No. 01-618

IN THE

# Supreme Court of the United States

ERIC ELDRED, *et al.*,

*Petitioners,*

*v.*

JOHN D. ASHCROFT, in his official capacity as Attorney General,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, DIGITAL FUTURE COALITION, MEDICAL LIBRARY ASSOCIATION AND SOCIETY OF AMERICAN ARCHIVIST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of Petitioners is submitted by the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Digital Future Coalition, the Medical Library Association, and the Society of American Archivists ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court grant the requested writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The **American Association of Law Libraries** is a nonprofit educational organization of over 5,000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public.

The **American Library Association** is a nonprofit educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries

The **Association of Research Libraries** is a nonprofit association of 123 research libraries in North America including university, public, government, and national libraries whose mission is to influence the future of research libraries in the process of scholarly communication.

The **Digital Future Coalition** is a forty-one member alliance of many of the nation's leading non-profit educational, scholarly, library, and consumer groups, as well as major

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. American University, Washington College of Law, Glushko-Samuelson Intellectual Property Clinic Students Christine Calareso, Lincoln Harris, Sheryl Rakestraw, and Timothy Tyre prepared this work under the supervision of Professor Ann Shalleck and Counsel of Record Professor Peter Jaszi.

commercial trade associations representing leaders in consumer electronics, telecommunications, computer, and network access industries.

The **Medical Library Association** is an educational organization of more than 1,000 institutions and 3,800 individual members in the health sciences information field.

The **Society of American Archivists r**epresents more than 3,000 individuals and 400 institutions and is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

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*Amici* are organizations whose members engage in practices such as preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books, creating works, and facilitating better technologically-adapted schools. Because *amici* continuously face copyright issues, they support balanced copyright laws. Restrictive copyright laws adversely affect authors, artists, curators, archivists, historians, librarians, and readers—the creators, recorders, keepers, disseminators, and users of our culture. *Amici* submit this brief to assist the Court's understanding of the practical consequences of this unique case for large segments of the public.

## SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") erroneously held that Congress' grant of twenty additional years of copyright protection as set forth in the Copyright Term Extension Act (CTEA)[2] is constitutional.[3] The DC Circuit failed to recognize that Congress' act violates the constitutional language that empowers Congress to grant copyright protection for "limited times" as a means of

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2. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

"promoting" the arts and sciences.[4] This balance struck by the Framers consisted of giving incentives for cultural production through limited rewards to creators, while providing for an ever-growing arena of ideas and materials available for the public. Central to this balance was the public domain, whose importance has been denigrated by the enactment of the CTEA.

The public domain is a vast expanse of knowledge, experience and ideas embodied in artistic creations, including written works, audio files, movies, and photographs, as well as historical documents and archives, held in common for all people to access, enjoy, research, and use as inspiration for future creations. The public domain results from the Framers' skepticism toward monopolies and remains an integral part of the balance between the protection of works and promotion of knowledge. Historically, copyright legislation and this Court's jurisprudence have recognized the importance of the public interest as embodied in this domain of information for the people.

The CTEA cannot promote the creation of works that already exist. But it will severely diminish the ability of modern creators to generate new art and new knowledge based on existing works — as did previous generations of authors and scholars. Artists, musicians, theatrical performers, scholars, educators, librarians, authors, publishers, archivists, and historians, among others, utilize the public domain. The CTEA harms these users by limiting their access to works through prohibitively expensive licensing fees and conditional permissions for use. The CTEA also prevents the timely preservation of works, deprives scholars of research materials, and reduces funds from educational institutions, thus hampering the preservation and dissemination of information, stories, and documentation of who we are as a people.

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4. U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for *limited Times* [emphasis added] to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). *Id*.

## ARGUMENT

### I. The Court Of Appeals Ignored The Original Intent Of The Framers That The Limited Monopoly Provided By Copyright Should Be Consistent With The Preservation Of A Vibrant Public Domain

The architecture of U.S. Copyright law embodies the principle that works should be available to the public after a limited time, through the avenue of the public domain. The public domain is the priceless repository of works that are ineligible for copyright, were created before copyright law existed, have had their copyrights expire, or have been freely given to the public by their authors. The Framers of the Constitution believed that dissemination of information throughout society was a cornerstone of learning, and thus of the democratic participation of citizens in the cultural and political life of the nation. They were skeptical of all restraints on the free exchange of ideas, whether by public tyranny or private monopoly.[5] Copyright operates as a monopoly for a limited time granted to the creator by the government for exclusive control over a work. This skepticism of the Framers shaped the constitutional "bargain" they struck between creators and the public: the grant of a *limited* monopoly in exchange for the subsequent deposit of works into the public domain.

