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15 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO HEADQUARTERS

17 _____)
18 BREWSTER KAHLE, INTERNET ARCHIVE,)
19 RICHARD PRELINGER, AND PRELINGER)
ASSOCIATES, INC.)

20 Plaintiffs,)

21 v.)

22 JOHN ASHCROFT, in his official capacity as)
23 Attorney General of the United States,)

24 Defendant.)
25 _____)

Case No. 04-CV-1127 MMC

**DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS'
AMENDED COMPLAINT**

Date: Friday, August 6, 2004

Time: 9:00 a.m.

Courtroom: 7, 19th Floor

**Judge: The Honorable Maxine M.
Chesney**

26 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
27
28

1 **PLEASE TAKE NOTICE** that on August 6, 2004 at 9:00 a.m., or as soon thereafter
2 as the matter may be heard, in the Courtroom of the Honorable Maxine M. Chesney, United
3 States District Judge, in the United States Courthouse located at 450 Golden Gate Avenue,
4 San Francisco, California, Defendant will, and hereby does, move the Court to dismiss all
5 claims against him for failure to state a claim pursuant to Federal Rule of Civil Procedure
6 12(b)(6).
7

8 This Motion is based on this Notice of Motion, the Memorandum of Points and
9 Authorities in support, on the pleadings and records on file in this action, and on such other
10 argument and evidence as may be presented to this Court at or before the hearing on this
11 Motion.

12 Dated: June 23, 2004.

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1 **STATEMENT OF RELIEF SOUGHT**

2 Defendant seeks an order dismissing Plaintiffs’ “Amended Complaint for Declaratory
3 Judgment” (“Amended Complaint” or “Am. Compl.”) pursuant to Federal Rule of Civil
4 Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

5 **INTRODUCTION**

6 Plaintiffs Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger
7 Associates, Inc. allege that they are individuals or organizations that exploit the creative
8 works of others that are in the public domain by copying and distributing such works on the
9 Internet. Am. Compl. ¶¶ 2-5, 8. In this action, Plaintiffs seek declaratory judgment that four
10 copyright statutes are unconstitutional because they allegedly create an “unconditional
11 copyright regime” that prevents Plaintiffs from posting “on the Internet [] works created [by
12 others] between 1964 and 1978” without committing infringement. *Id.* ¶¶ 1, 8, 35, Prayer for
13 Relief. Specifically, Plaintiffs allege that (1) the Copyright Act of 1976, 17 U.S.C. § 301 *et*
14 *seq.* (“1976 Act”), the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat.
15 2853 (1988) (“BCIA”), and the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106
16 Stat. 266 (1992) (“1992 Act”) violate the Intellectual Property Clause “for failing to ‘promote
17 . . . Progress’” (Am. Compl. ¶¶ 1, 105-113); (2) the 1992 Act and the Sonny Bono Copyright
18 Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (“CTEA”) violate the
19 “limited Times” provision of the Constitution’s Intellectual Property Clause (Am. Compl.
20 ¶¶ 1, 93-104, 114-119); and (3) the 1992 Act and the CTEA violate the First Amendment of
21 the Constitution. Am. Compl. ¶¶ 1, 81-92.¹

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¹ Plaintiffs also seek, upon the Court’s finding that the CTEA is unconstitutional, to enjoin
27 enforcement of the No Electronic Theft Act of 1997, 17 U.S.C. § 506(a) (1997) (“NET Act”),
28 against them for infringement of copyrights for works in their renewal term first published
between January 1, 1964 and December 31, 1977 that would not have a valid copyright “but

1 Plaintiffs’ challenges to Congress’ most recent extension of copyright terms and
2 changes to the requirements for copyright renewal are manifestly challenges to policy
3 determinations that the Constitution authorizes Congress to make. Indeed, the Supreme Court
4 has repeatedly stressed “that it is generally for Congress, not the courts, to decide how best to
5 pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212, 123 S. Ct.
6 769, 785 (2003). Congress’ exercise of its Intellectual Property Clause authority in enacting
7 the challenged copyright statutes is subject to a rational basis review, and here, as set forth
8 more fully below, Congress had a rational basis for enacting each such statute. Further, as the
9 Supreme Court in *Eldred v. Ashcroft* confirmed, a copyright extension for a fixed term, such
10 as the CTEA, does not evade the Intellectual Property’s “limited Times” constraint. 537 U.S.
11 at 204, 123 S. Ct. at 781. In addition, neither the 1992 Act nor the CTEA alter “the traditional
12 contours of copyright protection” – namely, the “idea/expression dichotomy” and the “fair
13 use” defense comprising copyright law’s built-in First Amendment accommodations – and
14 thus require no further First Amendment scrutiny. *See id.*, 537 U.S. at 218-21, 123 S. Ct. at
15 788-90.

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17
18 Accordingly, Defendant respectfully requests the Court to dismiss Plaintiffs’
19 Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief
20 can be granted.

21 **STATUTORY AND REGULATORY BACKGROUND**

22 **I. COPYRIGHT TERM EXTENSIONS**

23
24
25 for 17 U.S.C. §§ 302-304, as amended by the CTEA.” Am. Compl. ¶ 1, Prayer for Relief.
26 Defendant respectfully submits that, as Plaintiffs’ claim that the CTEA is unconstitutional
27 should be dismissed, Plaintiffs’ injunctive relief request should also be dismissed. *E.g.*
28 *Eldred v. Reno*, 74 F. Supp. 2d 1, 2, n.2 (D.D.C. 1999) (same), *aff’d*, 239 F.3d 372 (D.C. Cir.
2001), *aff’d sub nom. Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003).

