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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN HISTORICAL ASSOCIATION, AMERICAN LIBRARY ASSOCIATION, ART LIBRARIES SOCIETY OF NORTH AMERICA, ASSOCIATION FOR RECORDED SOUND COLLECTIONS, ASSOCIATION OF RESEARCH LIBRARIES, COUNCIL ON LIBRARY AND INFORMATION RESOURCES, INTERNATIONAL ASSOCIATION OF JAZZ RECORD COLLECTORS, MEDICAL LIBRARY ASSOCIATION, MIDWEST ARCHIVES CONFERENCE, MUSIC LIBRARY ASSOCIATION, NATIONAL COUNCIL ON PUBLIC HISTORY, SOCIETY FOR AMERICAN MUSIC, SOCIETY OF AMERICAN ARCHIVISTS, AND SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE* [1]

This brief *amici curiae* in support of Petitioners is submitted by the entities listed below ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court reverse the judgment of the U.S. Court of Appeals for the D.C. Circuit.

The **American Association of Law Libraries** is a nonprofit educational organization with 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 Historical Association** is a nonprofit organization of approximately 15,000 members. It promotes historical studies, the collection and preservation of historical documents and artifacts, and dissemination of historical research.

The **American Library Association** is a nonprofit educational organization of approximately 64,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries.

The **Art Libraries Society of North America** is a non-profit organization of approximately 1,500 individual and institutional members including architecture and art librarians, visual resources professionals, artists, curators, educators, publishers, and others interested in advancing education, information, and scholarly communication in the arts.

The **Association for Recorded Sound Collections** is a non-profit scholarly organization of approximately 1000 individuals and institutional members and promotes the preservation and study of historic recordings in all fields of music and speech.

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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.

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

The **Council on Library and Information Resources** is a nonprofit organization working to expand access to information, however recorded and preserved, as a public good with special attention now being paid to preservation of non-book formats and digital information.

The **International Association of Jazz Record Collectors** is a non-profit corporation of approximately 1500 members. |Its goals include maintaining an association of collectors of jazz recordings, and promoting collecting and research in the field.

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 **Midwest Archives Conference** is the nation's largest regional archival organization, with over 1000 members from corporate, government, church, and university archives, historical societies and other manuscripts repositories and special collections.

The **Music Library Association** is the professional organization in the United States devoted to music librarianship and to all aspects of music materials in libraries.

The **National Council on Public History** is a professional organization of approximately 1700 historians engaged in work outside of academia, and those within academia who prepare students for careers in government agencies, museums, libraries, historic preservation and private businesses.

The **Society for American Music** is a nonprofit scholarly and educational organization of approximately 900 individual and 120 institutional members. It seeks to stimulate the appreciation, performance, creation and study of American music.

The **Society of American Archivists** represents 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.

The **Special Libraries Association** is an international professional association serving more than 14,000 members of the information profession, including special librarians, information managers, brokers and consultants.

Amici are organizations who support the creation of new creative works and promote the advancement of knowledge by preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books and other works, creating and using works, and facilitating better technologically-adapted schools.

SUMMARY OF ARGUMENT

A fundamental part of the genius of the United States copyright system is that the Constitution ensures that after the original, creative works of authors have been rewarded with a limited term of protection, those works become part of the public domain to be freely used by all. In enacting the Copyright Term Extension Act ("CTEA"),[2] Congress, *inter alia*, retrospectively enlarged the copyright terms of existing works by twenty years, and prospectively added twenty years of copyright protection to future works. This Act exceeds Congress's authority under Article I, Section 8, Clause 8 of the Constitution (the "Copyright Clause") and materially impoverishes the public domain that the clause was designed to enrich.

In its retrospective application in particular, CTEA gratuitously confers private gains on owners of copyrights in older works, imposes substantial, unexamined burdens on the public at large, and delays by decades the entry of substantial numbers of works into the public domain. CTEA effectively prohibits non-copyright owners — like librarians, curators, archivists, historians, and scholars — from republishing and

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

disseminating older works that may have no significant commercial value, but may be of strong historical or artistic interest. This, in turn, deters and complicates their efforts to preserve such works. For those who want to republish or use such works, CTEA needlessly imposes high transaction costs of seeking out (often unsuccessfully) the rights holders to older works, licensing fees (if they are found) and restrictions on use. CTEA also inhibits scholars, authors and artists from creating and disseminating new works that incorporate works with extended terms. The public ultimately pays for these harms by restricted and/or more expensive access to older works, and by inhibitions on scholarship, teaching, and the creation of new works.

