

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE APPELLEE

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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

Plaintiffs Brewster Kahle, Internet Archives, Richard Prelinger, and Prelinger Associates brought this action against John Ashcroft, in his official capacity as Attorney General of the United States;<sup>1</sup> plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1361 and 2201. By Order of November 19, 2004, Excerpts of Record ("ER") 35-60, and Judgment of November 30, 2004, ER 61, the district court granted defendant's motion to dismiss, and dismissed the action with prejudice. On December 7, 2004, plaintiffs filed a timely notice

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<sup>1</sup> Pursuant to Fed. R. App. P. 43(c)(2), the name of the current Attorney General, Alberto R. Gonzales, is substituted for that of his predecessor, John Ashcroft.

of appeal (ER 62-63). See Fed. R. App. P. 4(a)(1). This Court has jurisdiction over plaintiffs' appeal under 28 U.S.C. § 1291.

#### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, 266 (1992) ("1992 Act"), and the Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA"), violate the "limited Times" requirement of the Constitution's Intellectual Property/Copyright Clause, U.S. Const., art. I, § 8, cl. 8.

2. Whether the 1992 Act and the CTEA violate the First Amendment to the Constitution.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Constitution grants Congress the power "[t]o 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. Relevant statutory provisions are discussed in the "Statutory Framework" subsection of the "Statement of the Case" section, infra, and are set forth in the Addendum to plaintiffs' amended opening brief ("Pl. Br.").

#### **STATEMENT OF THE CASE**

##### **A. Nature of the Case and Course of Proceedings Below.**

Plaintiffs brought this action to challenge, under the Copyright Clause of the Constitution and the First Amendment, the constitutionality of several acts of Congress relating to copyrights. Defendant moved to dismiss, largely on the basis of

the Supreme Court's recent decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), rejecting a Copyright Clause and First Amendment challenge to the CTEA, one of the statutes attacked by plaintiffs in the instant case. By order of November 19, 2004, the district court granted defendant's motion.

B. Statutory Framework.

1. Copyright Term Extensions.

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

In 1976, Congress altered the method for computing copyright terms for works created on or after January 1, 1978 (as well as for unpublished works that were "fixed" before 1978 and previously enjoyed perpetual copyright protection), and established a single term of copyright protection for the life of

the author plus 50 years. 17 U.S.C. §§ 302-304 ("1976 Act").

"In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works." *Eldred*, 537 U.S. at 195 (citing H.R. Rep. No. 94-1476, at 135 (1976)). In 1998, Congress enacted the CTEA, which extended this copyright term by 20 years to the life of the author plus 70 years for all works not created by January 1, 1978 (17 U.S.C. §§ 302(a), 303(a)), to "harmonize[] the baseline United States copyright term with the term adopted by the European Union in 1993." *Eldred*, 537 U.S. at 196. By matching the United States' copyright term with the European Union's, "Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." *Id.* at 205-06.

## 2. Amendments to the Copyright Renewal Requirement.

Under the 1909 Act, a copyright holder could secure a 28-year renewal term only after filing a renewal registration with the Register of Copyrights in the last year of the first 28-year term of protection. S. Rep. No. 102-194, at 3 (1992). "In 1976, Congress concluded years of debate and study on all aspects of the Copyright Act by passing a comprehensive revision to the 1909 law." *Id.* Congress identified the copyright renewal revision as "[o]ne of the worst features of the present copyright law." H.R. Rep. No. 94-1476, at 134 (1976). "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."

*Id.* Thus, the 1976 Act abolished the renewal requirement for future works created on or after January 1, 1978 -- the effective date of the Copyright Act of 1976 -- and established a single term of copyright protection for the life of the author plus 50 years. S. Rep. No. 102-194, at 3. However, Congress retained the existing renewal registration requirement for copyrights still subsisting in their first term on the 1976 Act's effective date, because "Congress was concerned that eliminating the renewal requirement for these works altogether could potentially disrupt existing expectancies or contractual interests." S. Rep. No. 102-194, at 3-4; H.R. Rep. No. 94-1476, at 139.<sup>2</sup>

The Copyright Office, publishers, authors, academics, and others "criticized the registration renewal provision for being burdensome and unfair to thousands of copyright holders and their heirs." S. Rep. No. 102-194, at 4. Congress believed that the public domain "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." *Id.* at 6. Significantly, Congress recognized that authors of earlier

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<sup>2</sup> Although Congress retained the renewal registration requirement for copyrights still in their first term prior to the 1976 Act's effective date, the length of the renewal term for such copyrights was extended from 28 to 47 years (for a total potential term of 75 years), and copyrights already in their renewal term at that time would be extended by an amount sufficient to extend their total term to 75 years. H.R. Rep. No. 94-1476, at 139-40.

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

Based on these important concerns, Congress enacted the 1992 Act, which amended the renewal provisions set forth in 17 U.S.C. § 304 to "make[] clear that a timely registration by the proper statutory claimant vests the right to the renewal term on the date of registration in the Copyright Office and, if a registration is not made, the right in the renewal term vests automatically in the proper statutory claimant on the last day of the first term." S. Rep. No. 102-194, at 4. The automatic renewal provisions apply only to those pre-January 1, 1978 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.*, works that acquired a first term of copyright protection between January 1, 1964 and December 31, 1977. See *id.* at 7. Thus, the 1992 Act puts protection of such works on equal footing with the protection of qualifying works for which

renewal registration was made. *Id.* At the same time, Congress recognized that a renewal registration system "provides a useful public record for users of copyrighted material so they may locate the copyright holder and arrange to license a work, or determine when copyright material falls into the public domain." *Id.* at 6-7. Accordingly, the 1992 Act offers incentives to authors to continue to voluntarily renew their copyright in a timely manner, while it "eliminates the harsh consequences of failing to renew." *Id.* at 7.

### 3. Copyright Deposit and Notice Requirements.

As the Supreme Court stated in *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 41 (1939), the purpose of the deposit requirement (currently set forth in 17 U.S.C. § 407) is not proof or preservation of copyright, but the acquisition of books for the Library. "Until 1976, failure to deposit with the Library of Congress resulted in a forfeiture of copyright." *Ladd v. Law & Tech. Press*, 762 F.2d 809, 813 (9th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). With the enactment of the Copyright Act of 1976, Congress changed the deposit enforcement provisions because:

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. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.