1 In 1790, the year after the adoption of the Constitution, the First Congress enacted the
2 nation’s first Copyright Act, establishing a 14-year initial term of copyright protection from
3 the date of publication, renewable for an additional 14 years if the author survived the first
4 term – for a potential total term of 28 years. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124
5 (“1790 Act”). In 1831, Congress unconditionally extended the initial term to 28 years (while
6 retaining the 14-year renewal term), extending the potential total term to 42 years. Act of
7 Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (“1831 Act”). In 1909, Congress then
8 extended the copyright’s renewal term to 28 years, further extending the total copyright term
9 to 56 years. Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (“1909 Act”).
10

11 In 1976, Congress altered the method for computing copyright terms for works created
12 on or after January 1, 1978 and established a single term of copyright protection for the life of
13 the author plus 50 years. 17 U.S.C. §§ 302-304 (1976 Act). “In these respects, the 1976 Act
14 aligned United States copyright terms with the then-dominant international standard adopted
15 under the Berne Convention for the Protection of Literary and Artistic Works.” *Eldred*, 537
16 U.S. at 195, 123 S. Ct. at 775-76 (citing H.R. Rep. No. 94-1476, at 135 (1976)). In 1998,
17 Congress enacted the CTEA, which extended this copyright term by 20 years to the life of the
18 author plus 70 years for all works not created by January 1, 1978 (17 U.S.C. §§ 302(a),
19 303(a)) to “harmonize[] the baseline United States copyright term with the term adopted by
20 the European Union in 1993.” *Id.*, 537 U.S. at 196; 123 S. Ct. at 776. By matching the
21 United States’ copyright term with the European Union’s, “Congress sought to ensure that
22 American authors would receive the same copyright protection in Europe as their European
23 counterparts.” *Id.*, 537 U.S. at 205-06, 123 S. Ct. at 781.
24
25

26 **II. AMENDMENTS TO THE COPYRIGHT RENEWAL REQUIREMENT**
27
28

1 Under the 1909 Act, a copyright holder could secure a 28-year renewal term only after
2 filing a renewal registration with the Register of Copyrights in the last year of the first 28-year
3 term of protection. S. Rep. No. 102-194, at 3 (1992). “In 1976, Congress concluded years of
4 debate and study on all aspects of the Copyright Act by passing a comprehensive revision to
5 the 1909 law.” *Id.* Congress identified the copyright renewal revision as “[o]ne of the worst
6 features of the present copyright law.” H.R. Rep. No. 94-1476, at 134. “A substantial burden
7 and expense, this unclear and highly technical requirement results in incalculable amounts of
8 unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of
9 copyright.” *Id.* Thus, the 1976 Act abolished the renewal requirement for future works
10 created on or after January 1, 1978 – the effective date of the Copyright Act of 1976 – and
11 established a single term of copyright protection for the life of the author plus 50 years. S.
12 Rep. No. 102-194, at 3. However, Congress retained the existing renewal registration
13 requirement for copyrights still subsisting in their first term on the 1976 Act’s effective date
14 because “Congress was concerned that eliminating the renewal requirement for these works
15 altogether could potentially disrupt existing expectancies or contractual interests.” S. Rep.
16 No. 102-194, at 3-4; H.R. Rep. No. 94-1476, at 139.²

19 The Copyright Office, publishers, authors, academics, and others “criticized the
20 registration renewal provision for being burdensome and unfair to thousands of copyright
21 holders and their heirs.” S. Rep. No. 102-194, at 4. Congress believed that the public domain
22 “should not be enlarged because of an author’s error in recordkeeping, or any other innocent
23 failure to comply with overly technical formalities in the copyright law.” *Id.* at 6.

25
26 ² Although Congress retained the renewal registration requirement for copyrights still in
27 their first term prior to the 1976 Act’s effective date, the length of the renewal term for such
28 copyrights was extended from 28 to 47 years (for a total potential term of 75 years), and

1 Significantly, Congress recognized that authors of earlier works who were still subject to the
2 1976 Act’s renewal requirements should retain the same rights enjoyed by authors of more
3 recent works created after the 1976 Act’s effective date. *Id.* Congress also sought to modify
4 the 1976 Act’s renewal requirement because foreign authors faced an additional dilemma as
5 they were even less familiar than domestic authors with the formality of a renewal
6 requirement because it is unique to U.S. law. In fact, Congress understood that “[t]he
7 domestic laws of most developed countries contain very few formalities conditioning
8 copyright protection” and that compliance with such formalities are “antithetical to the major
9 international treaty on copyright relations, the Berne Convention.” *Id.*

11 Based on these important concerns, Congress enacted the 1992 Act, which amended
12 the renewal provisions set forth in 17 U.S.C. § 304 to “make[] clear that a timely registration
13 by the proper statutory claimant vests the right to the renewal term on the date of registration
14 in the Copyright Office and, if a registration is not made, the right in the renewal term vests
15 automatically in the proper statutory claimant on the last day of the first term.” S. Rep. No.
16 102-194, at 4. The automatic renewal provisions apply only to those pre-January 1, 1978
17 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.* works that
18 acquired a first term of copyright protection between January 1, 1964 and December 31, 1977.
19 *See id.* at 7. Thus, the 1992 Act puts protection of such works on equal footing with the
20 protection of qualifying works for which renewal registration was made without restoring
21 protection to works that had already fallen into the public domain. *Id.* At the same time,
22 Congress recognized that a renewal registration system “provides a useful public record for
23 users of copyrighted material so they may locate the copyright holder and arrange to license a
24

25 copyrights already in their renewal term at that time would be extended by an amount
26 sufficient to extend their total term to 75 years. H.R. Rep. No. 94-1476, at 139-40.
27
28

1 work, or determine when copyright material falls into the public domain.” *Id.* at 6-7.

2 Accordingly, the 1992 Act offers incentives to authors to continue to voluntarily renew their
3 copyright in a timely manner, while it “eliminates the harsh consequences of failing to
4 renew.” *Id.* at 7.

5 **III. COPYRIGHT DEPOSIT AND NOTICE REQUIREMENTS**

6 As the Supreme Court stated in *Washingtonian Publ’g Co. v. Pearson*, the purpose of
7 this deposit requirement, currently set forth in 17 U.S.C. § 407, is not proof or preservation of
8 copyright but the acquisition of books for the Library. 306 U.S. 30, 41, 59 S. Ct. 397, 402
9 (1939). “Until 1976, failure to deposit with the Library of Congress resulted in a forfeiture of
10 copyright.” *Ladd v. Law & Technology Press*, 762 F.2d 809, 813 (9th Cir. 1985). With the
11 enactment of the Copyright Act of 1976, Congress changed the deposit enforcement
12 provisions because
13

14
15 A realistic fine, coupled with the increased inducements for voluntary
16 registration and deposit under other sections of the bill, seems likely to
17 produce a more effective deposit system than the present one. The
18 bill’s approach will also avoid the danger that, under a divisible
19 copyright, one copyright owner’s rights could be destroyed by another
20 owner’s failure to deposit.