In its ruling below, the D.C. Circuit failed to enforce the limitations on congressional authority specifically set forth in the Copyright Clause and recognized in this Court's precedents.[3] The D.C. Circuit's analysis construes the Copyright Clause language, "[t]o promote the Progress of Science and useful Arts," in a manner that deprives it of substantive meaning. The court thereby failed to recognize a fundamental limitation on this grant of power to Congress. Copyright protection is intended to reward authors in exchange for a benefit to the public. An author's creative, original expression is a precondition of any grant of exclusive rights in a work. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991) ("*Feist*"). It follows that Congress cannot "enlarge" protection under this clause without some addition of original creative authorship. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966) ("*Graham*"). CTEA's retrospective application in particular requires nothing from copyright owners in exchange for its enlarged term of protection.

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3. *Eldred v. Reno*, 239 F.3d 372, *reh'g denied*, 255 F.3d 849 (D.C. Cir. 2001). The D.C. Circuit also held that CTEA is not subject to challenge under the First Amendment. 239 F.3d at 376. *Amici* believe that this decision was also in error, but the instant brief will focus on the issue of the scope of Congress's authority under the Copyright Clause.

As an independent constitutional requirement, no term of protection may exceed the "limited" times necessary "to promote" the progress of science and useful arts. *Amici* believe that there must be a "congruence and proportionality" between the "limited" time of copyright protection and the need for such protection "to promote" the progress of science and useful arts. *See, e.g.*, *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 640, 647 (1999) ("*Florida Prepaid*"). Congress did not undertake the careful balancing necessary to demonstrate such "congruence and proportionality" for CTEA. Congress did not meaningfully address the substantial burdens CTEA places upon the public's access to and use of copyrighted works that would otherwise have entered the public domain. Rather, Congress gave undue weight to purported benefits from CTEA that are largely illusory. For example, CTEA is claimed to promote preservation and restoration of works by providing financial incentives to copyright owners. *See, e.g.*, S. Rep. No. 315, 104th Cong., 2d Sess. 13 (1996) ("Sen. Rep."). This justification for CTEA rests on a number of unexamined and largely erroneous assumptions. Moreover, the narrow "harmonization" CTEA achieves with European Union counties is both a dubious goal as a legal matter and overstated as a factual matter. Finally, CTEA's limited exemption for libraries and archives to enable them to reproduce, distribute, display, or perform works in the last twenty years of the extended term for research and preservation purposes, *see* 17 U.S.C. § 108(h), does little to mitigate CTEA's substantial burdens.

ARGUMENT

Article I, Section 8, Clause 8 of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In failing to give proper effect to all the words of this text, the U.S. Court of Appeals for the D.C. Circuit allowed to stand a congressional enactment that clearly exceeds this qualified grant.

I. Copyright Term Enlargements Must "Promote The Progress Of Science And Useful Arts" And Require New Original Expression From The Copyright Owner

The D.C. Circuit's first analytical error was to construe the Copyright Clause in a manner that deprives some of its specific language of substantive meaning. The court below repeatedly characterizes the language, "To promote the Progress of Science and useful Arts," as the "preamble" to the Copyright Clause. *Eldred v. Reno*, 239 F.3d 372, 378, *reh'g denied*, 255 F.3d 849 (D.C. Cir. 2001). Following its precedent in *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), the D.C. Circuit held that this text does not limit congressional power. *Eldred v. Reno*, 239 F.3d at 377-78. Notwithstanding the D.C. Circuit's characterization, the Copyright Clause does not contain a "preamble."[4]

In *Graham*, this Court stated in the context of a patent case that "[t]he clause is both a grant of power and a limitation." 383 U.S. at 5. Further, "[t]he Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose." *Id*. at 5-6.[5] This Court's jurisprudence demands that all the words comprising the Copyright Clause be given effect. For the D.C. Circuit to diminish a portion of the Constitution's language as an inconsequential "preamble" stands on its head this Court's characterization of this same text as a "constitutional command." *Id*. at 6. The copyright laws, like the patent laws, "by constitutional command" must promote the progress of science and useful arts. *Id.* "This is the *standard* expressed in the Constitution and it may not be ignored." *Id*. (emphasis in original). In reviewing the constitutionality of CTEA, the

4. *See id.* at 382 (Sentelle, J., dissenting) (erroneous to style "the granting clause of the sentence as merely introductory when in fact it is the definition of the power bestowed by that clause").