The DC Circuit, in upholding the constitutionality of the Copyright Term Extension Act,[6] abandoned this constitutional

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5. [E]xclusion [of publishers] from the copyright clause is probably explained by concern for the perceived potential of a booksellers' monopoly in this country, the danger of which the copyright litigation in eighteenth-century England had made manifest . . . Given the vagaries of the political process – and the historically proven skills of publishers as legislative lobbyist – the limitations were essential if the goals of copyright were to be achieved and retained without being consumed by the monopolistic practices in the book trade.

L. Ray Patterson & Stanley W. Lindberg, *Nature of Copyright* 59 (1991).

6. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

bargain by ruling, in effect, that Congress has the power to use repeated extensions of the length of copyright protection for existing works (as well as new ones), transforming a limited monopoly into a virtually limitless one.[7] However, such ever-increasing periods of protection ignore the Constitution's clear directive to "Promote the progress of Science and useful Arts,"[8] and constitute a dangerous expansion of the monopoly created by copyright.

The dangers inherent in this expansion include rendering some older works inaccessible, some prohibitively expensive, and some available only upon restrictive conditions. Moreover, long terms of copyright mean that it is difficult or impossible even to determine who owns the rights that control the use of many cultural resources. This state of affairs differs dramatically from what the Framers envisioned.

Motivated by the need to promote the arts and sciences in a new society where individual freedoms to pursue and share knowledge through speech, religion, and the press were fundamental, the First Congress of the United States passed the Copyright Act of 1790, with the public domain as a central feature of its architecture.[9] This Court has in the past given deference to the acts of the First Congress when seeking enlightenment regarding Constitutional intent because many members of the First Congress were also Framers of the Constitution.[10]

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7. *See supra* note 3.

8. *See supra* note 4.

9. *See* Act of May 31, 1790, ch. 15, 1 stat. 124 (repealed 1831).

10. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument . . . is contemporaneous and weighty evidence of its true meaning.' " (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)). *See also Biographical Directory of the United States Congress, 1774 to Present*, *available at* http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Nov. 16, 2001) (noting that of the 55 original Founding Fathers, 20 were delegates at the First Congress: 10 Representatives and 10 Senators).

Cognizant of British law, the First Congress modeled the first statutory grant of copyright protection on the 1710 Statute of Anne[11] which itself reflected a deep anti-monopolistic bias.[12] Thus Congress granted fourteen years of protection with a provision for a fourteen-year renewal grant only if the author were alive.[13] Prior to the finalization of the Bill of Rights, Thomas Jefferson had proposed that it include the following language: "Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding ___ [sic] years, but for no longer term, and for no other purpose."[14] Although he did not specify a term, Jefferson knew that protection from unduly long copyright monopolies was a fundamental right of the people.[15] This idea was ultimately embodied in the "limited times" language of the intellectual property clause of the Constitution; like other Constitutional clauses, this one contained a grant of power to Congress with built-in restraints.[16] As Professor William Winslow Crosskey noted,

> Reading the [copyright] power, then, in the light of the Statute of Anne and then recent decisions of the English courts, it is clear that this power of Congress was enumerated in the Constitution, *for the purpose*

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11. *See* An Act for the Encouragement of Learning, 1710 8 Anne ch. 19 (Eng.) [hereinafter Statute of Anne].

12. *See* Merges, Robert et al., *Intellectual Property In the New Technological Age* 346-47 (2d ed. 2000). Parliament turned its back on publishers' unrestrained monopolies by enacting the Statute of Anne. It vested the new monopoly in authors rather than publishers, and limited it to fourteen years, with a possible renewal for another fourteen. The process of obtaining rights was made complex and very strict. Another anti-monopolistic measure in the statute provided for government power to set maximum prices for copyrighted books upon application by "dissatisfied" consumers. *Id*.

13. *See* Statute of Anne, supra note 11.

14. Thomas Jefferson to James Madison, August 28, 1789, *The Papers of Thomas Jefferson*, Julian P. Boyd, ed., volume 15 (Princeton, New Jersey: Princeton University Press, 1958), p.368.

15. *Id*.

16. *See id*. at note 4.