21 *Id.* (quoting H.R. Rep. No. 94-1476, at 150). Under the 1976 Act, therefore, deposit is still
22 required of one obtaining a copyright, but failure to deposit results not in forfeiture but in
23 fines in the amount of the cost to the library of obtaining the work plus penalties. *Id.*

24 With respect to copyright notice, under the 1909 Act, a work had to bear a valid
25 copyright notice upon publication in order to secure copyright protection. 17 U.S.C. §§ 10,
26 19 *et seq.* (1909 Act). In 1988, Congress enacted the BCIA to bring the United States in line
27 with the Berne Convention, an international convention aimed at harmonizing copyright law
28 around the world. *Garnier v. Andin Int’l, Inc.*, 36 F.3d 1214, 1219 (1st Cir. 1994). Pursuant
to the BCIA, the attachment of notice of copyright is no longer required to gain copyright

1 protection for works first published after March 1, 1989, but it is still encouraged through
2 various incentives. *Id.*; 17 U.S.C. §§ 401(d), 402(d).

3 ARGUMENT

4 **I. CONGRESS HAD THE CONSTITUTIONAL AUTHORITY TO ENACT** 5 **THE CHALLENGED COPYRIGHT ACTS**

6 Plaintiffs allege that Congress exceeded its authority under the Intellectual Property
7 Clause when it enacted the 1976 Act, the BCIA, and the 1992 Act because such statutes
8 allegedly changed the renewal, registration, deposit and notice requirements in a way that
9 “failed to promote progress.” Am. Compl. ¶¶ 105-113, 111. Plaintiffs further contend that
10 Congress did not have the authority to enact the 1992 Act and the CTEA because (1) they
11 allegedly create a copyright term that “has become effectively perpetual” and (2) “Congress
12 has no power to extend the terms of existing copyrights” in violation of the “limited Times”
13 provision of the Intellectual Property Clause. Am. Compl. ¶¶ 93-104, 114-19, 103, 117.

14 Contrary to Plaintiffs’ claims, however, each challenged statute reflects a rational exercise of
15 Congress’ legislative authority and sets forth copyright terms for “limited Times” pursuant to
16 the Intellectual Property Clause.
17

18 **A. The 1976 Act, the 1992 Act, and the BCIA Promote the Progress of** 19 **Science**

20 Congress had a rational basis for believing that the 1976 Act, the BCIA, and the 1992
21 Act “promote the Progress of Science.” All versions of the Copyright Act have been enacted
22 pursuant to the power granted Congress by Article I, Section 8, Clause 8 of the Constitution
23 (the “Intellectual Property Clause” or “Copyright Clause”), which states that “The Congress
24 shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for
25 limited Times to Authors and Inventors the exclusive Right to their respective Writings and
26
27
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1 Discoveries.” *Accord Ladd*, 762 F.2d at 812.³ Thus, the Intellectual Property Clause
2 provides Congress with the power to grant a limited monopoly through copyrights to authors
3 for their particular writings. *Mazer v. Stein*, 347 U.S. 201, 207-09, 74 S. Ct. 460, 465-66
4 (1954). This “constitutional command” asks Congress, to the extent that it enacts copyright
5 laws at all, to create a system that promotes the progress of science. *Eldred*, 537 U.S. at 212,
6 123 S. Ct. at 785.

7
8 Plaintiffs allege that Congress exceeded its authority under the Intellectual Property
9 Clause when it enacted the 1976 Act, the BCIA, and the 1992 Act because such statutes
10 allegedly changed the renewal, deposit and notice requirements in a way that “failed to
11 promote progress.” Am. Compl. ¶¶ 105-113, 111. In *Eldred*, however, the Supreme Court
12 held that such challenges are adjudicated only to ensure that a rational basis exists for
13 believing that the statute promotes progress. 537 U.S. at 213, 123 S. Ct. at 785 (affirming
14 judgment that the CTEA “promote[s] the Progress of Science” because Congress had rational
15 basis for its enactment). Significantly, the Supreme Court has also stressed that the
16 Constitution grants Congress, not the courts, the power to select the best policy for pursuing
17 the Intellectual Property Clause’s objectives – including the objective of promoting the
18 progress of science. *Eldred*, 537 U.S. at 212, 123 S. Ct. at 785. Thus, Congress’ enactment
19 of the 1976 Act, the BCIA, and the 1992 Act must be upheld as constitutionally promoting the
20 progress of science so long as they are “a rational exercise of the legislative authority
21 conferred by the Copyright Clause. On that point, we defer substantially to Congress.”
22
23

24
25 ³ In carrying out the Intellectual Property Clause, Congress can make “all Laws which shall
26 be necessary and proper for carrying into Execution the foregoing Powers.” U.S. Const. art. I,
27 sec. 8, cl. 18; *see also Ladd*, 762 F.2d at 812 (holding that “the necessary and proper clause
28 should be liberally construed”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-21
(1819) (mandating an expansive construction of the “necessary and proper” clause as essential
to the functioning of a national government).

1 *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781; *Luck’s Music Library, Inc. v. Ashcroft*, -- F. Supp.
2 2d --, No. 01-2220 (RMU), slip op. at 17 (D.D.C. June 10, 2004, amended June 16, 2004),
3 Exhibit 1 hereto, (holding that Section 514 of the Uruguay Round Agreements Act (“URAA”)
4 is constitutional because it “has a rational relationship to the promotion of science”).⁴

5
6 **1. The 1976 Act promotes the progress of science.**

7 Congress had a rational basis for believing that the 1976 Act’s changes to the deposit
8 and renewal requirements promote the progress of science. The 1976 Act’s elimination of the
9 renewal requirement for works created on or after January 1, 1978 – establishing a single term
10 of copyright protection for the life of the author plus 50 years – is a rational method of
11 promoting the progress of science. *See* 17 U.S.C. § 302 (1976 Act). Congress established
12 this single term of copyright protection based on several rational policy reasons. For
13 example, Congress identified the copyright renewal revision as “[o]ne of the worst features of
14 the present copyright law” because it was “a substantial burden and expense[;] this unclear
15 and highly technical requirement results in incalculable amounts of unproductive work. In a
16 number of cases it is the cause of inadvertent and unjust loss of copyright.” H.R. Rep. No.
17 94-1476, at 134. Thus, Congress rationally believed that the 1976 Act’s replacement of the
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23 ⁴ *See also Stewart v. Abend*, 495 U.S. 207, 230, 110 S. Ct. 1750, 1765 (1990) (“Th[e]
24 evolution of the duration of copyright protection tellingly illustrates the difficulties Congress
25 faces . . . it is not our role to alter the delicate balance Congress has labored to achieve”); *Sony*
26 *Corp. of Am. v. Universal Studios*, 464 U.S. 417, 429, 104 S. Ct. 774, 782 (1984) (“it is
27 Congress that has been assigned the task of defining the scope of [rights] that should be
28 granted to authors or to inventors in order to give the public appropriate access to their work
product”); *Graham v. John Deere Co.*, 383 U.S. 1, 6, 86 S. Ct. 684, 688 (1966) (“Within the
limits of the constitutional grant, the Congress may, of course, implement the stated purpose
of the Framers by selecting the policy which in its judgment best effectuates the constitutional
aim.”).