5. *See also Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000) (same language that serves as basis for affirmative grant of congressional power to enforce Fourteenth Amendment also serves to limit that power).

D.C. Circuit, like Congress in enacting the legislation, has nevertheless disregarded that standard.

This fundamentally flawed legal foundation led the D.C. Circuit to erroneous conclusions about the constitutionality of the Act. As this Court also stated in *Graham*, Congress may not "*enlarge* the patent monopoly without regard to the innovation, advancement or social benefit gained thereby." *Id.* at 6 (emphasis added). This principle recognizes that any "enlarge[ment]" of the "patent monopoly" requires some level of constitutionally cognizable innovation: innovation is a precondition of an initial grant or any enlargement of the duration or scope of patent protection. *Id*.

In the case of copyright, also, there is a precondition of any "enlarge[ment]" of the term of protection, and that is originality. This Court has held that the originality requirement is constitutionally mandated for all works. *Feist*, 499 U.S. at 347 (citations omitted). Copyright protection "is intended *to motivate the creative activity* of authors . . . by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added). *See also Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (copyright monopoly grant to induce creation of new material). In the words of a principal author of the Copyright Clause, copyright protection should be "considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use."[6]

The D.C. Circuit's position below is at odds with this Court's articulation of the aims of the Copyright Clause.

6. James Madison, Detached Memoranda, *in* James Madison: Writings 756 (Jack N. Rakove ed., 1999). *Accord Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) (patent laws are "carefully crafted bargain for encouraging the creation and disclosure of new, useful and nonobvious advances in return for the exclusive right to practice the invention for a period of years").

The D.C. Circuit held that without any additional showing of original, creative activity by an author, a copyright may by statute be continued in force beyond the renewal term specified by law when the copyright was first granted. *Eldred v. Reno*, 239 F.3d at 377. Yet the enlargement of existing copyright terms under CTEA cannot reasonably be construed as motivating the creative activity of or requiring anything in exchange from authors to obtain the added grant of protection.[7] Indeed, motivation is logically impossible in the context of granting protection to existing works. *Eldred v. Ashcroft*, 255 F.3d 849, 855 (D.C. Cir. 2001) (Sentelle, J., dissenting from denial of rehearing en banc).[8] In its retrospective application in particular, CTEA deprives the public of a substantial part of the benefit of its original bargain with authors and exacts nothing in return as a condition of the additional protection. With CTEA, Congress has not rewarded an author in exchange for "the fruits of [the author's] intellectual labor." *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Rather, Congress has conferred a windfall of income principally upon the heirs and corporate successors-in-interest of authors, in exchange for no direct social benefit.[9]

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7. It is insufficient to say that the originality justifying the initial grant of copyright justifies enlargement of the copyright at the end of its "limited" term. *See, e.g.*, *Eldred v. Reno*, 239 F.3d at 377. Originality is a precondition of the grant of the original term. *Feist*, 499 U.S. at 347. Even were the claim of "progress" to be justified by new sales, circulation, preservation, or other activity to enhance public access to a work, CTEA does not *require* such activity as a precondition of the enlarged grant. Thus, the enlarged grant of protection is gratuitous and not in exchange for any defined public benefit.

8. *See also* Edward Rappaport, Copyright Term Extension: Estimating the Economic Values 4 (Cong. Research Service Rep. No. 144, 1998) (extension has basically no effect on creation because these works already exist).

