10 times all text in Library of Congress
- 30 billion web pages
- 34, 000 audio, video and text works = over 3000 moving image works, 22, 000 text works, 9,000 audio works
- Prelinger Associates: 1620 films available online

Petition outlines the Internet Archive's preservation process:

- Preservation requires copying and access
 - Copy to new medium, and verify integrity of copy from original (a.k.a. migration)
- “Merely copying a work does not ensure its preservation”
- Therefore, the prohibition of access to replicas (copies) prevents the IA from verifying the integrity of the copy

Migration essential:

“The purpose of migration is to preserve the integrity of digital objects and to retain the ability for clients to retrieve, display, and otherwise use them in the face of constantly changing technology. The Task Force regards migration as an essential function of digital archives.”

Task Force on Archiving Digital Information, Preserving Digital Information, May 1, 1996 (excerpted in IA petition)

Internet Archive petitions under sections 108, 117, and 107

- 108: Prohibits libraries or archives from profiting from works under owner's copyright
- 117: Allows software owners to make archival copies
- 107: Fair Use
 - “...the making of duplicate copies for purposes of archival preservation certainly falls within the scope of ‘fair use.’”

Copyright Office response (October 2003)

- New exemption created “in response to a proposal by the Internet Archive.”
- Exemption: “*Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.*”

Instead of:

- “[L]iterary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.”
- Exempted class of works “limited to works distributed in now-obsolete formats.”

U.S. Case Law

- Two major cases:
 - *Eldred v. Ashcroft*
 - *Kahle v. Gonzales*

Eldred v. Ashcroft

- Background:
 - Eric Eldred
 - 1998 Sonny Bono Copyright Term Extension Act
 - Internet Archive *amicus curiae*

Eldred v. Ashcroft

- *Eldred's* argument:
- CTEA's extension of existing copyrights exceeds Congress's power under the Copyright Clause:
“Congress has the power to promote the Progress of Science...by securing for **limited Times** to Authors...exclusive Right their Writings....”

Eldred v. Ashcroft

- *Amicus curiae* filed by Internet Archive on behalf of *Eldred*
- Free Speech (First Amendment) tack
- Argues that a robust public domain is possible due to digital technology
- CTEA damages the public domain

Eldred v. Ashcroft **(Internet Archive *amicus*)**

“Digital technology allows us the opportunity to build a ‘universal’ library that dwarfs the collections of the Alexandria Library and even our modern Library of Congress. This library will expand our understanding of ‘public access.’”

from Summary of Argument

Eldred v. Ashcroft (Internet Archive *amicus*)

- “Digital technology *possesses the capacity to make flawless copies* trivial and worldwide distribution instantaneous.”
- “*Digitizing a film, book, or a sound recording makes a perfect copy* of the work...”
- “...We only need a single digital copy of a work *to preserve it in perfect condition for a virtually unlimited duration...*digital archives make preservation and enhanced access realistic and cost effective.”

Eldred v. Ashcroft

Decision: 5 to 2 in favor of *Ashcroft*

- Endorses earlier Court's rulings that
“[A]ny fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time it remains a limited time.”
- Dissent: “The ...effect [of the CTEA] ...is to make the copyright term... virtually perpetual.”

Eldred v. Ashcroft

- Dissent:

“This statute will cause serious expression-related harm. *It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children.*”

Kahle v. Gonzales

- Currently before Ninth Circuit of Appeals
- Orphan works
- Background
 - Brewster Kahle, Prelinger Associates, and the Internet Archive
 - Copyright Renewal Act (CRA) of 1992
 - Sonny Bono Copyright Term Extension Act (CTEA) of 1998

Kahle v. Gonzales

- *Kahle's* argument:
- CRA and CTEA alter “traditional contours of copyright”:
 - 1790 – 1978 = “opt-in” system
 - 1978 – present = “opt-out” system
 - Terms “virtually perpetual”
- Damage: exponential increase in orphan works

Kahle v. Gonzales

- Orphan works and digital preservation (harm to Internet Archive)
- Example: Approx. 10,000 books published in 1930
- In 2001, 175 still in print
- Therefore over 9800 out-of-print book still under copyright

Kahle v. Gonzales

- Kahle argues that cost prohibitive of finding copyright owners and getting permission
- No list of owners, no requirement for such
- Options: Contact all owners or abandon project
- “The balance of creative work — and the vast majority of creative work — remains locked up by legal regulation.”

Kahle v. Gonzales

- *Gonzales*' argument:
- A re-litigation of *Eldred*
- “[I]n reality [the plaintiffs] object to Congress’s exercise ... [in] establish[ing] parameters of copyright coverage.”

Kahle v. Gonzales

- Case pending
- Free speech/ “free culture” implications
- Feasible that we will encounter electronic orphan works

Conclusion

- Preservation efforts/potential virtually uninhibited in Australia, Canada, UK, Hong Kong, Singapore
- In U.S.:
 - Attempt to ‘get ahead’ in migration rebuffed
 - Public domain stifled – potential not realized

Questions?