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

With respect to copyright notice, under the 1909 Act, a work had to bear a valid copyright notice upon publication in order to secure copyright protection. 17 U.S.C. §§ 10, 19 *et seq.* At the time of its enactment, the 1976 Act continued to require that notice be affixed to all published copies and phonorecords of a work, 17 U.S.C. §§ 401 & 402 -- but Congress also made it clear that the requirement was no longer absolute, took steps to avoid the harsh consequences of the omission of notice, and prescribed remedial measures that could be taken in cases where notice was omitted. *Id.* at § 405. In 1988, Congress enacted the Berne Convention Implementation Act ("BCIA"), Pub. L. No. 100-568, 102 Stat. 2853 (1988), to bring the United States in line with the Berne Convention, an international convention aimed at harmonizing copyright law around the world. *Garnier v. Andin Int'l, Inc.*, 36 F.3d 1214, 1219 (1st Cir. 1994). Pursuant to the BCIA, the attachment of notice of copyright is no longer required to gain copyright protection for works first published after March 1, 1989, but it is still encouraged through various incentives. *Id.*; 17 U.S.C. §§ 401(d), 402(d).

C. Facts of the Case.

Plaintiffs Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. allege that they are individuals or organizations that exploit the creative works of others that are in the public domain by copying and distributing such works on the Internet. Amended Complaint ("Am. Compl."; reproduced at ER 1-27), ¶¶ 2-5, 8, ER 4, 5. They brought this action seeking a declaratory judgment that four copyright statutes are unconstitutional because they allegedly create an "unconditional copyright regime" that prevents plaintiffs from posting "on the Internet [] works created [by others] between 1964 and 1978" without committing infringement. *Id.* at ¶¶ 1, 8, 35, Prayer for Relief, ER 2-3, 5, 10, 26. Specifically, plaintiffs contended in district court that (1) the 1976 Act, the BCIA, and the 1992 Act violate the Constitution's Intellectual Property Clause "for failing to 'promote . . . Progress'" (Am. Compl. ¶¶ 1, 105-113, ER 2-3, 24-25); (2) the 1992 Act and the CTEA violate the "limited Times" provision of the Intellectual Property Clause (Am. Compl. ¶¶ 1, 93-104, 114-119, ER 2-3, 22-23, 25-26); and (3) the 1992 Act and the CTEA violate the First Amendment to the Constitution. Am. Compl. ¶¶ 1, 81-92, ER 2-3, 20-22.<sup>3</sup>

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<sup>3</sup> Plaintiffs also sought -- upon a finding that the CTEA is unconstitutional -- to enjoin enforcement of the No Electronic Theft Act of 1997, 17 U.S.C. § 506(a) (1997) ("NET Act"), against them for infringement of copyrights for works in their renewal term first published between January 1, 1964 and December 31, 1977 that would not have a valid copyright "but for 17 U.S.C. (continued...)

Defendant moved to dismiss plaintiffs' Amended Complaint pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Defendant relied primarily upon the Supreme Court's recent decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), in which the Court rejected a Copyright Clause and First Amendment challenge to the CTEA. By Order of November 19, 2004 ("Order," ER 35-60), and Judgment of November 30, 2004 (ER 61), the district court granted defendant's motion.

In its Order, the court first "f[ound] the matter appropriate for decision without oral argument," and therefore vacated the hearing it had previously scheduled. Order, 1, ER 35. After describing the background of the litigation (*id.* at 2-8, ER 36-42) and setting forth the standard of review (*id.* at 8-9, ER 42-43), the court addressed the merits of plaintiffs' claims. *Id.* at 9-26, ER 43-60.

The court first adjudicated Counts Two and Four of plaintiffs' Amended Complaint, both invoking the "limited Times" provision of the Intellectual Property Clause. *Id.* at 10-12, ER. 44-46. Regarding Count Two, alleging that the 1992 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" (*id.* at 10, ER 44), the court emphasized that "[i]n *Eldred*, the Supreme Court rejected the argument that the CTEA violated the Copyright Clause by extending the terms of

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(...continued)  
§§ 302-304, as amended by the CTEA." Am. Compl. ¶ 1, Prayer for Relief, ER 2-3, 26.

existing copyrights." *Id.* (citation omitted). The court further found plaintiffs' reliance upon Justice Breyer's dissent in *Eldred* misplaced, because "[i]n reaching its decision, the Supreme Court expressly criticized the present value analysis set forth in Justice Breyer's dissent . . . ." *Id.* at 11, ER 45, citing *Eldred*, 537 U.S. at 209 n.16. The court thus concluded that "the Supreme Court's statements in *Eldred* that the CTEA 'did not create perpetual copyrights,' that Congress did not attempt to override the 'limited Times' constraint in enacting the CTEA, and its rejection of Justice Breyer's present value analysis . . . disposes of plaintiffs' contention . . . that the CTEA and the [1992 Act] (which establishes a shorter copyright term than did the CTEA) violate the 'limited Times' clause by creating a copyright that is 'effectively perpetual.'" *Id.*, citing *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1217-18 (D. Colo. 2004) (rejecting claim that CTEA violates Copyright Clause, by creating "effectively or virtually perpetual" copyright term, as foreclosed by *Eldred*).

With respect to Count Four, in which plaintiffs sought reconsideration of *Eldred*'s "limited Times" holding, the court held that this Count "likewise must be dismissed as a result of the Supreme Court's decision in *Eldred*." *Id.* at 12, ER 46. The court stated that "[i]rrespective of whether the Supreme Court considered the [specific arguments raised by plaintiffs], this court has no authority to overturn *Eldred*," and "[a]ny such argument must be addressed directly to the Supreme Court." *Id.*

The court next considered plaintiffs' claim in Count Three that "Congress' elimination of the registration, deposit, notice, and renewal requirements violates the portion of the Copyright Clause that authorize Congress to enact copyright laws that 'promote the Progress of Science.'" *Id.* (citation omitted). The court stated that "[p]laintiffs seek a declaratory judgment that the 1976 Act, the BCIA, and the [1992 Act] are unconstitutional for failing to 'promote . . . Progress.'" *Id.* at 12-13, ER 46-47). The court observed, however, that "[i]n *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" (*id.* at 13, citing *Eldred*, 537 U.S. at 211-14); the court also pointed out that *Eldred* "'stressed'" that "'it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives'" (*id.*, citing *Eldred*, 537 U.S. at 212), and that the *Eldred* Court deferred to the judgment of Congress with respect to the reasons underlying the CTEA. *Id.* at 13-15, ER 47-49. The court then evaluated at considerable length the three Acts of Congress challenged by plaintiffs in Count Three, and held that each of these statutes promotes the progress of science for purposes of the Intellectual Property Clause.<sup>4</sup> *Id.* at 16-23, ER 50-57.

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<sup>4</sup> Because plaintiffs are not appealing the district court's ruling on Count 3 (see Pl. Br. 8), we will not burden the Court with an extended recitation of the court's comprehensive rationale for upholding the statutes challenged in this Count.