9. "In effect, we are taking 20 years of wealth-generation and transferring it to a small group of people — often corporate owners that did not create the works in the first place. The public is significantly harmed by that transfer of wealth." Sen. Rep. at 36 (Minority Views of Sen. Brown); *id.* at 34-35 (CTEA has the effect of diverting money from

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The consequence is that "the public [will] continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

The D.C. Circuit rejected the idea that the Copyright Clause requires some *quid pro quo* flowing from authors to the public in exchange for any enlarged term of copyright protection. *Eldred v. Reno*, 239 F.3d at 376-77. The Court of Appeals endorsed the notion that Congress has previously granted federal protection to works that were already in existence or already published. *Id.* at 377. Most notably, the D.C. Circuit cites the Copyright Act of 1790,[10] enacted by the first Congress after the Constitution was adopted, because that act protected works that were already in print. The D.C. Circuit held that this Copyright Act of 1790 is "almost conclusive" on the point that Congress can extend copyright protection for works that were already created, published and under copyright protection. 239 F.3d at 379. *Amici* believe this argument to be inapposite.

In 1790, Congress brought previously published works within the ambit of its first copyright legislation.[11] When it did so, it conferred a benefit upon authors — who had not *previously*

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education programs and leads to higher consumer prices by creating unnatural scarcity of works); *id.* at 38 (Minority Views of Sen. Kohl) (windfall income to copyright owners at expense of consumers). *See also* Paul J. Heald & Susanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. Ill. L. Rev. 1119, 1170, 1174-75 (2000) ("Heald & Sherry") (CTEA's retrospective application is a "legislative gift" of public funds; amounts to subsidy to copyright owners with no political accountability).

10. "An Act for the encouragement of learning," § 1, 1 Stat. 124 (1790) ("Copyright Act of 1790"), *reprinted in* 8 Melville B. Nimmer & David Nimmer, Nimmer On Copyright App. 7, at 41 (2002) ("Nimmer On Copyright")

11. The Copyright Act of 1790 covered "any map, chart, book or books already printed within these United States," and "any map, chart, book or books already made and composed, but not printed or published, or that shall hereafter be made and composed." § 1, 1 Stat. 124, *reprinted in* 8 Nimmer On Copyright App. 7, at 41.

been rewarded with federal copyright protection — a *new* term of federal protection. Prior to the Copyright Act of 1790, authors had received protection pursuant to the various states' pre-constitutional copyright statutes.[12] The Copyright Act of 1790 essentially supplanted this state law protection.[13] It rewarded an author's creativity and original work with a limited term of exclusive federal rights *only once*, and under very specific historical circumstances. This new federal protection for previously published works in 1790 is therefore materially different from the gratuitous protection added to existing federal copyright terms in 1998. *See Eldred v. Reno*, 239 F.3d at 384 (Sentelle, J., dissenting) (Copyright Act of 1790 "did not extend subsisting federal copyrights enacted pursuant to the Constitution").

Similarly, in 1976, when Congress extended new federal protection to works that previously had been created but were unpublished,[14] it was protecting works that *previously* had not been rewarded with federal copyright protection. This reward was conferred *only once* (at least until CTEA). The copyright

12. These statutes are reprinted in 8 Nimmer on Copyright App. 7, at 12-40. *See also* Journal of the United States in Congress Assembled, Containing The Proceedings From Nov. 1782, to Nov. 1793, pp. 256-57 (Philadelphia, D.C. Claypoole, 1783), *reprinted in* 8 Nimmer On Copyright App. 7, at 11 (recommendation of the Continental Congress that states, secure copyrights for "any *new books not hitherto printed*") (emphasis added). *See generally* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 47 J. Copr. Soc'y 167 (2000).

13. *See* The Federalist No. 43 (James Madison), *reprinted in* James Madison: Writings 243 (Jack N. Rakove ed., 1999) (states cannot separately make effectual copyright protection; most "have anticipated the decision of this point, by laws passed at the instance of Congress"). *Cf. Goldstein v. California*, 412 U.S. 546, 557-71 (1973) (states retain concurrent power to afford copyright protection to works of authors as long as such protection does not conflict with federal law).