1 renewal system with a life-plus-50 year single term would better promote progress by
2 minimizing the burdens and expenses of renewals.⁵

3 In addition, as *Eldred* recognized, “the 1976 Act aligned United States copyright terms
4 with the then-dominant international standard adopted under the Berne Convention for the
5 Protection of Literary and Artistic Works.” 537 U.S. at 195, 123 S. Ct. at 775-76 (citing H.R.
6 Rep. No. 94-1476, at 135). Congress recognized that “[n]o country in the world has
7 provisions on the duration of copyright like ours,” and that the United States needed “to
8 conform the duration of U.S. copyright to that prevalent throughout the rest of the world”
9 where “[a] very large majority of the world’s countries have adopted a copyright term of the
10 life of the author and 50 years after the author’s death.” H.R. Rep. No. 94-1476, at 135.
11 Indeed, this term was “required for adherence to the Berne Convention.” *Id.* at 135-36.
12
13

14
15 ⁵ Congress also replaced the renewal system with a copyright term based on the life of the
16 author because

- 17 (1) the 56-year term was “not long enough to insure an author and his dependents the fair
18 economic benefits from his works. Life expectancy has increased substantially, and
19 more and more authors are seeing their works fall into the public domain during their
lifetimes, forcing later works to compete with their own early works in which
copyright ha[d] expired;”
- 20 (2) “tremendous growth in communications media ha[d] substantially lengthened the
21 commercial life of a great many works;”
- 22 (3) “too short a term harms the author without giving any substantial benefit to the public
23 [who] frequently pays the same for works in the public domain as it does for
copyrighted users at the author’s expense;”
- 24 (4) computing based on the life of the author provides a simpler and clearer method for
25 computing the term based on a “definite determinable event” than “the confusion and
uncertainty involved in the vague concept of ‘publication.’”

26 H.R. Rep. No. 94-1476, at 134-35. *Cf. Eldred*, 537 U.S. at 207 n.14, 123 S. Ct. at 782 n.14
27 (acknowledging as rational bases for the CTEA’s 20-year term extension (1) “increases in
28 human longevity” and (2) “failure of the U.S. copyright term to keep pace with substantially
increased commercial life of copyrighted works”)) (citations omitted).

1 The Supreme Court’s *Eldred* decision recognized that giving U.S. authors the same
2 copyright protection as those received by foreign authors is a rational means of “promot[ing]
3 the Progress of Science.” In *Eldred*, the Supreme Court noted that the principal reason for
4 enacting the CTEA was to respond to “a 1993 European Union (EU) directive instructing EU
5 members to establish a copyright term of life plus 70 years.” 537 U.S. at 205, 123 S. Ct. at
6 781. The United States’ failure to match Europe’s term would have resulted in lesser
7 protection in Europe for U.S. authors, and thus the CTEA secured equal protection for U.S.
8 authors by adhering to Europe’s copyright term. *Id.* (citing Berne Conv. Art. 7(8)). The
9 Supreme Court concluded that the CTEA was a rational method of promoting progress under
10 the Copyright Clause to “ensure that American authors would receive the same copyright
11 protection in Europe as their European counterparts.” *Id.*, 537 U.S. at 205-06, 205, 208, 123
12 S. Ct. at 781, 781, 782 (“The CTEA reflects judgments of a kind Congress typically makes,
13 judgments we cannot dismiss as outside the Legislature’s domain. . . . The CTEA is a rational
14 enactment”).
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17 Like the CTEA, the 1976 Act’s replacement of a renewal system for computing a
18 copyright term to one based on the life of the author promotes the “Progress of Science.”
19 Congress enacted both statutes to match the international community’s standards and thereby
20 better protect U.S. authors. Accordingly, a rational basis supports Congress’ determination
21 that the 1976 Act’s elimination of the renewal term for works created on or after January 1,
22 1978 “promote[s] the Progress of Science.”⁶
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26 ⁶ Plaintiffs contend that Congress chose the wrong policy in the 1976 Act because it
27 “eliminated the mechanism by which unnecessary copyrights can be removed . . . and thereby
28 limited the ability of would-be users [*i.e.*, Plaintiffs] to exploit the vast majority of
copyrighted material that would otherwise . . . be dedicated to the public domain” because
before 1976, an average 85-92% of copyrighted works were not renewed, and most of these

1 Furthermore, the Ninth Circuit also upheld the constitutionality of the 1976 Act's
2 deposit requirement, 17 U.S.C. § 407, as promoting the progress of science. *Ladd*, 762 F.2d
3 at 814, 815. Plaintiffs contend that, when the 1976 Act stopped enforcing a failure to deposit
4 with copyright forfeiture, Congress eliminated the deposit of copyrighted works as a
5 “condition” of securing copyright protection and thereby unconstitutionally failed to promote
6 the progress of science. *E.g.* Am. Compl. ¶¶ 47, 86, 109(2). In fact, the purpose of the
7 deposit requirement is the acquisition of books for the Library of Congress, not to secure
8 copyright protection. *Pearson*, 306 U.S. at 41, 59 S. Ct. at 402; *id.*, 306 U.S. at 37; 59 S. Ct.
9 at 401 (since the 1909 Act, “it is no longer necessary to deposit anything to secure a copyright
10 of a published work.”) (internal quotations omitted); *Ladd*, 762 F.2d at 813; *id.* at 812 (“the
11 deposit requirement’s purpose is to enforce contributions of desirable books to the Library of
12 Congress”). Under the 1909 Act, if the copyright owner chose not to deposit two copies with
13 the Library of Congress following demand by the Register of Copyrights, then the copyright
14 was forfeit. *Ladd*, 762 F. 2d at 814. In 1976, Congress changed the deposit enforcement
15 provisions because

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19 were of no commercial value. *E.g.* Am. Compl. ¶¶ 42, 109. Congress not only considered
20 these precise policy concerns; Congress rejected them:

21 A point that has concerned some educational groups arose from the possibility
22 that, since a large majority (now about 85%) of all copyrighted works are not
23 renewed, a life-plus-50 year term would tie up a substantial body material that
24 is probably of no commercial interest . . . Balanced against this are the burdens
25 and expenses of renewals, the near impossibility of distinguishing between
types of work in fixing a statutory term, and the extremely strong case in favor
of a life-plus-50 system. . . . The advantages of a basic term of copyright
enduring for the life of the author and for 50 years after the author’s death
outweigh any possible disadvantages.