> of expressing its limitations. And those limitations were expressed, first, because the Convention did *not* desire that Congress should have any power to grant perpetual copyrights; and, second, because it *did* desire, by restricting Congress to the creation of limited rights, to extinguish, *by plain implication of "the supreme Law of the Land,"* the perpetual rights which authors had, or were supposed by some to have, under the Common Law.[17]

This history provides additional evidence of the Framers' view of intellectual property as a creature of positive law, designed for the public benefit.[18] Likewise, the constitutional language relating to copyright protection suggests three primary goals: promotion of learning, protection of the author, and preservation of the public domain.[19] Consistent with the Framers' views, the original copyright legislation and subsequent congressional acts until the 1909 Copyright Act[20] encouraged an expansive vision of the public domain.[21]

Modern scholarship stresses the centrality of the public domain to the public purpose of copyright law.[22] Professor Jessica Litman has stated

> American ideas of freedom are bound up with a vision of information policy that counts information as social wealth owned by all. We believe we are

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17. William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 486 (1953).

18. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. Ill. L. Rev. 1119, 1154 (2000).

19. *See supra* note 5 at 49.

20. Pre-1909 term extensions were few and modest. *See* Timothy R. Phillips, *The Unconstitutionality of the Copyright Term Extension Act of 1998*, 72 n.27.

21. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 Cardozo, Arts & Ent. L.J. 491, 513 (1999).

22. *See id.*

> entitled to say what we think, to think what we want, and to learn whatever we're willing to explore. Part of the information ethos in the United States is that facts and ideas cannot be owned, suppressed, censored or regulated, they are meant to be found, studied, passed along and freely traded in the "marketplace of ideas."[23]

Further, Professor Yochai Benkler sees the public domain as a vehicle for "a robust democratic discourse, of diversity of antagonistic voices, and of individual expressive autonomy."[24]

Nevertheless, congressional copyright extensions have dramatically suppressed the growth rate of the public domain.[25] The CTEA, Congress' most aggressive extension to date,[26] imposes extraordinary new restrictions on public access to copyrightable works by adding twenty years to all but a portion of one of the categories protected in the Copyright Act.[27] The DC Circuit appropriately recognized congressional authority to enact legislation that promotes creative labor through copyrights. However, the DC Circuit failed to recognize that lengthy copyright terms as embodied in the CTEA, violate the Constitutional mandate "to promote the Progress of Science and useful Arts."

Unless the court's decision is reversed, the public will be deprived of new cultural resources that depend on the availability of prior work on reasonable terms.

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23. Jessica Litman, *Digital Copyright* 1 (2001).

24. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, (Nov. 2001) (unpublished Framing Paper, *available at* http://www.law.duke.edu/pd/papers.html) (last visited Nov. 29, 2001).

25. *See supra* note 20. *See also* http://www.law.asu.esu/homePages/Karjalaopposingcopyrightexpansion/constitutionality/phillips02.html (last visited Oct. 3, 2001).

26. *See supra* note 20.

27. *See* Copyright Act, 17 U.S.C. § 303(a) (2000). The one exception is for the attributed works created but not copyrighted before 1978.

## II. The DC Circuit's Decision Harms The Public Interest In Copyright Law By Minimizing The Public Domain

The DC Circuit ignored the long line of Supreme Court cases that affirm the primacy of the public interest in copyright law.[28] In particular, it overlooked the oft-stated view of this Court as set forth in *Twentieth Century Music Corporation v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright term required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[29]

The public domain is an essential component of a copyright system that fulfills the public interest. In particular, it helps to secure the "broad public availability" of information to which this Court referred in *Aiken*. Restrictions on the growth of the public domain directly and adversely affect that public interest in a variety of ways.

Although the number of creators and creations has grown over time, every term extension has created a period of "zero

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28. *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expressions for the good of the public"); *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors but to 'promote the Progress of Science and useful Arts' "); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors").

29. *Twentieth Century Music Group v. Aiken*, 422 U.S. 151, 156 (1975).

growth" in the public domain as shown in chart i.[30] The resulting decline in the rate at which this resource accumulates is unwarranted in a nation that cherishes the promotion of creative and scientific works for the betterment of its people.

The public domain benefits the public by providing inexpensive and ready access to many works of literary, scientific, historic, social and artistic importance, and by supporting innovation and the expansion of knowledge. Works within the public domain are the foundation for new creativity: creators rarely produce original works isolated from cultural tradition, but in every era authors have drawn extensively on public domain materials.[31] While all works are not pastiche, even the most innovative incorporate previous ideas and expressions.[32] For example, modern dance pioneer Martha Graham frequently expressed her indebtedness to public domain materials that encouraged her creative process and fostered acclaimed new works.[33]

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30. *See* appendix I.

