

No. _____

**In The
Supreme Court of the United States**

BREWSTER KAHLE; INTERNET ARCHIVE;
RICHARD PRELINGER; and
PRELINGER ASSOCIATES, INC.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,
in his official capacity as Attorney
General of the United States,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the “traditional contours of copyright protection” referred to in *Eldred, et al. v. Ashcroft*, 537 U.S. 186 (2003), extend beyond the two “traditional First Amendment safeguards” also identified in *Eldred*?
2. If so, is the change from an “opt-in” to an “opt-out” system of copyright a change in a “traditional contour of copyright protection” requiring “further First Amendment scrutiny” under *Eldred*?

**PARTIES TO THE PROCEEDINGS
AND CORPORATE DISCLOSURE STATEMENT**

In this case, Petitioners are Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. Petitioners certify that they do not have a parent corporation, nor does any publicly-held corporation own 10% or more of their stock. The sole Respondent in this matter is Alberto R. Gonzales, in his official capacity as Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The amended opinion of the United States Court of Appeals for the Ninth Circuit and order denying rehearing and rehearing *en banc* (App. 1a) is reported at 487 F.3d 697. The original opinion of the United States Court of Appeals for the Ninth Circuit (App. 9a) is reported at 474 F.3d 665. The order of the district court (App. 17a) is reported at 2004 WL 2663157.

**JURISDICTION**

The judgment of the United States Court of Appeals was issued on January 22, 2007, and the petition for rehearing and for rehearing *en banc* was denied on May 14, 2007. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Progress Clause confers upon Congress the power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST., art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” *Id.*, amend. I.

The pertinent provisions of the copyright laws cited in this petition are reprinted in the appendix. (App. 52a-107a).



STATEMENT OF THE CASE

In *Eldred, et al. v. Ashcroft*, 537 U.S. 186 (2003), and for the first time in the history of the First Amendment, this Court adopted a standard for First Amendment review of copyright laws that explicitly linked heightened review to copyright law’s tradition. Following an approach similar to that suggested by Justice Scalia in the context of the Due Process Clause, *see, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989), Equal Protection Clause, *see, e.g., United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, dissenting) and Free Speech Clause, *see, e.g., Rutan, et al. v. Republican Party of Illinois, et al.*, 497 U.S. 62, 95-96 (1990) (Scalia, dissenting), *Eldred* conditioned First Amendment review of a copyright statute upon

Congress's changing the "traditional contours of copyright protection."¹ *Eldred*, 537 U.S. at 221. When Congress enacts a copyright law that conforms to the "traditional contours of copyright protection, further First Amendment review is unnecessary." *Id.* But when a copyright law changes these "traditional contours of copyright protection," then "further First Amendment review" is required, as every court to consider the question has concluded. (App. 1a (Ninth Circuit opinion below) and 17a (District Court order below)). See also *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004).

¹ As Justice Scalia described this approach in *Rutan*:

The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

Rutan, 497 U.S. at 95-96 (footnote omitted).

The First Amendment question before the Court in *Eldred* was whether Congress was prohibited from extending the term of copyright for existing works. Applying the “traditional contours” test, the Court held that the term extension in issue in *Eldred* was immunized from First Amendment scrutiny based on Congress’s previous extensions of copyright terms. The Court was not presented with, and did not decide, the question of whether the change from an “opt-in” to an “opt-out” copyright regime was similarly immunized from First Amendment scrutiny.

Eldred was a critically important clarification by this Court of how copyright and the First Amendment interact. It explicitly rejected a statement by the D.C. Circuit that copyrights were “‘categorically immune from challenges under the First Amendment.’” *Eldred*, 537 U.S. at 221 (quoting *Eldred, et al. v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)). And as Professor Daniel Farber has described, the passage effecting this clarification “bears every sign of careful drafting.” Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the Digital Age*, 89 MINN. L. REV. 1318, 1349 (2005).

That care notwithstanding, however, there is growing conflict and confusion within the federal courts about the meaning of the phrase, “traditional contours of copyright protection.” See *infra*. That conflict and confusion will have increasing significance. The instant case is just the latest in a series of cases that have challenged innovations in Congress’s copyright policy. See *Luck’s Music Library*, 321 F. Supp. 2d at 119; *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (appeal pending; argued June 8, 2006). Relying upon the standard articulated in *Eldred*, a number of commentators have suggested other aspects of current copyright law that are also constitutionally suspect. See, e.g.,

Matt Williams, *Balancing Free Speech Interests: The Traditional Contours of Copyright Protection and The Visual Artists' Rights Act*, 13 UCLA ENT. L. REV. 105 (2005) (arguing the Visual Artists' Rights Act changes "traditional contours of copyright protection"); Farber, *supra*, at 1349 (reviewing Digital Millennium Copyright Act). As Congress adapts copyright law to the digital age, it is critically important that it understand clearly the limits the First Amendment imposes upon its work. In light of the growing conflict and confusion in the federal courts, those lines however are not now clear. This Court should grant review to resolve this conflict in authority, and resolve the uncertainty about the standard it set in *Eldred*.

1. Petitioners provide free Internet archives of both cultural and scientific material. Petitioner Brewster Kahle founded the Internet Archive in 1996. Since then, the Archive has collected public domain, and freely licensed material that it has made available freely on its website. Petitioner Richard Prelinger founded the Prelinger Archives in 1983. These archives collect, among other things, "ephemeral" films, including advertising, educational, industrial, and amateur films. Prelinger Archives has made free digital versions of these films available through the Internet Archive. In addition, in cooperation with Getty Images, the Archive provides stock footage to the media and entertainment industries.

2. In March 2004, Petitioners filed an amended complaint seeking declaratory and injunctive relief in the United States District Court for Northern District of California. Jurisdiction was grounded in 28 U.S.C. §§ 1331, 1361 and 2201. The core of Petitioners' complaint asked the Court to find that in changing from an "opt-in"

(in which copyright is granted only to those to take affirmative steps to secure it) to an “opt-out” (in which copyright is automatic) system of copyright, Congress had changed the “traditional contours of copyright protection,” meriting, under the standard first set out in *Eldred*, “further First Amendment review.” In particular, Petitioners alleged that four statutes effected this change: (1) the Copyright Act of 1976, Publ. L. No. 94-553, 90 Stat. 2541, which abolished the registration, deposit and renewal requirements and extended copyright protection automatically to all eligible works; (2) the Berne Convention Implementation Act of 1988, Publ. L. No. 100-568, 102 Stat. 2853-2861, which eliminated the notice requirement; (3) the Copyright Renewal Act of 1992, Publ. L. No. 102-307, 106 Stat. 264, which automatically renewed all copyrights issued from 1964 through 1977; and (4) the Sonny Bono Copyright Term Extension Act of 1998, Publ. L. No. 105-298, 112 Stat. 2827-2828, which extended by 20 years the term of all existing copyrights. Petitioners challenged the effect of these changes on works fixed after December 31, 1963 and before January 1, 1978. (App. 5a).

3. The government moved to dismiss Petitioners’ complaint as failing to state a claim upon which relief might be granted. (App. 17a). In a memorandum opinion issued in November 2004, the District Court dismissed the complaint. The Court agreed with Petitioners that changes in the “traditional contours of copyright protection” merited “further First Amendment review.” (App. 48a-49a). But the lower court held that “mere formalities” could

never constitute “traditional contours of copyright protection.” (App. 50a).²

4. The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (App. 3a). Once again, the Court agreed with Petitioners that changes in the “traditional contours of copyright protection” “may trigger First Amendment review.” (App. 5a). But because *Eldred* had affirmed a statute that in part had the same effect as the changes challenged in the instant case – by “plac[ing] existing and future copyrights in parity” – the Court held that the changes Petitioners challenged were immune from scrutiny under the *Eldred* standard. (App. 5a-7a).

5. Petitioners filed for rehearing and rehearing *en banc*. (App. 2a). The panel voted to deny rehearing, and no judge voted to take the matter *en banc*. (App. 2a). The Court of Appeals, however, did issue an amended opinion that further clarified its holding. (App. 1a-8a).



REASONS FOR GRANTING THE WRIT

This case involves a fundamental change in the tradition of American copyright law, and the standards for reviewing that change under the First Amendment. The change relates to how a copyright is secured and maintained under federal law; the First Amendment standard is the one first articulated in *Eldred*.

² The Court also rejected Petitioners’ claim that the effect of the change from opt-in to opt-out copyright was to render the copyright terms at issue no longer “limited.” Petitioners do not raise that question upon review. (App. 7a-8a).

For 186 years, federal copyright was an “opt-in” system: An author received the full benefit of copyright only if he took certain affirmative steps to claim that protection – including registering the work, depositing the work, marking the work, and renewing the copyright after an initial term. *See* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 135-46, 148-54 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491-93 (2004).

The effect of this traditional design was to radically narrow the regulation of copyright to those works whose authors might presumptively benefit from an exclusive right, leaving unregulated work that had no continuing commercial value tied to an exclusive right. According to one estimate, a majority of all published work during this “opt-in” period of copyright never received copyright at all, and the vast majority never renewed its copyright after an initial term. *See* Sprigman, *supra*, at 502-14, 519. *See also* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 236 (Harvard Univ. Press 2003). As Judge Benjamin Kaplan described the system in 1958, “a very great amount of material published domestically and capable of copyright is not in fact published with notice and passes at once into the public domain without ever touching the Copyright Office.” Reese, *supra*, at 138.

Beginning in 1976, however, Congress has changed this tradition, shifting from an “opt-in” to an “opt-out” system of copyright regulation: Under this “opt-out” regime, an author receives the full protection of copyright automatically, whether or not he registers the work,

deposits the work, marks the work, and without any need to renew the copyright after an initial term.

The effect of this new design is to radically increase the scope and reach of copyright regulation, whether or not there is any commercial benefit from that regulation, and whether or not the author can even be identified. Copyright under the traditional system automatically narrowed its protection to works that could reasonably benefit from it; copyright under the current system is radically different, indiscriminately attaching its regulation without regard to whether it promotes commercial ends or stifles them. Whereas the traditional approach resulted in a rich public domain populated by new and old works alike, the current system of automatic protection destroys that tradition by putting all eligible works under protection for nearly a century or more.

Petitioners challenged this change in the tradition of copyright, relying upon the standard first specified by this Court in *Eldred* – arguing that a change from an opt-in to opt-out system was a change in a “traditional contour of copyright protection.” *Eldred*, 537 U.S. at 221. The government argued in response that *Eldred* limited First Amendment challenges of a copyright statute to the two “First Amendment safeguards” identified by the Court, *id.* at 220 – either a change in the “‘idea/expression’ dichotomy,” or in fair use. See Brief for the Appellee, *Kahle v. Gonzales*, No. 04-17434, 2005 WL 926823, at *31-32 (Mar. 10, 2005).

But while neither the district court nor the Ninth Circuit accepted the government’s broad reading of First Amendment immunity, both rejected Petitioners’ claim. Instead, applying a horseshoes theory of constitutional

review, the Ninth Circuit concluded that because the different changes challenged in *Eldred* would have a “similar” effect to the changes challenged here (App. 3a) the rule first articulated in *Eldred* need not be applied to the claims raised by Petitioners here. Petitioners, the Ninth Circuit wrote, were “mak[ing] essentially the same argument [as in *Eldred*], in different form.” (App. 6a-7a). *Eldred* thus “answer[ed]” Petitioners’ claims. (App. 5a).

The Ninth Circuit misreads both *Eldred* and this case. Petitioners’ challenge here is fundamentally different from the challenge raised in *Eldred*. In *Eldred*, Petitioners attacked the tradition of extending the terms of subsisting copyrights whenever copyright terms were extended prospectively. In this case, Petitioners are attacking something very different – an unprecedented change whereby copyrights are extended and maintained for every work eligible for copyright protection automatically, without regard for the need for protection, or whether the author of the work seeks or wants protection. No doubt both cases involve copyright and the First Amendment. But in this case, the First Amendment is invoked to test a change in the tradition of copyright legislation, applying the tradition-based test articulated in *Eldred*.

This misapplication of the *Eldred* rule, and the growing inconsistency among federal courts about its meaning, argues strongly for review by this Court to resolve apparent uncertainty about the scope of the tradition-based immunity granted in *Eldred*.

I. This Court Should Grant Certiorari To Resolve a Conflict Among Federal Courts About the Scope of Any Immunity for Copyright Acts Within the “Traditional Contours of Copyright Protection”

Eldred plainly grants Congress an immunity from First Amendment review for copyright acts within the “traditional contours of copyright protection.” But that immunity is limited, as is obvious from the context in which it was announced in *Eldred*.

Eldred was this Court’s first review of a free speech challenge to a copyright statute. The Court was presented with two very different standards under which to evaluate a First Amendment claim: Petitioners in *Eldred* had asked the Court to apply ordinary First Amendment review to what they argued was copyright’s “regulation of speech.” *Eldred*, 537 U.S. at 218-21. The government had asked the Court to affirm the decision by the Court of Appeals for the District of Columbia below, holding that copyright laws were “categorically immune from challenges under the First Amendment.” *Id.* at 221.

This Court declined both Petitioners’ and the government’s invitations. Instead, this Court crafted a First Amendment standard that sanctioned traditional practices, but left open challenges to changes in those practices. Heightened review is triggered by changes in “the traditional contours of copyright protection.” *Id.* Where there is no change to these “traditional contours of copyright protection, further First Amendment review is unnecessary.” *Id.*

The appeal of this tradition-based rule is obvious. As Justice Scalia has argued in other contexts, *see, e.g.*,

Rutan, 497 U.S. at 95-96 (Scalia, J., dissenting), where a practice is historically unchallenged and instead supported by long-standing practice, there is little reason for this Court to entertain now a newly discovered challenge. It is unlikely, to say the least, that modern litigants have discovered a constitutional flaw previously unnoticed – as this Court viewed the practice at issue in *Eldred* – for almost two centuries. Such practices, at least in the context of copyright legislation, this Court now deems constitutional. But when a practice is not supported by tradition, obviously no presumption of constitutionality should immunize it from ordinary First Amendment review – at least where the change significantly restricts free speech. Tradition, on this theory, settles constitutional questions within the scope of that tradition. But it cannot settle questions about practices without the tradition.

However sensible the tradition-based rule of *Eldred* may be, its scope is apparently obscure within the federal courts. Following the argument of the government, at least one court has concluded that the “traditional contours of copyright protection” refers exclusively to the two “First Amendment safeguards” identified by the *Eldred* opinion – the “idea/expression” dichotomy and fair use. Other courts have rejected this broad rule for First Amendment immunity.

In *Luck’s Music Library*, 321 F. Supp. 2d at 119, for example, the court was presented with a First Amendment challenge (among others) to a law that removed works from the public domain. The government argued the only grounds for a First Amendment challenge under *Eldred* were changes in either the “idea/expression dichotomy” or fair use. The court agreed. As the district court wrote:

When Congress “has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”

In the instant case, Congress has not altered the traditional contours of copyright protection by enacting Section 514. *See generally* 17 U.S.C. § 104A. Section 514 does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine. . . . Given that Section 514 does not encroach on the traditional copyright protections and includes additional protections, further scrutiny under the First Amendment is unnecessary.

Luck’s Music Library, 321 F. Supp. 2d at 118-19 (quoting *Eldred*, 537 U.S. at 219-21) (footnote omitted).

