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14
15 IN THE UNITED STATES DISTRICT COURT

16
17 NORTHERN DISTRICT OF CALIFORNIA

18 BREWSTER KAHLE,
19 INTERNET ARCHIVE,
20 RICHARD PRELINGER,
21 and PRELINGER ASSOCIATES, INC.,

22 Plaintiffs,

23 v.

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

26 Defendant.

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Civil Case No. C 04-1127 BZ

**AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

1 **AMENDED COMPLAINT**

2 This case is an action for declaratory relief pursuant to 28 U.S.C. § 2201. It arises from the
3 conflict between two fundamental changes that have affected the ability of individuals to cultivate and
4 spread culture. One change is technological; the other is legal.

5 The technological change is the birth and spread of the Internet. The Internet has created an
6 extraordinary opportunity for individuals, including Plaintiffs, to cultivate and spread our culture. No
7 single technological change in the history of the American Republic has more profoundly affected the
8 potential for democratic speech and the spread of knowledge.

9 The legal change is the radical shift in the nature and extent of copyright regulation. For almost
10 190 years of the American Republic, copyright law was purposefully tailored to regulate extremely
11 narrowly. Given the nature of creative production, and the limits to the law, copyright burdened
12 relatively few — especially few beyond commercial creators. The law thus left essentially unburdened
13 archivists, preservationists, libraries, and non-commercial creators.

14 This traditional pattern has now changed. Whereas copyright regulation before was the
15 exception, it is now the rule. Whereas the burden of copyright before was effectively limited to works
16 that had continuing commercial viability, the burden of copyright now is spread broadly and
17 indiscriminately to all creative works regardless of any continued commercial interest in the copyright.
18 Whereas traditionally, the contours of American copyright law guaranteed that this regulation of speech
19 was reasonably and effectively tailored to a viable commercial interest, today this regulation of speech
20 burdens effectively all creative work, regardless of any continuing commercial interest in “Authors” to
21 control its dissemination or use.

22 Some of these changes in the law have importantly strengthened the rights of creators to control
23 and profit from the distribution of their works. That is the proper aim of copyright, with which Plaintiffs
24 have no quarrel.

25 But because of the radically indiscriminate nature of the most recent of these changes, the law
26 has also produced an extraordinary “orphan class” of creative work — work that the author has no
27 continuing interest to control, but which, because of the burdens of the law, no one else can effectively
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1 and efficiently archive, preserve, or build upon in the digital environment for a term now reaching almost
2 a century.

3 This is an important and radical change in the nature of copyright law, coming just at a time
4 when technology could enable the archiving, preservation, and reuse of content at a level never imagined
5 before. For 186 years, American law limited the grant of copyright to those authors who claimed the
6 need for copyright's benefit. But because of the indiscriminate nature of copyright today, the burden of
7 copyright regulation extends to work whether or not the original author has any need for continuing
8 protection. That unnecessary burden blocks the cultivation of our culture and the spread of knowledge.

9 Plaintiffs, the Chairman and the President of two archives that post public domain books, films,
10 audio, and other creative works on the Internet, and the archives themselves, seek declaratory
11 judgment:

- 12 (1) that Copyright Renewal Act of 1992 (Copyright Renewal Act) and the Copyright Term
13 Extension Act (CTEA) are unconstitutional by virtue of the First Amendment;
- 14 (2) that the Copyright Renewal Act and the CTEA have violated the "limited Times"
15 prescription of Article I, sec. 8, cl. 8, by establishing terms that are so long as to be
16 effectively perpetual;
- 17 (3) that the Copyright Act of 1976, the Berne Convention Implementation Act (BCIA), and
18 the Copyright Renewal Act are unconstitutional for failing to "promote ... Progress;"
- 19 (4) that the Copyright Renewal Act and CTEA are unconstitutional to the extent they extend
20 the terms of copyrights that have not, and will not, be renewed.

21 Plaintiffs also seek preliminary and permanent injunctive relief against the criminal enforcement
22 of § 2(b) of the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"),
23 amending 17 U.S.C. 506(a), with respect to works first published after January 1, 1964 and before
24 January 1, 1978.

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27 **PARTIES**

28
29 **AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

1 2. Plaintiff Brewster Kahle resides at 513B Upper Simonds Loop, San Francisco, California
2 94129.

3 3. Plaintiff Internet Archive is a 501(c)(3) public nonprofit corporation located at The Presidio of
4 San Francisco, 116 Sheridan Avenue, San Francisco, CA 94129, and found on the Internet at
5 <<http://www.archive.org/>>. Internet Archive's principal activity is to build an "Internet library,"
6 with the purpose of offering permanent and free access for researchers, historians, and scholars
7 to works — including audio, books, films, websites, and software — that exist in digital format.
8 Internet Archive is currently working, in partnership with Carnegie Mellon University, the
9 National Science Foundation, and the governments of India and China, on the "One Million
10 Book Project," which is an effort to create a digital archive of one million books in fully-
11 readable online text format. Among the books to be offered will be a large number of "orphan"
12 works — i.e., books that remain under copyright, but are out of print and therefore not widely
13 available to the public. Internet Archive also operates the "Internet Bookmobile", a mobile
14 Internet bookstore that downloads, prints and binds public domain books for \$1 each. Plaintiff
15 Kahle is the Chairman of the Board of Internet Archive.

16 4. Plaintiff Richard Prelinger resides at 649 15th Avenue, San Francisco, California 94118.