31. For as Justice Story explained,

> [i]n truth, in literature, in science and in art, there are, and can be, few if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

*Campbell v. Acuff-Rose*, 510 U.S. 569, 575 (1994) (quoting Emerson v. Davies, 8. F. Cas. 615, 619 (1845)).

32. Elton Fukumoto, *The Author Effect After the "Death of the Author" Copyright in a Post-Modern Age*, 72 Wash. L. Rev. 903, 933 (1997) ("Historically a recognition existed that imitation, borrowing, and copying was an inevitable part of creating works of art, but only in the post Romantic period did such artistic appropriation constitute copyright infringement . . ."). *Id*.

33. Siva Vaidhyanathan, *Copyrights and Copywrongs* 186 (2001) (describing how Graham was inspired by the Declaration of Independence, Greek mythology, African culture, and Native American legends).

Similarly, the Walt Disney Company has used many stories and previous works from the public domain in creating its internationally recognized animated movies. The old tales of *Snow White and the Seven Dwarves*, *Cinderella*, and *Sleeping Beauty*, as well as modern works of authorship such as *Pinocchio*, the *Jungle Book*, and the *Hunchback of Notre Dame*, were public domain works utilized by Disney to produce some of American cinema's most memorable icons.[34]

Public domain status also gives the public new opportunities to appreciate older works. In 1993 Willa Cather's *My Antonia* entered the public domain and in 1994 seven new editions appeared (costing from $2 to $24) making the story available to many more people than had previously read it.[35] Likewise, the children's book *The Velveteen Rabbit* became a widely popular classic once it passed into the public domain. Although the original version is still in print, newly illustrated versions that

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34. *See* Heidi Anne Heiner, *Sur La Lune Annotated Fairy Tales* (Oct. 14, 2000) *at* http://members.aol.com/rocketrder/frytales/snowhite/history.htm (last visited Nov. 18, 2001) (relating that *Snow White* was originally recorded by the Grimm brothers in 1818); *see* Tiffany Jensen, *Cinderella The Evolution of a Story: An Examination of the Cultural Significance of Oral History*, *available at* http://www.usu.edu /anthro/origins_of_writing/cinderella (last visited Nov. 18, 2001) (noting that *Cinderella* and *Sleeping Beauty* are both direct representatives of "Histoires ou Contes Du Temps Passe" [Tales of Times Past] by Charles Perrault, 1697); *see* Bob's World Literature Page *at* http://www.intac.com/~rfrone/Lit/1106/1106-00.htm (last visited Nov 18, 2001) (explaining that *Pinocchio* was originally created in 1883 by Carlo Collodi, and released as a movie in 1940 by Disney). *Jungle Book* was written in 1894 by Rudyard Kipling (who died in 1936) but which, had CTEA's rules applied, would not have been available for use by Disney until 2007, 40 years after Disney released its version as a movie, *at* http://www.ricochet-jeunes.org/eng/biblio/author/kipling.html (last visited Nov. 18, 2001); and the *Hunchback of Notre Dame* appeared in 1831, *at* http://www.kirjasto.sci.fi/vhugo.htm, (last visited Nov. 18, 2001).

35. *See* S. Rep. No. 104-315 at 37 (1996) (Statement of Sen. Herb Kohl).

creatively interpret the story have been released, and seven different editions are now listed in *Books in Print*.[36]

Generally, the CTEA extends the term (and therefore the economic reward) of copyright protection, creating disturbing consequences. Users must incur further costs for licensing fees (which effectively limit the amount of material available for public use), while many creators and scholars face costly impediments to identifying and locating rights holders for older, lesser-known works, which may entail multiple ownership tiers. Even the necessity of *seeking* permission to use such works may be prohibitive because of the high search and negotiation costs involved. The CTEA, under certain circumstances, may subject the public and institutions that disseminate information to additional expense and burdens with very uncertain benefits.[37] As a consequence, institutions large and small may forgo use of those works. For example, the University of Texas, apparently conscious of potential liability, prohibits students, faculty or staff from using copyrighted works if permission cannot be obtained, even if a good faith effort is made to secure such permission, and even if a persuasive fair use argument may be made.[38]

Specifically, the CTEA imposes a twenty-year moratorium on works entering the public domain.[39] Were it not for the CTEA,

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36. *See* Horn Book Inc. *at* http://www.hbook.com/exhibit/editorial_eh.html (last visited Dec. 4, 2001).