In the instant case, however, both the district court and Court of Appeals apparently rejected the government’s interpretation of *Eldred*. As the district court wrote, and contrary to the government’s claim, “[t]he Supreme Court has not identified the entire universe of protections that it considers to be within such ‘traditional contours.’” (App. 49a). Likewise, the Ninth Circuit also did not rely upon the narrow reading of “traditional contours of copyright protection” advanced by the government to reject Petitioners’ claim. (App. 6a-7a). The ground actually relied upon by the Ninth Circuit (discussed below) was neither briefed nor argued before that court.

Thus, at least three courts from two circuits are conflicted about the meaning of the tradition-based immunity granted in *Eldred*. Meanwhile, the Tenth Circuit is also presently considering a claim related to *Luck’s Music Library* in which the government has again maintained that the only changes to copyright law that merit First

Amendment review are changes in the “idea/expression dichotomy” and fair use. *See Golan*, 310 F. Supp. 2d at 1215 (appeal pending; argued June 8, 2006).³

Perceived uncertainty regarding the scope of this Court’s rule has thus slowed resolution of cases raising important questions about changes in the scope of copyright law affected by Congress. This uncertainty is an important ground for granting review.

II. The Proper Application of the *Eldred* Rule Is Important for Guiding Congress In Its Adjusting of Copyright To Digital Technologies

The rule announced in *Eldred* is not an insignificant detail in copyright law. As changing technologies alter the way copyright law regulates, Congress will repeatedly be called upon to rebalance the interests that copyright law affects. *See Sony v. Universal Studios*, 464 U.S. 417, 429 (1984). In the process of these adjustments, Congress is of course free to change copyright law. It is even free to change the “traditional contours of copyright protection.” But the critical question presented by this case is what constitutional standard limits Congress in this process of updating or changing the contours of copyright protection. Is Congress free of the First Amendment so long as it doesn’t change the “idea/expression dichotomy” or fair use? Or are there other “traditional contours of copyright protection” that also constrain its innovations?

³ For this reason, Petitioners would suggest this Court at least hold consideration of this Petition until the Tenth Circuit rules.

For example, copyright law has traditionally been viewpoint neutral. Imagine the European Union decided to deny copyright protection to “hate speech,” and Congress, in an effort to “harmonize” international copyright law, did the same. Would that law be subject to First Amendment review?

On Petitioners’ reading of *Eldred*, the answer is obviously yes. This change in a “traditional contour of copyright protection” – viewpoint neutrality – would subject the law changing that contour to ordinary First Amendment review.

On the view that has been advanced by the government, however, the only changes in the “traditional contours of copyright protection” that would merit First Amendment review would be changes in the two “First Amendment safeguards” identified by this Court in *Eldred*: namely, changes in fair use, or the “idea/expression dichotomy.” *Eldred*, 537 U.S. at 219-20. As the government argued below, it is these safeguards alone that define the traditional contours of copyright protection for purposes of the First Amendment. See Brief for the Appellee, *Kahle v. Gonzales*, No. 04-17434, 2005 WL 926823, at *31-32 (Mar. 10, 2005). Thus under this view, a change in the traditional viewpoint neutrality of copyright law would not be subject to First Amendment review.

To avoid this absurd result, the government modified its position below to suggest the *Eldred* rule applies only to content neutral copyright regulation. See *id.* at *36-37. But that gloss on *Eldred* has no basis in the Court’s opinion, and the apparent need to gloss the *Eldred* rule only reinforces Petitioners’ argument that there is important uncertainty about its holding. The government also

modified its position to suggest that the traditional First Amendment safeguards “largely, if not exclusively” determined when First Amendment review was required. *See id.* at *31-32. The government has not described, however, the line defining “largely.” These qualifications demonstrate the uncertainty the government has helped generate around the meaning and scope of the *Eldred* decision.

Given this uncertainty, it is extremely important that this Court clarify the role of the First Amendment in framing the scope of copyright legislation. If Congress believes, as the government has maintained, that the only place it need consider the First Amendment is when changing “fair use” or the idea/expression distinction, then fundamental constitutional values will be ignored as Congress updates copyright law to better fit the digital age. As Congress, for example, considers “Orphan Works” reform, *see* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (Jan. 2006), or changes to the Digital Millennium Copyright Act, *see* Intellectual Property Enhanced Criminal Enforcement Act of 2007, H.R. 3155, 110th Cong. (1st Sess. 2007), the scope of First Amendment values will be critical. Thus again, clarifying the perceived ambiguity in *Eldred* would significantly aid Congress as it legislates.

III. The Ninth Circuit’s Application of *Eldred* Is Erroneous

This uncertainty about the scope of the tradition-based immunity in *Eldred* notwithstanding, Petitioners nonetheless urge the Court to grant review for the purpose of instructing the Ninth Circuit to correct an obvious

mistake in its application of *Eldred*, and to evaluate Petitioners' challenge under the *Eldred* standard.

Because *Eldred* established a tradition-based rule for determining whether a copyright statute is subject to First Amendment review, the obvious first question any court presented with a First Amendment challenge to a copyright act must address is whether the act deviates from the "traditional contours of copyright protection." The Ninth Circuit in this case refused even this first step. It did not consider whether the change from an opt-in to an opt-out regime was change in a "traditional contours of copyright protection." Instead, the Court dismissed Petitioners' claim because it believed this Court's decision in *Eldred* "in effect" answered Petitioners' claim. (App. 5a). As the Court wrote:

The [Eldred] Court observed that when Congress passed the CTEA, it 'placed existing and future copyrights in parity. . . .' Thus, extending existing copyrights to achieve parity with future copyrights does not require further First Amendment scrutiny.

(App 5a-6a).

The *Eldred* Court, however, did *not* hold that Congress got immunity from First Amendment review whenever (and however) it "placed existing and future copyrights in parity." (App. 6a). Instead, the Court granted Congress immunity when Congress legislates consistent with the "traditional contours of copyright protection." As applied to the claims in *Eldred*, this Court believed Congress was legislating consistent with tradition, because this Court believed that every time Congress had extended the terms of copyrights prospectively, it granted the

benefit of that extension to all existing copyrights.⁴ It was *consistency with tradition* that justified the immunity, not the *consistency of existing and future copyrights*. Or put differently, this Court did not say *because* the copyrights are placed in parity, “further review is unnecessary.” It said *because* Congress hadn’t changed “the traditional contours of copyright, further First Amendment review is unnecessary.” What mattered to this Court was copyright law’s tradition; what triggers First Amendment review on this standard is a change in that tradition.

It was thus plain error for the Court, after rejecting the government’s broad reading of immunity, not then to consider whether the change to an opt-out system was a change in a traditional contour of copyright. Petitioners would ask this Court to remand the case with instructions that the Court at least consider this obvious and necessary first step.

Such a review, Petitioners believe, would plainly demonstrate that Congress has changed copyright law’s tradition. But Petitioners were denied the opportunity to present any evidence on this issue. Instead, the case was dismissed at the pleading stage, before any evidentiary showing could be made, or any proof introduced. (App. 17a). Accordingly, this Court should at the very least vacate the Ninth Circuit’s decision and remand the case for a consideration of the *Eldred* test upon a proper record.

⁴ This in fact is not correct. When Congress extended the term of copyrights in 1831, it granted the benefit of that extension to works in their initial term. Works in the renewal term did not get the benefit of the extension. See Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

IV. Petitioners Are Entitled To First Amendment Review of That Part of Congress’s Current Practice That Deviates from “The Traditional Contours of Copyright Protection”

Eldred justified both its Progress Clause and First Amendment conclusions on the grounds of Congress’s actual practice. This Court concluded that Congress had always granted the benefit of an extended term to existing copyright holders. In upholding the Sonny Bono Copyright Term Extension Act (“CTEA”), it believed it was simply affirming a practice that reached back to the Framers.

But in fact, Congress has not historically granted the benefit of an extended term to all existing copyright holders. The Act of 1831, for example, did not grant the benefit of an extended term to copyrights in their renewal term. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. More importantly, the benefits of every extension before the CTEA were not automatically granted to anyone. Under the traditional regime, in order to secure the benefit of the extended term, copyright holders had to take affirmative steps to claim the benefit of original or additional federal protection. Indeed, until the CTEA, Congress had never granted an automatic extension of term for copyrights that had not, or would not, pass through a filter of formalities. Before the CTEA, every extension was limited to those copyright holders who took affirmative steps to claim the benefits of copyright protection.

This history reflects the true nature of the “traditional contours of copyright protection” in America. Until very recently, the opt-in system assured that copyright law would narrow its reach automatically, by requiring affirmative steps to secure or maintain a copyright. That tradition thus narrowed – automatically – the burden of

copyright. Congress has now changed this traditional nature of copyright law, with profound free speech consequences as the tools for creative and spreading speech – digital technologies – spread. Petitioners thus ask this Court to grant review to permit First Amendment review of that part of Congress’s current practice that deviates fundamentally from the “traditional contours of copyright protection.”

◆

CONCLUSION

For the reasons articulated, this Court should grant certiorari in this case, and reverse the decision of the Ninth Circuit, finding the change from an opt-in to an opt-out copyright regime is a change in a “traditional contour of copyright protection,” meriting ordinary First Amendment review. Alternatively, this Court should grant review, and vacate the judgment of the Ninth Circuit, remanding for a determination of whether the change from an opt-in to an opt-out copyright regime is a change in a “traditional contour of copyright protection,” meriting ordinary First Amendment review.

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BREWSTER KAHLE; INTERNET
ARCHIVE; RICHARD PRELINGER;
PRELINGER ASSOCIATES, INC.,

Plaintiffs-Appellants,

v.

ALBERTO R. GONZALES,
Attorney General, in his
official capacity as Attorney
General of the United States,

Defendant-Appellee.

No. 04-17434

D.C. No.
CV-04-01127-MMC

**ORDER AND
AMENDED OPINION**

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
November 13, 2006 – San Francisco, California

Filed May 14, 2007

Before: Mary M. Schroeder, Chief Circuit Judge,
Jerome Farris and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Farris

COUNSEL

Jennifer Stisa Granick, Lawrence Lessig, and Christopher
Sprigman, Center for Internet and Society, Stanford,
California, for the plaintiffs-appellants.

John S. Koppel, Department of Justice, Washington, D.C.,
for the defendant-appellee.

ORDER

The opinion filed on January 22, 2007, Slip op. at 889, is withdrawn and an amended opinion is filed simultaneously with this order.

Chief Judge Schroeder and Judge Rawlinson have voted to deny the petition for rehearing en banc. Judge Farris so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or for rehearing en banc may be filed.

OPINION

FARRIS, Senior Circuit Judge:

Plaintiffs appeal from the district court's dismissal of their complaint. They allege that the change from an "opt-in" to an "opt-out" copyright system altered a traditional contour of copyright and therefore requires First Amendment review under *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). They also allege that the current copyright term violates the Copyright Clause's "limited Times" prescription.

Arguments similar to Plaintiffs' were presented to the Supreme Court in *Eldred*, which affirmed the constitutionality of the Copyright Term Extension Act against those attacks. The Supreme Court has already effectively addressed and denied Plaintiffs' arguments. We AFFIRM.

In March 2004, Plaintiffs Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. filed an amended complaint seeking declaratory judgment and injunctive relief. Brewster Kahle and Internet Archive have built an "Internet library" that offers free access to digitized audio, books, films, websites, and software. Richard Prelinger and Prelinger Associates make digital versions of "ephemeral" films available for free on the internet. Each Plaintiff provides, or intends to provide, access to works that allegedly have little or no commercial value but remain under copyright protection. The difficulty and expense of obtaining permission to place those works on the Internet is overwhelming; ownership of these "orphan" works is often difficult, and sometimes impossible, to ascertain.

Prior to 1978, the number of orphaned works was limited by the renewal requirement. Renewal served as a filter that passed certain works – mostly those without commercial value – into the public domain. Along with formalities such as registration and notice (which have also been effectively eliminated), renewal requirements created an "opt-in" system of copyright in which protections were only available to those who affirmatively acted to secure them. The majority of creative works were thus never copyrighted and only a small percentage were protected for the maximum term.

The Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (1992), and the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), altered the system to one Plaintiffs characterize as “opt-out.” Among other effects, the CRA eliminated the renewal requirements for works created between 1964 and 1977 and thus extended their term; the CTEA effected a further extension. Plaintiffs confine their First Amendment challenge to the extensions granted to those works.

Eliminating the renewal requirement dramatically increased the average copyright term and correspondingly decreased the number of works currently entering the public domain. The change is most noticeable for works that have little commercial value and thus, under an opt-in system, provide little incentive for their creators to renew the copyright. Plaintiffs characterize this change as altering the “traditional contours of copyright” and therefore requiring First Amendment review under *Eldred*.

Plaintiffs also argue that they should be allowed to present evidence that the present copyright term violates the Copyright Clause’s “limited Times”¹ prescription as the Framers would have understood it. That claim was not directly at issue in *Eldred*, though Justice Breyer discussed it extensively in his dissent. *See Eldred*, 537 U.S. at 243. Plaintiffs assert all existing copyrights are effectively perpetual.

¹ The Copyright Clause grants Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

Although the Supreme Court recently addressed similar issues in *Eldred*, Plaintiffs argue that their specific claims were not answered – or if they were, only in dicta. They place particular emphasis on the increased possibilities for archiving and disseminating expressive content over the Internet and the detrimental impact the change from an opt-in to an opt-out system has on those efforts. Plaintiffs articulate policy reasons behind their position; they do not, however, provide a legal argument explaining why we should ignore the clear holding of *Eldred*.

I

Dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim are reviewed de novo. *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). Complaints are only “dismissed for failure to state a claim [if] it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court accepts the complaint’s well pleaded allegations of fact and construes them in the plaintiff’s favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

Plaintiffs assert that the change from discretionary to automatic renewal and subsequent extension of copyrights for works created between 1964 and 1977 altered the “traditional contours of copyright protection.” Under *Eldred*, that may trigger First Amendment review. 537 U.S. at 221. However, *Eldred* also upheld the CTEA, in effect answering Plaintiffs’ challenge.

Eldred addressed whether extending existing copyrights was constitutionally permissible. The Court observed that when Congress passed the CTEA, it “placed

existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations.” *Id.* at 194. Thus, extending existing copyrights to achieve parity with future copyrights does not require further First Amendment scrutiny. Instead, traditional First Amendment safeguards such as fair use and the idea/expression dichotomy are sufficient to vindicate the speech interests affected by the CRA and the CTEA. *Id.* at 219-20.

The CRA and the CTEA eliminated the renewal requirements and lengthened the term for works created between 1964 and 1977, and in doing so they placed existing copyrights in parity with those of future works. The extensions left intact “built-in First Amendment accommodations” such as the idea/expression dichotomy and fair use. *Eldred*, 537 U.S. at 219.

By removing the renewal requirement, the CRA effectively extended copyright protection for works that would otherwise have fallen into the public domain. The CTEA further extended those works’ protection. Congress could have achieved the identical result by extending the term of existing copyrights before their renewal was required. *Eldred* tells us that such extensions would not violate the First Amendment. *Id.* at 221. It therefore follows that the materially indistinguishable CRA and CTEA provisions are constitutional as well. Here, as in *Eldred*, extending existing copyrights while preserving speech-protective measures does not alter the “traditional contours of copyright protection.”

Despite Plaintiffs’ attempt to frame the issue in terms of the change from an opt-in to an opt-out system rather than in terms of extension, they make essentially the same

argument, in different form, that the Supreme Court rejected in *Eldred*. It fails here as well.