17 5. Plaintiff Prelinger Associates, Inc., a New York corporation known in the trade as Prelinger
18 Archives, was founded in 1983 by Plaintiff Richard Prelinger in New York City and
19 incorporated in 1985. In 20 years, it has grown into a collection of over 48,000 "ephemeral"
20 (advertising, educational, industrial, and amateur) films. Prelinger Archives provides stock
21 footage to the media and entertainment industries through its authorized sales representative,
22 Getty Images, and is supported by royalty payments from Getty. In 2002, the film collection
23 was acquired by the Library of Congress. Prelinger Archives remains in existence, holding
24 approximately 4,000 titles on videotape and a smaller collection of film materials acquired
25 subsequent to the Library of Congress transaction. Its goal remains to collect, preserve, and
26 facilitate access to films of historic significance that have not been collected elsewhere, or made
27 commercially available elsewhere. Included are films produced by and for many hundreds of
28

1 important U.S. corporations, nonprofit organizations, trade associations, community and interest
2 groups, and educational institutions. The collection, including the portion acquired by the Library
3 of Congress, currently contains over 10% of the total production of ephemeral films between
4 1927 and 1987, and it may be the most complete and varied collection in existence of films
5 from these poorly preserved genres. Plaintiff Richard Prelinger is the President of Prelinger
6 Associates, Inc.

- 7 6. Defendant John Ashcroft is the Attorney General of the United States and the head of the
8 United States Department of Justice. Ashcroft is responsible for the enforcement of the
9 copyright and criminal laws of the United States, including the Copyright Act of 1976
10 (Copyright Act), Copyright Renewal Act, CTEA, and NET Act.

11 12 **JURISDICTION AND VENUE**

- 13 7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201,
14 because this declaratory judgment action challenges the constitutionality of federal statutes.
15 There is personal jurisdiction over defendant Ashcroft. Venue is properly laid in this District
16 under 28 U.S.C. § 1391(e).

17 18 **STANDING**

- 19 8. Plaintiffs have standing to bring and maintain this action because their activities have been, and
20 will continue to be, directly affected by the Copyright Act, Copyright Renewal Act, CTEA, and
21 NET Act. Plaintiffs have for many years routinely taken films, music, books and other creative
22 works that are in the public domain and have posted those works on the Internet. Plaintiffs plan
23 to continue to do so for the indefinite future. Among the works that plaintiffs had been preparing
24 to post on the Internet are works created between 1964 and 1978, that, but for enactment of
25 the Copyright Renewal Act and CTEA, could have been legally copied and distributed on
26 January 1, 2004. The total retail value of such works would exceed \$1,000.

1 9. The Copyright Act can be civilly enforced against Plaintiffs and, through the NET Act, criminally
2 enforced as well. In addition, Plaintiffs’ constitutional rights to freedom of expression have been
3 chilled by enactment of the Copyright Renewal Act and the CTEA.

4
5 **BACKGROUND**

6 **A. Technological Changes Affecting the Cultivation of Culture
7 and Spread of Knowledge**

8 10. Digital technologies have profoundly changed the nature and economics of creativity and the
9 preservation of creativity. In particular, they have changed the efficiency with which creative
10 work can be created, preserved, copied, and integrated, and the efficiency with which it can be
11 spread.

12 11. Digital technologies have changed the efficiency with which work can be created, preserved,
13 copied, and integrated by providing a common platform upon which creative work can subsist.
14 This “digital platform” makes it inexpensive to create and restore creative work. It enables
15 perfect and inexpensive copies of any digitized work. And because sound, images and text
16 reside on a common platform, it allows work to be more easily integrated.

17 12. Apple’s iLife technologies are examples of this creative capacity. iLife is a suite of technologies
18 for manipulating digital content, including technologies for manipulating sound (iTunes), still
19 images (iPhoto), and moving images (iMovie). Each of these technologies enables the user to
20 organize and manipulate digital objects. iMovie enables the user to integrate moving images with
21 still images and sound. Each also enables the user to produce copies of the digital objects that
22 they manipulate. iLife includes a technology (iDVD) to enable users to burn DVDs of their
23 content.

24 13. Plaintiff Internet Archive is an example of this preservation capacity. The Internet Archive,
25 <<http://www.archive.org>>, offers free access to over 300 terabytes of content — more than 10
26 times as much data as all of the text in the Library of Congress. The archive has over 30 billion
27 Web pages, archived from the beginning of 1996. It hosts over 33,705 audio, video, and texts-
28 based works, available for free download from its site. The Internet Archive also hosts 3,173

1 moving images, ranging from graduate-level mathematics lectures to independent news and
2 ephemeral films. The archive's texts collection contains 21,633 public domain works, including
3 the first 10,551 books digitized pursuant to a "Million Book" project. Users have contributed
4 7,643 live concert recordings, 1,043 studio recordings, and 213 radio programs to the audio
5 collection. The cost of storing this content is less than \$1 million per year. And because the cost
6 of digital storage continues to fall dramatically, the cost of storing a terabyte of data continues to
7 decline each year.

8 14. Digital technologies have also radically improved the efficiency with which work can be spread.

9 15. At the core of these technologies is the Internet.

10 16. The Internet is a network of networks linked by a common suite of protocols (referred to as
11 "TCP/IP"), which enables content to be spread efficiently around the world.

12 17. The Internet originated in 1968 as a research program funded by the Defense Advanced
13 Research Projects Agency (DARPA). Initially limited by rule to noncommercial activities, in
14 1992 the commercial restriction was lifted. Since 1992, the Internet has linked networks
15 established by individuals, governments, businesses, universities and non-profit organizations.
16 Today, the Internet is believed to have more than 650 million users worldwide.

17 18. Among the protocols within TCP/IP are protocols to enable the "World Wide Web." "The
18 Web" is a collection of easily accessible files and databases located on machines across the
19 Internet. Machines host "Web sites" which provide resources associated with a certain person
20 or organization. An individual or organization with a Web site can "post" a message, document,
21 or other type of information on the Web. Anything posted openly on the Web can be read and
22 copied (or "downloaded") by anyone who has access to the Internet.

23 19. Another protocol within TCP/IP is a protocol for transferring files across the Internet. This
24 protocol is known as "FTP." With this protocol, computers on the Internet can exchange files.
25 These files can contain documents, or images, or sound, or any other content saved in a digital
26 form.