37. *Amici* are well aware that the CTEA provides an exemption in § 108(h) of Title 17 U.S.C. (Copyright Act) for librarians and archivists to have access to a limited group of works within the last twenty years of a work's copyright protection term. However, use of the exemption requires compliance with various conditions.

38. University of Texas policy, *available at* http://www3.utsystem.edu/ogc/IntellectualProperty/cprtpol.htm (last visited Dec. 4, 2001).

39. *See supra* note 6. The only exception to this proposition is represented by unpublished works whose authors died prior to 1933; if not published by the end of 2002, these works will become generally available to the public. Copyright Act, 17 U.S.C. § 303(a) 2000.

the decades from 1998 to 2018 would have seen the entry into the public domain of a wide variety of works published in the United States between 1923 and 1943, in addition to many unpublished works by authors who died prior to 1968.[40] The following examples illustrate the harms flowing from the general phenomenon of the erosion of the public domain by copyright extension.

**1. Copyright Term Extension Harms Disseminators Of Information**

Primary disseminators of information include educators, archivists and librarians. These individuals and their organizations serve the public without commercial gain, seeking only to benefit users through promoting accessible information, exposure to arts and sciences, and cultural enrichment, drawing in part on the public domain.

**a. Educators and librarians**:

Educators face many difficulties obtaining works by important authors at reasonable prices. The CTEA affects educational enterprises by adding to the cost of books that are commonly assigned for class use, such as *The Great Gatsby* and *A Farewell to Arms.*[41]

Copyright term extension also inhibits educators' efforts to provide students with texts in electronic form. Electronic teaching tools have become an important resource for educators, as evidenced by the success of The Dickens Web, a successful

40. *Id.* at § 303 and 304(a). 304(a)-terms based on publication and 303-unpublished works, providing an alternative basis for calculating term (life of author or until the end of 2002, whichever is longer).

41. *See* S. Rep. No. 104-315 at 34 (1996) (Statement of Sen. Hank Brown). In 1996 Bantam Books conducted a study and determined that almost 12 million literary classics are sold each year to high schools and colleges. One analysis concluded that if copyright were extended twenty years, consumers including schools and students would pay out an additional $345 million in royalties. *Id*. at 34. *See also* S. Rep. No. 104 –315 at 37 (1996) (Statement of Sen. Herb Kohl). Moreover, firms like Scribners, publisher of Fitzgerald and Hemingway, long charged their educational customers high prices for reprints of modern classics. *Id*. at 37.

hypertextual research and educational site detailing the world of Charles Dickens.[42] The creation of such pedagogical tools becomes difficult or impossible if the information needed remains under copyright protection. Thus, copyright concerns will continue to inhibit the development of similar resources for the study of twentieth-century culture.

**2. Copyright Term Extension Harms Creative Users Of The Public Domain**

Copyright term extension adversely affects not just institutional disseminators, but also a wide variety of creative users of public domain material. These include theatrical and musical performers, authors, publishers, and film scholars.

**a. Theatrical and musical performers:**

Without the public domain, every theater in the nation, be it a high school or the Kennedy Center, would first need to obtain permission from Shakespeare's heirs to perform any work by Shakespeare. In the future, under the current regime of repeated copyright term extension, this requirement of securing permission may be the case for the plays of Tennessee Williams and other twentieth-century playwrights for many decades to come. Term extension poses additional dilemmas for would-be performers of dramatic works. For example, a recently published play, *Painting Churches*, includes the following direction to potential licensees: "Note: Permission to produce *Painting Churches* does not include permission to use this song ['Nothing Could Be Finer'], which ought to be procured from the copyright owner;" and on another page, "Note: This song is still under copyright protection. Permission to use it in productions of *Painting Churches* ought to be procured from the copyright owner."[43] The potential producer must identify, locate, and

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42. *See* http://www.eastgate.com/catalog/Dickens.html (last visited Nov. 27, 2001) (offering educational software package that provides electronically linked text and images that interact and provide different pathways of information for the user to follow).

43. Tina Howe, *Painting Churches*, 11,35 (Samuel French, Inc. 1982) 1984.

receive permission from unnamed copyright owners, a costly and burdensome exercise.

Today, many regional theaters forgo performing classic American musicals because producers cannot afford the necessary licensing fees.[44] Even if they can, the copyright holder may restrict the interpretation of the work to reflect contemporary times and issues. For example, theaters are barred by the Gershwin Family Trust from producing *Porgy and Bess* (1934) with casts including white performers.[45] Permission to perform Rodgers and Hammerstein works is also subject to strict conditions.[46] Copyright extension reduces opportunities for new artists to expand on or reinterpret materials that would otherwise have been part of the public domain.