II

In addition to their First Amendment claim, Plaintiffs make the closely related argument that the current copyright term violates the Copyright Clause’s “limited Times” prescription by creating a term that “the Framers would have considered . . . so long as to be effectively perpetual.” (Pet. Br. at 48.) This second claim overlaps with the first in that the Plaintiffs’ criticism of the elimination of formalities for works created between 1964 and 1977 is merely another way of saying that the copyright term is too long – put differently, “effectively perpetual.”

Eldred disposes of Plaintiffs’ second argument, as it did their first. *Eldred* did not purport to directly address whether the phrase “limited Times” places substantive limits on copyright duration. See *Eldred*, 537 U.S. at 210 n.17 (noting that whether an average copyright duration of ninety-five years is at the outer boundaries of “limited Times” was not before the Court). Nevertheless, the Court denied Justice Breyer’s assertion that the term enacted by the CTEA was constitutionally impermissible, observing that “[i]t is doubtful . . . that those architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar.” *Eldred*, 537 U.S. at 210 n.16. Plaintiffs seize on that phrase as evidence that the Court misunderstood the Framers’ intent behind the phrase “limited Times.” The Court’s phrasing in *Eldred* sacrificed clarity for pithiness: the calculator and the calendar are merely different ways of measuring economic benefit to authors.

However, the Supreme Court clearly grasped the role “limited Times” play in the copyright scheme and the Framers’ understanding of that phrase. In contrast to Plaintiffs, the Court has long defined “limited Times” by a balancing rather than an absolute test. *See Eldred*, 537 U.S. at 205-08; *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that the “limited copyright duration required by the Constitution” serves to encourage authors while eventually bringing their works within the public domain).

Put differently, the outer boundary of “limited Times” is determined by weighing the impetus provided to authors by longer terms against the benefit provided to the public by shorter terms. That weighing is left to Congress, subject to rationality review. *See Eldred*, 537 U.S. at 206-07 (“Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.” (internal citations omitted)). The Court was cognizant of the meaning of “limited Times” when assessing the current copyright term; it simply reached a different conclusion than that desired by Plaintiffs. Future extensions may or may not survive review, but the current term is constitutional. Plaintiffs’ claim was properly dismissed.

Both of Plaintiffs’ main claims attempt to tangentially relitigate *Eldred*. However, they provide no compelling reason why we should depart from a recent Supreme Court decision.

AFFIRMED.

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Brewster Kahle; Internet
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Plaintiff-Appellants,

v.

Alberto R. Gonzales, Attorney
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ity as Attorney General of the
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No. 04-17434

D.C. No.
CV-04-01127-MMC

OPINION

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Maxine M. Chesney, District Judge, Presiding

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Circuit Judges.

Opinion by Judge Farris

COUNSEL

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California, for the plaintiffs-appellants.

John S. Koppel, Department of Justice, Washington, D.C., for the defendant-appellee.

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Plaintiffs appeal from the district court's dismissal of their complaint. They allege that the change from an "opt-in" to an "opt-out" copyright system altered a traditional contour of copyright and therefore requires First Amendment review under *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). They also allege that the current copyright term violates the Copyright Clause's "limited Times" prescription.

Arguments similar to Plaintiffs' were presented to the Supreme Court in *Eldred*, which affirmed the constitutionality of the Copyright Term Extension Act against those attacks. The Supreme Court has already effectively addressed and denied Plaintiffs' arguments. We AFFIRM.

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Eliminating the renewal requirement dramatically increased the average copyright term and correspondingly decreased the number of works currently entering the public domain. The change is most noticeable for works that have little commercial value and thus, under an opt-in system, provide little incentive for their creators to renew the copyright. Plaintiffs characterize this change as altering the “traditional contours of copyright” and therefore requiring First Amendment review under *Eldred*.

Plaintiffs also argue that they should be allowed to present evidence that the present copyright term violates the Copyright Clause’s “limited Times”¹ prescription as the Framers would have understood it. That claim was not directly at issue in *Eldred*, though Justice Breyer discussed it extensively in his dissent. *See Eldred*, 537 U.S. at 243. Plaintiffs assert all existing copyrights are effectively perpetual.

Although the Supreme Court recently addressed similar issues in *Eldred*, Plaintiffs argue that their specific claims were not answered – or if they were, only in dicta. They place particular emphasis on the increased possibilities for archiving and disseminating expressive content over the Internet and the detrimental impact the change from an opt-in to an opt-out system has on those efforts. Plaintiffs articulate policy reasons behind their position; they do not, however, provide a legal argument explaining why we should ignore the clear holding of *Eldred*.

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court accepts the complaint's well pleaded allegations of fact and construes them in the plaintiff's favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

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Plaintiffs frame their argument that Congress altered copyright's "traditional contours" within the context of renewal requirements, which, while a "formality," have a longstanding and vital role in regulating the amount of works under copyright. See *Stewart v. Abend*, 495 U.S. 207, 217 (1990) ("Since the earliest copyright statute in this country, the copyright term of ownership has been split between an original term and a renewal term."). The CRA and the CTEA did eliminate the renewal requirements and lengthen the term for works created between

1964 and 1977, but in doing so they simply placed existing copyrights in parity with those of future works. Thus, *Eldred*'s explicit holding that efforts to achieve parity are constitutionally valid refutes Plaintiffs' claim that eliminating the renewal requirement should trigger First Amendment scrutiny.

Despite Plaintiffs' attempt to frame the issue in terms of the change from an opt-in to an opt-out system rather than in terms of extension, they make essentially the same argument, in different form, that the Supreme Court rejected in *Eldred*. It fails here as well.

II

In addition to their First Amendment claim, Plaintiffs make the closely related argument that the current copyright term violates the Copyright Clause's "limited Times" prescription by creating a term that "the Framers would have considered . . . so long as to be effectively perpetual." (Pet. Br. at 48.) This second claim overlaps with the first in that the Plaintiffs' criticism of the elimination of formalities for works created between 1964 and 1977 is merely another way of saying that the copyright term is too long – put differently, "effectively perpetual."

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that “[i]t is doubtful . . . that those architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar.” *Eldred*, 537 U.S. at 210 n.16. Plaintiffs seize on that phrase as evidence that the Court misunderstood the Framers’ intent behind the phrase “limited Times.” The Court’s phrasing in *Eldred* sacrificed clarity for pithiness: the calculator and the calendar are merely different ways of measuring economic benefit to authors.

However, the Supreme Court clearly grasped the role “limited Times” play in the copyright scheme and the Framers’ understanding of that phrase. In contrast to Plaintiffs, the Court has long defined “limited Times” by a balancing rather than an absolute test. *See Eldred*, 537 U.S. at 205-08; *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that the “limited copyright duration required by the Constitution” serves to encourage authors while eventually bringing their works within the public domain).

Put differently, the outer boundary of “limited Times” is determined by weighing the impetus provided to authors by longer terms against the benefit provided to the public by shorter terms. That weighing is left to Congress, subject to rationality review. *See Eldred*, 537 U.S. at 206-07 (“Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.” (internal citations omitted)). The Court was thus clearly cognizant of the meaning of “limited Times” when assessing the current copyright term; it simply reached a different conclusion than that

desired by Plaintiffs. Future extensions may or may not survive review, but the current term is constitutional. Plaintiffs' claim therefore was properly dismissed.

Both of Plaintiffs' main claims attempt to tangentially relitigate *Eldred*. However, they provide no compelling reason why we should depart from a recent Supreme Court decision.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BREWSTER KAHLE, et al.,	No. C-04-1127 MMC
Plaintiffs,	ORDER GRANTING
v.	MOTION TO DISMISS;
JOHN ASHCROFT, in his	VACATING HEARING
official capacity as Attorney	(Docket No. 24)
General of the United States,	(Filed Nov. 19, 2004)
Defendant.	/

Before the Court is the motion filed June 23, 2004 by defendant John Ashcroft, in his official capacity as Attorney General of the United States (“Ashcroft”), to dismiss the above-titled action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs Brewster Kahle (“Kahle”), Internet Archive, Richard Prelinger (“Prelinger”) and Prelinger Associates, Inc. have filed opposition, to which Ashcroft has replied. Having reviewed the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, *see* Civil Local Rule 7-1(b), and hereby VACATES the December 10, 2004 hearing on the motion. For the reasons set forth below, Ashcroft’s motion is GRANTED.

BACKGROUND¹

By the instant action, plaintiffs challenge the constitutionality of certain federal copyright laws, in particular, the Copyright Renewal Act of 1992 (“Copyright Renewal Act”), the Sonny Bono Copyright Term Extension Act (“CTEA”), the Copyright Act of 1976 (“1976 Act”), and the Berne Convention Implementation Act (“BCIA”), as applied to work created between January 1, 1964, and December 31, 1977.

In Count One, plaintiffs contend the Copyright Renewal Act and the CTEA, enacted in 1998, violate the First Amendment of the United States Constitution by imposing substantial burdens on speech without advancing any legitimate government interest. In particular, plaintiffs object to the extension of the term of copyright by those statutes for works created between January 1, 1964 and December 31, 1997, without any requirement that the copyright owner apply for renewal of copyright.

In Count Two, plaintiffs assert that the Copyright Renewal Act and the CTEA violate Article I, section 8, clause 8 of the United States Constitution (“Copyright Clause”) and, in particular, the “limited Times” clause of the Copyright Clause, by establishing copyright terms that are effectively perpetual.

In Count Three, plaintiffs assert that the Copyright Renewal Act, the 1976 Act, and the Berne Convention Implementation Act (“BCIA”), enacted in 1988, all violate

¹ All facts set forth in the section below are taken from the allegations of the complaint and are presumed true for purposes of the instant motion.

the Copyright Clause by failing to “promote . . . Progress.” In particular, plaintiffs challenge the elimination by those statutes of the traditional requirements that copyright owners register their works, deposit a copy of their works with the government, and provide notice of their claim to copyright protection, as well as the requirement that, to avoid expiration, the copyright be renewed by the copyright holder.

In Count Four, plaintiffs seek reconsideration of the United States Supreme Court’s decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in light of certain matters assertedly not considered therein. Plaintiffs contend, contrary to *Eldred’s* holding, that Congress violated the “limited Times” clause and the First Amendment in enacting the CTEA because it has no power to extend the terms of existing copyrights.

Plaintiffs seek a declaratory judgment that all four of the above-mentioned statutes are unconstitutional, as applied to works created between January 1, 1964 and December 31, 1977. In addition, plaintiffs seek an order enjoining the criminal enforcement of § 2(b) of the No Electronic Theft Act of 1997 (“NET Act”), 17 U.S.C. § 506(a), “against persons whose infringement of a copyright would not have happened but for 17 U.S.C. §§ 302-304, as amended by the CTEA, for works in their renewal term between January 1, 1964 and December 31, 1977[.]” (See Amended Complaint (“Compl.”), prayer for relief ¶ 5.) The NET imposes criminal penalties for copyright infringement. See 17 U.S.C. § 506(a).

Plaintiff Kahle is chairman of the board of plaintiff Internet Archive. (See Compl. ¶ 3.) Internet Archive’s principal activity is to build an “Internet Library,” with the

purpose of offering permanent and free access for researchers, historians, and scholars to works – including audio, books, films, websites, and software – that exist in digital format. (*See id.*) Internet Archive is currently working, in partnership with Carnegie Mellon University, the National Science Foundation, and the governments of India and China, on the “One Million Book Project,” which is an effort to create a digital archive of one million books in fully readable online text format. (*See id.*) Among the books to be offered will be a large number of “orphan” books, *i.e.*, books that remain under copyright, but which are out of print and therefore not widely available to the public. (*See id.*) Internet Archive also operates the “Internet Bookmobile,” a mobile Internet bookstore that downloads, prints, and binds public domain books for \$1 each. (*See id.*)

Plaintiff Prelinger is president of plaintiff Prelinger Associates, Inc. (*See id.* ¶ 5.) Prelinger Associates, Inc., known in the trade as Prelinger Archives, has a collection of more than 48,000 “ephemeral” (advertising, educational, industrial, and amateur) films. (*See id.*) Prelinger Archives provides stock footage to the media and entertainment industries through its authorized sales representative, Getty Images. (*See id.*) In 2002, the Prelinger Archives film collection was acquired by the Library of Congress. (*See id.*) Prelinger Archives remains in existence, holding approximately 4000 titles on videotape and a smaller collection of film materials acquired subsequent to the Library of Congress transaction. (*See id.*) Its goal remains to collect, preserve, and facilitate access to films of historic significance that have not been collected or made commercially available elsewhere. (*See id.*)

Plaintiffs have for many years routinely taken films, music, books and other creative works that are in the public domain and have posted those works on the Internet, and intend to do so for the indefinite future. (*See id.* ¶ 8.) Among the works plaintiffs had been preparing to post on the Internet are works created between 1964 and 1978 that, but for the enactment of the Copyright Renewal Act and CTEA, could, according to plaintiffs, have been legally copied and distributed as of January 1, 2004. (*See id.*)

Plaintiffs allege that, until the enactment of the 1976 Act, copyright protection was granted only to those authors who took affirmative steps to indicate their desire for such protection; an author who failed to take the affirmative steps required by statute to obtain a copyright effectively dedicated his or her works to the public domain. (*See Compl.* ¶ 36.) Plaintiffs refer to these requirements as creating a “conditional copyright regime.” (*See id.* ¶ 34.) For example, under the Act of May 31, 1790 (“1790 Act”), a copyright, for a term of 14 years, was secured only if the author (1) registered the title of his or her work with the government; (2) deposited a copy of the work with the government, and (3) provided notice of the copyright to the public. (*See id.* ¶ 37; *see also* 1790 Act, 1 Stat. 124 §§ 1, 3, 4.) In order to secure a second 14-year term of copyright protection, the 1790 Act required an author to affirmatively renew his copyright within six months before the expiration of the initial 14-year term. (*See Compl.* ¶ 37; *see also* 1790 Act, 1 Stat. 124 § 1.) Similarly, although the Act of February 3, 1831 (“1831 Act”) extended the initial term of copyright to 28 years, it retained the requirements of registration, deposit, and notice, as well as the requirement that a copyright owner renew his or her copyright to

secure the benefits of an additional 14-year term of copyright protection.² (*See* Compl. ¶ 38; *see also* 1831 Act, 4 Stat. 436 §§ 1-5.) The Act of March 4, 1909 (“1909 Act”) extended the renewal term to 28 years, while retaining the registration, deposit, notice, and renewal requirements.³ (*See* Compl. ¶ 39; *see also* 1909 Act, 35 Stat. 1075 §§ 9-10, 12-13, 18-19, 23.) According to plaintiffs, the consequence of requiring these affirmative steps to secure and retain copyright protection was that the overwhelming majority of published works either passed immediately into the public domain (because they were never registered or deposited or notice was not given), or passed into the public domain after the initial copyright term due to failure to renew the copyright for a second term. (*See* Compl. ¶ 40.)

Beginning in 1976, with the enactment of the 1976 Act, Congress began to replace the conditional copyright regime with an unconditional copyright regime. (*See id.* ¶ 35, 47.) In 1976, Congress abolished any registration, deposit, or renewal requirement as a prerequisite for obtaining or maintaining copyrights for works created on or after January 1, 1978, but retained a modified notice requirement. (*See id.* ¶ 47; *see also* 1976 Act, Pub. L. 94-553 §§ 302, 401-406, 407(a), 408(a).) As a result of these changes, copyright extended automatically to all works for the full term of copyright, without requiring any

² The requirements for registration, deposit, notice, and renewal were amended in ways not material to the instant action. *See* 1831 Act, 4 Stat. 436 §§ 2-5.