Finally, the district court rejected plaintiffs' claim in Count One that "the [1992] 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." *Id.* at 23, ER 57. The court focused on *Eldred's* analysis and rejection of the argument that the CTEA violates the First Amendment (*id.* at 23-25, ER 57-59), and dismissed plaintiffs' assertion 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." *Id.* at 25, ER 59. The court stated that, unlike "the idea/expression dichotomy and the fair use exception," "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" -- and that "Congress has repeatedly stated that these requirements are mere 'formalities'" (*id.*; citations omitted), which the court held "do not alter the scope of copyright protection, but merely determine the procedures necessary to obtain or maintain such protection." *Id.* Accordingly, "[b]ecause changes to requirements of this nature do not alter the substantive rights granted by copyright," the court "f[ound] that the challenged amendments do not alter 'the

traditional contours of copyright protection.'" *Id.* The court therefore found immaterial plaintiffs' promise to "show at trial the 'real world effect' . . . of the challenged changes to the copyright law," because "no such evidence can alter this fundamental defect in their case." *Id.*

#### **STANDARD OF REVIEW**

The district court's order dismissing the action is subject to de novo review. See, e.g., *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 852 (9th Cir. 2003); *Stone v. Travelers Corp.*, 58 F.3d 434, 436 (9th Cir. 1995).

#### **SUMMARY OF ARGUMENT**

A mere two years after the Supreme Court's landmark decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), upholding the CTEA against Copyright Clause and First Amendment challenges, plaintiffs seek both to relitigate that case and to construe the Court's opinion in a wholly unreasonable manner, so as to unduly cabin its holdings and to turn a defeat for their position into a victory. The district court correctly rejected plaintiffs' invitation simultaneously to turn *Eldred* on its head and to read its significance largely out of existence, and this Court should also decline plaintiffs' misguided proposal. The instant action was properly dismissed, and the judgment should be affirmed.

As *Eldred* establishes, plaintiffs' objections to Congress' most recent extensions of copyright terms and changes to the requirements for copyright renewal constitute challenges to policy determinations that the Constitution authorizes Congress

to make. Indeed, the Supreme Court has frequently stressed, and recently reiterated, "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 537 U.S. at 212. Congress' exercise of its Intellectual Property Clause authority in enacting copyright statutes is subject only to exceedingly deferential rational basis review -- and here, plaintiffs have chosen not even to appeal the district court's ruling that Congress had a rational basis for enacting the various copyright statutes plaintiffs challenged below on rationality grounds.

Further, as the Supreme Court recently confirmed in *Eldred*, a copyright extension for a fixed term, such as the CTEA, does not run afoul of the Intellectual Property Clause's "limited Times" constraint. *Id.* at 204. In addition, neither the 1992 Act nor the CTEA alters "the traditional contours of copyright protection" -- in particular, the "traditional First Amendment safeguards," *i.e.*, the "idea/expression dichotomy" and the "fair use" defense comprising copyright law's "built-in First Amendment accommodations" -- and thus these statutes require no further First Amendment scrutiny. *See id.* at 218-21. As the district court held, Congress may alter the formalities of copyright law without implicating the First Amendment.

Plaintiffs repeatedly deride both the *Eldred* opinion and the district court's ruling as resting upon mere "intuition." *See* Pl. Br. 35, 44, 48. But the so-called "intuition" of a majority of the Supreme Court carries the force of law, and the district



court, far from acting intuitively, properly heeded the Supreme Court's mandate. Far from committing legal error in doing so, it would have committed legal error had it done otherwise.

In short, no matter how they characterize their claims, plaintiffs in reality object to Congress's exercise of its broad power to draw lines and to establish the parameters of copyright coverage under the Intellectual Property Clause, and assert that Congress has decided to accord too much protection to material under the copyright laws. This is a classic judgment for Congress to make, however, and the actions of the legislative branch manifestly do not violate either the Intellectual Property Clause or the First Amendment. Plaintiffs raise precisely the types of claims that the Supreme Court emphatically rejected in *Eldred* -- and indeed, with respect to the CTEA, the very same arguments. The result here should be the same.

## **ARGUMENT**

### **I. THE CTEA AND THE 1992 ACT DO NOT VIOLATE THE "LIMITED TIMES" PROVISION OF THE COPYRIGHT CLAUSE.**

Plaintiffs contend that Congress did not have the authority to enact the 1992 Act and the CTEA because (1) the statutes allegedly create a copyright term that "has become effectively perpetual," and (2) "Congress has no power to extend the terms of existing copyrights" in violation of the "limited Times" provision of the Intellectual Property Clause. Am. Compl. ¶¶ 93-104, 114-19, ER 22-23, 25-26; see also Pl. Br. 49-53. Contrary to plaintiffs' claims, however, each of the challenged statutes sets forth copyright terms for "limited Times" pursuant to the

Intellectual Property Clause. As the district court held, under *Eldred*, the CTEA and the 1992 Act do not violate the "limited Times" clause.

The Supreme Court has already considered and upheld the CTEA as a constitutional copyright term extension that does not violate the "limited Times" provision of the Intellectual Property Clause. *Eldred*, 537 U.S. at 204. Nonetheless, plaintiffs ask this Court to "reconsider" the *Eldred* decision, because they allege that "Congress has no power to extend terms of existing copyrights." Am. Compl. ¶ 117, ER 26; see also Pl. Br. 49-53. Yet *Eldred* explicitly addressed the issue of whether "Congress has authority under the Copyright Clause to extend the terms of existing copyrights," and the Supreme Court squarely held that Congress does have such authority. *E.g.*, *Eldred*, 537 U.S. at 199, 203-04 ("Neither is it a sound objection to the validity of a copyright term extension, enacted pursuant to the [Intellectual Property Clause's] grant of authority, that the enlarged term covers existing copyrights."). The Supreme Court also denied the *Eldred* petitioners' request for rehearing. See 538 U.S. 916 (2003). Accordingly, no further "reconsideration" of *Eldred* is necessary -- or even permissible, because the Supreme Court's recent ruling is dispositive.

Neither in their Amended Complaint, nor in their opening brief on appeal, do plaintiffs explain how the 1992 Act violates the "limited Times" provision. Instead, plaintiffs seek reconsideration of the *Eldred* holding because "[t]he Court in

*Eldred* did not consider that every extension before CTEA applied to works whose terms had to be renewed." Am. Compl. ¶ 116, ER 26; see also Pl. Br. 50-51. This assertion is incorrect; in fact, the Court in *Eldred* understood that the 1976 Act's grant of copyright protection "would run from the work's creation . . . until 50 years after the author's death," thereby "alter[ing] the method for computing federal copyright terms" from its predecessor, the 1909 Act, which had granted protection for "28 years from publication, renewable for an additional 28 years." *Eldred*, 537 U.S. at 194-95. The Court expressly recognized that, while earlier copyright terms had "been split between an original term and a renewal term," "under the method for measuring copyright terms established by the 1976 Act and retained by the CTEA, the baseline copyright term is measured in part by the life of the author." *Id.* at 201 n.6; see also *id.* at 222 ("The 1976 Act's time extensions . . . set the pattern that the CTEA followed.").