14. *See* Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976), §§ 301-04 (codified as amended at 17 U.S.C. §§ 301-04) (creating single system of federal statutory copyright for published and unpublished works) ("1976 Copyright Act").

owners whose works were covered received this federal protection *in exchange for* their perpetual common law protection. Congress explicitly recognized this at the time: "A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights."[15] Further, the decision to eliminate common law copyright in favor of a uniform federal standard enabled simplification of the process of determining the term of copyright. Congress deemed the confusion prior to 1976 regarding the proper term of a copyright and when or whether a work was "published" to be essential flaws in the system.[16] Thus, the benefit Congress conferred on owners of pre-existing common law protected works in 1976

15. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 135 (1976), *reprinted in* 8 Nimmer On Copyright App. 4, at 134 ("1976 Act House Report").

16. *Id*. at 133. In adopting the extension of the renewal term in 1909, Congress expressly decided *not* to extend initial terms, only renewal terms. H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909), *reprinted in* 8 Nimmer On Copyright App. 13, at 21 ("1909 Act House Report"). Conferring a longer term for renewed works, as opposed to works in their initial terms, Congress understood renewal as a copyright formality and therefore a procedural burden on owners. In 1909 and again in 1976, Congress was advised by the Copyright Office that only a small fraction of the copyrights for published works were actually renewed. *Id.* at 22; 1976 Act House Report at 136; U.S. Copyright Office, Register's Report on the General Revision of the U.S. Copyright Law (1961), *reprinted in* 8 Nimmer On Copyright App. 14, at 51. In short, the renewal process was a self-selecting determination by owners as to the longevity of their works. These extensions for previously published and copyrighted works may not have been consistent with the principles discussed above, but their negative impact was much more modest, more closely tied to actual interest by the copyright owner in exploiting the work, and therefore they were less likely to invite challenge. The series of term extensions enacted prior to the 1976 Act were not free from controversy. Congressman Kastenmeier and others thought them unconstitutional. *See, e.g.*, H.R. Rep. No. 605, 92nd Cong., 2d Sess. (1971), *reprinted in* 8 Nimmer On Copyright App. 8, at 59-60 (extension of existing copyright terms is windfall to copyright owner and retrospective reward for authorship at expense of public domain; does not directly serve constitutional aims) (Rep. Kastenmeier, dissenting).

was explicitly in exchange for a preexisting set of rights. Congress did not obtain such a benefit for the public in 1998 by enacting CTEA.

II. Copyright Term Enlargements Must Satisfy Constitutional Aims And Be Congruent And Proportional To Those Aims

As an independent constitutional requirement, no term of protection may exceed the "limited" times necessary "to promote" the progress of science and useful arts. To determine whether CTEA meets this requirement, the government's justifications for this legislation must be measured against a standard that fully takes into consideration the constitutional aims of the Copyright Clause, including the extent to which CTEA's enlargement of copyright terms retards, rather than promotes, progress.

This Court has stated that "[w]ithin the limits of the constitutional grant [of the Copyright Clause], the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6. But the Copyright Clause contains, on its face, specific limits and qualifications that exceed those imposed on other grants of congressional authority under Article I, Section 8. The question of what constitutes an appropriate "constitutional aim" is ultimately a judicial rather than a legislative question. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 270 (1964) (Black, J., concurring); *Florida Prepaid*, 527 U.S. at 635-39.

Moreover, special considerations apply in ascertaining the scope of the constitutional grant and the nature of the constitutional aims of the Copyright Clause. When Congress exercises its authority under the Copyright clause, it creates property interests that are presumably subject to the Takings Clause and may not be divested without due process or just compensation. *Florida Prepaid*, 527 U.S. at 642. Most importantly, this clause is materially different from other grants of congressional power in that it *necessarily* implicates

expressive interests protected under the First Amendment.[17] For example, CTEA's twenty-year term extensions enlarge the duration of the exclusive rights for copyright owners (defined in 17 U.S.C. § 106), and consequently burdens the public's ability to use the expression protected thereby.

In light of the specific limitations set out in the Copyright Clause and special considerations implicated by congressional action thereunder, it would be improper for the courts simply to review congressional action under the Copyright Clause as they "would under any other exercise of power enumerated in Article I." *Eldred v. Reno*, 239 F.3d at 380.[18] This Court's precedents in analogous areas of the law provide guidance as to the proper standard to be applied in reviewing congressional actions enlarging copyright terms. This Court's jurisprudence suggests that when Congress exercises an enumerated power in a manner that burdens another constitutional interest, there must be a "congruence and proportionality" between the scope of the legislation and the objectives to be achieved by it. *See Florida Prepaid*, 527 U.S. at 634-48 (applying "congruence and proportionality" standard to test validity of congressional amendment of patent laws, pursuant to Section 5 of the Fourteenth Amendment, to abrogate States' Eleventh

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17. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (linguistic expression has both emotive and cognitive force; "we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); *see also San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536 (1987) (applying intermediate scrutiny under First Amendment to grant of exclusive rights in term "Olympic").