³ The requirements for registration, deposit, notice, and renewal were amended in ways not material to the instant action. *See* 1909 Act, 35 Stat. 1075 §§ 9-10, 12-13, 18-19.

affirmative action by the author or his assigns, other than to provide notice to the public. (*See* Compl. ¶ 47; *see also* 1976 Act, Pub. L. 94-553 §§ 401-406.) In 1988, Congress passed the BCIA, which prospectively eliminated the notice requirement, and removed registration as a prerequisite for filing an infringement action based on the works of foreign authors. (*See id.* ¶ 48 (citing BCIA, Pub. L. No. 100-568); *see also* BCIA §§ 7, 9.) In 1992, Congress passed the Copyright Renewal Act, which renewed all copyrights for works published between January 1, 1964 and December 31, 1977, even in the absence of any expressed desire by the copyright owners to secure the benefits of an additional term. (*See* Compl. ¶ 49 (citing Copyright Renewal Act, Pub. L. No. 102-307); *see also* Copyright Renewal Act § 101 note, and § 102). Finally, in 1998, Congress enacted the CTEA, which unconditionally extended by 20 years the term of all existing copyrights, including those automatically extended by the Copyright Renewal Act. (*See* Compl. ¶ 50 (citing CTEA, Pub. L. No. 105-298); *see also* CTEA ¶ 102.)

Plaintiffs assert that “[w]hereas the traditional contours of a conditional copyright regime assured that the burdens of copyright regulation were narrowed to those works for which the author or his assign desired continued protection, an unconditional regime guarantees that the vast majority of works regulated by copyright serve no continuing commercial or copyright-related interest for their authors.” (*See id.* ¶ 52.) In addition, according to plaintiffs, “[w]hereas the traditional contours of a conditional copyright regime produced records both of the material protected and its ownership, an unconditional copyright regime destroys any reliable indication of copyright ownership, or any useful record of current

ownership.” (*See id.* ¶ 53.) Plaintiffs contend that “[w]ithout notice, there is no clear way to know where copyright is claimed” and “[w]ithout a registry, there is no reasonable method for identifying copyright owners.” (*See id.* ¶ 54.)

Plaintiffs state the focus of the instant action is on works published on or after January 1, 1964 but before January 1, 1978, because those works constitute “the first class of work in American history that has had its term extended without any requirement of renewal.” (*See id.* ¶ 68.) Plaintiffs contend the copyrights for the vast majority of this work would not have been renewed at the end of the initial 28-year copyright term; as a result of the 1976 Act and the CTEA, however, the term for this work has been extended by 67 years without any indication by the authors or their assigns that such protection is desired, and without producing any registry of the current owners of those copyrights. (*See id.* ¶ 68.)

According to plaintiffs, the change to an unconditional copyright regime “radically burdens” access to copyrighted works first published after January 1, 1964 and before January 1, 1978. (*See id.* ¶ 69.) Because most works produced during this period are not commercially available, “Internet based archives, libraries, film restorers, and follow-on creators have no viable or reasonable way to identify copyright owners for this creative work.” (*See id.* ¶ 69.) Plaintiffs contend there is no copyright-related interest in continuing the copyright for this work, and no copyright-related benefit from abolishing registration. (*See id.*)

Plaintiffs further contend that the NET, which was enacted in 1997, imposed additional criminal penalties for copyright infringement, which significantly chill the

opportunity of archives to make commercially unavailable work accessible to the world. (*See id.* ¶ 70-72.) The NET provides for a term of imprisonment of up to one year, and/or a fine, for “the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.” *See* 17 U.S.C. § 506(a); 18 U.S.C. § 2319(c).

Plaintiffs allege that “copyright law is now effectively removing much of the creative potential that the Internet provides for works published after January 1, 1964 and before January 1, 1978.” (*See id.* ¶ 73.) As a result of the creation of an unconditional copyright regime, plaintiffs contend, “the costs of tracing and identifying copyright ownership are enormous” and “the legal exposure for publishing work without permission is also enormous.” (*See id.* ¶ 76.) “The consequence,” according to plaintiffs, is that “a vast amount of content is unavailable to the Internet, despite the overwhelming probability that the work either is in the public domain, or is owned by an unknown rights holder who has no continued desire to exercise control over the content.” (*Id.*)

Plaintiffs allege that they have experienced these burdens directly, as “the difficulty of identifying rights-holders and clearing copyright under the current copyright laws has largely limited the Million Book Project to government documents, old texts, and books from India and China, where copyright laws are less burdensome.” (*See id.* ¶ 77.) Plaintiffs assert that although the works they seek to include in this project are no longer commercially available, the burden of clearing the rights to make them digitally available limits the potential of the project, (*see id.*), and because the scope of the project has thus been restricted, “a vast number of copyrighted yet no longer

commercially valuable works sit idle rather than enriching public knowledge.” (*See id.* ¶ 78.)

Plaintiffs further assert that approximately 35% of the motion pictures in the Prelinger Archives, prior to the Library of Congress acquisition, were, although no longer commercially exploited, nonetheless subject to existing copyright. (*See id.* ¶ 79.) Although the Prelinger Archives wishes to make these “orphan films” available to patrons on the same basis as the archive’s public domain materials, the process of locating rights holders for many of these works is, according to plaintiffs, too costly and uncertain, (*see id.*), and, consequently, the portion of the collection that remains subject to copyright protection is available only on a very limited basis, as the archive is not permitted to make copies of the works or to permit transformative re-use of the works. (*See id.*)

In conclusion, plaintiffs allege, they desire to give access to cultural and scientific work that is no longer commercially available. (*See id.* ¶ 80.) Were it not for the burdens created by the unconditional extension of copyrights from 1964 to date, plaintiffs state, they would continue their work of making commercially unavailable material accessible through their archives. (*See id.*) “Both archives seek to collect and make available material from throughout our history, but most importantly, from our recent past.” (*See id.*) According to plaintiffs, unconditional extensions of the copyright term have significantly burdened that work. (*See id.*)

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) cannot be granted unless “it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief.” See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. See *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any material beyond the pleadings. See *Hal Roach Studios, Inc. v. Richard Feiner And Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Material that is properly submitted as part of the complaint, however, may be considered. See *id.* Documents whose contents are alleged in the complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, also may be considered. See *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). In addition, the Court may consider any document “the authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily relies,” regardless of whether the document is referred to in the complaint. See *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that are subject to judicial notice. See *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

In analyzing a motion to dismiss, the Court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The Court may disregard factual allegations if such allegations are contradicted by the facts established by reference to exhibits attached to the complaint. See *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations,

unsupported by the facts alleged, need not be accepted as true. *See Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992).

DISCUSSION

As defendant's motion to dismiss addresses plaintiffs' claims under the Copyright Clause before proceeding to analyze plaintiffs' First Amendment claims, the Court likewise will begin its analysis with plaintiffs' claims under the Copyright Clause.

A. Copyright Clause

The Intellectual Property Clause of the United States Constitution, also known as the Copyright Clause, provides: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause is "both a grant of power and a limitation," and "to the extent [Congress] enacts copyrights laws at all," such laws must "promote the Progress of Science." *See Eldred v. Ashcroft*, 537 U.S. 186 at 212. By this dual grant and limitation, the Copyright Clause "empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future." *See id.* at 199. It is generally for Congress, "not the courts, to decide how best to pursue the Copyright Clause's objectives." *See id.* at 212. Consequently, a law that complies with the restrictions of the Copyright Clause is subject only to "rational basis" review. *See id.* ¶¶ 204-05 and n.10, 213.

B. Counts Two and Four

As Counts Two and Four both are based on the “limited Times” clause, the Court will address them sequentially.

1. Count Two

In Count Two, plaintiffs allege that, as to work first published on or after January 1, 1964 and before January 1, 1978, the Copyright Renewal Act and the CTEA violate the “limited Times” requirement of the Copyright Clause by establishing copyright terms that are so long as to be effectively perpetual. (See Compl. ¶ 103, prayer for relief ¶ 2.) In support thereof, plaintiffs point to the dissent in *Eldred*, in which Justice Breyer calculated, using a “discounted present value analysis,” (see Compl. ¶ 99), that the current 95-year copyright term for a work made for hire returns to the creator 99.8% of the value of a perpetual term. (See *Eldred*, 537 U.S. at 255-56 and App. A (Breyer, J., dissenting).)

In *Eldred*, the Supreme Court rejected the argument that the CTEA violated the Copyright Clause by extending the terms of existing copyrights. See *id.* at 775. The *Eldred* plaintiffs argued that permitting Congress to extend existing copyrights allows it to evade the “limited Times” constraint by creating effectively perpetual copyrights through repeated extensions. See *id.* at 208. In addressing those arguments, the Supreme Court noted that the word “limited,” at the time the Constitution was adopted, “meant what it means today: ‘confined within certain bounds,’ ‘restrain[ed],’ or ‘circumscribe[d].’” See *id.* at 199 (citations omitted). The Supreme Court held that “a regime of perpetual copyrights ‘clearly is not the situation

before us’” and found no reason to construe “the CTEA’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.” *See id.* at 209 (quoting *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)). In so holding, the Court emphasized that the plaintiffs had failed to show how the CTEA crossed “a constitutionally significant threshold with respect to ‘limited Times’ that the 1831, 1909, and 1976 Acts did not,” *see id.* at 209 (quoting *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)), and concluded “[t]hose earlier Acts did not create perpetual copyrights, and neither does the CTEA.” *See id.*

In reaching its decision, the Supreme Court expressly criticized the present value analysis set forth in Justice Breyer’s dissent, *see id.* at 209 n.16, noting: “If Justice Breyer’s calculations were a basis for holding the CTEA unconstitutional, then the 1976 Act would surely fall as well, for – under the same assumptions he indulges – the term set by that Act secures 99.4% of the value of a perpetual term.” *Id.* The Court further noted that “on that analysis even the ‘limited’ character of the 1909 (97.7%) and 1831 (94.1%) Acts might be suspect.” *See id.* Finally, the Court observed: “It is doubtful . . . that the [Founding Fathers] in framing the “limited Times” prescription, thought in terms of the calculator rather than the calendar.” *See id.*

Plaintiffs correctly note that the plaintiffs in *Eldred* conceded the CTEA’s baseline copyright term of life plus 95 years qualified as a “limited Time,” *see id.* at 199, a concession plaintiffs in the instant case do not make, and that the Supreme Court, in *Eldred*, did not provide a test for determining whether a copyright term exceeds the “limited Times” clause. Nonetheless, the Supreme Court’s

statements in *Eldred* that the CTEA “did not create perpetual copyrights,” that Congress did not attempt to evade or override the “limited Times” constraint in enacting the CTEA, and its rejection of Justice Breyer’s present value analysis, *see id.* at 209 and n.16, disposes of plaintiffs’ contention, (*see* Compl. ¶ 103), that the CTEA and the Copyright Renewal Act (which establishes a shorter copyright term than did the CTEA) violate the “limited Times” clause by creating a copyright term that is “effectively perpetual.” *See Golan v. Ashcroft*, 310 F.Supp.2d 1215, 1217-1218 (D. Colo. 2004) (finding claim that CTEA violates Copyright Clause, by creating “effectively or virtually perpetual” copyright term, foreclosed by *Eldred*).

Accordingly, the Court finds that the CTEA and the Copyright Renewal Act do not violate the “limited Times” clause by creating a copyright term that is “effectively perpetual.” Consequently, defendants’ motion to dismiss Count Two will be granted, and Count Two will be dismissed with prejudice.

2. Count Four

Court Four likewise must be dismissed as a result of the Supreme Court’s decision in *Eldred*. The Supreme Court held in *Eldred* that Congress does not violate the Copyright Clause or the First Amendment by extending the copyright terms of existing copyrights. *See Eldred*, 537 U.S. at 192-94; *see also id.* at 204 (“Neither is it a sound objection to the validity of a copyright term extension . . . that the enlarged term covers existing copyrights.”) Nonetheless, plaintiffs allege, the Supreme Court “did not consider that every extension before CTEA applied to works whose terms had to be renewed,” (*see* Compl. ¶ 116),

and that “[t]his change in a fundamental contour of copyright’s free speech protections should lead the [Supreme] Court to reconsider its decision in *Eldred*, and hold that within an unconditional copyright regime, Congress has no power to extend the terms of existing copyrights.” (See Compl. ¶ 117.)

Irrespective of whether the Supreme Court considered the above-referenced matters, this Court has no authority to overturn *Eldred*. Any such argument must be addressed directly to the Supreme Court.

Accordingly, defendants’ motion to dismiss Count Four will be granted, and Count Four will be dismissed with prejudice.

C. Count Three

In Count Three, plaintiffs contend that Congress’ elimination of the registration, deposit, notice, and renewal requirements violates the portion of the Copyright Clause that authorizes Congress to enact copyright laws that “promote the Progress of Science.” (See Compl. ¶¶ 107-109.) Plaintiffs seek a declaratory judgment that the 1976 Act, the BCIA, and the Copyright Renewal Act are unconstitutional for failing to “promote . . . Progress.” (See *id.*, prayer for relief ¶ 3.)

Plaintiffs allege that by eliminating the requirement that copyright holders renew their copyrights, “Congress has eliminated the mechanism by which unnecessary copyrights can be removed,” and “has thereby limited the ability of would-be users to exploit the vast majority of copyrighted material that would otherwise, after a relatively short period of protection, be dedicated to the

public domain.” (*See id.* ¶ 109(1).) By eliminating the registration, deposit, and notice requirements, plaintiffs allege, “Congress has brought within the domain of copyright entire classes of works for which protection was never desired, and then compounded the damage to both public domain use and licensing by removing the traditional means by which the owners of copyrighted material can be identified.” (*See id.* ¶ 109(2).) Plaintiffs further allege that “[i]n contrast to the substantial burdens that an unconditional copyright system imposes on the licensing and use of public domain works, the removal of copyright conditions provides no cognizable benefit to authors or the public that could not have been obtained without the removal of conditions.” (*See id.* ¶ 110.) Plaintiffs contend that by “moving from a conditional to an unconditional copyright system, Congress has failed to promote progress, and thus has acted beyond the scope of its power under the Progress Clause.” (*See id.* ¶ 111.)

In *Eldred*, the Supreme Court rejected the argument that the CTEA’s extension of the term of existing copyrights violated the Copyright Clause by failing to promote the Progress of Science. *See Eldred*, 537 U.S. at 211-214. As discussed, the Supreme Court noted that to the extent Congress enacts copyright laws at all, it must create a system that promotes the Progress of Science. *See Eldred*, 537 U.S. at 212. The Supreme Court “stressed,” however, “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *See id.* The Supreme Court observed that “a key factor in the CTEA’s passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years” and directing “its members to deny this longer term to the works of any non-EU country

whose laws did not secure the same extended term.” *See id.* at 205. The Court found that by “extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts,” *see id.* at 205-06, and noted that the CTEA “may also provide greater incentive for American and other authors to create and disseminate their work in the United States.” *See id.* at 206. The Court further noted that, in additional [sic] to international concerns, “Congress passed the CTEA in light of demographic, economic and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”⁴ *See id.* at 206-07 (internal citation and footnote omitted). The Court determined that these “justifications” for the enactment of the CTEA “provide a rational basis for the conclusion that the CTEA “promote[s] the Progress of Science.” *See id.* at 213.