26 H.R. Rep. No. 94-1476, at 136. Most significantly, Plaintiffs’ policy objections to the 1976
27 Act are unavailing because “courts are not at liberty to second-guess determinations and
28 policy judgments of this order, however, debatable or arguably unwise they may be.” *Eldred*,
537 F.2d at 208, 123 S. Ct. at 782-83.

1 [a] realistic fine, coupled with the increased inducements for voluntary
2 registration and deposit under other sections of the bill, seems likely to
3 produce *a more effective deposit system than the present one*. The
4 bill's approach will also avoid the danger that, under a divisible
copyright, one copyright owner's rights could be destroyed by another
owner's failure to deposit.

5 *Ladd*, 762 F.2d at 813 (quoting H.R. Rep. No. 94-1476, at 150) (emphasis added). In other
6 words, Congress rationally exercised its Intellectual Property Clause authority in amending
7 the deposit requirement "to produce a more effective deposit system than the present one." In
8 so doing, the Ninth Circuit held that the 1976 Act's deposit requirement was a rational
9 method of furthering the Intellectual Property Clause's "purpose of promoting the public
10 interest in the arts and sciences." *Id.* at 814, 815 ("the deposit requirement here directly
11 furthers the purpose of promoting arts and sciences by adding to the collection of our national
12 library").

14 2. The 1992 Act promotes the progress of science.

15 Congress had a rational basis for believing that the 1992 Act's changes to the renewal
16 registration requirements would promote the progress of science. In considering whether to
17 pass the 1992 Act, Congress recognized that the 1976 Act's retention of the renewal
18 registration requirement for pre-January 1, 1978 works did not grant authors of such works
19 the same level of protection granted to authors of works created on or after January 1, 1978 –
20 for whom the requirement had been eliminated by the 1976 Act. S. Rep. No. 102-194, at 6.
21 For those still subject to the renewal requirement, the Copyright Office, publishers, authors,
22 academics, and others "criticized the registration renewal provision for being burdensome and
23 unfair to thousands of copyright holders and their heirs." *Id.* at 4. The effects of the renewal
24 requirement were "felt most harshly by the holders of copyrights in less noted works . . .
25 [who] typically lack the sophisticated resources – detailed recordkeeping procedures to keep
26 track of renewal dates or the services of lawyers, agents, and large publishing houses – to
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1 assist them in complying with the intricacies of the renewal provision” and who often depend
2 on such works as “the sole source of income for authors and their families.” *Id.* at 4-5.
3 Congress believed that the public domain “should not be enlarged because of an author’s error
4 in recordkeeping, or any other innocent failure to comply with overly technical formalities in
5 the copyright law.” *Id.* at 6. In contrast, authors of works created on or after January 1, 1978
6 (and authors who had already renewed their pre-1978 works) were protected from a similar
7 inadvertent loss of copyright because the renewal registration requirement did not apply to
8 them.

10 To resolve this disparity in protection, Congress amended the renewal registration
11 provisions set forth in 17 U.S.C. § 304 to “make[] clear that a timely registration by the
12 proper statutory claimant vests the right to the renewal term on the date of registration in the
13 Copyright Office and, if a registration is not made, the right in the renewal term vests
14 automatically in the proper statutory claimant on the last day of the first term.” S. Rep. No.
15 102-194, at 4. The automatic renewal provisions apply only to those pre-January 1, 1978
16 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.* works that
17 acquired a first term of copyright protection between January 1, 1964 and December 31,
18 1977.⁷ *Id.* at 7. Thus, by granting automatic renewal to these works, Congress gave all

23 ⁷ At the same time, Congress recognized that a renewal registration system “provides a
24 useful public record for users of copyrighted material so they may locate the copyright holder
25 and arrange to license a work, or determine when copyright material falls into the public
26 domain.” S. Rep. No. 102-194, at 6-7. As a result, the 1992 Act offers incentives to authors
27 to continue to voluntarily renew their copyright in a timely manner. For example, registration
28 renewal entitles the author to *prima facie* evidence of the validity of the copyright, and greater
control, in the renewal term, of the use of derivative works which the copyright holder
authorized to be made in the first term. *Id.* at 7.

1 authors – present and future – the same protection from the “harsh consequences” of a
2 renewal requirement.⁸ *See id.*

3 As the *Eldred* Court recognized in the context of term extensions, the Intellectual
4 Property Clause empowers Congress “to secure the same level and duration of protection for
5 all copyright holders, present and future.” 537 U.S. at 199, 123 S. Ct. at 778. Indeed,
6 “Congress could rationally seek to ‘promote . . . Progress’ by including in every copyright
7 statute an express guarantee that authors would receive the benefit of any later legislative
8 extension of the copyright term.” *Id.*, 537 U.S. at 215, 123 S. Ct. at 786. Likewise, the 1992
9 Act ensures that past and future authors are equally protected from losing their works
10 “irretrievably into the public domain” based on an innocent failure to comply with renewal
11 registration formalities. S. Rep. No. 102-194, at 5, 7. Accordingly, Congress’ enactment of
12 the 1992 Act is a rational exercise of Congress’ authority under the Intellectual Property
13 Clause that “promote[s] the Progress of Science.” *See Eldred*, 537 U.S. at 208, 213, 123 S.
14 Ct. at 782-83, 785 (holding that “the CTEA is a rational enactment” and rejecting the
15 conclusion that “treating future and existing copyrights in parity for term extension purposes
16 [] is an impermissible exercise of Congress’ power under the Copyright Clause”).⁹

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20 ⁸ Significantly, Congress also sought to modify the 1976 Act’s renewal requirement
21 because foreign authors faced an additional problem of being even less familiar than domestic
22 authors with the formality of a renewal requirement because it is unique to U.S. law. In fact,
23 Congress understood that “[t]he domestic laws of most developed countries contain very few
24 formalities conditioning copyright protection” and that compliance with such formalities are
25 “antithetical to the major international treaty on copyright relations, the Berne Convention.”
26 S. Rep. No. 102-194, at 6. As noted above, Congress’ desire to enact laws consistent with
27 international copyright law generally (and the Berne Convention specifically) is a rational
28 exercise of Congress’ Intellectual Property power that promotes the progress of science.
Eldred, 537 U.S. at 205-06, 123 S. Ct. at 781.