Furthermore, the 1831 Act extended the initial term of copyright from 14 to 28 years, without requiring any affirmative act (renewal or otherwise) by the author or copyright owner to obtain the extension. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. Thus, the very first time Congress extended the copyright term, it extended the *initial* term -- and to get the benefit of that extension, a copyright owner did not have to renew, or to do anything at all; only in order to get the second term did the copyright owner have to renew under the 1831 Act.

Hence, the crucial point, which plaintiffs ignore, is that in the 1831 Act the first term was doubled without requiring any affirmative action by the copyright owner to indicate that he/she desired continued protection -- just as Congress extended the copyright term in the 1992 Act (through automatic renewal) and in the CTEA (by an across-the-board 20-year extension), without requiring any action by the copyright owner. The 1831 Act therefore removes the underpinnings of plaintiffs' argument.

Plaintiffs also allege that the CTEA's basic copyright term of the author's life plus 70 years exceeds the "limited Times" allowed by the Intellectual Property Clause because the term is "so long as to be effectively perpetual." Am. Compl. ¶¶ 93-104, ER 22-23; see also Pl. Br. 47-49. Plaintiffs' challenge is so extreme that even the petitioners in *Eldred* (represented by many of the same attorneys who represent plaintiffs here) did not advance it. *Eldred*, 537 U.S. at 193 ("Whether 50 years is enough, or 70 years too much, [petitioners] acknowledge, 'is not a judgment meet for this Court.'"). Moreover, plaintiffs advance the very position advocated by Justice Breyer, writing only for himself in dissent -- which the Court's majority opinion criticized as having "precious little support from precedent." *Id.* at 199 n.4.

In any event, the term set by the CTEA plainly meets the requirement that the copyright term be limited. The Supreme Court defines the Intellectual Property Clause's term "limited" as "confine[d] within certain bounds, restrain[ed], or

circumscribe[d]." *Id.* at 199 (internal quotations omitted). This definition conforms to dictionary definitions from the time of the framing and from contemporary dictionaries. *Id.* By the Court's definition, or any other, the CTEA's term is for a limited period because it ends. *Id.* at 210 (the Supreme Court noted that the copyright extensions enacted in 1831, 1909, and 1976 "did not create perpetual copyrights, and neither does the CTEA"). Thus, plaintiffs' allegation that the CTEA's term is "effectively perpetual" (Am. Compl. ¶¶ 98, 101, 103, ER 22, 23; Pl. Br. 47) is foreclosed by *Eldred*'s conclusion that "a regime of perpetual copyrights clearly is not the situation before us." *Eldred*, 537 U.S. at 209 (internal quotations omitted); see also *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829) (finding that so long as the time period is fixed, the length of such a period shall be subject to the discretion of Congress).

Furthermore, the Supreme Court specifically rejected Justice Breyer's argument in his dissent, and advanced by plaintiffs here (Am. Compl. ¶¶ 99-102, ER 23; Pl. Br. 47-49), that the CTEA, which allegedly creates a copyright term worth over 99% of the value of a perpetual copyright, makes the term "effectively perpetual." *Eldred*, 537 U.S. at 210 n.16 ("It is doubtful, however, that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar."). The Court also recognized that "[i]f Justice Breyer's calculations were a basis for holding the CTEA unconstitutional, then the 1976 Act would surely fall as

well" (*id.*) -- and even the 1909 and 1831 Acts "might be suspect." *Id.*; see also *id.* at 222. The Court unequivocally rejected Justice Breyer's analytical approach. Accordingly, the CTEA's establishment of a copyright term for the life of the author plus 70 years is a term for a limited period that does not violate the "limited Times" provision of the Intellectual Property Clause. *Id.* at 199-200 (holding that "there is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA").

Although the Supreme Court has already held that a term of copyright protection for the life of the author plus 70 years, as enacted by the CTEA, is a term for a "limited" time that does not violate the Intellectual Property Clause, *id.* at 204, plaintiffs nonetheless continue to argue that the CTEA's basic copyright term exceeds the "limited Times" allowed by the Intellectual Property Clause because the term is "so long as to be effectively perpetual." Am. Compl. ¶¶ 93-104, ER 22-23; Pl. Br. 47-49. Plaintiffs' contention is based solely on the erroneous legal theory that a copyright term is measured as a matter of law by the *economic value* of a work after the copyright term expires, not by the *time* it takes for the term to expire.

The Supreme Court rejected this theory in *Eldred*. 537 U.S. at 210 n.16. Plaintiffs concede that "the Court rejected Justice Breyer's argument" (Pl. Br. 47), but dismiss the Court's view as mere "dicta" (*id.* at 49) resting upon Justice Ginsburg's "intuition" (*id.* at 48). Not only is this a rather cavalier

characterization of language in an opinion that spoke for seven Justices of the Supreme Court,<sup>5</sup> but the suggestion that the language in question is nothing more than dicta is patently wrong; rather, an argument was raised by a dissenting Justice, and squarely rejected in a binding holding by a majority of the Court.

But even if "any view the Supreme Court offered on this question was dicta" (Pl. Br. 48) -- a point we do not concede -- it is especially valuable dicta because it was presented in the context of rejecting Justice Breyer's dissent, which adopted the very position that plaintiffs seek to advance here. See also *Eldred*, 537 U.S. at 199 n.4 (further criticizing Justice Breyer's dissent as having "precious little support from precedent"). And as the Seventh Circuit has held with respect to Supreme Court dicta:

Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. . . . If the Justices are just pulling our leg, let them say so.

*Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437, 448 (7th Cir. 1992) (Easterbrook, J.), cert. denied, 508 U.S. 950 (1993); see also *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 495-96 n.41 (3d Cir.) ("Generally, however,

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<sup>5</sup> Plaintiffs display a similar lack of regard for the district court in the instant case, whose decision they also characterize as being informed by "intuition." See Pl. Br. 35, 44.

we consider and respect Supreme Court dicta as well as holdings because the Supreme Court hears relatively few cases and frequently uses dicta to give guidance to lower courts."), *cert. denied*, 506 U.S. 868 (1992); *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly where, as here, dictum is of recent vintage and not enfeebled by any subsequent statement.") (citation omitted), *cert. denied*, 504 U.S. 910 (1992); see also cases cited *id.* Indeed, at least one other court has held that *Eldred* forecloses the argument that the CTEA is "effectively or virtually perpetual" in violation of the "limited Times" provision. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1218 (D. Colo. 2004) (holding that the plaintiffs' "effectively perpetual" argument "is foreclosed by the *Eldred* decision" and thus should be dismissed for failure to state a claim).