The Supreme Court further explained that the “economic philosophy” behind the Copyright Clause “is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.’” *See id.* at

⁴ In particular, the Supreme Court noted that members of Congress expressed the views that (1) as a result of increases in both longevity and in parents’ average age at the birth of their children, the pre-CTEA copyright term did not adequately secure the right to profit from one’s work during one’s lifetime and to ensure that one’s children might benefit from one’s posthumous popularity; and (2) that the pre-CTEA copyright term had failed to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media. *See id.* at 207 n.14.

212 n.18. As the Court observed, “‘copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge’” and, indeed, “[t]he profit motive is the engine that ensures the progress of science.” *See id.* (emphasis in original) (quoting *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992)). The Court additionally explained that “rewarding authors for their creative labor and ‘promot[ing] . . . Progress’ are thus complementary” and cited James Madison’s observation that, in copyright law, “[t]he public good fully coincides . . . with the claims of individuals.” *See id.* (quoting *The Federalist No. 43* at 272 (C. Rossiter ed. 1961)). The Court rejected Justice Breyer’s assertion that copyright statutes must serve public, not private ends, concluding that “[t]he two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.” *See id.*

In the instant case, the essence of plaintiffs’ argument is that recent copyright law unconstitutionally favors the interests of authors over those of the general public, and thereby violates the Copyright Clause by failing to promote the Progress of Science. *Eldred* has foreclosed this type of argument, however, by holding that the Progress of Science is promoted by rewarding authors for their creative labor, and that providing authors with such an incentive to create is “the best way to advance public welfare.” *See id.* Consequently, the Court will review the statutes at issue only to determine whether Congress had a rational basis for concluding that the statutes at issue promote the

Progress of Science. *See id.* at 213.⁵ In determining whether a statute “is a rational exercise of the legislative authority conferred by the Copyright Clause,” the Court must “defer substantially to Congress.” *See id.* at 204. Whether a copyright statute has a rational basis may be decided as a matter of law. *See Eldred*, 537 U.S. at 196 (deciding issue on cross-motions for judgment on the pleadings).

The Court first will set forth Congress’ stated justifications for the changes to copyright law that plaintiffs challenge, and then will consider whether those justifications provide a rational basis for such changes to the law under the “promote . . . Progress” clause.

1. Congress’ justifications

a. 1976 Act

i. Renewal requirement

The 1976 Act changed the maximum term of copyright for works created by individuals from 56 years, consisting of an initial term of 28 years plus a renewal term of 28 years, to a single term consisting of the life of the author, plus 50 years. *See* H.R. REP. NO. 94-1476 at 134 (1976).

⁵ In plaintiffs’ opposition, they ask this Court to apply heightened review to determine whether Congress’ elimination of copyright “formalities” are “congruent and proportional” to proper Progress Clause ends. (*See* Opp. at 17.) Plaintiffs fail to recognize that the Supreme Court, in *Eldred*, expressly rejected this argument and held that the “congruent and proportional” standard applicable to court review of laws enacted under § 5 of the Fourteenth Amendment has no application to court review of copyright laws. *See Eldred*, 537 U.S. at 217-18.

The legislative history contains the following reasons for eliminating the renewal provision:

One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

See id. In addition, international concerns were noted, as follows:

A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. . . . The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. . . . Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

See id. at 135. It was further noted that basing the copyright term on the life of the author would make it easier for a potential user of the copyrighted work to calculate the copyright term:

The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a

particular author's works, including successive revisions of them, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions.

See id. at 134. Finally, Congress expressly addressed some of the concerns raised by plaintiffs in the instant lawsuit, as follows:

[M]ost material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there is a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. . . .

It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. 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.

See id. at 136.

ii. Registration requirement

Congress was aware that under the 1909 Act, failure to comply with the Register of Copyright's formal demand for registration resulted in "complete loss of copyright." *See* H.R. REP. NO. 94-1476 at 150 (1976). Under the 1976 Act, copyright registration is not mandatory, but is a condition of bringing a suit for infringement. *See* 1976 Act, Pub. L. 94-553 §§ 408, 411. The legislative history contains a recognition that copyright registration for published works⁶ "is useful and important to users and should be induced in some practical way," *see* H.R. REP. NO. 94-1476 at 158 (1976), as well as a determination that unpublished works, which are subject to copyright under the 1976 Act, should not be entitled to "special statutory remedies unless the owner has, by registration, made a public record of his copyright claim." *See id.* Congress encouraged voluntary registration, pursuant to the 1976 Act, by providing that "a copyright owner whose work has been infringed before registration" would be entitled to an injunction and actual damages, plus any profits not used as a measure of damages, but would not be entitled to an "award of the special or 'extraordinary' remedies of statutory damages or attorney's fees where infringement of

⁶ Under the 1909 Act, the copyright term began on the date of publication, while under the 1976 Act, the copyright term generally begins at the time the work is created and fixed. *Compare* 1909 Act, 1 Stat. 1075 § 23 *with* 1976 Act, Pub. L. 94-553 §§ 102, 302.

copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration (unless registration has been made within a grace period of three months after publication).” *See id.* at 158; *see also* 1976 Act, Pub. L. 94-553 §§ 412.

iii. Deposit requirement

Under the 1909 Act, deposit of copies for the collections of the Library of Congress was part of the process of registering a copyright, and “failure to comply with a formal demand [by the Register of Copyrights] for deposit and registration result[ed] in complete loss of copyright.” *See* H.R. REP. NO. 94-1476 at 150 (1976). The 1976 Act treats deposit and registration as “separate though closely related.” *See id.* Under the 1976 Act, “the deposit requirements can be satisfied without ever making registration,” and deposit “is not a condition of copyright.” *See id.* at 150. The Register of Copyrights is entitled to exempt certain categories of materials from the deposit requirement to reflect “the needs and wants of the Library.” *See id.* at 150, 151. “Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine,” rather than by forfeiture of copyright. *See id.* at 150. Congress expressed the view that “[a] realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce a more effective deposit system than the present one.” *See id.*

iv. Notice requirement

The 1976 Act retained the notice requirement of the 1909 Act, but created new exceptions to the requirement that lessened the likelihood that an author would inadvertently lose his or her copyright by failing to strictly comply with the notice requirement. *See* H.R. REP. NO. 94-1476 at 143 (1976). As explained in the legislative history, the copyright notice “serves four principal functions”:

- (1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;
- (2) It informs the public as to whether a particular work is copyrighted;
- (3) It identifies the copyright owner;
- (4) It shows the date of publication.

See id. “Ranged against these values of a notice requirement are its burdens and unfairness to copyright owners.” *Id.* “One of the strongest arguments for revision of the [then-]present statute [was] the need to avoid the arbitrary and unjust forfeitures . . . resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.” *Id.* Congress concluded that

the copyright notice has real values which should be preserved, and that this should be done by inducing use of notice without causing outright forfeiture for errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of copyright notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Errors

in the name or date in the notice could be corrected without forfeiture of copyright.

See id. at 143. The 1976 Act's changes to the notice requirements, as stated in the legislative history, were intended to ensure that "the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain." *See id.* at 146.

b. BCIA

The stated purpose of the BCIA was "to make changes to the U.S. copyright law that are necessary for the United States to adhere to the Berne Convention." *See* S. REP. NO. 100-352 at 1 (1988). In enacting the BCIA, Congress recognized that the Berne Convention is "the highest internationally recognized standard for the protection of works of authorship of all kinds" and was of the view that "U.S. membership in the Berne Convention [would] secure the highest available level of multilateral copyright protection for U.S. artists, authors and other creators," as well as "ensure effective U.S. participation in the formulation and management of international copyright policy." *See id.* at 2.

Under the Berne Convention, "the enjoyment and the exercise of [copyright] shall not be subject to any formality." *See id.* at 11 (quoting Berne Convention, Art. 5(2).) In the legislative history of the BCIA, Congress notes that "[t]he only real difference . . . that makes the U.S. law incompatible with the Berne Convention consists in the notice and registration requirements." *See id.* The BCIA was expressly intended to eliminate the provisions of the 1976 Act that were incompatible with Article 5(2) of the Berne Convention. *See id.*

In particular, the BCIA eliminated the requirement that a work bear a copyright notice in order to obtain or maintain copyright protection. *See id.* at 12-13, 43-44; *see also* BCIA, Pub. L. 100-568 § 7. Recognizing the value of placing a copyright notice on publicly distributed works in alerting users that the work is copyrighted and in preventing unintentional infringement, however, the BCIA created an incentive for voluntary use of copyright notice; specifically, a new subsection was added, 17 U.S.C. § 401(d), “which, in specified circumstances, . . . allow[s] a copyright proprietor who places notice on copies of the work to prevent an attempt by an infringer to mitigate damages.” *See* S. REP. NO. 100-352 at 44; *see also* BCIA, Pub. L. 100-568 § 7.

In order to bring United States copyright law into compliance with the Berne Convention, the BCIA also eliminated, with respect to works originating in foreign states adhering to the Berne Convention,⁷ the requirement that a copyright holder register his or her copyright before seeking to enforce his or her copyright against others. *See* S. REP. NO. 100-352 at 13-14, 45-46; *see also* BCIA, Pub. L. 100-568 § 9.

c. Copyright Renewal Act

The stated purpose of the Copyright Renewal Act was to automatically grant renewal to works created before January 1, 1978 that were still in their first term of copyright, in order to “restore a measure of equity and

⁷ As stated in the legislative history of the BCIA, “Berne does not forbid its members to impose formalities on works first published on its own territory.” *See id.* at 18.

fairness to the copyright law.” *See* S. REP. NO. 102-194 at 1, 6 (1992). In the 1976 Act, Congress had retained the renewal requirement for works still in their first copyright term, due to a concern “that eliminating the renewal requirement for these works altogether could potentially disrupt existing expectancies or contractual interests.” *See id.* at 3-4. In adopting the Copyright Renewal Act, however, Congress expressed concern about the “harsh consequences of inadvertent forfeiture” of copyrights due to failure to renew and the consequent loss of income to authors and their families, *see id.* at 5, and was of the view that “the public domain should consist of works which have enjoyed a full and fair term of protection and should not be enlarged because of an author’s error in recordkeeping, or any other innocent failure to comply with overly technical formalities in the copyright law,” *see id.* at 6. It also expressed concern that the renewal requirement was confusing to foreign authors because such a requirement was unique to United States law, noting that “[c]ompliance with formalities is antithetical” to the Berne Convention. *See id.*

The legislative history contains a recognition, however, that a registration renewal system had some value in providing a useful public record for users of copyright material, to assist them in locating the copyright holder and arranging to license a work, or in determining when copyright material falls into the public domain. *See id.* Consequently, the Copyright Renewal Act created “incentives to authors, composers, and other artists to continue to voluntarily renew their copyright in a timely manner, while it eliminate[d] the harsh consequences of failing to renew.” *See id.* In particular, “[r]egistration 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.” *See id.*; *see also* Copyright Renewal Act, Pub. L. No. 102-307 § 102(a)(4).

2. Analysis

As noted, the Supreme Court, in *Eldred*, explained that “‘encouragement of individual effort by personal gain is the best way to advance public welfare though the talents of authors and inventors.’” *See Eldred*, 537 U.S. at 212 n.18 (citing *Mazer*, 347 U.S. at 219). The Supreme Court also stated that because “‘the profit motive is the engine that ensures the progress of science,’” rewarding authors for their labor and promoting Progress are complementary, and that “copyright law serves public ends by providing individuals with an incentive to pursue private ones.” *See id.* (quoting *American Geophysical Union v. Texaco*, 802 F. Supp. at 27).

As set forth in the legislative history and described above in detail, all of Congress’ justifications for the changes to copyright law that plaintiffs challenge are based on the desire to increase the financial reward to authors for their creative works, and to bring United States copyright law into alignment with international law, in particular, the Berne Convention.

As noted, the Supreme Court, in *Eldred*, has held that rewarding the personal efforts of authors is entirely consistent with the goal of promoting Progress. *See id.* The Supreme Court further held that the enactment, in the CTEA, of longer copyright terms for existing works did not violate the Copyright Clause, in part because Congress sought to bring United States copyright law into compliance

with the Berne Convention. *See id.* at 206-07. In so holding, the Court cited favorably to a law review article in which the author concluded that matching the level of copyright protection in the United States to that in the European Union “‘can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders.’” *See id.* at 206 (quoting Perlmutter, Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts, 36 Loyola (LA) L. Rev. 323, 330 (2002)). Thus, the Supreme Court has strongly suggested that changes to copyright law to conform with the Berne Convention are a rational means of promoting Progress.

Plaintiffs have not argued that Congress could not rationally have believed that the challenged changes to copyright law would provide any benefit to authors, or bring United States copyright law into compliance with the Berne Convention. Rather, plaintiffs argue that Congress (1) by eliminating the copyright renewal requirement, also eliminated the mechanism by which copyrights that were no longer desired by the author would be terminated, and (2) by eliminating the registration, deposit, and notice requirements, brought under copyright protection works for which such protection was never desired by the author, and made it more difficult for users of copyrighted material to identify the owners of such material. (*See* Compl. ¶ 109.) In essence, plaintiffs argue that Congress should have enacted a different balance between the rights of authors and the rights of the public.

The Supreme Court has stressed, however, that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives,” *see Eldred*,

537 U.S. at 212, and that it is not the role of the courts “to alter the delicate balance Congress has labored to achieve.” *See id.* (quoting *Stewart v. Abend*, 495 U.S. 207, 230 (1990)). “[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause”; “[t]he wisdom of Congress’ action . . . is not within [the courts’] province to second guess.” *See id.* at 222.

As Congress had a rational basis for its determination that the changes to copyright law in the 1976 Act, the BCIA, and the Copyright Renewal Act promote the Progress of Science by rewarding authors for their creative work, the Court finds those statutes do not violate the “Progress of Science” clause of the Copyright Clause.

Accordingly, defendants’ motion to dismiss Count Three will be granted, and Count Three will be dismissed with prejudice.

D. Count One

In Count One, plaintiffs allege that the Copyright Renewal Act and the CTEA violate the First Amendment to the United States Constitution by imposing an unconstitutional burden on speech with respect to works created after January 1, 1964 and before January 1, 1978 as a result of having altered the “traditional contours” of copyright law from a conditional copyright regime to an unconditional copyright regime. (*See* Compl. ¶¶ 81-92.)

In *Eldred*, the Supreme Court observed that the adoption “close in time” of the Copyright Clause and the First Amendment indicated that the Framers of the Constitution were of the belief that “copyright’s limited

monopolies are compatible with free speech principles.” See *Eldred*, 537 U.S. at 219. As the Supreme Court noted, “copyright’s purpose is to *promote* the creation and publication of free expression,” see *id.* (emphasis in original), and “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)).

The Supreme Court further explained that copyright law “contains built-in First Amendment accommodations.” See *id.* “First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection,” thus striking a “‘definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” See *id.* (quoting *Harper & Row*, 471 U.S. at 556). “Second, the ‘fair use’ defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.” *Id.*

Additionally, the Supreme Court distinguished between the reproduction of another’s speech and “the freedom to make . . . one’s own speech,” noting that the First Amendment “securely protects” the latter, but “bears less heavily when speakers assert the right to make other people’s speeches.” See *id.* at 221. “To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them.” *Id.* In conclusion, the Court declined to hold copyright law absolutely immune from challenges under the First Amendment, but held that where “Congress has not altered the traditional contours of copyright

protection, further First Amendment scrutiny is unnecessary.” *See id.*

As discussed earlier, *Eldred* addressed the constitutionality of applying the CTEA’s extended copyright terms to existing copyrights. In *Eldred*, the Supreme Court found there existed “an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.” *See id.* at 200. In addition, the Supreme Court found that the CTEA “protects authors’ original expression from unrestricted exploitation” and that “[p]rotection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas.” *See id.* at 221. Consequently, the Court found that Congress had not altered the “traditional contours of copyright protection,” and found no need to engage in scrutiny of the legislation under the First Amendment. *See id.*

Here, plaintiffs allege that Congress, by eliminating the registration, renewal, deposit, and notice requirements as a condition of obtaining and maintaining a copyright, has altered the traditional contours of copyright protection. The Supreme Court has not identified the entire universe of protections that it considers to be within such “traditional contours.” The phrase “traditional contours of copyright protection” originates in *Eldred* and appears in no other federal court decision prior to *Eldred*. The concepts of copyright law that the Supreme Court suggests fall within those contours – the idea/expression dichotomy and the fair use exception – each relate to the scope of copyright protection.