Merely singing songs in the most innocent of situations is touched by copyright extension. For example, restaurants where waiters serenade customers with "Happy Birthday" (in which the copyright now will not expire until at least 2030)[47] might be forced to pay performance rights fees to copyright holders.[48]

**b. Authors and publishers:**

Term extension yields other examples of results completely disconnected from the incentive rationale for copyright protection. In one instance, a university press required the author of a book on city planning to pursue permissions for use of a

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44. *See supra* note 44 at 37.

45. Gail Russell Chaddock, *Public Interest v. Private Rights*, Chicago Sun-Times, June 21, 1998, at 31.

46. Rodgers and Hammerstein Theatre Library, Below are Some Questions Commonly Asked By Theatre Library Customers . . . , *at* http://www.rnh.com/theatre/tlnews/qanda_test.html (last visited Nov. 18, 2001).

47. *"Happy Birthday" Song Sold to Warner Communications*, *Time*, Jan. 2, 1989, at 88 (describing how Warner Communications bought the copyright to "Happy Birthday to You" for an estimated price of $25 million, stating that "Warner is equipped with computer capacity and other resources to track uses;" at the time Warner purchased the song, the expected copyright expiration was 2010).

48. *See supra* note 45.

previously unpublished photograph of Charles Mulford Robinson, who died in 1917. The photographer's name was unknown, and securing permission was impossible.[49] In another instance, a television network required permission to use a similarly unpublished 1912 photograph of Jim Thorpe running on the deck of a ship en route to the Stockholm Olympics. The photograph, containing no indication of the photographer, established no clear evidence of ownership, and thus a clear path for securing permission could not be established.[50] Even when creators can surmount the costs of permissions and invest the complicated and time-consuming effort, this requirement creates enormous burdens for scholarship, documentary filmmakers and authors.

In the domain of fiction, as well, excessive copyright can restrict, rather than promote, creative production. A notorious recent example of attempted private censorship utilizing copyright law is the case of Alice Randall's *The Wind Done Gone*. This work, offering a revisionist portrait of the antebellum South, is a creative and critical commentary on Margaret Mitchell's *Gone With the Wind* in the form of the first-person narrative of Scarlett O'Hara's black half-sister.[51] Only because of copyright term extension could the Mitchell estate sue to suppress Randall's work. At the time of its first publication, *Gone With the Wind* was due to enter the public domain no later than 1992. However, because of successive term extensions, this work will not be freely available for public use until 2031 (presuming no further extensions by Congress).[52]

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49. Personal communication with William J. Maher, University Archivist, Univ. Ill. at Urbana Champaign, Oct. 31, 2001.

50. *Id*.

51. *See Suntrust Bank v. Houghton Mifflin Co.*, No. 01-12200, 11th Cir. LEXIS at 1; 60 U.S.P.Q. 2d (BNA) 1225 (2001). Randall, an African-American woman, was disturbed by the characterization of blacks in the novel.

52. *See* Lawrence Lessig, *Let the Stories Go*, April 30, 2001, N.Y. Times op-ed. http://www.nytimes.com/2001/04/30/opinion/30LESS.html (last visited Oct. 25, 2001).

### 3. Copyright Term Extension Harms Scholarly Institutions And Scholars Who Utilize The Public Domain

#### a. Archivists and historians:

Those who preserve and interpret history face similar problems. For example, important documents relating to World Wars I and II remain and will continue to remain inaccessible. Dwight D. Eisenhower died in 1969, so the copyright in his non-presidential papers will not expire until the end of 2039, restricting use of his letters ruminating on the conduct of World War II until nearly a century after that war was fought. Meanwhile, Eisenhower's thoughts on his service in World War I cannot be fully utilized in historical scholarship without costs and/or restrictions until more than 121 years after the 1918 Armistice.[53]

Copyright term extensions can severely limit the publication of scholarly works, as a recent article on the Civil War submitted to a historical journal demonstrates.[54] The author used compelling excerpts from soldiers' diaries and letters to compare the perceptions and sentiments of western soldiers with those of their eastern counterparts. The journal would not accept the article unless the researcher obtained signed permissions from the families (and other copyright holders if applicable) of every soldier who was quoted, since the materials could conceivably still enjoy copyright protection. The last Civil War veteran died in 1959; thus, under the CTEA, the copyright on some previously unpublished letters could endure until 2030.[55] Because archives

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53. *See* DWIGHT D. EISENHOWER: Papers, Pre-Presidential, 1916-52 Finding Aid, *available at* http://www.eisenhower.utexas.edu/listofholdingshtml/listofholdingsE/EDDPREPRESIDENTIAL/1652.pdf, (last visited Dec. 6, 2001). The guide notes that "Literary rights in the writings of Dwight D. Eisenhower are held by his literary executor, John S.D. Eisenhower." *Id*.

