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

BREWSTER KAHLE, et al.,

Plaintiffs,

v.

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

Defendant.

No. C-04-1127 MMC

**ORDER GRANTING MOTION TO  
DISMISS; VACATING HEARING**

(Docket No. 24)

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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.

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1 **BACKGROUND<sup>1</sup>**

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

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

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

17 In Count Three, plaintiffs assert that the Copyright Renewal Act, the 1976 Act, and  
18 the Berne Convention Implementation Act (“BCIA”), enacted in 1988, all violate the  
19 Copyright Clause by failing to “promote . . . Progress.” In particular, plaintiffs challenge the  
20 elimination by those statutes of the traditional requirements that copyright owners register  
21 their works, deposit a copy of their works with the government, and provide notice of their  
22 claim to copyright protection, as well as the requirement that, to avoid expiration, the  
23 copyright be renewed by the copyright holder.

24 In Count Four, plaintiffs seek reconsideration of the United States Supreme Court’s  
25 decision in Eldred v. Ashcroft, 537 U.S. 186 (2003), in light of certain matters assertedly not  
26 considered therein. Plaintiffs contend, contrary to Eldred’s holding, that Congress violated

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27 <sup>1</sup> All facts set forth in the section below are taken from the allegations of the  
28 complaint and are presumed true for purposes of the instant motion.

1 the “limited Times” clause and the First Amendment in enacting the CTEA because it has  
2 no power to extend the terms of existing copyrights.

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

11 Plaintiff Kahle is chairman of the board of plaintiff Internet Archive. (See Compl.  
12 ¶ 3.) Internet Archive’s principal activity is to build an “Internet Library,” with the purpose of  
13 offering permanent and free access for researchers, historians, and scholars to works –  
14 including audio, books, films, websites, and software – that exist in digital format. (See id.)  
15 Internet Archive is currently working, in partnership with Carnegie Mellon University, the  
16 National Science Foundation, and the governments of India and China, on the “One Million  
17 Book Project,” which is an effort to create a digital archive of one million books in fully  
18 readable online text format. (See id.) Among the books to be offered will be a large  
19 number of “orphan” books, i.e., books that remain under copyright, but which are out of  
20 print and therefore not widely available to the public. (See id.) Internet Archive also  
21 operates the “Internet Bookmobile,” a mobile Internet bookstore that downloads, prints, and  
22 binds public domain books for \$1 each. (See id.)

23 Plaintiff Prelinger is president of plaintiff Prelinger Associates, Inc. (See id. ¶ 5.)  
24 Prelinger Associates, Inc., known in the trade as Prelinger Archives, has a collection of  
25 more than 48,000 “ephemeral” (advertising, educational, industrial, and amateur) films.  
26 (See id.) Prelinger Archives provides stock footage to the media and entertainment  
27 industries through its authorized sales representative, Getty Images. (See id.) In 2002, the  
28 Prelinger Archives film collection was acquired by the Library of Congress. (See id.)

1 Prelinger Archives remains in existence, holding approximately 4000 titles on videotape  
2 and a smaller collection of film materials acquired subsequent to the Library of Congress  
3 transaction. (See id.) Its goal remains to collect, preserve, and facilitate access to films of  
4 historic significance that have not been collected or made commercially available  
5 elsewhere. (See id.)