By contrast, the registration, renewal, deposit, and notice requirements do not define the scope of copyright protection but, rather, the procedural steps necessary to obtain and maintain a copyright. Congress has repeatedly stated that these requirements are mere “formalities.” *See, e.g.*, S. REP. NO. 102-194 at 5-6 (repeatedly referring to renewal requirement as a “formality”); *see also* S. REP. NO. 100-352 at 12 (referring to notice and registration requirements as “formalities”); H. R. Rep. No. 83-2608, 1954 U.S.C.C.A.N. 3629, 3631 (1954) (referring to deposit, registration, and notice requirements as “formalities”; proposing amendments to U.S. copyright law to conform to Universal Copyright Convention). Such formalities do not alter the scope of copyright protection, but merely determine the procedures necessary to obtain or maintain such protection. Because changes to requirements of this nature do not alter the substantive rights granted by copyright, this Court finds that the challenged amendments do not alter the “traditional contours of copyright protection.” Although plaintiffs state, in their opposition, they will show at trial the “real world effect,” (*see* Opp. at 3), of the challenged changes to copyright law, no such evidence can alter this fundamental defect in their case.

As plaintiffs do not allege any alterations to the “traditional contours of copyright protection,” no further First Amendment analysis is necessary. *See Eldred*, 537 U.S. at 221.⁸ Accordingly, defendants’ motion to dismiss Count One will be granted, and Count One will be dismissed with prejudice.

⁸ In light of the findings set forth above, the Court does not reach Ashcroft’s additional contention that plaintiffs lack standing to challenge the constitutionality of the 1976 Act and the BCIA.

CONCLUSION

For the reasons set forth above, Ashcroft's motion to dismiss is GRANTED, and the complaint is DISMISSED, in its entirety, with prejudice.

The Clerk shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: November 19, 2004 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

17 U.S.C. Chapter 4**Copyright Notice, Deposit, and Registration**

SECTION

- 401 *Notice of copyright: Visually perceptible copies*
- 402 *Notice of copyright: Phonorecords of sound recordings*
- 403 *Notice of copyright: Publications incorporating United States Government works*
- 404 *Notice of copyright: Contributions to collective works*
- 405 *Notice of copyright: Omission of notice on certain copies and phonorecords*
- 406 *Notice of copyright: Error in name or date on certain copies and phonorecords*
- 407 *Deposit of copies or phonorecords for Library of Congress*
- 408 *Copyright registration in general*
- 409 *Application for copyright registration*
- 410 *Registration of claim and issuance of certificate*
- 411 *Registration and infringement actions*
- 412 *Registration as prerequisite to certain remedies for infringement*

§ 401 • Notice of copyright: Visually perceptible copies

(a) GENERAL PROVISIONS. – Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of

copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) **FORM OF NOTICE.** – If a notice appears on the copies, it shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and

(2) the year of first publication of the work; in the case of compilations, or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) **POSITION OF NOTICE.** – The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

(d) **EVIDENTIARY WEIGHT OF NOTICE.** – If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no

weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).

§ 402 • Notice of copyright: Phonorecords of sound recordings

(a) GENERAL PROVISIONS. – Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed phonorecords of the sound recording.

(b) FORM OF NOTICE. – If a notice appears on the phonorecords, it shall consist of the following three elements:

(1) the symbol © (the letter P in a circle); and

(2) the year of first publication of the sound recording; and

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

(c) POSITION OF NOTICE. – The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

(d) EVIDENTIARY WEIGHT OF NOTICE. – If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).

§ 403 • Notice of copyright: Publications incorporating United States Government works

Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting predominantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

§ 404 • Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient to invoke the provisions of section 401(d) or 402(d), as applicable with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work),

regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

§ 405 • Notice of copyright: Omission of notice on certain copies and phonorecords

(a) EFFECT OF OMISSION ON COPYRIGHT. – With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if –

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS. — Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) REMOVAL OF NOTICE. — Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

§ 406 • Notice of copyright: Error in name or date on certain copies and phonorecords

(a) **ERROR IN NAME.** – With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun –

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from transfers or licenses purportedly made under the copyright by the person named in the notice.

(b) **ERROR IN DATE.** – When the year date in the notice on copies or phonorecords distributed before the effective date of the Berne Convention Implementation Act of 1988 by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section

302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) OMISSION OF NAME OR DATE. – Where copies or phonorecords publicly distributed before the effective date of the Berne Convention Implementation Act of 1988 by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405 as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988.

§ 407 • Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication –

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable –

(1) to a fine of not more than \$250 for each work; and

(2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them; and

(3) to pay a fine of \$2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.

(e) With respect to transmission programs that have been fixed and transmitted to the public in the United States but have not been published, the Register of Copyrights shall, after consulting with the Librarian of Congress and other interested organizations and officials, establish regulations governing the acquisition, through deposit or otherwise, of copies or phonorecords of such programs for the collections of the Library of Congress.

(1) The Librarian of Congress shall be permitted, under the standards and conditions set forth in such regulations, to make a fixation of a transmission program directly from a transmission to the public, and to reproduce one copy or phonorecord from such fixation for archival purposes.

(2) Such regulations shall also provide standards and procedures by which the Register of Copyrights may make written demand, upon the owner of the right of transmission in the United States, for the deposit of a copy or phonorecord of a specific transmission program. Such deposit may, at the option of the owner of the right of transmission in the United States, be accomplished by gift, by loan for purposes of reproduction, or by sale at a price not to exceed the cost of reproducing and supplying the copy or phonorecord. The regulations established under

this clause shall provide reasonable periods of not less than three months for compliance with a demand, and shall allow for extensions of such periods and adjustments in the scope of the demand or the methods for fulfilling it, as reasonably warranted by the circumstances. Willful failure or refusal to comply with the conditions prescribed by such regulations shall subject the owner of the right of transmission in the United States to liability for an amount, not to exceed the cost of reproducing and supplying the copy or phonorecord in question, to be paid into a specially designated fund in the Library of Congress.

(3) Nothing in this subsection shall be construed to require the making or retention, for purposes of deposit, of any copy or phonorecord of an unpublished transmission program, the transmission of which occurs before the receipt of a specific written demand as provided by clause (2).

(4) No activity undertaken in compliance with regulations prescribed under clauses (1) or (2) of this subsection shall result in liability if intended solely to assist in the acquisition of copies or phonorecords under this subsection.

§ 408 • Copyright registration in general

(a) REGISTRATION PERMISSIVE. – At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by

delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(b) DEPOSIT FOR COPYRIGHT REGISTRATION. – Except as provided by subsection (c), the material deposited for registration shall include –

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of the published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under subsection (e) of section 407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT. —

(1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under the following conditions:

(A) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(B) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate renewal registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as

contributions to periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published; and

(D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

(d) CORRECTIONS AND AMPLIFICATIONS. – The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK. – Registration for the first published edition of a work previously registered in unpublished form may be

made even though the work as published is substantially the same as the unpublished version.

§ 409 • Application for copyright registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include –

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) in the case of a work made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief,

general statement of the additional material covered by the copyright claim being registered;

(10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and

(11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

If an application is submitted for the renewed and extended term provided for in section 304(a)(3)(A) and an original term registration has not been made, the Register may request information with respect to the existence, ownership, or duration of the copyright for the original term.

§ 410 • Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 411 • Registration and infringement actions

(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if

notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner –

(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

§ 412 • Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for –

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

102 Stat. 2853
Oct. 31, 1988
Public Law 100-568
100th Congress

An Act

To amend title 17, United States Code, to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCES TO TITLE 17, UNITED STATES CODE.

(a) **SHORT TITLE.** – This Act may be cited as the “Berne Convention Implementation Act of 1988”.

(b) **REFERENCES TO TITLE 17, UNITED STATES CODE.** – Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or a repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

SEC. 2. DECLARATIONS.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the

“Berne Convention”) are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

SEC. 3. CONSTRUCTION OF THE BERNE CONVENTION.

(a) **RELATIONSHIP WITH DOMESTIC LAW.** – The provisions of the Berne Convention –

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) **CERTAIN RIGHTS NOT AFFECTED.** – The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law –

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work, that would prejudice the author's honor or reputation.

SEC. 4. SUBJECT MATTER AND SCOPE OF COPYRIGHTS.

(a) SUBJECT AND SCOPE. – Chapter 1 is amended –

(1) in section 101 –

(A) in the definition of “Pictorial, graphic, and sculptural works” by striking out in the first sentence “technical drawings, diagrams, and models” and inserting in lieu thereof “diagrams, models, and technical drawings, including architectural plans”;

(B) by inserting after the definition of “Audiovisual works”, the following:

“The ‘Berne Convention’ is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

“A work is a ‘Berne Convention work’ if –

“(1) in the case of an unpublished work, one or more of the authors is a national of a nation adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication;

“(2) the work was first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign

nation that does not adhere to the Berne Convention;

“(3) in the case of an audiovisual work –

“(A) if one or more of the authors is a legal entity, that author has its headquarters in a nation adhering to the Berne Convention; or

“(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a nation adhering to the Berne Convention; or

“(4) in the case of a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, the building or structure is located in a nation adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a nation adhering to the Berne Convention is considered to be a national of that nation. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.”; and

(C) by inserting after the definition of “Copyright owner”, the following:

“The ‘country of origin’ of a Berne Convention work, for purposes of section 411, is the United States if –

“(1) in the case of a published work, the work is first published –

“(A) in the United States;

“(B) simultaneously in the United States and another nation or nations adhering to the Berne Convention, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

“(C) simultaneously in the United States and a foreign nation that does not adhere to the Berne Convention; or

“(D) in a foreign nation that does not adhere to the Berne Convention, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

“(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

“(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

For the purposes of section 411, the ‘country of origin’ of any other Berne Convention work is not the United States.”;

(2) in section 104(b) –

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by inserting after paragraph (3) the following new paragraph:

“(4) the work is a Berne Convention work; or”;

(3) in section 104 by adding at the end thereof the following:

“(c) EFFECT OF BERNE CONVENTION. – No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.”; and

(4) by inserting after section 116 the following new section:

“§ 116A. Negotiated licenses for public performances by means of coin-operated phonorecord players.

“(a) APPLICABILITY OF SECTION. – This section applies to any nondramatic musical work embodied in a phonorecord.

“(b) LIMITATION ON EXCLUSIVE RIGHT IF LICENSES NOT NEGOTIATED. –

“(1) APPLICABILITY. – In the case of a work to which this section applies, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited by section 116 to the extent provided in this section.

“(2) Determination by copyright royalty tribunal. – The Copyright Royalty Tribunal, at the end of the 1-year period beginning on the effective date of the Berne Convention Implementation Act of 1988, and periodically thereafter to the extent necessary to carry out subsection (f), shall determine whether or not negotiated licenses authorized by subsection (c) are in effect so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending on the effective date of that Act. If the Copyright Royalty Tribunal determines that such negotiated licenses are not so in effect, the Tribunal shall, upon making the determination, publish the determination in the Federal Register. Upon such publication, section 116 shall apply with respect to musical works that are not the subject of such negotiated licenses.

“(c) NEGOTIATED LICENSES. –

“(1) AUTHORITY FOR NEGOTIATIONS. – Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

“(2) ARBITRATION. – Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the

Copyright Royalty Tribunal of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

“(d) LICENSE AGREEMENTS SUPERIOR TO COPYRIGHT ROYALTY TRIBUNAL DETERMINATIONS. – License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Tribunal.

“(e) NEGOTIATION SCHEDULE. – Not later than 60 days after the effective date of the Berne Convention Implementation Act of 1988, if the Chairman of the Copyright Royalty Tribunal has not received notice, from copyright owners and operators of coin-operated phonorecord players referred to in subsection (c)(1), of the date and location of the first meeting between such copyright owners and such operators to commence negotiations authorized by subsection (c), the Chairman shall announce the date and location of such meeting. Such meeting may not be held more than 90 days after the effective date of such Act.

“(f) COPYRIGHT ROYALTY TRIBUNAL TO SUSPEND VARIOUS ACTIVITIES. – The Copyright Royalty Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of the Berne Convention Implementation Act of 1988, the negotiated licenses adopted by the parties under this section do not provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during

the one-year period ending on the effective date of such Act.

“(g) **TRANSITION PROVISIONS; RETENTION OF COPYRIGHT ROYALTY TRIBUNAL JURISDICTION.** – Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license under section 116, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, which is in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, shall remain in force. If a negotiated license authorized by this section comes into force so as to supersede previous determinations of the Copyright Royalty Tribunal, as provided in subsection (d), but thereafter is terminated or expires and is not replaced by another licensing agreement, then section 116 shall be effective with respect to musical works that were the subject of such terminated or expired licenses.”.

(b) **TECHNICAL AMENDMENTS.** – (1) Section 116 is amended –

(A) by amending the section heading to read as follows:

“Section 116. Scope of exclusive rights in nondramatic musical works: Compulsory licenses for public performance by means of coin-operated phonorecord players”;

(B) in subsection (a) in the matter preceding paragraph (1), by inserting after “in a phonorecord,” the following: “the performance of which is subject to this section as provided in section 116A,”; and

(C) in subsection (e), by inserting “and section 116A” after “As used in this section”.

(2) The table of sections at the beginning of chapter 1 is amended by striking out the item relating to section 116, and inserting in lieu thereof the following:

“§ 116. Scope of exclusive rights in nondramatic musical works: Compulsory licenses for public performances by means of coin-operated phonorecord players.

“§ 116A. Negotiated licenses for public performance by means of coin-operated phonorecord players.”.

SEC. 5. RECORDATION.

Section 205 is amended –

- (1) by striking out subsection (d); and
- (2) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

SEC. 6. PREEMPTION WITH RESPECT TO OTHER LAWS NOT AFFECTED.

Section 301 is amended by adding at the end thereof the following:

“(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.”.

SEC. 7. NOTICE OF COPYRIGHT.

(a) VISUALLY PERCEPTIBLE COPIES. – Section 401 is amended –

(1) in subsection (a), by amending the subsection heading to read as follows:

“(a) GENERAL PROVISIONS. –”;

(2) in subsection (a), by striking out “shall be placed on all” and inserting in lieu thereof “may be placed on”;

(3) in subsection (b), by striking out “The notice appearing on the copies” and inserting in lieu thereof “If a notice appears on the copies, it”; and

(4) by adding at the end the following:

“(d) EVIDENTIARY WEIGHT OF NOTICE. – If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).”.