⁹ Plaintiffs raise the same policy objections to the 1992 Act’s automatic renewal provision
as they do with the 1976 Act’s elimination of the renewal requirement – namely, that by
making renewal voluntary, the 1992 Act “eliminated the mechanism by which unnecessary
copyrights” “of no commercial value” would “be dedicated to the public domain.” *E.g.* Am.

1 Congress recognized that enacting the BCIA to implement Article 5(2) of the Berne
2 Convention “will secure the highest available level of multilateral copyright protection for
3 U.S. artists, authors and other creators.” S. Rep. No. 100-352, at 2. Given industry losses of
4 \$43 to \$61 billion through piracy because of “inadequate [foreign] legal protection for United
5 States intellectual property,” the Senate noted that implementing the Berne Convention “is a
6 significant opportunity to reduce the impact of copyright piracy on our world trade position.”
7 *Id.*; *Luck’s Music*, --F. Supp. 2d. --, No. 01-2220 (RMU) slip op. (Ex. 1) at 17 (same).

9 Courts considering statutes implementing other articles of the Berne Convention have
10 held that such enactments advance the goals of the Intellectual Property Clause when they
11 secure the protection of copyrights of U.S. citizens overseas. For instance, the Supreme Court
12 in *Eldred* recognized that obtaining improved protection for U.S. copyright holders abroad
13 “[c]onsistent with the Berne Convention” justified enacting the CTEA. 537 U.S. at 205-06,
14 123 S. Ct. at 781 (enacting the CTEA “to ensure that American authors would receive the
15 same copyright protection in Europe as their European counterparts” was a rational exercise
16 of Congressional authority). Similarly, in *Luck’s Music Library, Inc. v. Ashcroft*, the court
17 determined that implementing Article 18 of the Berne Convention “to secure the protection of
18 copyrights in foreign countries for United States citizens” justified enacting Section 514 of the
19 URAA because that rationale “bears a rational relationship to the progression of science.” --
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23 also recognized that the placement of copyright notices do serve the purpose of alerting users
24 to the fact that a copyright is claimed in the work in question and may prevent unintentional
25 infringement. S. Rep. No. 100-352, at 43. Thus, the BCIA’s amendments to the notice
26 provision encourages the placement of notices through various incentives. *Id.*; 17 U.S.C.
27 §§ 401(d), 402(d). For example, copyright owners using the prescribed notice will defeat a
28 defense in an infringement action based on allegedly innocent infringement in mitigation of
actual damages or statutory damages, when offered by a defendant who had access to the
noticed copies. 17 U.S.C. §§ 401(d), 402(d); S. Rep. No. 100-352, at 43-44.

1 F. Supp. 2d --, slip op. (Ex. 1) at 17.¹¹ Accordingly, because Congress had a rational basis for
2 concluding that the BCIA’s changes to the copyright notice provision would advance the
3 goals of the Intellectual Property Clause, the BCIA constitutionally promotes the progress of
4 science.¹²

6 ¹¹ Independent of its status as an exercise of Congress’ copyright power, the BCIA is also a
7 valid exercise of Congress’ constitutional power to implement treaties. The Constitution
8 grants to the President the power, “by and with the Advice and Consent of the Senate to make
9 treaties, provided two thirds of the Senators present concur.” U.S. Const. art. II, cl. 2. “If the
10 treaty is valid there can be no dispute about the validity of [an implementing] statute under
11 Article I, § 8, as a necessary and proper means to execute the powers of the Government.”
12 *Missouri v. Holland*, 252 U.S. 416, 432, 40 S. Ct. 382, 383 (1920). Significantly, the treaty
13 power, and Congress’ corresponding power to implement treaties through domestic
14 legislation, is not limited by Congress’ Article I powers. Thus, powers granted to Congress
15 by Article I cannot provide the outer boundaries for the Article II power to make international
16 agreements. *Id.*, 252 U.S. at 433, 123 S. Ct. at 383 (holding that, even if Congress could not
17 enact the Migratory Bird Treaty using one of the powers enumerated in Article I, the
18 Constitution does not forbid achieving the same result by enacting legislation implementing
19 the treaty). As already noted, the BCIA implements Article 5(2) of the Berne Convention and
20 thereby protects equally U.S. authors and foreign authors from unlawful piracy. Accordingly,
21 Congress had the power to implement the Berne Convention – independent of whether
22 Congress could pass identical language under the Intellectual Property Clause – and, in
23 addition, enacting the BCIA pursuant to its power to implement treaties does not run afoul of
24 any restraint on Congress’ power imposed by the Intellectual Property Clause. *Cf.* 321
25 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1103-04 (N.D. Cal.
26 2004) (holding that enacting the Digital Millennium Copyright Act’s anti-trafficking
27 provisions pursuant to the Commerce Clause to “[p]rotect[] the exclusive rights granted to
28 copyright owners against unlawful piracy . . . is consistent with the purpose of the Intellectual
Property Clause’s grant to Congress of the power to ‘promote the useful arts and sciences’ by
granting exclusive rights to authors in their writings . . . and does not run afoul of any restraint
on Congress’ power imposed by the Intellectual Property Clause”) (quoting *United States v.*
Elcom Ltd., 203 F. Supp. 2d 1111, 1140-42 (N.D. Cal. 2002)).

¹² It is worth nothing that, as their basis for standing, Plaintiffs allege that four copyright
statutes unconstitutionally preclude Plaintiffs from posting on the Internet “works created
between 1964 and 1978.” Am. Compl. ¶¶ 2, 8, 68 (“It is works first published on or after
January 1, 1964 but before January 1, 1978, that are the focus of this action.”). At the same
time, however, Plaintiffs concede that the 1976 Act’s changes to the deposit and renewal
requirements only apply to “works created on or *after* January 1, 1978.” *Id.* ¶ 47 (emphasis
added). Plaintiffs also concede that the BCIA’s changes to the notice requirement challenged
by Plaintiffs “prospectively eliminated the notice requirement” – *i.e.*, only applying to works
first published *after* March 1, 1989. *Id.* ¶ 48. Thus, Plaintiffs have not alleged facts in their
Amended Complaint establishing their standing to challenge the 1976 Act and BCIA.