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

12 Plaintiffs allege that, until the enactment of the 1976 Act, copyright protection was  
13 granted only to those authors who took affirmative steps to indicate their desire for such  
14 protection; an author who failed to take the affirmative steps required by statute to obtain a  
15 copyright effectively dedicated his or her works to the public domain. (See Compl. ¶ 36.)  
16 Plaintiffs refer to these requirements as creating a “conditional copyright regime.” (See id.  
17 ¶ 34.) For example, under the Act of May 31, 1790 (“1790 Act”), a copyright, for a term of  
18 14 years, was secured only if the author (1) registered the title of his or her work with the  
19 government; (2) deposited a copy of the work with the government, and (3) provided notice  
20 of the copyright to the public. (See id. ¶ 37; see also 1790 Act, 1 Stat. 124 §§ 1, 3, 4.) In  
21 order to secure a second 14-year term of copyright protection, the 1790 Act required an  
22 author to affirmatively renew his copyright within six months before the expiration of the  
23 initial 14-year term. (See Compl. ¶ 37; see also 1790 Act, 1 Stat. 124 § 1.) Similarly,  
24 although the Act of February 3, 1831 (“1831 Act”) extended the initial term of copyright to  
25 28 years, it retained the requirements of registration, deposit, and notice, as well as the  
26 requirement that a copyright owner renew his or her copyright to secure the benefits of an  
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1 additional 14-year term of copyright protection.<sup>2</sup> (See Compl. ¶ 38; see also 1831 Act, 4  
2 Stat. 436 §§ 1-5.) The Act of March 4, 1909 (“1909 Act”) extended the renewal term to 28  
3 years, while retaining the registration, deposit, notice, and renewal requirements.<sup>3</sup> (See  
4 Compl. ¶ 39; see also 1909 Act, 35 Stat. 1075 §§ 9-10, 12-13, 18-19, 23.) According to  
5 plaintiffs, the consequence of requiring these affirmative steps to secure and retain  
6 copyright protection was that the overwhelming majority of published works either passed  
7 immediately into the public domain (because they were never registered or deposited or  
8 notice was not given), or passed into the public domain after the initial copyright term due  
9 to failure to renew the copyright for a second term. (See Compl. ¶ 40.)

10 Beginning in 1976, with the enactment of the 1976 Act, Congress began to replace  
11 the conditional copyright regime with an unconditional copyright regime. (See id. ¶ 35, 47.)  
12 In 1976, Congress abolished any registration, deposit, or renewal requirement as a  
13 prerequisite for obtaining or maintaining copyrights for works created on or after January 1,  
14 1978, but retained a modified notice requirement. (See id. ¶ 47; see also 1976 Act, Pub. L.  
15 94-553 §§ 302, 401-406, 407(a), 408(a).) As a result of these changes, copyright extended  
16 automatically to all works for the full term of copyright, without requiring any affirmative  
17 action by the author or his assigns, other than to provide notice to the public. (See Compl.  
18 ¶ 47; see also 1976 Act, Pub. L. 94-553 §§ 401-406.) In 1988, Congress passed the BCIA,  
19 which prospectively eliminated the notice requirement, and removed registration as a pre-  
20 requisite for filing an infringement action based on the works of foreign authors. (See id. ¶  
21 48 (citing BCIA, Pub. L. No. 100-568); see also BCIA §§ 7, 9.) In 1992, Congress passed  
22 the Copyright Renewal Act, which renewed all copyrights for works published between  
23 January 1, 1964 and December 31, 1977, even in the absence of any expressed desire by  
24 the copyright owners to secure the benefits of an additional term. (See Compl. ¶ 49 (citing

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

28 <sup>3</sup> 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.

1 Copyright Renewal Act, Pub. L. No. 102-307); see also Copyright Renewal Act § 101 note,  
2 and § 102). Finally, in 1998, Congress enacted the CTEA, which unconditionally extended  
3 by 20 years the term of all existing copyrights, including those automatically extended by  
4 the Copyright Renewal Act. (See Compl. ¶ 50 (citing CTEA, Pub. L. No. 105-298); see also  
5 CTEA ¶ 102.)

6 Plaintiffs assert that “[w]hereas the traditional contours of a conditional copyright  
7 regime assured that the burdens of copyright regulation were narrowed to those works for  
8 which the author or his assign desired continued protection, an unconditional regime  
9 guarantees that the vast majority of works regulated by copyright serve no continuing  
10 commercial or copyright-related interest for their authors.” (See id. ¶ 52.) In addition,  
11 according to plaintiffs, “[w]hereas the traditional contours of a conditional copyright regime  
12 produced records both of the material protected and its ownership, an unconditional  
13 copyright regime destroys any reliable indication of copyright ownership, or any useful  
14 record of current ownership.” (See id. ¶ 53.) Plaintiffs contend that “[w]ithout notice, there  
15 is no clear way to know where copyright is claimed” and “[w]ithout a registry, there is no  
16 reasonable method for identifying copyright owners.” (See id. ¶ 54.)