The current copyright term of the author's life plus 70 years is not *per se* a perpetual copyright term. *Eldred* itself noted that the copyright extensions enacted in 1831, 1909, and 1976 "did not create perpetual copyrights, and neither does the CTEA" and that "a regime of perpetual copyrights clearly is not the situation before us." *Eldred*, 537 U.S. at 209, 210 (internal quotations omitted). The *Eldred* Court further concluded that Congress had a rational basis for believing that setting the copyright term at the author's life plus 70 years "promotes . . .



Progress" pursuant to the Copyright Clause. *Id.* at 213. As the district court held, *Eldred's* conclusion, and the deference due Congress' policy decisions pursuant to its Copyright Clause authority, foreclose plaintiffs' claim that the CTEA's term is "effectively perpetual." Accordingly, the CTEA's establishment of a copyright term for the life of the author plus 70 years is a term for a limited period that does not violate the "limited Times" provision of the Intellectual Property Clause, and plaintiffs' claim was correctly dismissed. See *id.* at 199-200 (holding that "there is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA"); accord, *Golan*, 310 F. Supp. 2d at 1218 (holding that the CTEA's term is not "effectively or virtually perpetual").

Plaintiffs nonetheless argue that "the historical practice that the [*Eldred*] Court identified does not reach extensions of work that have no continuing commercial interest"; that "such extensions -- of work that has no continuing commercial or copyright related interest -- would be the grant of a 'term' that does not promote the Progress of Science"; and that "[s]uch a term should therefore not be deemed to be 'limited.'" Pl. Br. 50. This abstruse argument is not only hard to follow, but flawed at every turn: its premise that an extension for works with no apparent continuing commercial interest *a fortiori* cannot "promote the Progress of Science" is wrong, given that the commercial value of some works is not recognized until long after they are created (and even in some instances until after the

author's death, as in the case of the novel *A Confederacy of Dunces*, by John Kennedy Toole, for example); and it further appears to rest upon the *non sequitur* that a term that allegedly "does not promote the Progress of Science" therefore somehow becomes "unlimited." In any event, however, plaintiffs have not appealed the district court's dismissal of Count III, and therefore have conceded that, as the court held (see Order 20-23, ER 54-57), the 1992 Act (along with the 1976 Act and the BCIA) satisfies the "promotion of science" standard. See Pl. Br. 8 ("Plaintiffs do not challenge the District Court's conclusion with respect to Count III.").

Moreover, *Eldred* makes clear both that the breadth of copyright protection is a matter for congressional judgment, and that the CTEA promotes the progress of science (and indeed, understandably in light of *Eldred*, plaintiffs did not even challenge the CTEA on this basis in the instant action). Plaintiffs are bound both by *Eldred*'s rulings that the CTEA promotes the progress of science and satisfies the "limited Times" requirement, and by their own admission that the 1992 Act promotes the progress of science; their unfounded attempt to collapse, and blur the distinctions between, the analytically distinct "limited Times" and "Progress of Science" components of the Intellectual Property Clause should be rejected.

Pace plaintiffs, the Supreme Court has only recently reiterated the bedrock principle that its precedents must be followed. See *Doe v. Tenet*, No. 03-1395, 2005 WL 473682, \*6

(U.S. Mar. 2, 2005), citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Under the circumstances, neither plaintiffs' effort to read *Eldred*'s IP Clause rulings out of existence, nor plaintiffs' ill-advised request for "this Court to reconsider the application of the principle articulated in *Eldred* to the CTEA, to the extent the CTEA extends the term of works that themselves have not been filtered by renewal" (Pl. Br. 51), merits extended consideration.

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

By the same token, neither the CTEA nor the 1992 Act violates the First Amendment, because they do not alter "the traditional contours of copyright protection" (*Eldred*, 537 U.S. at 221) -- in particular, the "idea/expression dichotomy" and the "fair use" defense that are copyright's "traditional First Amendment safeguards" (*id.* at 220), its "built-in free speech safeguards" (*id.* at 221) -- and thus require no further First Amendment scrutiny. The Supreme Court has long recognized that "copyright's limited monopolies are compatible with free speech principles." *Id.* at 219. For this reason, the *Eldred* Court held that although "[t]he First Amendment securely protects the freedom to make . . . one's own speech[,]" it bears less heavily when speakers assert the right to make other people's speeches." *Id.* at 221. In fact, by offering an economic incentive, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Eldred*, 537 U.S. at 219 (holding that

"copyright's purpose is to *promote* the creation and publication of free expression") (emphasis in original). For those instances when copyright protections raise First Amendment concerns, the Supreme Court has recognized that copyright law already contains "built-in First Amendment accommodations" adequate to address them. *Eldred*, 537 U.S. at 219; see also *id.* at 220-21.

Thus, when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." *Eldred*, 537 U.S. at 221. The Supreme Court has enumerated copyright's "traditional First Amendment safeguards" as (1) the "idea/expression dichotomy" and (2) the "fair use" doctrine. *Eldred*, 537 U.S. at 219-20; *Harper & Row*, 471 U.S. at 539, 556, 560. "First, [copyright law] distinguishes between ideas and expression and makes only the latter eligible for copyright protection." *Eldred*, 537 U.S. at 219. This bright-line idea/expression dichotomy strikes "a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Id.* (quoting *Harper & Row*, 471 U.S. at 556). Due to this "definition," every idea in a copyrighted work becomes instantly available for public exploitation at the moment of publication. *Id.* "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.*; 17 U.S.C. § 107 (allowing use of copyrighted material for, *inter alia*, "criticism, comment, news reporting, teaching . . .

scholarship, or research"). These are copyright's "built-in First Amendment accommodations" (*Eldred*, 537 U.S. at 219) -- its "traditional First Amendment safeguards" (*id.* at 220), or the "built-in free speech safeguards [that] are generally adequate to address [First Amendment concerns]." *Id.* at 221.