18. *Cf. United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., and O'Connor, J., concurring) ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights.").

Amendment immunity from suits by citizens).[19] In addition, there must be an adequate record to support the rationale.[20]

What this means in the context of the Copyright Clause is that Congress must create a record to establish that there is a congruence and proportionality between the length of copyright terms and the utility of that protection in promoting the progress of science and useful arts. In this case, the D.C. Circuit improperly concluded that Congress examined factors and evidence sufficient to support an enlargement by two decades. *See Eldred v. Reno*, 239 F.3d at 378-79. An adequate record to justify CTEA would necessarily have to include not only examination of the putative benefits to the progress of science and useful arts. It would also have to carefully examine the burdens such protection places on the public, including economic and practical burdens as well as the diminution of the public's ability to access and to use expression during the extended term of protection. Absent such an inquiry by Congress and a record that squarely supports the proposed enlarged term, this Court should not find that the enlargement of copyright protection under CTEA is congruent and proportional with the need to promote the progress of science and useful arts.

This level of justification is particularly needed in the context of repeated extensions of existing copyright terms.

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19. *See also City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1993; no proportionality or congruence between means adopted and legitimate end to be achieved).

20. *See Florida Prepaid*, 527 U.S. at 640 ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *City of Boerne v. Flores*, 521 U.S. at 531 (legislative record contained very little evidence of unconstitutional conduct purportedly targeted by statute's substantive provisions). *Cf. Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 182 (1997) (under First Amendment Congress must make reasoned judgment that "burden imposed" on speakers by content neutral regulation is congruent to legislation's benefits); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 667-68 (1994) (inquiry required into sufficiency of findings on effect of regulation to determine whether regulation narrowly tailored).

As the time of protection becomes progressively less and less limited, Congress should be required to have a progressively greater foundation for determining that enlarged protection is necessary to promote the progress of science and useful arts.[21] Otherwise, the "limited Times" constraint on congressional power is meaningless, allowing Congress to afford perpetual copyright protection "on the installment plan."[22] This type of scrutiny would not require, as some fear, the Court to exceed "judicially manageable limits" on congressional authority to set copyright terms. *See* Br. for Respondent in Opp'n to Pet. for Cert. at 14. Rather, it would simply involve the Court construing, as it always has, the relevant constitutional language, and ensuring that Congress engaged in a sufficient consideration of all factors and evidence necessary to support its determination. As demonstrated by this Court's application of this standard in cases such as *Florida Prepaid*, this level of scrutiny would be judicially manageable and would not impermissibly limit any discretion that Congress has, in fact, been granted.

III. Congress Did Not Adequately Consider The Substantial Burdens CTEA Places On The Public's Access To And Use Of Copyrighted Works During Their Extended Terms

The brief legislative record accompanying CTEA shows that Congress only weighed certain benefits it perceived would

21. The more remote in time the copyright incentive becomes, the less plausible the assertion that it serves to motivate creative activity. *See generally* Robert L. Bard & Lewis Kurlantzick, *Copyright Duration at the Millennium*, 47 J. Copr. Soc'y 13, 22-29 (2000) (costs increase but benefits do not with lengthy terms); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright In Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 323-29 (1970) (same). *See also* Heald & Sherry at 1173-74 (CTEA's prospective application would have no measurable effect in increasing number of works authored); Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 Fla. L. Rev. 989, 1002, 1031 (2000) (same).