17 Plaintiffs state the focus of the instant action is on works published on or after  
18 January 1, 1964 but before January 1, 1978, because those works constitute “the first class  
19 of work in American history that has had its term extended without any requirement of  
20 renewal.” (See id. ¶ 68.) Plaintiffs contend the copyrights for the vast majority of this work  
21 would not have been renewed at the end of the initial 28-year copyright term; as a result of  
22 the 1976 Act and the CTEA, however, the term for this work has been extended by 67  
23 years without any indication by the authors or their assigns that such protection is desired,  
24 and without producing any registry of the current owners of those copyrights. (See id. ¶  
25 68.)

26 According to plaintiffs, the change to an unconditional copyright regime “radically  
27 burdens” access to copyrighted works first published after January 1, 1964 and before  
28 January 1, 1978. (See id. ¶ 69.) Because most works produced during this period are not

1 commercially available, “Internet based archives, libraries, film restorers, and follow-on  
2 creators have no viable or reasonable way to identify copyright owners for this creative  
3 work.” (See id. ¶ 69.) Plaintiffs contend there is no copyright-related interest in continuing  
4 the copyright for this work, and no copyright-related benefit from abolishing registration.  
5 (See id.)

6 Plaintiffs further contend that the NET, which was enacted in 1997, imposed  
7 additional criminal penalties for copyright infringement, which significantly chill the  
8 opportunity of archives to make commercially unavailable work accessible to the world.  
9 (See id. ¶ 70-72.) The NET provides for a term of imprisonment of up to one year, and/or a  
10 fine, for “the reproduction or distribution of 1 or more copies or phonorecords of 1 or more  
11 copyrighted works, which have a total retail value of more than \$1,000.” See 17 U.S.C.  
12 § 506(a); 18 U.S.C. § 2319(c).

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

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

1 been restricted, “a vast number of copyrighted yet no longer commercially valuable works  
2 sit idle rather than enriching public knowledge.” (See id. ¶ 78.)

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

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

## 20 **LEGAL STANDARD**

21 A motion to dismiss under Rule 12(b)(6) cannot be granted unless “it appears  
22 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would  
23 entitle him to relief.” See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be  
24 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
25 under a cognizable legal theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699  
26 (9th Cir. 1990).

27 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any  
28 material beyond the pleadings. See Hal Roach Studios, Inc. v. Richard Feiner And Co.,

1 Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Material that is properly submitted as part  
2 of the complaint, however, may be considered. See id. Documents whose contents are  
3 alleged in the complaint, and whose authenticity no party questions, but which are not  
4 physically attached to the pleading, also may be considered. See Branch v. Tunnell, 14  
5 F.3d 449, 454 (9th Cir. 1994). In addition, the Court may consider any document “the  
6 authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily  
7 relies,” regardless of whether the document is referred to in the complaint. See Parrino v.  
8 FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that  
9 are subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d  
10 1279, 1282 (9th Cir. 1986).

11 In analyzing a motion to dismiss, the Court must accept as true all material  
12 allegations in the complaint, and construe them in the light most favorable to the  
13 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
14 The Court may disregard factual allegations if such allegations are contradicted by the facts  
15 established by reference to exhibits attached to the complaint. See Durning v. First Boston  
16 Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the  
17 facts alleged, need not be accepted as true. See Holden v. Hagopian, 978 F.2d 1115,  
18 1121 (9th Cir. 1992).