Applying this framework to the CTEA, the *Eldred* Court held that the statute does not violate the First Amendment because it "has not altered the traditional contours of copyright protection" -- thereby squarely rejecting plaintiffs' claim that the CTEA violates the First Amendment. *Id.* Indeed, *Eldred* further held that "[t]he CTEA itself supplements these traditional First Amendment safeguards" in several ways. *Id.* at 220. For example, it allows libraries and archives to "'reproduce'" and "'distribute'" copies of certain published works "'during the last 20 years of any term of copyright . . . for purposes of preservation scholarship, or research,'" if the work is not already being exploited commercially or further copies are unavailable at a reasonable price. *Id.* (quoting 17 U.S.C. § 108(h)). Further, the CTEA exempts small businesses from having to pay performance royalties on music played from licensed radio or television. *Id.* (citing 17 U.S.C. § 110(5)(B)). Thus, *Eldred* concluded that the CTEA does not alter the "traditional contours of copyright protection" because "it protects authors' original expression from unrestricted exploitation." *Id.* at 221.

Like the CTEA, the 1992 Act's automatic renewal provision does not alter the "traditional contours of copyright protection." Plaintiffs claim that the 1992 Act alters the "traditional contours of copyright protection" because the 1992 Act "automatically renewed" the 1976 Act's copyright term and the CTEA "unconditionally extended" that term by 20 years without conditioning such renewals and extensions on formalities such as registration and notice; thus, according to plaintiffs, Congress altered the "traditional contours of copyright protection" by creating an "opt-out system of protection." Am. Compl. ¶¶ 86, 90, ER 20-21, 21-22; Pl. Br. 33, 35-36, 43-47. Plaintiffs, however, confuse copyright formalities, like renewal registration, with the "traditional contours of copyright protection." Congress does not alter the "traditional contours of copyright protection" as long as it does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine. *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004) ("Congress has not altered the traditional contours of copyright protection by enacting Section 514. Section 514 does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine.") (internal citations omitted), *appeal pending on other grounds*, No. 04-5240 (D.C. Cir.).

Plaintiffs also allege that the "CTEA was thus the first statute to extend the copyright term for works that had not been filtered by a renewal requirement. It is thus the first

extension in United States history to so unconditionally and indiscriminately extends [sic] the burdens of copyright." Am. Compl. ¶ 63, ER 15; see also Pl. Br. 50-51 and n.8. This allegation is incorrect -- the 1831 Act extended the initial term of copyright from 14 to 28 years, without requiring any affirmative act (renewal or otherwise) by the author or copyright owner to obtain the extension; for the first time, it also made the renewal term available to the author's widow/widower or children if the author was no longer alive. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

It also bears emphasis that plaintiffs do not (and cannot) allege, for example, that eliminating renewal registration as a copyright condition redefines or in any way affects the idea/expression dichotomy. In the same vein, plaintiffs do not (and cannot) allege that the 1992 Act narrows or changes the scope of the "fair use" doctrine. Hence, the conditional/unconditional line that plaintiffs draw does not alter or concern in any way the "built-in First Amendment accommodations" that comprise "the traditional contours of copyright protection" recognized by the Supreme Court -- namely, the "fair use" doctrine and the "idea/expression dichotomy." *Cf. Eldred*, 537 U.S. at 218 n.23 (holding that "petitioners do not explain how their First Amendment argument is moored to the prospective/retrospective line they urge us to draw").

In fact, like the CTEA, the 1992 Act "protects authors' original expression from unrestricted exploitation" by giving all

authors -- present and future -- the same protection from the "harsh consequences" of losing their works "irretrievably into the public domain" for failing to satisfy a renewal registration requirement. S. Rep. No. 102-194, at 7; *accord, Eldred*, 537 U.S. at 221. "Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221. Accordingly, because the CTEA and the 1992 Act do not encroach on the "traditional contours of copyright protection," further First Amendment scrutiny is unnecessary. *Id.*; *accord, Luck's Music*, 321 F. Supp. 2d at 119.

Plaintiffs devote considerable attention to several unsupported themes that plainly contradict *Eldred*. Plaintiffs frequently cite *Eldred's* "traditional contours of copyright" language, but fail to complete the quotation with the word "protection." See, e.g., Pl. Br. 6, 30-31, 33-37, 41, 43-47. This glaring omission apparently is designed to bolster plaintiffs' groundless theory that any change to copyright law's "tradition" -- regardless of whether such change actually affects the scope of copyright protection -- merits First Amendment scrutiny. As part of this argument, plaintiffs also suggest that the district court rejected the government's "claim" that "fair use" doctrine and the "idea/expression" dichotomy are the only traditional contours of copyright protection vis-à-vis the First Amendment. See *id.* at 7-8, 29-30, 35.



In fact, the district court *agreed* with the government that these are the only safeguards recognized by the Supreme Court thus far, and that changes to formalities are not like changes to the fair use doctrine or the idea/expression distinction and therefore not likely to be added to that list. Order 25, ER 59. Plaintiffs' lengthy discussion of the unremarkable proposition that the Supreme Court has the authority to add to its current list of two safeguards is interesting but not relevant to the point that plaintiffs must, but cannot, establish -- that changes to copyright formalities constitute changes to the scope of copyright protection.

Plaintiffs offer little argument as to why changes to formalities merit the same scrutiny that would apply to changes to copyright protection. Instead, they contend (apparently for the first time on appeal) that *Eldred's* discussion of copyright's "traditional" built-in First Amendment safeguards -- fair use and idea/expression -- is distinct from *Eldred's* reference to "traditional contours of copyright protection," because they are separate "traditions." See Pl. Br. 34-43. This argument directly contradicts *Eldred's* (and the district court's) holding that the fair use doctrine and the idea/expression distinction do relate to the scope of copyright protection.

Plaintiffs' mistaken attempt to uncouple these notions underscores their inability to show how formalities affect the scope of copyright protection, much less First Amendment-

protected expression. There is simply no precedent for the notion that formalities impact the scope of copyright protection in a way that can give rise to a First Amendment cause of action in light of *Eldred*.

Perhaps for this reason, plaintiffs also stress on appeal their notion that changes to copyright formalities constitute "inevitably speech restricting regulation" (Pl. Br. 18) and "create burdens on speech that would demand First Amendment review" (*id.* at 32). This analysis, too, contradicts *Eldred*'s baseline holding that copyright law is generally immune from First Amendment scrutiny because it promotes, rather than restricts, free speech. Most importantly, plaintiffs' view once again is wholly unsupported by authority.