22. *Copyright Term Extension Act of 1995: Hearings on S. 483 Before The Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) ("Senate Hearings") (statement of Professor Peter Jazsi).

accrue from the Act's broad enlargement of copyright protection. *See, e.g.*, Sen. Rep. at 3-23; H.R. Rep. No. 452, 105th Cong., 2d Sess. 3-9 (1998). Congress did not meaningfully address the substantial burdens this Act places upon the public's access to and use of copyrighted works that would otherwise have gone into the public domain.[23]

Notwithstanding a narrow legislative exception for specified activities of qualifying libraries and archives under 17 U.S.C. § 108(h), *infra* pp. 29-30, the entire structure and history of CTEA evidence a failure to balance these substantial burdens against the limited benefits of the legislation. As noted in the Minority views of Senator Brown, the hearings and debate on CTEA wrongly suggested that the extension would not harm anyone and at the same time neglected to examine the concomitant harm to the public domain.[24] Similarly, Senator Kohl observed that unless Congress pays due consideration to the reasons for limiting copyright terms, it risks damaging the public interest: To respect the Constitution's requirement, Congress must "strike a balance between encouraging creativity and protecting consumers from monopoly power. Like all monopolists, copyright owners are loathe to give up their power. But once the main purpose of copyright has been served and creativity has been adequately encouraged, the monopoly power must bow to the public interest." Sen. Rep. at 38. In enacting

23. *Amici* recognize that Congress did have before it some indications of the problems with and objections to the legislation. For instance, the Register of Copyrights testified that the "negative impacts" of CTEA would include freezing the public domain for twenty years and perpetuating problems with copyright clearances. She acknowledged that determining copyright status and term of some works is difficult and that finding the owners can be "almost impossible." Senate Hearings (statement of Marybeth Peters, Register of Copyrights). However, such limited testimony falls far short of weighing the full scope of these burdens against the perceived benefits of the legislation or devising meaningful ways to address these burdens.

24. Sen. Rep. at 34; *see also id.* at 34-35 (extending copyright term by twenty years upsets constitutional balance and threatens to dry up public domain).

CTEA, Congress did not "adequately balance[ ] these competing interests." *Id*. Moreover, closer examination reveals that the perceived benefits of the legislation are largely illusory or are not directed towards proper aims of copyright protection.

A. CTEA Substantially Burdens Efforts To Preserve Works, Make Them Available To The Public, And Use Them To Create New Works

In the legislative history, it was claimed that CTEA could promote preservation and restoration of works embodied in perishable media. *See*, *e.g.*, Sen. Rep. at 13. The Senate Report states that "the digital revolution offers a solution to the difficulties of film, video, and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well. However, to transfer such works into a digital format costs a great deal of money. . . ." *Id.* The Senate Report also observes that digitized works can be perfectly reproduced at little or no cost. *Id.* It concludes that without copyright protection "there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurances of an adequate return on that investment." *Id*.[25]

However, giving copyright owners additional protection to reward restoration and preservation of works was either unnecessary as a practical matter or improper as a constitutional matter. Were the restoration of an existing work to involve any original, creative expression, the additional matter would qualify as a derivative work under the pre-existing terms of the Copyright Act.[26] Thus, there was already a copyright incentive

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25. The Court of Appeals believed that CTEA could be found to "promote Progress" by giving owners of copyrights in existing works "an incentive to preserve older works, particularly motion pictures in need of restoration." *Eldred v. Reno*, 239 F.3d at 379 (citing Sen. Rep. at 12).

26. 17 U.S.C. § 103(b) (copyright in derivative work extends only to material contributed by author of such work, as distinguished from preexisting material employed in work; derivative work copyright independent of, and does not enlarge, copyright in preexisting material).

for activities that add original, creative expression to public domain works. And although preservation activities are laudable, they are not copyrightable authorship. By further rewarding owners of copyrights in pre-existing works for possible acts of preservation, Congress is granting copyright protection through the back door for "sweat of the brow" efforts. Contrary to what the D.C. Circuit stated,[27] this is not a legitimate aim of copyright protection. *See Feist*, 499 U.S. at 353-61. Although Congress may fund such preservation activities directly, it may not use its powers under the Copyright Clause to do so.

Experience teaches that copyright owners principally preserve and make accessible only those works they believe have sufficient commercial appeal to merit the expenses associated with such undertakings.[28] Conversely, many institutions and individuals (including those represented by the *Amici*) are willing to invest the sums required to preserve, digitize and facilitate public access to vast amounts of material regardless of its commercial appeal and with little or no assurance of financial return. CTEA will actually deter the preservation of and public access to such materials by keeping them out of the public domain.