## 19 **DISCUSSION**

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

### 23 **A. Copyright Clause**

24 The Intellectual Property Clause of the United States Constitution, also known as the  
25 Copyright Clause, provides: “The Congress shall have Power . . . To promote the Progress  
26 of Science and useful Arts, by securing for limited Times to Authors and Inventors the  
27 exclusive Right to their respective Writings and Discoveries[.]” U.S. CONST. art. I, § 8, cl. 8.  
28 The Copyright Clause is “both a grant of power and a limitation,” and “to the extent

1 [Congress] enacts copyrights laws at all,” such laws must “promote the Progress of  
2 Science.” See Eldred v. Ashcroft, 537 U.S. 186 at 212. By this dual grant and limitation,  
3 the Copyright Clause “empowers Congress to prescribe ‘limited Times’ for copyright  
4 protection and to secure the same level and duration of protection for all copyright holders,  
5 present and future.” See id. at 199. It is generally for Congress, “not the courts, to decide  
6 how best to pursue the Copyright Clause’s objectives.” See id. at 212. Consequently, a  
7 law that complies with the restrictions of the Copyright Clause is subject only to “rational  
8 basis” review. See id. ¶ 204-05 and n.10, 213.

## 9 **B. Counts Two and Four**

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

### 12 **1. Count Two**

13 In Count Two, plaintiffs allege that, as to work first published on or after January 1,  
14 1964 and before January 1, 1978, the Copyright Renewal Act and the CTEA violate the  
15 “limited Times” requirement of the Copyright Clause by establishing copyright terms that  
16 are so long as to be effectively perpetual. (See Compl. ¶ 103, prayer for relief ¶ 2.) In  
17 support thereof, plaintiffs point to the dissent in Eldred, in which Justice Breyer calculated,  
18 using a “discounted present value analysis,” (see Compl. ¶ 99), that the current 95-year  
19 copyright term for a work made for hire returns to the creator 99.8% of the value of a  
20 perpetual term. (See Eldred, 537 U.S. at 255-56 and App. A (Breyer, J., dissenting).)

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

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

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

18 Plaintiffs correctly note that the plaintiffs in Eldred conceded the CTEA’s baseline  
19 copyright term of life plus 95 years qualified as a “limited Time,” see id. at 199, a  
20 concession plaintiffs in the instant case do not make, and that the Supreme Court, in  
21 Eldred, did not provide a test for determining whether a copyright term exceeds the “limited  
22 Times” clause. Nonetheless, the Supreme Court’s statements in Eldred that the CTEA “did  
23 not create perpetual copyrights,” that Congress did not attempt to evade or override the  
24 “limited Times” constraint in enacting the CTEA, and its rejection of Justice Breyer’s  
25 present value analysis, see id. at 209 and n.16, disposes of plaintiffs’ contention, (see  
26 Compl. ¶ 103), that the CTEA and the Copyright Renewal Act (which establishes a shorter  
27 copyright term than did the CTEA) violate the “limited Times” clause by creating a copyright  
28 term that is “effectively perpetual.” See Golan v. Ashcroft, 310 F. Supp. 2d 1215, 1217-

1 1218 (D. Colo. 2004) (finding claim that CTEA violates Copyright Clause, by creating  
2 “effectively or virtually perpetual” copyright term, foreclosed by Eldred).

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

## 7 **2. Count Four**

8 Court Four likewise must be dismissed as a result of the Supreme Court’s decision  
9 in Eldred. The Supreme Court held in Eldred that Congress does not violate the Copyright  
10 Clause or the First Amendment by extending the copyright terms of existing copyrights.  
11 See Eldred, 537 U.S. at 192-94; see also id. at 204 (“Neither is it a sound objection to the  
12 validity of a copyright term extension . . . that the enlarged term covers existing  
13 copyrights.”) Nonetheless, plaintiffs allege, the Supreme Court “did not consider that every  
14 extension before CTEA applied to works whose terms had to be renewed,” (see Compl.  
15 ¶ 116), and that “[t]his change in a fundamental contour of copyright’s free speech  
16 protections should lead the [Supreme] Court to reconsider its decision in Eldred, and hold  
17 that within an unconditional copyright regime, Congress has no power to extend the terms  
18 of existing copyrights.” (See Compl. ¶ 117.)