1 20. Project Gutenberg, <<http://promo.net/pg/>>, is an example of the access capacity enabled by
2 these protocols. Through a massive, worldwide, voluntary effort, Project Gutenberg has
3 digitized thousands of public-domain books and made them available for free. These books are
4 available using the protocols of the Web, or FTP. As a consequence, this library of public-
5 domain works is now available to the world at no cost (beyond the cost of Internet
6 connectivity). Before the Internet, the same access would have cost literally millions of dollars.

7 21. These Internet protocols have also been integrated into commercial and noncommercial
8 applications. Again, for example, Apple's iLife technologies integrate directly with Apple's Web
9 service, .Mac, so content produced using iLife can immediately be published to the Web. Many
10 other commercial and noncommercial services offer similar functionality — including Kodak's
11 Ofoto service, and Six Apart's "TypePad" Weblog hosting service.

12 22. The suite of Internet protocols, and the applications and services that take advantage of these
13 protocols, have made possible a previously unknown freedom of speech. Anyone with access
14 to the Internet can make creative content available to anyone else in the world at a marginal cost
15 approaching zero. For the first time in history, borders need not limit publication, and economics
16 need not restrict the spread of knowledge.

17 23. The suite of Internet protocols, tied to the falling cost of digital storage, also means that for the
18 first time in history, archives of knowledge and culture can be made available cheaply around
19 the world. For the first time in history, the dream of the Library of Alexandria is a possibility —
20 not just for the few with access to a remote but universal library, but for anyone with access to
21 the Internet.

22 24. Plaintiff Prelinger Archives is an example of the distributive capacity. Because of the falling
23 costs and economies of scale of online digital distribution, Prelinger Archives is able to make its
24 film holdings widely accessible at a fraction of the traditional costs. The archive has made 1,620
25 motion pictures available on-line, through the Internet Archive, including industrial, advertising,
26 educational, amateur, newsreel and actuality films. These works are available for free viewing,
27 or can be downloaded for a variety of purposes, including for transformative use of portions of

1 a motion picture in a derivative work. Since January 2, 2001, there have been over 1.5 million
2 downloads from the Prelinger Archives, and many of these downloads have been for the
3 purpose of transformative uses.

4 25. Because of these technologies, the costs of publishing material to the world have fallen
5 dramatically. Using simple and inexpensive technologies for digitizing and marking content,
6 content can be made available to any computer across the world. This change in turn has
7 inspired many to build free libraries of content available to anyone on the Net. It has also
8 inspired many businesses to publish content they otherwise would not have published. These
9 technologies, in short, have exploded the opportunities for free speech, learning, and culture
10 around the world.

11 **B. Legal Changes Affecting the Cultivation of Culture and Spread of Knowledge**

12 26. At the same time that technology has been lowering profoundly the costs of cultivating culture
13 and spreading knowledge, radical changes in the nature and scope of copyright law have been
14 increasing those same costs. These changes arise from specific amendments that Congress has
15 made to the federal copyright law, but these changes, fundamentally at odds with the tradition of
16 copyright law in America, are all of recent origin.

17 27. These changes have been driven by the legitimate and valuable objective of benefiting authors
18 and creators in their ability to exploit their work commercially. But the unintended consequence
19 of these changes in the law has been to radically burden other important uses of knowledge and
20 creative work, after the commercial life of that content has expired.

21 28. The law thus effectively “orphans” this creative work. Plaintiffs’ sole focus in this challenge is
22 upon this orphaning effect.

23
24 **(1) The Constitutional Source of Congress’ Copyright Regulation**

25 29. Congress’s power to regulate speech through copyright law is grounded in the Constitution.
26 Article I, § 8, cl. 8, referred to herein as the “Progress Clause,” gives Congress the power “to

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

3 30. The Progress Clause is “both a grant of power and a limitation.” *Eldred v. Ashcroft*, 537 U.S.
4 186 (2003) (slip. op. 21), quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

5 31. The “grant of power” is the power to “promote the Progress of Science.”

6 32. The “limitation[s]” are those specified in the balance of the clause — that the “exclusive right” be
7 granted “to Authors” for “their ... Writings” and “for limited Times.” Congress has no power,
8 pursuant to Article I, §8, to grant a copyright to anyone but an “Author.” It has no power to
9 grant a copyright except for a “Writing.” It has no power to grant a copyright except for a term
10 that is “limited.”

11
12 **(2) Conditional versus Unconditional Copyright Regimes**

13 33. The traditional pattern of copyright regulation in the United States has recently changed
14 dramatically. That change can be understood by contrasting two types of copyright regimes —
15 conditional and unconditional.

16 34. A *conditional copyright regime* limits copyright protection to those who take affirmative steps
17 to claim copyright protection. For example, a regime that requires registration of a copyrighted
18 work, or the deposit of a copyrighted work, or the marking of a copyrighted work with
19 copyright notice, or the renewal of the term of protection, is a conditional regime.

20 35. An *unconditional copyright regime* grants copyright protection whether or not the author or
21 his assigns takes any affirmative steps to claim copyright protection. For example, a regime that
22 grants protection whether or not the work is registered, deposited, marked, or renewed, is an
23 unconditional copyright regime. In each instance, protection is automatic, regardless of the will
24 of the author or his assigns.

25
26 **(3) The Traditional Contours of the United States Copyright Law:
27 Conditional Copyright**

1 36. For the first 186 years of the Republic, the United States had a conditional copyright regime.
2 The protection of copyright was granted only to those authors, or their assigns, who took
3 affirmative steps to indicate their desire for protection. An author or copyright holder who failed
4 to take these affirmative steps dedicated their works to the public domain.

5 37. Thus, under the Copyright Act of 1790, Act of May 31, 1790, 1 Stat. 124, the initial term of
6 copyright protection was 14 years. But that term of protection was secured only if the author
7 (1) registered his work, §3 (2) deposited a copy of the work, §4, and (3) provided notice of
8 the copyright in “one or more of the newspapers printed in the United States,” §3 (“notice
9 requirement”). Likewise, to secure the benefit of a second term, the Act of 1790 required an
10 author to re-register the work through a process called “renewal.” §1.