(b) PHONORECORDS OF SOUND RECORDINGS. – Section 402 is amended –

(1) in subsection (a), by amending the subsection heading to read as follows:

“(a) GENERAL PROVISIONS. –”;

(2) in subsection (a), by striking out “shall be placed on all” and inserting in lieu thereof “may be placed on”;

(3) in subsection (b), by striking out “The notice appearing on the phonorecords” and inserting in lieu thereof “If a notice appears on the phonorecords, it”; and

(4) by adding at the end thereof the following new subsection:

“(d) EVIDENTIARY WEIGHT OF NOTICE. – If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).”.

(c) PUBLICATIONS INCORPORATING UNITED STATES GOVERNMENT WORKS. – Section 403 is amended to read as follows:

“Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting predominantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.”.

(d) NOTICE OF COPYRIGHT; CONTRIBUTIONS TO COLLECTIVE WORKS. – Section 404 is amended –

(1) in subsection (a), by striking out “to satisfy the requirements of sections 401 through 403”, and inserting in lieu thereof “to invoke the provisions of section 401(d) or 402(d), as applicable”; and

(2) in subsection (b), by striking out “Where” and inserting in lieu thereof “With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the

Berne Convention Implementation Act of 1988, where”.

(e) OMISSION OF NOTICE. – Section 405 is amended –

(1) in subsection (a), by striking out “The omission of the copyright notice prescribed by” and inserting in lieu thereof “With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in”;

(2) in subsection (b), by striking out “omitted,” in the first sentence and inserting in lieu thereof “omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988,”; and

(3) by amending the section heading to read as follows:

“§ 405. Notice of copyright: Omission of notice on certain copies and phonorecords”

(f) ERROR IN NAME OR DATE. – Section 406 is amended –

(1) in subsection (a) by striking out “Where” and inserting in lieu thereof “With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where”;

(2) in subsection (b) by inserting “before the effective date of the Berne Convention Implementation Act of 1988” after “distributed”;

(3) in subsection (c) –

(A) by inserting “before the effective date of the Berne Convention Implementation Act of 1988” after “publicly distributed”; and

(B) by inserting after “405” the following: “as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988”; and

(4) by amending the section heading to read as follows:

“§ 406. Notice of copyright: Error in name or date on certain copies and phonorecords”

(g) CLERICAL AMENDMENT. – The table of sections at the beginning of chapter 4 is amended by striking out the items relating to sections 405 and 406 and inserting in lieu thereof the following:

“405. Notice of copyright: Omission of notice on certain copies and phonorecords.

“406. Notice of copyright: Error in name or date on certain copies and phonorecords.”.

SEC. 8. DEPOSIT OF COPIES OR PHONORECORDS FOR LIBRARY OF CONGRESS.

Section 407(a) is amended by striking out “with notice of copyright”.

SEC. 9. COPYRIGHT REGISTRATION.

(a) REGISTRATION IN GENERAL. – Section 408 is amended –

(1) in subsection (a), by striking out “Subject to the provisions of section 405(a), such” in the second sentence and inserting in lieu thereof “Such”;

(2) in subsection (c)(2) –

(A) by striking out “all of the following conditions – ” and inserting in lieu thereof “the following conditions:”;

(B) by striking out subparagraph (A); and

(C) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(b) INFRINGEMENT ACTIONS. –

(1) REGISTRATION AS A PREREQUISITE. – Section 411 is amended –

(A) by amending the section heading to read as follows:

“§ 411. Registration and infringement actions”;

(B) in subsection (a) by striking out “Subject” and inserting in lieu thereof “Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States, and subject”; and

(C) in subsection (b)(2) by inserting “, if required by subsection (a),” after “work”.

(2) TABLE OF SECTIONS. – The table of sections at the beginning of chapter 4 is amended by striking out the item relating to section 411 and inserting in lieu the following:

“411. Registration and infringement actions.”.

SEC. 10. COPYRIGHT INFRINGEMENT AND REMEDIES.

(a) INFRINGEMENT. – Section 501(b) is amended by striking out “sections 205(d) and 411,” and inserting in lieu thereof “section 411.”

(b) DAMAGES AND PROFITS. – Section 504(c) is amended –

(1) in paragraph (1) –

(A) by striking out “\$250”, and inserting in lieu thereof “\$500”; and

(B) by striking out “\$10,000”, and inserting in lieu thereof “\$20,000”; and

(2) in paragraph (2) –

(A) by striking out “\$50,000.”, and inserting in lieu thereof “\$100,000.”; and

(B) by striking out “\$100.”, and inserting in lieu thereof “\$200.”.

SEC. 11. COPYRIGHT ROYALTY TRIBUNAL.

Chapter 8 is amended –

(1) in section 801, by adding at the end of subsection (b) the following: “In determining whether a return to a copyright owner under section 116 is fair, appropriate weight shall be given to –

“(i) the rates previously determined by the Tribunal to provide a fair return to the copyright owner, and

“(ii) the rates contained in any license negotiated pursuant to section 116A of this title.”; and

(2) by amending section 804(a)(2)(C) to read as follows:

“(C)(i) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1990 and in each subsequent tenth calendar year, and at any time within 1 year after negotiated licenses authorized by section 116A are terminated or expire and are not replaced by subsequent agreements.

“(ii) If negotiated licenses authorized by section 116A come into force so as to supersede previous determinations of the Tribunal, as provided in section 116A(d), but thereafter are terminated or expire and are not replaced by subsequent agreements, the Tribunal shall, upon petition of any party to such terminated or expired negotiated license agreement, promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such interim royalty rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116A(d).”

SEC. 12. WORKS IN THE PUBLIC DOMAIN.

Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.

SEC. 13. EFFECTIVE DATE; EFFECT ON PENDING CASES.

(a) **EFFECTIVE DATE.** – This Act and the amendments made by this Act take effect on the date on which the Berne Convention (as defined in section 101 of title 17, United States Code) enters into force with respect to the United States.

(b) **EFFECT ON PENDING CASES.** – Any cause of action arising under title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose.

Approved October 31, 1988.

106 Stat. 264
June 26, 1992
Public Law 102-307
102d Congress

An Act

To amend title 17, United States Code, the copyright renewal provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Copyright Amendments Act of 1992”.

TITLE I – RENEWAL OF COPYRIGHT

SEC. 101. SHORT TITLE.

This title may be referred to as the “Copyright Renewal Act of 1992”.

SEC. 102. COPYRIGHT RENEWAL PROVISIONS.

(a) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.
– Section 304(a) of title 17, United States Code, is amended to read as follows:

“(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978. – (1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

“(B) In the case of –

“(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

“(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 47 years.

“(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work –

“(i) the author of such work, if the author is still living,

“(ii) the widow, widower, or children of the author, if the author is not living,

“(iii) the author’s executors, if such author, widow, widower, or children are not living, or

“(iv) the author’s next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years.

“(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which –

“(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

“(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

“(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years, which –

“(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

“(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

“(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office –

“(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 47 years; and

“(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

“(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 47 years.

“(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

“(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and

extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.”.

(b) REGISTRATION. – (1) Section 409 of title 17, United States Code, is amended by adding at the end the following:

“If an application is submitted for the renewed and extended term provided for in section 304(a)(3)(A) and an original term registration has not been made, the Register may request information with respect to the existence, ownership, or duration of the copyright for the original term.”.

(2) Section 101 of title 17, United States Code, is amended by inserting after the definition of “publication” the following:

“Registration”, for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.”.

(c) LEGAL EFFECT OF RENEWAL OF COPYRIGHT UNCHANGED. – The renewal and extension of a copyright for a further term of 47 years provided for under paragraphs (1) and (2) of section 304(a) of title 17, United States Code (as amended by subsection (a) of this section) shall have the same effect with respect to any grant, before the effective date of this section, of a transfer or license of the further term as did the renewal of a copyright before the effective date of this section under the law in effect at the time of such grant.

(d) CONFORMING AMENDMENT. – Section 304(c) of title 17, United States Code, is amended in the matter preceding paragraph (1) by striking “second proviso of subsection (a)” and inserting “subsection (a)(1)(C)”.

(e) REGISTRATION PERMISSIVE. – Section 408(a) of title 17, United States Code, is amended by striking “At” and all that follows through “unpublished work,” and inserting “At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date,”.

(f) COPYRIGHT OFFICE FEES. – Section 708(a)(2) of title 17, United States Code, is amended –

- (1) by striking “in its first term”; and
- (2) by striking “\$12” and inserting “\$20”.

(g) EFFECTIVE DATE; COPYRIGHTS AFFECTED BY AMENDMENT. – (1) Subject to paragraphs (2) and (3), this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) The amendments made by this section shall apply only to those copyrights secured between January 1, 1964, and December 31, 1977. Copyrights secured before January 1, 1964, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before the effective date of this section.

(3) This section and the amendments made by this section shall not affect any court proceedings pending on the effective date of this section.

TITLE II – NATIONAL FILM PRESERVATION**SEC. 201. SHORT TITLE.**

This title may be cited as the “National Film Preservation Act of 1992”.

SEC. 202. NATIONAL FILM REGISTRY OF THE LIBRARY OF CONGRESS.

The Librarian of Congress (hereinafter in this title referred to as the “Librarian”) shall establish a National Film Registry pursuant to the provisions of this title, for the purpose of maintaining and preserving films that are culturally, historically, or aesthetically significant.

SEC. 203. DUTIES OF THE LIBRARIAN OF CONGRESS.

(a) **STUDY OF FILM PRESERVATION.** – (1) The Librarian shall, after consultation with the Board established pursuant to section 204, conduct a study on the current state of film preservation and restoration activities, including the activities of the Library of Congress and the other major film archives in the United States. The Librarian shall, in conducting the study –

(A) take into account the objectives of the national film preservation program set forth in clauses (i) through (iii) of subsection (b)(1)(A); and

(B) consult with film archivists, educators and historians, copyright owners, film industry representatives, including those involved in the preservation of film, and others involved in activities related to film preservation.

The study shall include an examination of the concerns of private organizations and individuals involved in the collection and use of abandoned films such as training, educational, and other historically important films.

(2) Not later than 1 year after the date of the enactment of this Act, the Librarian shall submit to the Congress a report containing the results of the study conducted under paragraph (1).

(b) POWERS. – (1) The Librarian shall, after consultation with the Board, do the following:

(A) After completion of the study required by subsection (a), the Librarian shall, taking into account the results of the study, establish a comprehensive national film preservation program for motion pictures, in conjunction with other film archivists and copyright owners. The objectives of such a program shall include –

(i) coordinating activities to assure that efforts of archivists and copyright owners, and others in the public and private sector, are effective and complementary;

(ii) generating public awareness of and support for those activities; and

(iii) increasing accessibility of films for educational purposes, and improving nationwide activities in the preservation of works in other media such as videotape.

(B) The Librarian shall establish guidelines and procedures under which films may be included in the National Film Registry, except that no film shall be eligible for inclusion in the National Film Registry until 10 years after such film's first publication.

(C) The Librarian shall establish procedures under which the general public may make recommendations to the Board regarding the inclusion of films in the National Film Registry.

(D) The Librarian shall establish procedures for the examination by the Librarian of prints of films named for inclusion in the National Film Registry to determine their eligibility for the use of the seal of the National Film Registry under paragraph (3).

(E) The Librarian shall determine which films satisfy the criteria established under subparagraph (B) and qualify for inclusion in the National Film Registry, except that the Librarian shall not select more than 25 films each year for inclusion in the Registry.

(2) The Librarian shall publish in the Federal Register the name of each film that is selected for inclusion in the National Film Registry.

(3) The Librarian shall provide a seal to indicate that a film has been included in the National Film Registry and is the Registry version of that film.

(4) The Librarian shall publish in the Federal Register the criteria used to determine the Registry version of a film.

(5) The Librarian shall submit to the Congress a report, not less than once every two years, listing films included in the National Film Registry and describing the activities of the Board.

(c) SEAL. – The seal provided under subsection (b)(3) may be used on any copy of the Registry version of a film. Such seal may be used only after the Librarian has examined and approved the print from which the copy was

made. In the case of copyrighted works, only the copyright owner or an authorized licensee of the copyright may place or authorize the placement of the seal on a copy of a film selected for inclusion in the National Film Registry, and the Librarian may place the seal on any print or copy of the film that is maintained in the National Film Registry Collection of the Library of Congress. The person authorized to place the seal on a copy of a film selected for inclusion in the National Film Registry may accompany such seal with the following language: "This film is included in the National Film Registry, which is maintained by the Library of Congress, and was preserved under the National Film Preservation Act of 1992."

(d) DEVELOPMENT OF STANDARDS. – The Librarian shall develop standards or guidelines by which to assess the preservation or restoration of films that will qualify films for use of the seal under this section.

SEC. 204. NATIONAL FILM PRESERVATION BOARD.

(a) NUMBER AND APPOINTMENT. – (1) The Librarian shall establish in the Library of Congress a National Film Preservation Board to be comprised of up to 18 members, who shall be selected by the Librarian in accordance with the provisions of this section. Subject to subparagraphs (C) and (O), the Librarian shall request each organization listed in subparagraphs (A) through (P) to submit to the Librarian a list of not less than 3 candidates qualified to serve as a member of the Board. Except for the members-at-large appointed under paragraph (2), the Librarian shall appoint 1 member from each such list submitted by such organizations, and shall designate from that list an alternate who may attend those meetings to which the

individual appointed to the Board cannot attend. The organizations are the following:

(A) The Academy of Motion Pictures Arts and Sciences.

(B) The Directors Guild of America.

(C) The Writers Guild of America. The Writers Guild of America East and the Writers Guild of America West shall each nominate not less than 3 candidates, and a representative from 1 such organization shall be selected as the member and a representative from the other such organization as the alternate.

(D) The National Society of Film Critics.

(E) The Society for Cinema Studies.

(F) The American Film Institute.

(G) The Department of Theatre, Film and Television of the College of Fine Arts at the University of California, Los Angeles.

(H) The Department of Film and Television of the Tisch School of the Arts at New York University.

(I) The University Film and Video Association.

(J) The Motion Picture Association of America.

(K) The National Association of Broadcasters.

(L) The Alliance of Motion Picture and Television Producers.

(M) The Screen Actors Guild of America.

(N) The National Association of Theater Owners.

(O) The American Society of Cinematographers and the International Photographers Guild, which shall jointly submit 1 list of candidates from which a member and alternate will be selected.

(P) The United States members of the International Federation of Film Archives.

(2) In addition to the Members appointed under paragraph (1), the Librarian shall appoint up to 2 members-at-large. The Librarian shall select the at-large members from names submitted by organizations in the film industry, creative artists, producers, film critics, film preservation organizations, academic institutions with film study programs, and others with knowledge of copyright law and of the importance, use, and dissemination of films. The Librarian shall, in selecting 1 such member-at-large, give preference to individuals who are responsible for commercial film libraries. The Librarian shall also select from the names submitted under this paragraph an alternate for each member-at-large, who may attend those meetings to which the member-at-large cannot attend.

(b) CHAIRPERSON. – The Librarian shall appoint 1 member of the Board to serve as Chairperson.

(c) TERM OF OFFICE. – (1) The term of each member of the Board shall be 3 years, except that there shall be no limit to the number of terms that any individual member may serve.

(2) A vacancy in the Board shall be filled in the manner in which the original appointment was made under subsection (a), except that the Librarian may fill the vacancy from a list of candidates previously submitted by the organization or organizations involved. Any member appointed to fill a vacancy before the expiration of the

term for which his or her predecessor was appointed shall be appointed only for the remainder of such term.

(d) **QUORUM.** – 9 members of the Board shall constitute a quorum but a lesser number may hold hearings.

(e) **BASIC PAY.** – Members of the Board shall serve without pay. While away from their home or regular places of business in the performance of functions of the Board, members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5701 of title 5, United States Code.