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

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

## 24 **C. Count Three**

25 In Count Three, plaintiffs contend that Congress’ elimination of the registration,  
26 deposit, notice, and renewal requirements violates the portion of the Copyright Clause that  
27 authorizes Congress to enact copyright laws that “promote the Progress of Science.” (See  
28 Compl. ¶¶ 107-109.) Plaintiffs seek a declaratory judgment that the 1976 Act, the BCIA,

1 and the Copyright Renewal Act are unconstitutional for failing to “promote . . . Progress.”  
2 (See id., prayer for relief ¶ 3.)

3 Plaintiffs allege that by eliminating the requirement that copyright holders renew their  
4 copyrights, “Congress has eliminated the mechanism by which unnecessary copyrights can  
5 be removed,” and “has thereby limited the ability of would-be users to exploit the vast  
6 majority of copyrighted material that would otherwise, after a relatively short period of  
7 protection, be dedicated to the public domain.” (See id. ¶ 109(1).) By eliminating the  
8 registration, deposit, and notice requirements, plaintiffs allege, “Congress has brought  
9 within the domain of copyright entire classes of works for which protection was never  
10 desired, and then compounded the damage to both public domain use and licensing by  
11 removing the traditional means by which the owners of copyrighted material can be  
12 identified.” (See id. ¶ 109(2).) Plaintiffs further allege that “[i]n contrast to the substantial  
13 burdens that an unconditional copyright system imposes on the licensing and use of public  
14 domain works, the removal of copyright conditions provides no cognizable benefit to  
15 authors or the public that could not have been obtained without the removal of conditions.”  
16 (See id. ¶ 110.) Plaintiffs contend that by “moving from a conditional to an unconditional  
17 copyright system, Congress has failed to promote progress, and thus has acted beyond the  
18 scope of its power under the Progress Clause.” (See id. ¶ 111.)

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

1 same extended term.” See id. at 205. The Court found that by “extending the baseline  
2 United States copyright term to life plus 70 years, Congress sought to ensure that  
3 American authors would receive the same copyright protection in Europe as their European  
4 counterparts,” see id. at 205-06, and noted that the CTEA “may also provide greater  
5 incentive for American and other authors to create and disseminate their work in the United  
6 States.” See id. at 206. The Court further noted that, in addition to international  
7 concerns, “Congress passed the CTEA in light of demographic, economic and  
8 technological changes, and rationally credited projections that longer terms would  
9 encourage copyright holders to invest in the restoration and public distribution of their  
10 works.”<sup>4</sup> See id. at 206-07 (internal citation and footnote omitted). The Court determined  
11 that these “justifications” for the enactment of the CTEA “provide a rational basis for the  
12 conclusion that the CTEA “promote[s] the Progress of Science.” See id. at 213.

13 The Supreme Court further explained that the “economic philosophy” behind the  
14 Copyright Clause “is the conviction that encouragement of individual effort by personal  
15 gain is the best way to advance public welfare through the talents of authors and  
16 inventors.” See id. at 212 n.18. As the Court observed, “copyright law celebrates the profit  
17 motive, recognizing that the incentive to profit from the exploitation of copyrights will  
18 redound to the public benefit by resulting in the proliferation of knowledge” and, indeed,  
19 “[t]he profit motive is the engine that ensures the progress of science.” See id. (emphasis  
20 in original) (quoting American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27  
21 (S.D.N.Y. 1992). The Court additionally explained that “rewarding authors for their creative  
22 labor and ‘promot[ing] . . . Progress’ are thus complementary” and cited James Madison’s  
23 observation that, in copyright law, “[t]he public good fully coincides . . . with the claims of

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25 <sup>4</sup> In particular, the Supreme Court noted that members of Congress expressed the  
26 views that (1) as a result of increases in both longevity and in parents’ average age at the  
27 birth of their children, the pre-CTEA copyright term did not adequately secure the right to  
28 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.

1 individuals.” See id. (quoting The Federalist No. 43 at 272 (C. Rossiter ed. 1961)). The  
2 Court rejected Justice Breyer’s assertion that copyright statutes must serve public, not  
3 private ends, concluding that “[t]he two ends are not mutually exclusive; copyright law  
4 serves public ends by providing individuals with an incentive to pursue private ones.” See  
5 id.