Plaintiffs allege that the CTEA and the 1992 Act violate the First Amendment because the 1992 Act "automatically renewed" the 1976 Act's copyright term, and the CTEA "unconditionally extended" that term by 20 years without conditioning such renewals on "traditional" formalities such as registration and notice; according to plaintiffs, Congress thereby created an impermissible "opt-out" copyright system. *E.g.*, Am. Compl. ¶¶ 86, 90, ER 20-21, 21-22; Pl. Br. 33, 35-36, 43-47. Plaintiffs contend that under *Eldred*, virtually any change by Congress to a "traditional" feature of copyright -- even a formality such as a change in the renewal registration requirement -- triggers an extensive and searching First Amendment review. *E.g.*, Pl. Br. 43-47. Disparaging the district court's analysis, they state

that "[o]n the basis of its own intuition about the significance of formalities, the [district] Court concluded that 'mere formalities' could not be a 'traditional contour[] of copyright.'" Pl. Br. 44 (citing Order, 24, ER 58); see also *id.* at 35 ("Instead, the Court relied upon its own intuition about the significance of what it called 'mere formalities.'"). Plaintiffs themselves "recognize that the significance of 'formalities' is counterintuitive," but they maintain that "constitutional questions are not to be resolved upon intuition." *Id.* at 44.

Far from being a matter of "intuition," the district court's ruling is firmly rooted in *Eldred*. In contrast, plaintiffs' unfounded position is that, whenever a change in copyright law is challenged under the First Amendment, "a court must determine first whether plaintiffs have established the pedigree and significance of a 'traditional contour[] of copyright' before the burden shifts to the government to defend the change in that 'contour' under the First Amendment" (*id.*); in essence, this means that whenever Congress changes a "traditional" formality, like renewal registration, a party challenging the change on First Amendment grounds must be given "the opportunity to present facts" in order to "establish th[e] pedigree and significance" of the change for purposes of First Amendment analysis. *Id.* *Eldred* does not support this view.

Plaintiffs' argument both misconstrues *Eldred* and ignores the unique constitutional relationship between copyright and free

speech. As the Supreme Court has only recently reiterated, the copyright system "incorporates its own speech-protective purposes and safeguards." *Eldred*, 537 U.S. at 219. "The Copyright Clause and the First Amendment were adopted close in time," and "[t]his proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles." *Id.* Thus, the Supreme Court's starting point for analyzing copyright laws under the First Amendment is that they are *not* typically subject to First Amendment review because copyright laws promote, rather than threaten, free expression: "copyright supplies the economic incentive to create and disseminate ideas," *Harper & Row Publishers, Inc.*, 471 U.S. at 558, and "protects authors' original expression from unrestricted exploitation." *Eldred*, 537 U.S. at 221. Rather, by offering an economic incentive, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558; *Eldred*, 537 U.S. at 219 (holding that "copyright's purpose is to *promote* the creation and publication of free expression"). And *Eldred* makes clear that Congress does not violate the First Amendment by adjusting that economic incentive as it sees fit.

Moreover, the Supreme Court has recognized that, in addition to promoting free expression, copyright law already contains "built-in free speech accommodations" -- in particular, the "idea/expression dichotomy" and the "fair use" doctrine. *Eldred*, 537 U.S. at 219-21. Such "traditional First Amendment safeguards" are what largely define the contours of copyright

protection vis-à-vis the First Amendment. See *id.* Specifically, the idea/expression distinction limits the scope of copyright's protection only to original expression, not to ideas, theories or facts. *Id.* at 219. Similarly, "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 . . . 'for purposes such as criticism [or] comment.'" *Id.* at 219-20.

Plaintiffs do not dispute that the Supreme Court has only identified the "idea/expression distinction" and the fair use doctrine as "traditional First Amendment safeguards" built into copyright law. Moreover, although plaintiffs contend that there are other features within the "traditional contours of copyright protection," they do not assert that the Supreme Court has identified such features with particularity, or that the Court recognized any other "traditional First Amendment safeguards." Most significantly, the Supreme Court has not recognized a cause of action for a First Amendment challenge to a content/viewpoint neutral copyright law that does *not* change the traditional contours of copyright *protection* vis-à-vis the First Amendment as defined by copyright's built-in "traditional First Amendment safeguards."

Plaintiffs contend that a content- or viewpoint-based copyright statute seeking to extend or deny copyright protection based on the idea being expressed in a copyrighted work would receive heightened First Amendment scrutiny without implicating

fair use or the idea/expression distinction. See Pl. Br. 38-40. However, plaintiffs' observation is irrelevant here, because when the Supreme Court in *Eldred* was considering whether First Amendment scrutiny was necessary, it was expressly considering a challenge to a "content neutral regulation of speech" (the CTEA), not a statute discriminating on the basis of content or viewpoint.<sup>6</sup> *Eldred*, 537 U.S. at 218. Similarly, it is undisputed that the statutes that plaintiffs challenge here as violating the First Amendment -- the CTEA and the 1992 Act -- are both content- and viewpoint-neutral statutes.

Thus, where, as here, plaintiffs merely claim the right under the First Amendment "to make other people's speeches" in a way that would otherwise violate copyright law, the Supreme Court typically will not recognize a cause of action based on such "First Amendment concerns" because "copyright's built-in free speech safeguards are generally adequate to address them." *Eldred*, 537 U.S. at 221. Congress does not alter the traditional contours of copyright protection, and no First Amendment scrutiny is required, if it does not weaken copyright law's built-in First Amendment safeguards such as the idea/expression dichotomy or the fair-use doctrine. *E.g., id.; Luck's Music*, 321 F. Supp. 2d at 119 ("Congress has not altered the traditional contours of copyright protection . . . [because] by enacting Section 514 [of

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<sup>6</sup> Contrary to plaintiffs' assertion, it is immaterial that "the language the government quotes is not the Court's characterization of copyright law," but rather "the characterization offered by *plaintiffs* [*in Eldred*]." Pl. Br. 40.

the URAA] . . . [it] does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine.") (internal citations omitted).

For example, the *Eldred* Court has already held that the CTEA does not violate the First Amendment because the CTEA has not altered copyright law's built-in First Amendment safeguards by either extending the scope of copyright protection beyond original expression or by limiting the scope of fair use. If anything, *Eldred* found that "[t]he CTEA itself supplements these traditional First Amendment safeguards." *Eldred*, 537 U.S. at 220. As a result, *Eldred* held that the CTEA "has not altered the traditional contours of copyright protection" -- thereby squarely rejecting plaintiffs' claim here that the CTEA violates the First Amendment. *Id.* at 221.

Like the CTEA, the 1992 Act's automatic renewal provision does not alter the "traditional contours of copyright protection" because it does not undermine any of copyright law's built-in "traditional First Amendment safeguards." Plaintiffs concede that the 1992 Act does not redefine or in any way affect the idea/expression dichotomy. Similarly, plaintiffs concede that the 1992 Act does not narrow or change the scope of the "fair use" doctrine. In fact, like the CTEA and other copyright laws, the 1992 Act "supplements these traditional First Amendment safeguards" because it "protects authors' original expression from unrestricted exploitation" by giving all authors -- present and future -- the same protection from the "harsh consequences"

of losing their works "irretrievably into the public domain" for failing to satisfy a renewal registration formality. S. Rep. No. 102-194, at 7; see also *Eldred*, 537 U.S. at 220. Indeed, the Supreme Court observed not only that Congress' "consistent placement of existing copyright holders in parity with future copyright holders" (*Eldred*, 537 U.S. at 214-15) is constitutional, but that nothing in the Constitution prevents Congress from "including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term." *Id.* at 215. "Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221.