11 38. The Act of 1831, 4 Stat. 435, followed the same form. That act extended the initial term of
12 copyright to 28 years, §15, 4 Stat. 439. But the act kept the registration, deposit, and notice
13 requirements of the 1790 regime, see §§ 3 - 5, 4 Stat. 437-48, and kept the requirement that
14 copyright owners renew their copyright to secure the benefits of a second term. § 2, 4 Stat.
15 436-37.

16 39. The Act of 1909, 35 Stat. 1075, also preserved this traditional form. That act kept the
17 registration, deposit, and notice requirements. §§ 9, 10, 12, 13, 18, 19. It extended the renewal
18 term of the 1831 Act, but it expressly limited that extension to works that authors had actually
19 renewed. §21.

20 40. The consequence of requiring these affirmative steps to secure copyright protection was that the
21 overwhelming majority of published works either passed immediately into the public domain
22 (because they were never registered or notice was not given), or passed into the public domain
23 after a relatively short initial term of protection (because their terms were never renewed).

24 41. Because of the requirements of registration, deposit, and notice, the vast majority of published
25 work historically was never subject to copyright. In the period 1790 to 1800, for example,
26 copyright protected no more than 5% of published works, because only 5% was registered
27 according to the rules of the 1790 Act. The remaining 95% of published work thus moved
28

1 immediately into the public domain. And while the proportion of registered work grew
2 dramatically over the 186 years that defined the traditional regime, copyright still affected just a
3 small part of the total body of published work.

4 42. Likewise, the requirement of renewal moved the vast majority of copyrighted work into the
5 public domain after a relatively short initial term. For most of our history, the renewal rate for
6 copyrighted works averaged between 8% and 15%. At its highest, in 1990, the rate was 22%.
7 Renewal rates for different certain classes of works were substantially lower. The renewal rate
8 for books has averaged less than 8%, and for graphic arts, approximately 3%.

9 43. Thus, using the highest renewal figure for all works, the average term of copyright under the
10 conditional copyright regime at no time exceeded 34.1 years.

11 44. Although Congress has periodically revisited the copyright law, both to broaden the types of
12 works subject to copyright (e.g., to film, sound recordings, and technical drawings) and to
13 lengthen the term of copyright, for almost two centuries, U.S. copyright statutes retained the
14 core features of a conditional copyright regime — a copyright for a fixed term of years, subject
15 to registration, deposit, notice, and renewal.

16 45. This conditional regime thus kept a vast amount of creative work wholly free of the burdens of
17 copyright regulation. Even for the subset of works for which authors secured copyright, the
18 conditional regime kept records of the works for which copyright was claimed, and moved most
19 protected work into the public domain after a relatively short initial term. Both the existence and
20 duration of copyright regulation was effectively narrowed to just those works that the author or
21 his assigns desired to protect. The balance of creative work was left free of copyright regulation,
22 or released from protection early.

23
24 **(4) The Changed Contours of United States Copyright Law:
Unconditional Copyright**

25 46. In 1976, Congress began a process to change “the traditional contours” of copyright, *Eldred*,
26 557 U.S., at 221, by replacing a conditional copyright regime with an unconditional one.
27
28

1 47. In 1976, Congress abolished any registration, deposit, or renewal requirement for works
2 created on or after January 1, 1978. These changes meant that the grant of protection for
3 copyright extended automatically to all works for the full term of copyright, without requiring any
4 affirmative actions by the author or his assigns. Congress has retained a voluntary registration
5 system.

6 48. In 1988, Congress passed the Berne Convention Implementation Act, Pub. L. No. 100-568,
7 102 Stat. 2853-2861, which prospectively eliminated the notice requirement, and also removed
8 registration as a pre-requisite for filing an infringement action for the works of foreign authors.
9 Congress has retained a requirement that U.S.-based works be registered before an
10 infringement suit based upon the work is brought

11 49. In 1992, Congress passed the Copyright Renewal Act, Pub. L. No. 102-307, 106 Stat. 266,
12 which indiscriminately renewed all copyrights dating from January 1, 1964 to December 31,
13 1977. Though historical patterns suggest that no more than 8-15% of the copyrights during that
14 period would have been renewed, Congress extended the protection of copyright to all
15 subsisting copyrights even in the absence of any expressed desire by the copyright owners to
16 secure the benefits of an additional term.

17 50. Finally, in 1998, Congress passed the Sonny Bono Copyright Term Extension Act, Pub. L. No.
18 105-298, 112 Stat. 2827-2828, which unconditionally extended by 20 years the term of all
19 subsisting copyrights, including those automatically extended by the Copyright Extension Act,
20 regardless of any expressed desire by the copyright owners to secure the benefits of an
21 additional term.

22 51. These changes have had a profound effect on the nature and reach of copyright regulation.

23 52. Whereas the traditional contours of a conditional copyright regime assured that the burdens of
24 copyright regulation were narrowed to those works for which the author or his assign desired
25 continued protection, an unconditional regime guarantees that the vast majority of works
26 regulated by copyright serve no continuing commercial or copyright-related interest for their
27 authors.

1 53. Whereas the traditional contours of a conditional copyright regime produced records both of the
2 material protected and its ownership, an unconditional copyright regime destroys any reliable
3 indication of copyright ownership, or any useful record of current ownership.

4 54. Whereas the traditional contours of a conditional copyright regime produced, through the
5 renewal requirement, a fresh record of copyright ownership, an unconditional copyright regime
6 guarantees no mechanism to identify the current or even presumptive owner of copyrighted
7 material. This makes subsequent reuse practically impossible for the vast majority of uses that
8 Plaintiffs would enable. Without notice, there is no clear way to know where copyright is
9 claimed. Without a registry, there is no reasonable method for identifying copyright owners.