(f) **MEETINGS.** – The Board shall meet at least once each calendar year. Meetings shall be at the call of the Librarian.

(g) **CONFLICT OF INTEREST.** – The Librarian shall establish rules and procedures to address any potential conflict of interest between a member of the Board and the responsibilities of the Board.

SEC. 205. RESPONSIBILITIES AND POWERS OF BOARD.

(a) **IN GENERAL.** – The Board shall review nominations of films submitted to it for inclusion in the National Film Registry and shall consult with the Librarian, as provided in section 203, with respect to the inclusion of such films in the Registry and the preservation of these and other films that are culturally, historically, or aesthetically significant.

(b) **NOMINATION OF FILMS.** – The Board shall consider, for inclusion in the National Film Registry, nominations submitted by the general public as well as representatives of the film industry, such as the guilds and societies representing actors, directors, screenwriters, cinematographers and other creative artists, producers, film critics, film preservation organizations, and representatives of academic institutions with film study programs. The Board shall nominate not more than 25 films each year for inclusion in the Registry.

(c) **GENERAL POWERS.** – The Board may, for the purpose of carrying out its duties, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Librarian and the Board considers appropriate.

SEC. 206. NATIONAL FILM REGISTRY COLLECTION OF THE LIBRARY OF CONGRESS.

(a) **ACQUISITION OF ARCHIVAL QUALITY COPIES.** – The Librarian shall endeavor to obtain, by gift from the owner, an archival quality copy of the Registry version of each film included in the National Film Registry. Whenever possible, the Librarian shall endeavor to obtain the best surviving materials, including preprint materials.

(b) **ADDITIONAL MATERIALS.** – The Librarian shall endeavor to obtain, for educational and research purposes, additional materials related to each film included in the National Film Registry, such as background materials, production reports, shooting scripts (including continuity scripts) and other similar materials.

(c) PROPERTY OF UNITED STATES. – All copies of films on the National Film Registry that are received by the Librarian and other materials received by the Librarian under subsection (b) shall become the property of the United States Government, subject to the provisions of title 17, United States Code.

(d) NATIONAL FILM REGISTRY COLLECTION. – All copies of films on the National Film Registry that are received by the Librarian and other materials received by the Librarian under subsection (b) shall be maintained in a special collection in the Library of Congress to be known as the “National Film Registry Collection of the Library of Congress”. The Librarian shall, by regulation, and in accordance with title 17, United States Code, provide for reasonable access to films in such collection for scholarly and research purposes.

SEC. 207. SEAL OF THE NATIONAL FILM REGISTRY.

(a) USE OF THE SEAL. – (1) No person shall knowingly distribute or exhibit to the public a version of a film which bears the seal described in section 203(b)(3) if such film –

(A) is not included in the National Film Registry; or

(B) is included in the National Film Registry, but such copy was not made from a print that was examined and approved for the use of the seal by the Librarian under section 203(c).

(2) No person shall knowingly use the seal described in section 203(b)(3) to promote any version of a film other than a Registry version.

(b) **EFFECTIVE DATE OF THE SEAL.** – The use of the seal described in section 203(b)(3) shall be effective for each film after the Librarian publishes in the Federal Register the name of that film as selected for inclusion in the National Film Registry.

SEC. 208. REMEDIES.

(a) **JURISDICTION.** – The several district courts of the United States shall have jurisdiction, for cause shown, to prevent and restrain violations of section 207(a).

(b) **RELIEF.** – (1) Except as provided in paragraph (2), relief for a violation of section 207(a) shall be limited to the removal of the seal of the National Film Registry from the film involved in the violation.

(2) In the case of a pattern or practice of the willful violation of section 207(a), the United States district courts may order a civil fine of not more than \$10,000 and appropriate injunctive relief.

SEC. 209. LIMITATIONS OF REMEDIES.

The remedies provided in section 208 shall be the exclusive remedies under this title, or any other Federal or State law, regarding the use of the seal described in section 203(b)(3).

SEC. 210. STAFF OF BOARD; EXPERTS AND CONSULTANTS.

(a) **STAFF.** – The Librarian may appoint and fix the pay of such personnel as the Librarian considers appropriate to carry out this title.

(b) EXPERTS AND CONSULTANTS. – The Librarian may, in carrying out this title, procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum rate of basic pay payable for GS-15 of the General Schedule. In no case may a member of the Board be paid as an expert or consultant under such section.

SEC. 211. DEFINITIONS.

As used in this title –

(1) the term “Librarian” means the Librarian of Congress;

(2) the term “Board” means the National Film Preservation Board;

(3) the term “film” means a “motion picture” as defined in section 101 of title 17, United States Code, except that such term does not include any work not originally fixed on film stock, such as a work fixed on videotape or laser disks;

(4) the term “publication” means “publication” as defined in section 101 of title 17, United States Code; and

(5) the term “Registry version” means, with respect to a film, the version of the film first published, or as complete a version as the bona fide preservation and restoration activities by the Librarian, an archivist other than the Librarian, or the copyright owner can compile in those cases where the original material has been irretrievably lost.

SEC. 212. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Librarian such sums as are necessary to carry out the provisions of this title, but in no fiscal year shall such sum exceed \$250,000.

SEC. 213. EFFECTIVE DATE.

The provisions of this title shall be effective for four years beginning on the date of the enactment of this Act. The provisions of this title shall apply to any copy of any film, including those copies of films selected for inclusion in the National Film Registry under the National Film Preservation Act of 1988, except that any film so selected under such Act shall be deemed to have been selected for the National Film Registry under this title.

SEC. 214. REPEAL.

The National Film Preservation Act of 1988 (2 U.S.C. 178 and following) is repealed.

TITLE III – OTHER COPYRIGHT PROVISIONS

SEC. 301. REPEAL OF COPYRIGHT REPORT TO CONGRESS.

Section 108(i) of title 17, United States Code, is repealed.

Approved June 26, 1992.

112 Stat. 2827
Oct. 27, 1998
Public Law 105-298
105th Congress

An Act

To amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I – COPYRIGHT TERM EXTENSION

SEC. 101. SHORT TITLE.

This title may be referred to as the “Sonny Bono Copyright Term Extension Act”.

SEC. 102. DURATION OF COPYRIGHT PROVISIONS.

(a) **PREEMPTION WITH RESPECT TO OTHER LAWS.** – Section 301(c) of title 17, United States Code, is amended by striking “February 15, 2047” each place it appears and inserting “February 15, 2067”.

(b) **DURATION OF COPYRIGHT: WORKS CREATED ON OR AFTER JANUARY 1, 1978.** – Section 302 of title 17, United States Code, is amended –

(1) in subsection (a) by striking “fifty” and inserting “70”;

(2) in subsection (b) by striking “fifty” and inserting “70”;

- (3) in subsection (c) in the first sentence –
 - (A) by striking “seventy-five” and inserting “95”; and
 - (B) by striking “one hundred” and inserting “120”; and
- (4) in subsection (e) in the first sentence –
 - (A) by striking “seventy-five” and inserting “95”;
 - (B) by striking “one hundred” and inserting “120”; and
 - (C) by striking “fifty” each place it appears and inserting “70”.

(c) DURATION OF COPYRIGHT: WORKS CREATED BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANUARY 1, 1978. – Section 303 of title 17, United States Code, is amended in the second sentence by striking “December 31, 2027” and inserting “December 31, 2047”.

- (d) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS. –
 - (1) IN GENERAL. – Section 304 of title 17, United States Code, is amended –
 - (A) in subsection (a) –
 - (i) in paragraph (1) –
 - (I) in subparagraph (B) by striking “47” and inserting “67”; and
 - (II) in subparagraph (C) by striking “47” and inserting “67”;

(ii) in paragraph (2) –

(I) in subparagraph (A) by striking “47” and inserting “67”; and

(II) in subparagraph (B) by striking “47” and inserting “67”; and

(iii) in paragraph (3) –

(I) in subparagraph (A)(i) by striking “47” and inserting “67”; and

(II) in subparagraph (B) by striking “47” and inserting “67”;

(B) by amending subsection (b) to read as follows:

“(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE SONNY BONO COPYRIGHT TERM EXTENSION ACT. – Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.”;

(C) in subsection (c)(4)(A) in the first sentence by inserting “or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2),” after “specified by clause (3) of this subsection,”; and

(D) by adding at the end the following new subsection:

“(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (C) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE SONNY BONO COPYRIGHT TERM EXTENSION ACT. – In the case of any copyright other than a work made for hire, subsisting in its renewal term on the

effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

“(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

“(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.”.

(2) COPYRIGHT AMENDMENTS ACT OF 1992. – Section 102 of the Copyright Amendments Act of 1992 (Public Law 102-307; 106 Stat. 266; 17 U.S.C. 304 note) is amended –

(A) in subsection (c) –

(i) by striking “47” and inserting “67”;

(ii) by striking “(as amended by subsection (a) of this section)”;

(iii) by striking “effective date of this section” each place it appears and inserting “effective date of the Sonny Bono Copyright Term Extension Act”; and

(B) in subsection (g)(2) in the second sentence by inserting before the period the following: “, except each reference to forty-seven years in such provisions shall be deemed to be 67 years”.

SEC. 103. TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.

Sections 203(a)(2) and 304(c)(2) of title 17, United States Code, are each amended –

(1) by striking “by his widow or her widower and his or her children or grandchildren”; and

(2) by inserting after subparagraph (C) the following:

“(D) In the event that the author’s widow or widower, children, and grandchildren are not living, the author’s executor, administrator, personal representative, or trustee shall own the author’s entire termination interest.”.

SEC. 104. REPRODUCTION BY LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended –

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following:

“(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational

institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

“(2) No reproduction, distribution, display, or performance is authorized under this subsection if –

“(A) the work is subject to normal commercial exploitation;

“(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

“(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

“(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.”.

SEC. 105. VOLUNTARY NEGOTIATION REGARDING DIVISION OF ROYALTIES.

It is the sense of the Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this title, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements with respect to the establishment of a fund or

other mechanism for the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works.

SEC. 106. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

TITLE II - MUSIC LICENSING EXEMPTION FOR FOOD SERVICE OR DRINKING ESTABLISHMENTS

SEC. 201. SHORT TITLE.

This title may be cited as the “Fairness In Music Licensing Act of 1998”.

SEC. 202. EXEMPTIONS.

(a) EXEMPTIONS FOR CERTAIN ESTABLISHMENTS. – Section 110 of title 17, United States Code, is amended –

(1) in paragraph (5) –

(A) by striking “(5)” and inserting “(5)(A) except as provided in subparagraph (B),”; and

(B) by adding at the end the following:

“(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual

transmission, by a cable system or satellite carrier, if –

“(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and –

“(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

“(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

“(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750

gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and –

“(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

“(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

“(iii) no direct charge is made to see or hear the transmission or retransmission;

“(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

“(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;” and

(2) by adding after paragraph (10) the following:

“The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.”.

(b) EXEMPTION RELATING TO PROMOTION. – Section 110(7) of title 17, United States Code, is amended by inserting “or of the audiovisual or other devices utilized in such performance,” after “phonorecords of the work,”.

SEC. 203. LICENSING BY PERFORMING RIGHTS SOCIETIES.

(a) IN GENERAL. – Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

“§ 512. Determination of reasonable license fees for individual proprietors

“In the case of any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society, notwithstanding the provisions of that consent decree, an individual proprietor who owns or operates fewer than 7 non-publicly traded establishments in which nondramatic musical works are performed publicly and who claims that any license agreement offered by that performing rights society is unreasonable

in its license rate or fee as to that individual proprietor, shall be entitled to determination of a reasonable license rate or fee as follows:

“(1) The individual proprietor may commence such proceeding for determination of a reasonable license rate or fee by filing an application in the applicable district court under paragraph (2) that a rate disagreement exists and by serving a copy of the application on the performing rights society. Such proceeding shall commence in the applicable district court within 90 days after the service of such copy, except that such 90-day requirement shall be subject to the administrative requirements of the court.

“(2) The proceeding under paragraph (1) shall be held, at the individual proprietor’s election, in the judicial district of the district court with jurisdiction over the applicable consent decree or in that place of holding court of a district court that is the seat of the Federal circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor’s establishment is located.

“(3) Such proceeding shall be held before the judge of the court with jurisdiction over the consent decree governing the performing rights society. At the discretion of the court, the proceeding shall be held before a special master or magistrate judge appointed by such judge. Should that consent decree provide for the appointment of an advisor or advisors to the court for any purpose, any such advisor shall be the special master so named by the court.

“(4) In any such proceeding, the industry rate shall be presumed to have been reasonable at the time it was agreed to or determined by the court. Such presumption shall in no way affect a determination of

whether the rate is being correctly applied to the individual proprietor.

“(5) Pending the completion of such proceeding, the individual proprietor shall have the right to perform publicly the copyrighted musical compositions in the repertoire of the performing rights society by paying an interim license rate or fee into an interest bearing escrow account with the clerk of the court, subject to retroactive adjustment when a final rate or fee has been determined, in an amount equal to the industry rate, or, in the absence of an industry rate, the amount of the most recent license rate or fee agreed to by the parties.

“(6) Any decision rendered in such proceeding by a special master or magistrate judge named under paragraph (3) shall be reviewed by the judge of the court with jurisdiction over the consent decree governing the performing rights society. Such proceeding, including such review, shall be concluded within 6 months after its commencement.

“(7) Any such final determination shall be binding only as to the individual proprietor commencing the proceeding, and shall not be applicable to any other proprietor or any other performing rights society, and the performing rights society shall be relieved of any obligation of nondiscrimination among similarly situated music users that may be imposed by the consent decree governing its operations.

“(8) An individual proprietor may not bring more than one proceeding provided for in this section for the determination of a reasonable license rate or fee under any license agreement with respect to any one performing rights society.

“(9) For purposes of this section, the term ‘industry rate’ means the license fee a performing rights

society has agreed to with, or which has been determined by the court for, a significant segment of the music user industry to which the individual proprietor belongs.”.

(b) **TECHNICAL AND CONFORMING AMENDMENT.** – The table of sections for chapter 5 of title 17, United States Code, is amended by adding after the item relating to section 511 the following:

“512. Determination of reasonable license fees for individual proprietors.”.

SEC. 204. PENALTIES.

Section 504 of title 17, United States Code, is amended by adding at the end the following:

“(d) **ADDITIONAL DAMAGES IN CERTAIN CASES.** – In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.”.

SEC. 205. DEFINITIONS.

Section 101 of title 17, United States Code, is amended –

(1) by inserting after the definition of “display” the following:

“An ‘establishment’ is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

“A ‘food service or drinking establishment’ is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.”;

(2) by inserting after the definition of “fixed” the following:

“The ‘gross square feet of space’ of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.”;

(3) by inserting after the definition of “perform” the following:

“A ‘performing rights society’ is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.”; and

(4) by inserting after the definition of “pictorial, graphic and sculptural works” the following:

“A ‘proprietor’ is an individual, corporation, partnership, or other entity, as the case may be, that owns

an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.”.

SEC. 206. CONSTRUCTION OF TITLE.

Except as otherwise provided in this title, nothing in this title shall be construed to relieve any performing rights society of any obligation under any State or local statute, ordinance, or law, or consent decree or other court order governing its operation, as such statute, ordinance, law, decree, or order is in effect on the date of the enactment of this Act, as it may be amended after such date, or as it may be issued or agreed to after such date.

SEC. 207. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect 90 days after the date of the enactment of this Act.

Approved October 27, 1998.