54. E-mail from Peter Hirtle, Co-Director Cornell Institute for Digital Collections, to Peter Jaszi, Counsel of Record (Nov. 29, 2001).

55. Civil War correspondence published in even a limited edition before 2003 would enjoy protection until 2047, a term extended by the CTEA. *Id*.

include items of mixed and unknown provenance, the task of clearing such copyrights may involve genealogical and probate inquiries dwarfing the scope of the original research effort.[56] The journal's reluctance to gamble on a potential copyright infringement action prevented the publication of this important article.[57]

Similarly, archivists desiring to make digital copies of Civil War materials available to schools and universities to further public understanding are thwarted in their efforts by excessive copyright terms.[58] As Roy Rosenzweig noted in a recent article in the Journal of American History, "[f]or historians, copyright protection has redlined . . . much twentieth-century history . . ."[59]

56. In some cases the soldier's family may have donated or sold the letters and diaries to a repository, while other documents and letters may have been originally found in old houses, furniture, or suitcases by people with no direct connection to the writers. Ownership of a physical letter does not necessarily carry with it the right to use the contents, 17 U.S.C. § 303.

57. Had this incident occurred in Canada, the author would only have had to make a documented good faith effort to locate the copyright owners and submit the documentation of the unsuccessful search to the Copyright Board. In cases where a copyright holder cannot be located, the Board is authorized by Canada's Copyright Act to grant a license. License fees are held in trust for missing rights holders who may claim royalties up to 5 years after the expiration of a Board-issued license as codified in § 77 of the Canadian Copyright Act, R.S.C., C-30, S.1., *available at* http://www.cancopy.com (last visited Nov. 20, 2001). U.S. law contains no such provision. *Id*. *See also* http://www.cb-cda.gc.ca/info/act-e.html#rid-33225 (last visited Dec. 6, 2001).

58. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*. Interdisciplinary Conference On The Impact Of Technological Change On The Creation, Dissemination, And Protections Of Intellectual Property, The Ohio State University College of Law, Columbus, OH. March 8-10, 2001. Forthcoming in the *Journal of the Copyright Society*. Preliminary draft version for conference attendees *available at* http://cidc.library.cornell.edu/copyright/Hirtle_OSU_paper.pdf, (last visited Nov. 22, 2001).

59. Roy Rosenzweig, *The Road to Xanadu: Public and Private Pathways on the History Web*, 88 J. Am. Hist. 2, (2001).

If copyright term extension survives constitutional challenge, opportunities for new artists to expand on the culture of the past will be fewer, and citizens will miss opportunities to be exposed to, and enriched by, primary historical documents and knowledge.

**b. Film scholars and archivists:**

A film scholar and author of the book *Film, Form, & Culture*, a textbook with an accompanying CD-ROM, chronicles the difficulty and cost of identifying and obtaining permission for use of films from the twentieth century. The Second Edition increased in cost when the author included clips from two "B" gangster films of the late 1940's and 50's, for which the copyright owner demanded $2,000 for 120 seconds of clips. This same author also could not use any clips by Disney-owned works, which are not licensed for CD-ROM use as a general policy.[60] Although a modified version of *Film, Form, and Culture* was eventually published, the need to obtain permission may chill similar publications for decades to come, since under the CTEA many pre-1960 American films will be protected well into the twenty-first century.

Although the CTEA is sometimes characterized as promoting the preservation of America's film heritage, the reality is otherwise.[61] Thousands of old movies sit on shelves deteriorating because the companies that hold the copyrights make no efforts to restore them or make them available, while their copyright status prevents others from preserving such works.[62] By the time many of these works are finally available to enter the public domain, prints and negatives will have physically disintegrated. These endangered works include not

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60. Telephone interview with Robert Kolker, Chair, School of Literature, Communication, and Culture, Ivan Allen College, Georgia Institute of Technology (October 16, 2001).

61. *See supra* note 41 at 30.