10 **(5) Extension of Copyright Terms**

11 55. While Congress has historically extended the term of subsisting copyrights, in every case before
12 the CTEA, every subsisting copyright whose term was extended passed at some point through
13 the filter of a renewal requirement. Never were terms extended except in the context of works
14 that would have to be renewed to get the benefit of an extended term.

15 56. The Act of 1831 extended the initial term of subsisting copyrights from 14 to 28 years, but
16 within a regime that required copyright owners to renew their copyright to secure the benefits of
17 the maximum term of 42 years.

18 57. The Act of 1909 likewise extended the renewal term of subsisting copyrights, but the act
19 expressly limited its effect to works that had been renewed.

20 58. And finally, the Copyright Act of 1976 extended the term of subsisting copyrights, but again,
21 only works that were renewed would receive the benefit of the maximum term.

22 59. Thus, *every extension of subsisting copyrights* until CTEA conditioned the maximum
23 copyright term upon the copyright holder satisfying a renewal requirement. Every extension was
24 thus conditioned by the renewal requirement.

25 60. In 1998, Congress enacted the CTEA. Among other changes, that Act extended the term of
26 subsisting copyrights by 20 years. This extension was granted indiscriminately to all subsisting
27 copyrights. But because the renewal requirement survived in American law until 1992, the effect
28

1 of this extension differed dramatically depending upon the period during which the initial
2 copyright was granted.

3 61. For registered works published between January 1, 1923 and December 31, 1963, CTEA
4 extended the term of any subsisting copyright by 20 years. But because the average renewal
5 rate for work published between 1923 and 1926 was just 15%, 85% of the work originally
6 copyrighted during that period had already passed into the public domain. Thus, while CTEA
7 extended the terms of subsisting copyrights, the filter of renewal had already eliminated the
8 burden of copyright regulation from the vast majority of copyrights granted during this period.

9 62. For registered works published between January 1, 1964 and December 31, 1978, CTEA
10 extended the term of subsisting copyrights by 20 years. But because the Copyright Renewal Act
11 had granted an automatic renewal to all subsisting copyrights not yet in their renewal term,
12 CTEA extended the copyright term of a class of works of which, according to historical data,
13 85% would never have been renewed.

14 63. CTEA was thus the first statute to extend the copyright term for works that had not been filtered
15 by a renewal requirement. It is thus the first extension in United States history to so
16 unconditionally and indiscriminately extend the burdens of copyright.

17 **(6) The Burden of Unconditional Copyright Regulation**

18 64. This shift to a regime of unconditional copyright regulation has significantly increased the burden
19 of copyright on the freedom to cultivate culture and spread knowledge. While the traditional
20 contours of copyright protection excluded a significant portion of creative work from the
21 regulation of copyright, eliminating those limitations on the reach of copyright significantly
22 burdens speech. These burdens can be understood more precisely according to when the
23 relevant work was copyrighted.

24 65. Works first published before 1923 are in the public domain. For these works, the changes in
25 copyright law have no effect.

1 66. Works first published between 1923 and 1964 whose term was not renewed 28 years after
2 their first publication are in the public domain. For those works too, the changes in copyright
3 law have no effect.

4 67. Works first published between 1923 and 1964 whose terms were renewed 28 years after their
5 first publication now enjoy a 95-year term of protection. This term has been unconditionally
6 extended twice. By a series of extensions between 1962 and 1974, these works were granted
7 an additional term totaling 19 years. They were granted another unconditional 20-year extension
8 by CTEA. Thus, while these works have at least passed through a filter of renewal,
9 unconditional extensions of copyright burden access to these works by presumptively extending
10 their protection by 39 years without any indication by the author or his assigns that such
11 protection is desired, and without producing any effective registry of the current owners of the
12 copyright.

13 68. It is works first published on or after January 1, 1964 but before January 1, 1978, that are the
14 focus of this action. These works constitute the first class of work in American history that has
15 had its term extended without any requirement of renewal. From historical data, it can be
16 inferred that the vast majority of this work would never have been renewed at the end of its
17 initial 28-year term. Nonetheless, because of the extensions of the Copyright Act of 1976, and
18 the CTEA, the term for this work has been extended by 67 years without any indication by the
19 author or his assigns that such protection is desired, and without producing any effective registry
20 of the current owners of these copyrights.

21 69. This change to an unconditional copyright regime thus radically burdens access to copyrighted
22 works first published after January 1, 1964 and before January 1, 1978. There is no continuing
23 copyright-related interest in continuing the protection of copyright for the vast majority of this
24 work. While that burden may be slight in the context of commercially viable works — since the
25 fact of commercial availability makes access possible, and makes identifying the copyright
26 owner relatively easy — for the vast majority of works in this period that are not currently
27 commercially available, this unconditional regime effectively orphans them. Internet based
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1 archives, libraries, film restorers, and follow-on creators have no viable or reasonable way to
2 identify copyright owners for this creative work. And with respect to this work, there is no
3 copyright-related benefit from abolishing registration.

4 **(7) The No Electronic Theft Act**

5 70. In addition to extending the terms of copyright, Congress has increased the penalty for
6 unauthorized use of copyrighted material. In particular, the No Electronic Theft Act of 1997 (the
7 “NET Act”) criminalizes copyright infringement. It amended 17 U.S.C. § 506(a) to provide, in
8 relevant part:

9 Section 2. Criminal Infringement of Copyrights. . . . (a) Criminal
10 Infringement. — Any person who infringes a copyright willfully either —
11 (1) for purposes of commercial advantage or private financial gain, or
12 (2) by the reproduction or distribution, including by electronic means,
13 during any 180-day period, of 1 or more copies or phonorecords of 1
14 or more copyrighted works, which have a total retail value of more than
\$1,000, shall be punished as provided under section 2319 of title 18,
United States Code.