1 **B. The CTEA and the 1992 Act Do Not Violate the “limited Times”**
2 **Clause**

3 The Supreme Court already considered and upheld the CTEA as a constitutional
4 copyright term extension that does not violate the “limited Times” provision of the
5 Intellectual Property Clause. *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781. Nonetheless,
6 Plaintiffs ask this Court to “reconsider” the *Eldred* decision because they allege that
7 “Congress has no power to extend terms of existing copyrights.”¹³ Am. Compl. ¶ 117. Yet
8 *Eldred* already addressed the issue of whether “Congress has authority under the Copyright
9 Clause to extend the terms of existing copyrights,” and the Supreme Court squarely held that
10 Congress does have such authority. *E.g.*, 537 U.S. at 199, 203-04, 123 S. Ct. at 778, 780
11 (“Neither is it a sound objection to the validity of a copyright term extension, enacted
12 pursuant to the [Intellectual Property Clause’s] grant of authority, that the enlarged term
13 covers existing copyrights.”). Accordingly, no further reconsideration of *Eldred* is necessary
14 or appropriate.
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16 Plaintiffs also allege that the CTEA’s basic copyright term of the author’s life plus 70
17 years exceeds the “limited Times” allowed by the Intellectual Property Clause because the
18 term is “so long as to be effectively perpetual.” Am. Compl. ¶¶ 93-104, 98, 101, 103.
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20 ¹³ In their Amended Complaint, Plaintiffs do not explain how the 1992 Act violates the
21 Limited Times provision. Instead, Plaintiffs seek reconsideration of the *Eldred* holding
22 because “[t]he Court in *Eldred* did not consider that every extension before CTEA applied to
23 works whose terms had to be renewed.” Am. Compl. ¶ 116. This statement is incorrect; in
24 fact, the Court in *Eldred* understood that the 1976 Act’s grant of copyright protection “would
25 run from the work’s creation . . . until 50 years after the author’s death” thereby “alter[ing] the
26 method for computing federal copyright terms” from its predecessor, the 1909 Act, which had
27 granted protection for “28 years from publication, renewable for an additional 28 years.” 537
28 U.S. at 194-95, 123 S. Ct. at 775. The Court expressly recognized that, while earlier
copyright terms that “has been split between an original term and a renewal term,” “under the
method for measuring copyright terms established by the 1976 Act and retained by the CTEA,
the baseline copyright term is measured in part by the life of the author.” *Id.*, 537 U.S. at 201

1 Plaintiffs’ challenge is so extreme that even the plaintiffs in *Eldred* (represented by many of
2 the same attorneys who represent Plaintiffs here) did not advance it. 537 U.S. at 193, 123 S.
3 Ct. at 775 (““Whether 50 years is enough, or 70 years too much,’ [Petitioners] acknowledge,
4 ‘is not a judgment meet for this Court.’”). Moreover, Plaintiffs advance the very position
5 advocated by Justice Breyer, writing for himself in dissent, which the Court’s majority
6 opinion criticized as having “precious little support from precedent.” *Id.*, 537 U.S. at 200 n.4,
7 123 S. Ct. at 778, n.4.

9 In any event, the term set by the CTEA meets the requirement that the copyright term
10 be limited. The Supreme Court defines the Intellectual Property Clause’s term “limited” as
11 “confine[d] within certain bounds, restrain[ed] or circumscribe[d].” *Id.*, 537 U.S. at 199, 123
12 S. Ct. at 778 (internal quotations omitted). This definition conforms to dictionary definitions
13 from the time of the framing and from contemporary dictionaries. *Id.* By the Court’s
14 definition, or any other, the CTEA’s term is for a limited period because it ends. *Id.*, 537 U.S.
15 at 210, 123 S. Ct. at 784 (the Supreme Court noted that the copyright extensions enacted in
16 1831, 1909, and 1976 “did not create perpetual copyrights, and neither does the CTEA”).
17 Thus, Plaintiffs’ allegation that the CTEA’s term is “effectively perpetual” (Am. Compl.
18 ¶¶ 98, 101, 103) is foreclosed by *Eldred*’s conclusion that “a regime of perpetual copyrights
19 clearly is not the situation before us.” 537 U.S. at 209, 123 S. Ct. at 783 (internal quotations
20 omitted); *see also Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) (finding that so long as the
21 time period is fixed, the length of such a period shall be subject to the discretion of
22 Congress).¹⁴

26 n.6, 123 S. Ct. at 779 n.6; *id.*, 537 U.S. at 222, 123 S. Ct. at 790 (“The 1976 Act’s time
27 extensions . . . set the pattern that the CTEA followed”).

28 ¹⁴ Furthermore, the Supreme Court specifically rejected Justice Breyer’s argument in his
dissent, and advanced by Plaintiffs here (Am. Compl. ¶¶ 99-102), that the CTEA, which

1 Accordingly, the CTEA’s establishment of a copyright term for the life of the author
2 plus 70 years is a term for a limited period that does not violate the “limited Times” provision
3 of the Intellectual Property Clause. *Eldred*, 537 U.S. at 199-200, 123 S. Ct. at 778 (holding
4 that “there is no cause to suspect that a purpose to evade the ‘limited Times’ prescription
5 prompted Congress to adopt the CTEA”).

6 **II. THE CTEA AND THE 1992 ACT DO NOT VIOLATE THE FIRST**
7 **AMENDMENT**

8 Neither the CTEA nor the 1992 Act violate the First Amendment because they do not
9 alter “the traditional contours of copyright protection” – namely, the “idea/expression
10 dichotomy” and the “fair use” defense – and thus require no further First Amendment
11 scrutiny. The Supreme Court has long recognized that “copyright’s limited monopolies are
12 compatible with free speech principles.” *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788. For this
13 reason, the *Eldred* Court held that although “[t]he First Amendment securely protects the
14 freedom to make . . . one’s own speech[,] it bears less heavily when speakers assert the right
15 to make other people’s speeches.” *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. In fact, by
16 offering an economic incentive, “the Framers intended copyright itself to be the engine of free
17 expression.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 105 S. Ct.
18 2218, 2229 (1985); *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788 (holding that “copyright’s
19 purpose is to *promote* the creation and publication of free expression”) (emphasis in original).
20 For those instances when copyright protections raise First Amendment concerns, the Supreme
21 Court has recognized that copyright law already contains built-in free speech accommodations
22 adequate to address them. *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789.

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26 _____ allegedly creates a copyright term worth over 99% of the value of a perpetual copyright,
27 makes the term “effectively perpetual.” *Eldred*, 537 U.S. at 209 n.16, 123 S. Ct. at 783 n.16
28 (“It is doubtful that those architects of our Nation, in framing the ‘limited Times’ prescription,
thought in terms of the calculator rather than the calendar.”).

