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Ninth circuit rejects challenge to copyright protection for orphan works

In *Kahle v Gonzalez* the United States Court of Appeals for the Ninth Circuit has dismissed a challenge to the constitutionality of current copyright laws that extend copyright protection to so-called 'orphan works'.

The Ninth Circuit described orphan works as "works that allegedly have little or no commercial value but remain under copyright protection" and noted that "ownership of these 'orphan works' is often difficult, and sometimes impossible, to ascertain".

Before 1978 renewal requirements limited the number of orphan works by creating an opt-in system of copyright, where copyright owners were required to renew their rights affirmatively. The initial term of copyright protection was 28 years and many works passed into the public domain after the initial term. The [Copyright Renewal Act 1992](#) and the [Sonny Bono Copyright Term Extension Act](#) eliminated the renewal requirements for works created between 1964 and 1977. The plaintiffs asserted that these changes created what they called an opt-out system, with a copyright term that extends 70 years after the author's death for many works.

The plaintiffs argued that these changes to the copyright law altered the "traditional contours of copyright" and were therefore unconstitutional under the First Amendment of the Constitution and the 2003 Supreme Court decision in *Eldred v Ashcroft* (537 US 186 (2003)). The plaintiffs also argued that the present copyright term violates the "limited times" provision of the Copyright Clause of the Constitution, in effect creating a perpetual copyright term.

In addressing the plaintiff's first argument, the Ninth Circuit relied on *Eldred*, in stating that *Eldred* "upheld the [Copyright Term Extension Act], in effect answering plaintiff's challenge." The Supreme Court in *Eldred* held that in extending the copyright term, "Congress acted within its authority and did not transgress constitutional limitations" (537 US at 194).

In addressing the plaintiff's second argument, the Ninth Circuit again relied on *Eldred*, stating that "*Eldred* disposes of plaintiff's second argument, as it did their first". The Ninth Circuit stated that the "outer boundary of 'limited times'" is "left to Congress, subject to rationality review," and that the current term of copyrights for works made between 1964 and 1977 is constitutional.

The Ninth Circuit noted in conclusion that:

"[b]oth of plaintiff's main claims attempt to tangentially relitigate Eldred. However, they provide no compelling reason why we should depart from a recent Supreme Court decision."

For background to the issue of orphan works, see [Will proposed copyright legislation create new homes for orphan works?](#) and [US Copyright Office issues orphan works report](#).

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