15 71. 18 U.S.C. § 2319(c), in turn, makes it a felony to violate 17 U.S.C. § 506(a)(2):

16 (c) Any person who commits an offense under section 506(a)(2) of title
17 17, United States Code—shall be imprisoned not more than 3 years, or
18 fined in the amount set forth in this title, or both, if the offense consists
19 of the reproduction or distribution of 10 or more copies or
20 phonorecords of 1 or more copyrighted works, which have a total retail
21 value of \$2,500 or more; shall be imprisoned not more than 6 years, or
22 fined in the amount set forth in this title, or both, if the offense is a
23 second or subsequent offense under paragraph (1); and shall be
24 imprisoned not more than 1 year, or fined in the amount set forth in this
title, or both, if the offense consists of the reproduction or distribution of
1 or more copies or phonorecords of 1 or more copyrighted works,
which have a total retail value of more than \$1,000.

25 72. The No Electronic Theft Act, as its name suggests, was enacted to criminalize the violation of
26 copyrights through the posting of copyrighted materials on the Internet. But the statute is not
27 limited to network-based copyright infringement. Instead, it threatens additional criminal
28 penalties for copyright infringement generally. These additional penalties significantly chill the

1 opportunity of archives such as Plaintiffs' to make even commercially unavailable work
2 accessible to the world.

3
4 **C. The Effect of These Legal and Technological Changes Together**

5 73. These changes in law and technology together mean that copyright law is now effectively
6 removing much of the creative potential that the Internet provides for works first published after
7 January 1, 1964 and before January 1, 1978. With respect to work that continues to have
8 commercial viability, copyright provides authors and publishers with an important and valuable
9 incentive. But with respect to works that no longer have commercial viability, or for which the
10 author has no continuing commercial interest in preserving a copyright, the law substantially
11 burdens the creative potential of the Internet.

12 74. The reasons are directly tied to the nature of a digital network, and to the particular form that
13 copyright law now takes.

14 75. The ordinary trigger for copyright jurisdiction is the making of a "copy." Yet there is no way for
15 a digital network to function without making a copy. Thus, the ordinary use of copyrighted
16 materials on a digital network triggers the regulation of copyright, while the ordinary use of the
17 same materials off the network would not. In contrast to reading a physical book, which does
18 not necessarily involve copying that book, every time a person uses the Internet to view a film,
19 book, or still image, or to listen to a song, that person's computer makes a copy of the work.
20 As a result, copyright law permeates every use of creative work in the on-line environment —
21 including uses that are unregulated in the "analog" world of physical books, films, and
22 recordings.

23 76. Likewise, although copyright now affects ordinary people much more directly than it did in the
24 world before the Internet, the law has removed the tools that could have allowed users to trace
25 copyright ownership. Within an unconditional copyright regime, the costs of tracing and
26 identifying copyright owners are enormous. Likewise, the legal exposure for publishing work
27 without permission is also enormous. The consequence is that a vast amount of content is
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1 unavailable to the Internet, despite the overwhelming probability that the work either is in the
2 public domain, or is owned by an unknown rights holder who has no continued desire to
3 exercise control over the content.

4 77. Plaintiffs have experienced these burdens directly. Plaintiffs Internet Archive and Brewster
5 Kahle, for example, in partnership with Carnegie Mellon University, the National Science
6 Foundation, and the governments of India and China, have been working to build a fully-
7 readable online library of one million digitized books. Thus far, however, the difficulty of
8 identifying rights-holders and clearing copyright under current copyright laws has largely limited
9 the Million Book Project to government documents, old texts, and books from India and China,
10 where copyright laws are less burdensome. Though the works within this project are no longer
11 commercially available, the burden of clearing the rights to make them digitally available limits
12 the potential of the project.

13 78. Plaintiffs Kahle and Internet Archive do not intend to offer, free of charge, digitized versions of
14 copyrighted works that are commercially available. They instead intend to provide access to
15 “orphaned” works, while providing the author or copyright holder the right to request that its
16 work not be made available. But because of copyright regulation, these “orphan” books cannot
17 be made generally available. The project’s scope has thus necessarily been restricted. The result
18 is that a vast number of copyrighted yet no longer commercially valuable works sit idle rather
19 than enriching public knowledge.

20 79. The burden that unconditional copyright places on dissemination is further illustrated by the
21 experience of Plaintiff Richard Prelinger and the Prelinger Archives. Approximately 35% of the
22 motion pictures in the Prelinger Archives prior to the Library of Congress acquisition were,
23 though no longer commercially exploited, nonetheless subject to existing copyright. These films
24 too are “orphan” works. Although Prelinger Archives wishes to make these orphan films
25 available to patrons on the same basis as the archive’s public domain materials, the process of
26 locating rights holders for many of these works is too costly and uncertain. As a result, the part
27 of the collection subject to continuing copyright protection is available only on a very limited

1 basis. The Archive can make no copies of the works, nor can it permit transformative re-use of
2 this work. Because of copyright's burden, neither the rights holders nor the public are able to
3 benefit from these works.

4 80. Plaintiffs' desire is to give access to cultural and scientific work no longer commercially
5 available. But for the burdens created by the indiscriminate extension of copyrights from 1964
6 on, plaintiffs would continue their work of making commercially unavailable material accessible
7 through their archives. Both archives seek to collect and make available material from
8 throughout our history, but most importantly, from our recent past. Yet indiscriminate extensions
9 of the copyright term have significantly burdened that work.

10 **COUNT ONE: First Amendment**

11 81. Plaintiffs repeat and reallege paragraphs 1 through 80.

12 82. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of
13 speech, or of the press."

14 83. In *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003), the Supreme Court held that "when ...
15 Congress has not altered the traditional contours of copyright protection, further First
16 Amendment scrutiny is unnecessary."

17 84. By implication, when Congress does alter "the traditional contours of copyright protection,
18 further First Amendment scrutiny" should be necessary.

19 85. As alleged in paragraphs 32 through 45, "the traditional contours of copyright protection" in
20 America established a conditional copyright regime. Copyrights were granted, and maintained,
21 only if rights holders took affirmative steps to secure their rights.