6 In the instant case, the essence of plaintiffs’ argument is that recent copyright law  
7 unconstitutionally favors the interests of authors over those of the general public, and  
8 thereby violates the Copyright Clause by failing to promote the Progress of Science.  
9 Eldred has foreclosed this type of argument, however, by holding that the Progress of  
10 Science is promoted by rewarding authors for their creative labor, and that providing  
11 authors with such an incentive to create is “the best way to advance public welfare.” See  
12 id. Consequently, the Court will review the statutes at issue only to determine whether  
13 Congress had a rational basis for concluding that the statutes at issue promote the  
14 Progress of Science. See id. at 213.<sup>5</sup> In determining whether a statute “is a rational  
15 exercise of the legislative authority conferred by the Copyright Clause,” the Court must  
16 “defer substantially to Congress.” See id. at 204. Whether a copyright statute has a  
17 rational basis may be decided as a matter of law. See Eldred, 537 U.S. at 196 (deciding  
18 issue on cross-motions for judgment on the pleadings).

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

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25 <sup>5</sup> In plaintiffs’ opposition, they ask this Court to apply heightened review to determine  
26 whether Congress’ elimination of copyright “formalities” are “congruent and proportional” to  
27 proper Progress Clause ends. (See Opp. at 17.) Plaintiffs fail to recognize that the  
28 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.

1                                   **1. Congress' justifications**

2                                   **a. 1976 Act**

3                                   **i. Renewal requirement**

4                   The 1976 Act changed the maximum term of copyright for works created by  
5 individuals from 56 years, consisting of an initial term of 28 years plus a renewal term of 28  
6 years, to a single term consisting of the life of the author, plus 50 years. See H.R. REP. NO.  
7 94-1476 at 134 (1976). The legislative history contains the following reasons for  
8 eliminating the renewal provision:

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

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

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

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

28                   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

1 commercial value is renewed. Of the remainder, a certain proportion is of  
2 practically no value to anyone, but there is a large number of unrenewed  
3 works that have scholarly value to historians, archivists, and specialists in a  
4 variety of fields. . . .

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

18 See id. at 136.

## 19 **ii. Registration requirement**

20 Congress was aware that under the 1909 Act, failure to comply with the Register of  
21 Copyright's formal demand for registration resulted in "complete loss of copyright." See  
22 H.R. REP. NO. 94-1476 at 150 (1976). Under the 1976 Act, copyright registration is not  
23 mandatory, but is a condition of bringing a suit for infringement. See 1976 Act, Pub. L. 94-  
24 553 §§ 408, 411. The legislative history contains a recognition that copyright registration  
25 for published works<sup>6</sup> "is useful and important to users and should be induced in some  
26 practical way," see H.R. REP. NO. 94-1476 at 158 (1976), as well as a determination that  
27 unpublished works, which are subject to copyright under the 1976 Act, should not be  
28 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

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<sup>6</sup> 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.

1 the special or 'extraordinary' remedies of statutory damages or attorney's fees where  
2 infringement of copyright in an unpublished work began before registration or where, in the  
3 case of a published work, infringement commenced after publication and before registration  
4 (unless registration has been made within a grace period of three months after  
5 publication)." See id. at 158; see also 1976 Act, Pub. L. 94-553 §§ 412.

### 6 **iii. Deposit requirement**

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

### 21 **iv. Notice requirement**

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

- 27 (1) It has the effect of placing in the public domain a substantial body  
28 of published material that no one is interested in copyrighting;  
(2) It informs the public as to whether a particular work is copyrighted;

- 1 (3) It identifies the copyright owner;  
2 (4) It shows the date of publication.

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

8 the copyright notice has real values which should be preserved, and that this  
9 should be done by inducing use of notice without causing outright forfeiture  
10 for errors or omissions. Subject to certain safeguards for innocent infringers,  
11 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.