Plaintiffs, however, confuse changes to "traditional" copyright *formalities* with changes to copyright's built-in "traditional First Amendment safeguards" that define the scope of copyright protection. *Cf. id.* at 220. Plaintiffs contend broadly that the "change from an opt-in to an opt-out system of copyright qualifies as a change in a 'traditional contour[]' of copyright." Pl. Br. 6. Yet plaintiffs fail to establish that, as a matter of law, changes to "traditional" copyright *formalities* may constitute changes to the "contours of copyright protection." In the same vein, plaintiffs fail to establish -- as they must, as a matter of law, in order to proceed -- that the 1992 Act's changes to a copyright renewal *formality* may constitute changes to any of copyright's "traditional First



Amendment safeguards" that largely, if not exclusively, define the "traditional contours of copyright protection" for purposes of the First Amendment.

Most importantly, plaintiffs offer no authority for the proposition that there exists a cause of action under the First Amendment to challenge changes to copyright law that do not alter copyright law's built-in "traditional First Amendment safeguards." Indeed, *Eldred* forecloses such a cause of action by precluding First Amendment review of copyright laws *unless* Congress changes a "traditional First Amendment safeguard" that defines the "contours of copyright protection" vis-à-vis the First Amendment. *Eldred*, 537 U.S. at 220, 221.

Plaintiffs similarly fail to address how, as a matter of law, a change from a conditional or "opt-in" copyright regime to an unconditional or "opt-out" one affects free speech in a way that constitutes a cognizable cause of action under the First Amendment. In fact, the conditional/unconditional line that plaintiffs draw does not alter or affect in any way the built-in First Amendment accommodations that the Supreme Court has held define "the traditional contours of copyright protection." *Cf. id.* at 218 n.23 (holding that "petitioners do not explain how their First Amendment argument is moored to the prospective/retrospective line they urge us to draw").

In essence, plaintiffs argue that, notwithstanding *Eldred*, an "opt-in" copyright system is constitutionally compelled by the

First Amendment. This assertion is baseless. There is no support for it in *Eldred*, in other case law, or in logic.

Because plaintiffs have failed to establish as a matter of law that either the 1992 Act or the CTEA have altered the "traditional contours of copyright law," let alone weakened copyright's built-in "traditional First Amendment safeguards," further First Amendment review is neither required nor appropriate. *Id.* at 221; *Luck's Music*, 321 F. Supp. 2d at 119. Thus, plaintiffs have failed to state a cause of action challenging those statutes under the First Amendment. Accordingly, as the Supreme Court already did with respect to the CTEA in *Eldred*, this Court should "reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards," because neither the CTEA nor the 1992 Act encroaches on the traditional contours of copyright protections. *Eldred*, 537 U.S. at 218-19 (affirming rejection of First Amendment challenge to the CTEA pursuant to Rule 12(c)); accord, *Luck's Music*, 321 F. Supp. 2d at 118-19 (dismissing First Amendment challenge to Section 514 of the URAA pursuant to Rule 12(b)(6) because "Congress has not altered the traditional contours of copyright protection by enacting Section 514.").

Plaintiffs' amici further argue that the Court should apply the "overbreadth" doctrine to this case -- an argument never raised by plaintiffs. Amicus Brief ("Am. Br.") 14-16. It is well established that an amicus has no right to introduce

arguments not raised by a party. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir.), *reh'g denied*, 255 F.3d 849, 850-51 (D.C. Cir. 2001), *aff'd on other grounds*, 537 U.S. 186 (2003); *Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1049 (5th Cir.), *cert. denied*, 510 U.S. 820 (1993). And a court should be particularly reluctant to entertain such arguments in a case involving constitutional adjudication. *Eldred v. Reno*, *supra*. Accordingly, this Court need not address the "overbreadth" argument raised solely by amici, even though they claim that "the Amended Complaint's characterization of the First Amendment claim \* \* \* is consistent with a facial overbreadth challenge." Am. Br. 16 n.10.

Moreover, "[e]ven though the challenge be based on the First Amendment, the overbreadth doctrine is not casually employed." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999). Rather, it is "strong medicine," and the Supreme Court has "employed it with hesitation, and then only as a last resort." *Id.* (internal quotation marks omitted). Thus, given Congress's latitude to legislate under the Copyright Clause, recently reiterated by the Supreme Court in *Eldred*, 537 U.S. at 204-05, 208, 212-13, 218 -- as well as copyright's "traditional," "built-in free speech safeguards" and "accommodations," also emphasized by the Supreme Court in *Eldred*, *id.* at 220-21 -- overbreadth analysis is especially inappropriate in this context, where plaintiffs and their amici seek to use "other people's speeches." *Id.* at 221. And by the same token,

the statute plainly is not "overbroad" on the merits in any event -- especially inasmuch as "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that *substantial* overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (emphasis added and citation omitted); see also *id.* at 118-20. That manifestly is not the case here.<sup>7</sup>

For essentially the same reasons, the arguments of amici in favor of any kind of heightened First Amendment scrutiny -- arguments that closely track those of plaintiffs -- are equally wide of the mark. *Eldred* makes clear that the narrow tailoring that plaintiffs and their amici demand simply is not required in the realm of copyright. Whether the label applied is strict scrutiny or intermediate scrutiny, this type of analysis has no place here.

\* \* \* \* \*

At bottom, plaintiffs and their amici -- like the petitioners in *Eldred* -- are simply complaining about the lines drawn by Congress in the realm of copyright. *Eldred*, however, squarely forecloses their arguments. The judgments made by Congress in the CTEA and the 1992 Act violate neither the "limited Times" provision of the Intellectual Property Clause nor

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<sup>7</sup> In addition, amici's assertion of a right to receive information and ideas (Am. Br. 12-13) can get them no further than their assertion of the right to speak; these rights are "reciprocal." See *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 756-57 (1976).

the First Amendment. Contrary to plaintiffs' contention, free speech principles are not implicated, and the First Amendment is not imperiled, just because Congress has chosen to protect more of "other people's speeches" (*Eldred*, 537 U.S. at 221) under the copyright laws than plaintiffs would like.

### **CONCLUSION**

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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### **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, appellee states that he is unaware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2005, I served the foregoing Brief for the Appellee upon counsel by causing copies to be delivered as follows, by first class mail, postage prepaid, to:

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