1 Thus, when “Congress has not altered the traditional contours of copyright protection,
2 further First Amendment scrutiny is unnecessary.” *Eldred*, 537 U.S. at 221, 123 S. Ct. at 790.
3 The Supreme Court has enumerated the two “traditional contours of copyright protection” as
4 (1) the “idea/expression dichotomy” and (2) the “fair use” doctrine. *Eldred*, 537 U.S. at 219-
5 20, 123 S. Ct. at 788-89; *Harper & Row*, 471 U.S. at 539, 556, 560, 123 S. Ct. at 2218, 2228,
6 2230. “First, copyright law distinguishes between ideas and expression and makes only the
7 latter eligible for copyright protection.” *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788-89. This
8 bright-line idea/expression dichotomy strikes “a definitional balance between the First
9 Amendment and the Copyright Act by permitting free communication of facts while still
10 protecting the author’s expression.” *Id.* (quoting *Harper & Row*, 471 U.S. at 556, 123 S. Ct.
11 at 2228). Due to this “definition,” every idea in a copyrighted work becomes instantly
12 available for public exploitation at the moment of publication. *Eldred*, 537 U.S. at 219, 123
13 S. Ct. at 789. “Second, the ‘fair use’ defense, [which] allows the public to use not only facts
14 and ideas contained in a copyrighted work, but also expression itself in certain
15 circumstances.” *Eldred*, 537 U.S. at 219, 123 S. Ct. at 789; 17 U.S.C. § 107 (allowing use of
16 copyrighted material for, *inter alia*, “criticism, comment, news reporting, teaching . . .
17 scholarship, or research”).

20 Applying this framework to the CTEA, the *Eldred* Court held that it does not violate
21 the First Amendment because it “has not altered the traditional contours of copyright
22 protection” – thereby squarely rejecting Plaintiffs’ claim that the CTEA violates the First
23 Amendment. 537 U.S. at 221, 123 S. Ct. at 790. Indeed, *Eldred* further held that “[t]he
24 CTEA itself supplements these traditional First Amendment safeguards” in at least three
25 ways. 537 U.S. at 220, 123 S. Ct. at 789. *First*, it allows libraries and archives to
26 “reproduce” and “distribute” copies of certain published works “during the last 20 years of
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1 any term of copyright . . . for purposes of preservation scholarship, or research” if the work is
2 not already being exploited commercially and further copies are unavailable at a reasonable
3 price. *Id.* (quoting 17 U.S.C. § 108(h)). *Second*, the CTEA exempts small businesses from
4 having to pay performance royalties on music played from licensed radio or television. *Id.*
5 (citing 17 U.S.C. § 110(5)(B)). Thus, *Eldred* concluded that the CTEA does not alter the
6 “traditional contours of copyright protection” because “it protects authors’ original expression
7 from unrestricted exploitation.” 537 U.S. at 221, 123 S. Ct. at 789.

9 Like the CTEA, the 1992 Act’s automatic renewal provision does not alter the
10 “traditional contours of copyright protection.” Plaintiffs claim that the 1992 Act alters the
11 “traditional contours” of copyright protection because the 1992 Act “automatically renewed”
12 the 1976 Act’s copyright term and the CTEA “unconditionally extended” that term by 20
13 years without conditioning such renewals and extensions on formalities such as registration
14 and notice. Am. Compl. ¶¶ 86, 90.¹⁵ Plaintiffs, however, confuse copyright formalities, like
15 renewal registration, with the “traditional contours of copyright protection.” Congress does
16 not alter the traditional contours of copyright protection if it does not alter First Amendment
17 accommodations such as the idea/expression dichotomy or the fair-use doctrine. *Luck’s*
18 *Music*, -- F. Supp. 2d --, slip op. (Ex. 1) at 20 (as amended on June 16, 2004) (“Congress has
19 not altered the traditional contours of copyright protection by enacting Section 514. Section
20 514 does not alter First Amendment accommodations such as the idea/expression dichotomy
21 or the fair-use doctrine.”) (internal citations omitted).

24 ¹⁵ Plaintiffs also allege that the “CTEA was thus the first statute to extend copyright term for
25 works that had not been filtered by a renewal requirement. It is thus the first extension in
26 United States history to so unconditionally and indiscriminately extend the burdens of
27 copyright.” Am. Compl. ¶ 63. This allegation is incorrect – the 1831 Act extended the initial
28 term of copyright from 14 to 28 years, without requiring any affirmative act (renewal or

1 Plaintiffs do not (and cannot) allege, for example, that eliminating renewal registration
2 as a copyright condition redefines or in any way impacts the idea/expression dichotomy. In
3 the same vein, Plaintiffs do not (and cannot) allege that the 1992 Act narrows or changes the
4 scope of the “fair use” doctrine. Hence, the conditional/unconditional line that Plaintiffs draw
5 does not alter or affect in any way the built-in First Amendment accommodations that
6 comprise “the traditional contours of copyright protection;” namely, the “fair use” doctrine
7 and the “idea/expression dichotomy.” *Cf. Eldred*, 537 U.S. at 218 n.23, 123 S. Ct. at 788 n.23
8 (holding that “the petitioners do not explain how their First Amendment argument is moored
9 to the prospective/retrospective line they urge us to draw”).

11 In fact, like the CTEA, the 1992 Act “protects authors’ original expression from
12 unrestricted exploitation” by giving all authors – present and future – the same protection
13 from the “harsh consequences” of losing their works “irretrievably into the public domain” for
14 failing to satisfy a renewal registration requirement. S. Rep. No. 102-194, at 7; *accord*
15 *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. “Protection of that order does not raise the free
16 speech concerns present when the government compels or burdens the communication of
17 particular facts or ideas.” *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. Accordingly, because
18 the CTEA and the 1992 Act do not encroach on the traditional contours of copyright
19 protections, further First Amendment scrutiny is unnecessary. *Eldred*, 537 U.S. at 221, 123 S.
20 Ct. at 790; *accord Luck’s Music*, -- F. Supp. 2d --, slip op. (Ex. 1) at 20 (dismissing First
21 Amendment challenge to Section 514 of the URAA pursuant to Rule 12(b)(6) because
22 “Congress has not altered the traditional contours of copyright protection by enacting Section
23 514.”).

27 otherwise) by the author or copyright owner to obtain the extension. Act of Feb. 3, 1831, ch.
28 16, §§ 1, 16, 4 Stat. 436, 439.

1 **CONCLUSION**

2 For the foregoing reasons, Defendants respectfully submit that the Amended
3 Complaint should be dismissed pursuant to Rule 12(b)(6).

4 Dated: June 23, 2004.

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