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

#### 16 **b. BCIA**

17 The stated purpose of the BCIA was “to make changes to the U.S. copyright law that  
18 are necessary for the United States to adhere to the Berne Convention.” See S. REP. NO.  
19 100-352 at 1 (1988). In enacting the BCIA, Congress recognized that the Berne  
20 Convention is “the highest internationally recognized standard for the protection of works of  
21 authorship of all kinds” and was of the view that “U.S. membership in the Berne Convention  
22 [would] secure the highest available level of multilateral copyright protection for U.S. artists,  
23 authors and other creators,” as well as “ensure effective U.S. participation in the  
24 formulation and management of international copyright policy.” See id. at 2.

25 Under the Berne Convention, “the enjoyment and the exercise of [copyright] shall  
26 not be subject to any formality.” See id. at 11 (quoting Berne Convention, Art. 5(2).) In the  
27 legislative history of the BCIA, Congress notes that “[t]he only real difference . . . that  
28 makes the U.S. law incompatible with the Berne Convention consists in the notice and

1 registration requirements.” See id. The BCIA was expressly intended to eliminate the  
2 provisions of the 1976 Act that were incompatible with Article 5(2) of the Berne Convention.  
3 See id.

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

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

### 18 **c. Copyright Renewal Act**

19 The stated purpose of the Copyright Renewal Act was to automatically grant renewal  
20 to works created before January 1, 1978 that were still in their first term of copyright, in  
21 order to “restore a measure of equity and fairness to the copyright law.” See S. REP. NO.  
22 102-194 at 1, 6 (1992). In the 1976 Act, Congress had retained the renewal requirement  
23 for works still in their first copyright term, due to a concern “that eliminating the renewal  
24 requirement for these works altogether could potentially disrupt existing expectancies or  
25 contractual interests.” See id. at 3-4. In adopting the Copyright Renewal Act, however,  
26 Congress expressed concern about the “harsh consequences of inadvertent forfeiture” of

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28 <sup>7</sup> 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.

1 copyrights due to failure to renew and the consequent loss of income to authors and their  
2 families, see id. at 5, and was of the view that “the public domain should consist of works  
3 which have enjoyed a full and fair term of protection and should not be enlarged because of  
4 an author’s error in recordkeeping, or any other innocent failure to comply with overly  
5 technical formalities in the copyright law,” see id. at 6. It also expressed concern that the  
6 renewal requirement was confusing to foreign authors because such a requirement was  
7 unique to United States law, noting that “[c]ompliance with formalities is antithetical” to the  
8 Berne Convention. See id.

9       The legislative history contains a recognition, however, that a registration renewal  
10 system had some value in providing a useful public record for users of copyright material,  
11 to assist them in locating the copyright holder and arranging to license a work, or in  
12 determining when copyright material falls into the public domain. See id. Consequently,  
13 the Copyright Renewal Act created “incentives to authors, composers, and other artists to  
14 continue to voluntarily renew their copyright in a timely manner, while it eliminate[d] the  
15 harsh consequences of failing to renew.” See id. In particular, “[r]egistration renewal  
16 entitles the author to prima facie evidence of the validity of the copyright, and greater  
17 control, in the renewal term, of the use of derivative works which the copyright holder  
18 authorized to be made in the first term.” See id.; see also Copyright Renewal Act, Pub. L.  
19 No. 102-307 § 102(a)(4).

## 20                   **2. Analysis**

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

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

6 As noted, the Supreme Court, in Eldred, has held that rewarding the personal efforts  
7 of authors is entirely consistent with the goal of promoting Progress. See id. The Supreme  
8 Court further held that the enactment, in the CTEA, of longer copyright terms for existing  
9 works did not violate the Copyright Clause, in part because Congress sought to bring  
10 United States copyright law into compliance with the Berne Convention. See id. at 206–07.  
11 In so holding, the Court cited favorably to a law review article in which the author concluded  
12 that matching the level of copyright protection in the United States to that in the European  
13 Union “can ensure stronger protection for U.S. works abroad and avoid competitive  
14 disadvantages vis-a-vis foreign rightholders.” See id. at 206 (quoting Perlmutter,  
15 Participation in the International Copyright System as a Means to Promote the Progress of  
16 Science and Useful Arts, 36 Loyola (LA) L. Rev. 323, 330 (2002)). Thus, the Supreme  
17 Court has strongly suggested that changes to copyright law to conform with the Berne  
18 Convention are a rational means of promoting Progress.