22 86. These "traditional contours of copyright protection" served important First Amendment
23 interests. By requiring copyright owners to signal a desire to continue the protection of
24 copyright, the traditional requirement of renewal limited copyright to just those works whose
25 owners had a sufficient continuing interest in restricting use of the work. Likewise, the
26 registration and notice requirements provided clarity by identifying copyright holders and the
27 term of protection, thus facilitating the spread of knowledge through use of public domain
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1 material and licensing of works still under copyright. Like the doctrine of “fair use,” these
2 structural limitations on the scope of copyright’s regulation narrowly tailored the reach of the law
3 to those contexts within which the regulation would act as an “engine of free expression.”
4 *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545 (1985). It likewise
5 excluded copyright from those contexts within which the regulation would simply act as a brake
6 on free expression.

7 87. As alleged in paragraphs 46 through 63, beginning in 1976, Congress altered the “traditional
8 contours” of copyright law. By eliminating the renewal requirement, Congress eliminated the
9 mechanism by which unnecessary copyrights can be removed. By eliminating the registration,
10 deposit, and notice requirements, Congress has brought within the domain of copyright entire
11 classes of works for which protection was never desired, and then compounded the damage to
12 speech by removing the traditional means by which the owners of copyrighted material can be
13 identified.

14 88. All of these changes burden speech. Eliminating the renewal requirement burdens the speech of
15 Plaintiffs by limiting their ability to exploit material no longer exploited by the copyright holder.
16 Eliminating the registration and notice requirements burdens the speech of Plaintiffs by extending
17 copyright’s domain to a large amount of work for which no protection is desired, while
18 significantly increasing the cost of identifying the owners of creative work.

19 89. Because these changes have altered the “traditional contours” of copyright, they should be
20 evaluated under ordinary First Amendment scrutiny. Under either strict or intermediate review,
21 the burdens created by these changes for certain categories of copyrighted work far outweigh
22 any plausible benefits.

23 90. In particular, with respect to works created after January 1, 1964, and before January 1, 1978,
24 these changes have imposed an unconstitutional burden on speech. The term for work created
25 between January 1, 1964 and December 31, 1977 was extended by 19 years by the Copyright
26 Act of 1976. The term was then automatically renewed by the Copyright Renewal Act in 1992.
27 Finally, the term was unconditionally extended by 20 years by CTEA in 1998. Thus, even
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1 though historical data suggests that more than 85% of this work would never have had its
2 copyright renewed, the law has automatically extended the term for all of this work by 67 years.
3 This is the first category of copyrighted works in the history of the American Republic which has
4 had its term extended automatically without ever passing through the filter of renewal.

5 91. These changes to the copyright laws, as they are applied to and affect a large volume of creative
6 work that would never have had its copyright renewed, do not advance any legitimate
7 government interest. They instead impose substantial burdens on speech without advancing the
8 only legitimate interest the government might have — namely, to benefit the small minority of
9 work that continues to have commercial value. They therefore should be declared
10 unconstitutional as applied to the works identified and as to Plaintiffs.

11 92. A declaratory judgment will terminate the controversy between the parties.

12
13 **COUNT TWO: “Limited Times”**

14 93. Plaintiffs repeat and reallege paragraphs 1 through 92.

15 94. Article I, sec. 8, cl. 8, of the Constitution grants Congress the power to “Promote the Progress
16 of Science.”

17 95. That power is subject to a number of implied and expressed constitutional limits.

18 96. Among the expressed limits is the prescription that terms be “limited.”

19 97. While the Supreme Court has not yet interpreted fully the meaning of “limited,” in *Eldred v.*
20 *Ashcroft*, the Court indicated that “limited” means something more than simply a fixed term. As
21 the Court acknowledged, and as the government conceded, a term may be fixed yet exceed the
22 “outer boundaries” of a “limited” term. A term of 500 years may in one sense be “limited,” but it
23 would not be “limited” in the sense meant by the Constitution.

24 98. The Court in *Eldred* did not, however, indicate the standard to determine whether a term is so
25 long as to be effectively perpetual. In dicta, while the Court suggested that “[c]alibrating rational
26 economic incentives . . . is a task primarily for Congress, not the courts,” 537 U.S. at 207 n.15,

1 the Court also expressly recognized that petitioners in *Eldred* had not raised the claim that
2 copyrights had become so long as to be effectively perpetual. 537 U.S. at 199.

3 99. Justice Breyer in dissent argued that copyright terms had become so long as to be effectively
4 perpetual. Using a discounted present value analysis, Justice Breyer calculated that the current
5 term for work made for hire (95 years) returns to the creator 99.9997% of the value of a
6 perpetual term. This, Justice Breyer concluded, is an effectively unlimited term.

7 100. The method of discounted present value used by Justice Breyer to conclude that the term of
8 copyright had become effectively perpetual was well known to the Framers. Eighteenth Century
9 financial practices routinely valued property leases using the same formula relied upon by Justice
10 Breyer. A 99-year lease was understood to be the economic equivalent of a fee simple transfer.
11 Because the present value of that lease was the same as a fee simple transfer, it was considered
12 to be the equivalent of a perpetual term.

13 101. Under current law, the term of copyright ranges from 95 years for works made for hire, to life
14 of the author plus 70 years for ordinary works. In years, this means a range between 95 and
15 150 years. Under the analysis the framers would have applied to a term between 95 and 150
16 years, those terms would have been considered “effectively perpetual.”

17 102. This extreme term, moreover, is the product of very recent changes. As described in paragraphs
18 35 through 44, until the 1976 Act, the term of copyright in the United States was bifurcated.
19 The vast majority of copyright holders never renewed their copyright. Thus, while the maximum
20 term until 1978 was 56 years, the average term was never more than 34.1 years. In just 30
21 years, that average term has now tripled — from a maximum average term of 34.1 years in
22 1973, to 95 years for corporate works today.