62. Jesse Walker, *Copy Catfight*, Reason On Line (March 2000) *available at* http://www.reason. com/0003/fe.jw.copy.html, (last visited Dec. 5, 2001).

only film "classics," but also industrial films, forgotten examples of silent cinema, footage from uncompleted projects (such as Orson Welles' *Don Quixote*), and kinescopes of programs from the "golden age" of television.[63]

## CONCLUSION

Unless the decision of the DC Circuit is reversed, the CTEA and subsequent extensions of copyright terms will continue to impede the growth of the public domain. *Amici* do not argue against licensing fees as an appropriate means of rewarding authors and creators, nor do we suggest that we are prevented from invoking the fair use doctrine in appropriate situations. However, the practical result of copyright term extension, by maintaining unnecessary barriers to the accessibility of information, diminishes the ability of the public to be educated, to be entertained, and to engage in debate. Through excessive copyright extension, copyright owners will continue to restrict access to and exert censorial control over millions of works, thereby chilling discourse and cultural development long after incentives for production have ceased to operate.[64] The Framers of our Constitution envisioned a very different role for copyrights.

Every member of society, from the toddler who hears a fable for the first time to the archivist who meticulously inventories the wealth of information present on the World Wide Web, has the constitutional right to use and receive information. *Amici* urge this Court to recognize the breadth of the harms the public will suffer if the CTEA is not found unconstitutional and to reaffirm the Framer's intent for Congress to promote the public's interest through balanced copyright law.

For the foregoing reasons, this Court should grant the writ of certiorari and the judgment of the DC Circuit should be vacated and reversed.

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63. *Id*.

64. Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 Yale. L.J. 283, 285 (1996).

Respectfully submitted,

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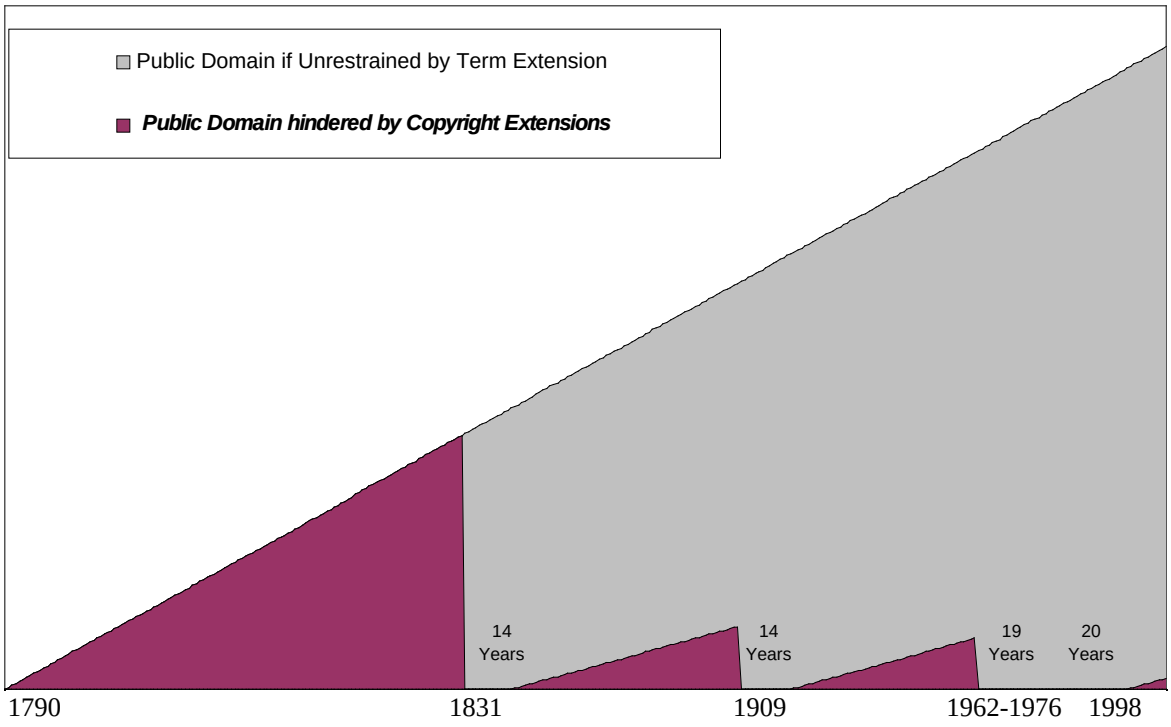
**The Growth Rate of the Public Domain**




[1]

[1] This chart is a visual representation of *amici's* understanding of the decline of the growth of public domain as a result of repeated copyright term extensions.