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

1 public.

2 The Supreme Court has stressed, however, that “it is generally for Congress, not the  
3 courts, to decide how best to pursue the Copyright Clause’s objectives,” see Eldred, 537  
4 U.S. at 212, and that it is not the role of the courts “to alter the delicate balance Congress  
5 has labored to achieve.” See id. (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).  
6 “[T]he Copyright Clause empowers Congress to determine the intellectual property regimes  
7 that, overall, in that body’s judgment, will serve the ends of the Clause”; “[t]he wisdom of  
8 Congress’ action . . . is not within [the courts’] province to second guess.” See id. at 222.

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

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

#### 15 **D. Count One**

16 In Count One, plaintiffs allege that the Copyright Renewal Act and the CTEA violate  
17 the First Amendment to the United States Constitution by imposing an unconstitutional  
18 burden on speech with respect to works created after January 1, 1964 and before  
19 January 1, 1978 as a result of having altered the “traditional contours” of copyright law from  
20 a conditional copyright regime to an unconditional copyright regime. (See Compl. ¶¶ 81-  
21 92.)

22 In Eldred, the Supreme Court observed that the adoption “close in time” of the  
23 Copyright Clause and the First Amendment indicated that the Framers of the Constitution  
24 were of the belief that “copyright’s limited monopolies are compatible with free speech  
25 principles.” See Eldred, 537 U.S. at 219. As the Supreme Court noted, “copyright’s  
26 purpose is to promote the creation and publication of free expression,” see id. (emphasis in  
27 original), and “[b]y establishing a marketable right to the use of one’s expression, copyright  
28 supplies the economic incentive to create and disseminate ideas.” Id. (quoting Harper &

1 Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985)).

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

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

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

1 legislation under the First Amendment. See id.

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

10 By contrast, the registration, renewal, deposit, and notice requirements do not define  
11 the scope of copyright protection but, rather, the procedural steps necessary to obtain and  
12 maintain a copyright. Congress has repeatedly stated that these requirements are mere  
13 “formalities.” See, e.g., S. REP. NO. 102-194 at 5-6 (repeatedly referring to renewal  
14 requirement as a “formality”); see also S. REP. NO. 100-352 at 12 (referring to notice and  
15 registration requirements as “formalities”); H. R. Rep. No. 83-2608, 1954 U.S.C.C.A.N.  
16 3629, 3631 (1954) (referring to deposit, registration, and notice requirements as  
17 “formalities”; proposing amendments to U.S. copyright law to conform to Universal  
18 Copyright Convention). Such formalities do not alter the scope of copyright protection, but  
19 merely determine the procedures necessary to obtain or maintain such protection.  
20 Because changes to requirements of this nature do not alter the substantive rights granted  
21 by copyright, this Court finds that the challenged amendments do not alter the “traditional  
22 contours of copyright protection.” Although plaintiffs state, in their opposition, they will  
23 show at trial the “real world effect,” (see Opp. at 3), of the challenged changes to copyright  
24 law, no such evidence can alter this fundamental defect in their case.

25 As plaintiffs do not allege any alterations to the “traditional contours of copyright  
26 protection,” no further First Amendment analysis is necessary. See Eldred, 537 U.S. at  
27  
28

1 221.<sup>8</sup> Accordingly, defendants' motion to dismiss Count One will be granted, and Count  
2 One will be dismissed with prejudice.

3 **CONCLUSION**

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

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

7 **IT IS SO ORDERED.**

8 Dated: November 19, 2004

/s/ Maxine M. Chesney \_\_\_\_\_  
MAXINE M. CHESNEY  
United States District Judge

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27 <sup>8</sup> In light of the findings set forth above, the Court does not reach Ashcroft's  
28 additional contention that plaintiffs lack standing to challenge the constitutionality of the  
1976 Act and the BCIA.