23 103. At least with respect to work first published on or after January 1, 1964 and before January 1,
24 1978, and that has not been renewed, this term has become effectively perpetual. It is therefore
25 not “limited” under the ordinary and obvious meaning that the Framers intended in Article I, §8,
26 cl. 8.

27 104. A declaratory judgment will terminate the controversy between the parties.

COUNT THREE: “Promote . . . Progress”

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105. Plaintiffs repeat and reallege paragraphs 1 through 104.
106. Article I, sec. 8, cl. 8, of the Constitution grants Congress the power to “Promote the Progress of Science.”
107. In addition to enumerating a legislative power, the “Promote . . . Progress” language also imposes a constraint. As the Supreme Court stated in *Eldred v. Ashcroft*, “[t]he constitutional command . . . is that Congress, to the extent it enacts copyright laws at all, create a system that ‘promotes the Progress of Science.’” 537 U.S. 186, 212 (2003) (internal quotations and citations omitted). Congress “may not overreach the restraints imposed by the stated constitutional purpose.” *Graham*, 383 U.S. at 5-6. And although Congress is ordinarily permitted to make its own determination whether a particular change to the copyright laws will promote progress, Congress’s lawmaking in this area remains subject to judicial review.
108. By altering the copyright laws from a conditional to an unconditional system, as is enumerated in paragraphs 35 through 63, Congress has moved from a system that kept faith with its constitutional obligation to “Promote . . . Progress” to one that does not.
109. Congress’ removal of formalities from the copyright laws makes both the identification and use of public domain works and the licensing of works still under copyright more costly, risky, and uncertain. This occurs in at least two ways:
- (1) By eliminating the renewal requirement, Congress has eliminated the mechanism by which unnecessary copyrights can be removed. Congress has thereby limited the ability of would-be users to exploit the vast majority of copyrighted material that would otherwise, after a relatively short period of protection, be dedicated to the public domain.
 - (2) By eliminating the registration, deposit, and notice requirements, Congress has brought within the domain of copyright entire classes of works for which protection was never desired, and then compounded the damage to both public domain use and licensing by removing the traditional means by which the owners of copyrighted material

1 can be identified. The existence of large numbers of “orphaned” works — i.e., books,
2 films, music, and other creative works that are still under copyright but are no longer
3 being published or otherwise commercially exploited — illustrates the extent to which
4 the transformation of our copyright laws from a conditional to an unconditional system
5 has failed to promote progress.

6 110. In contrast to the substantial burdens that an unconditional copyright system imposes on the
7 licensing and use of public domain works, the removal of copyright conditions provides no
8 cognizable benefit to authors or the public that could not have been obtained without the
9 removal of conditions. Nor does an unconditional copyright system provide public benefits that
10 are even arguably commensurate with and proportional to the benefits that could be provided
11 via a properly constructed conditional copyright system.

12 111. In sum, in moving from a conditional to an unconditional copyright system, Congress has failed
13 to promote progress, and thus has acted beyond the scope of its power under the Progress
14 Clause.

15 112. In particular, extending the term of works that are not filtered by the formalities of a conditional
16 copyright regime — in light of the extraordinary opportunity cost that has arisen as the Internet
17 has removed non-copyright barriers to creation, preservation, and dissemination of creative
18 works — is beyond the power of Congress.

19 113. A declaratory judgment will terminate the controversy between the parties.
20

21 **COUNT FOUR: “Limited Times” II**

22 114. Plaintiffs repeat and reallege paragraphs 1 through 113.

23 115. *Eldred v. Ashcroft* rejected the claim that Congress exceeds its Progress Clause power when
24 it extends the term of existing copyrights. In the Supreme Court’s view, Congress’s historical
25 practice of extending existing terms justified Congress’s continued power.
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1 116. The Court in *Eldred* did not consider that every extension before CTEA applied to works
2 whose terms had to be renewed. CTEA was the first statute to purport to extend the term of
3 works that would never be filtered by a requirement of renewal.

4 117. This change in a fundamental contour of copyright's free speech protections should lead the
5 Court to reconsider its decision in *Eldred*, and hold that within an unconditional copyright
6 regime, Congress has no power to extend the terms of existing copyrights.

7 118. Because the prospective aspects of CTEA are not severable from the retrospective aspects, the
8 Act as a whole must be invalidated.

9 119. A declaratory judgment will terminate the controversy between the parties.

10
11 WHEREFORE, plaintiffs Brewster Kahle, Richard Prelinger, Internet Archive, and Prelinger
12 Associates, Inc. request that this Court enter judgment:

- 13 (1) Declaring that the Copyright Renewal Act and the CTEA are
14 unconstitutional by virtue of the First Amendment;
- 15 (2) Declaring that the Copyright Renewal Act and the CTEA have violated the
16 "limited Times" prescription of Article I, sec. 8, cl. 8, by establishing terms
17 that are so long as to be effectively perpetual;
- 18 (3) Declaring that the Copyright Act of 1976, the BCIA, and the Copyright
19 Renewal Act are unconstitutional for failing to "promote ... Progress;"
- 20 (4) Declaring that the Copyright Renewal Act and the CTEA are
21 unconstitutional to the extent they extend the terms of copyrights that have
22 not, and will not, be renewed;
- 23 (5) Enjoining defendant, his successor, and their subordinates from enforcing
24 the NET Act, 17 U.S.C. 506(a) against persons whose infringement of a
25 copyright would not have happened but for 17 U.S.C. §§ 302-304, as
26 amended by the CTEA, for works in their renewal term between January 1,
27 1964 and December 31, 1977, and otherwise;

- 1 (6) Awarding plaintiffs the costs of this action, including reasonable attorneys'
2 fees; AND
3 (7) Awarding such further relief as the Court deems just and appropriate.
4

5 Dated: March 30, 2004

Respectfully submitted,

6
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APPLICATION FOR ORDER SHORTENING TIME