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27. "Preserving access to works that would otherwise disappear — not enter the public domain but disappear — 'promotes Progress' as surely as does stimulating the creation of new works." *Eldred v. Reno*, 239 F.3d at 379.

28. *See supra* note 16 (discussing small number of copyright renewals). Tellingly, following this Court's decision in *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), some commercial database producers purged thousands of articles by freelance authors rather than attempt to find and procure permission from the authors holding copyrights in individual articles originally published as part of larger collective works. Scott Carlson, *Once Trustworthy Newspaper Databases Have Become Unreliable and Frustrating*, Chronicle of Higher Education, Jan. 25, 2002, at 29.

1. CTEA Harms Public Domain Preservation and Republication Projects

An example of a project that is preserving and making historically significant public domain works available to the public is *Documenting the American South (DAS)*.[29] DAS is an electronic collection comprised of more than 1000 printed publications and manuscripts. Sponsored by the Academic Affairs Library at the University of North Carolina at Chapel Hill, DAS provides no-fee access to these materials via the Internet. These digitized, primary materials offer Southern perspectives on American history and culture, supplying teachers, students, and researchers at every educational level with a wide array of documents. "Currently, *DAS* includes six digitization projects: slave narratives, first-person narratives, Southern literature, Confederate imprints, materials related to the church in the black community, and North Caroliniana." *Id*. The textual materials on DAS were scanned using optical character recognition software, then proofed for completeness and accuracy, cataloged, and archived.[30] It is estimated that the costs of the digitization process exceed $5 per page.[31]

The documents digitized and published through DAS are of tremendous value to scholars and the public at large.[32]

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29. Accessible at http://docsouth.unc.edu (last visited May 17, 2002).

30. *See* http://docsouth.unc.edu/digitizingnarr.html (last visited May 17, 2002). Preservation review is also undertaken for safe handling of the original materials being digitized and for conservation treatments, re-housing, and microfilming, as appropriate. *Id*.

31. Telephone interview with Larry Alford, Deputy University Librarian, University of North Carolina, Chapel Hill (April 29, 2002).

32. Joe A. Hewitt, *Doc South 1000th Title Symposium* (March 1, 2002), *available at* http://docsouth.unc.edu/jahewitt.html (last visited May 17, 2002). The outpouring of praise for this project from readers of these materials has been overwhelming, and clearly attests to its value to the public. The availability of these primary sources in DAS has influenced what graduate students have adopted as research topics, what secondary school teachers can teach, what K-12 students can read, how budding novelists approach their characters and plots, and how readers

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The DAS web site receives approximately 4000-6000 hits per day. *Id.* These are often for sources not readily available elsewhere. For example, DAS includes approximately 160,000 pages of slave narratives. In many instances, there are perhaps only three or four original hard copies extant. Prior to digitization of this material, these type of documents would be accessed by perhaps a half dozen people per year. These unique documents are accessed now by an estimated fifteen to twenty people *per day* (i.e., well over 5000 people per year) via the Internet. Alford Interview, *supra* note 31.

Equally clear is the fact that this project would be nearly impossible to undertake without the public domain. Almost all the documents digitized for DAS are documents dated prior to 1923. *Id*. Although the institution has been able to include a few dozen works from after that date, it has not been able, as a practical matter, to digitize and publish works from the 1920s and 1930s. The high transaction costs associated with identifying and locating current copyright owners presents a major obstacle to digital publication. DAS simply does not have the resources necessary to investigate the copyright status of such works or to obtain clearances when necessary. *Id.* The few instances where the institution has undertaken to digitize and reprint important out-of-print works published after 1923 have largely involved situations where the publisher was affiliated with the institution and the heirs were comparatively easy to find. *Id.* Even in these cases the clearance process consumed approximately a dozen man-hours per work. *Id.*

Similar constraints have been imposed on the efforts of the Library of Congress to digitize and make available to the public substantial portions of its collections. *American Memory*, a gateway site to rich primary source materials relating to the

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from all walks of life experience history. *Id.* "Reenactors and confederate heritage groups have found just as much to praise as African-American historians and civil rights activists. Somehow, the primary sources in *Doc South* seem to help people from different backgrounds to find their way back to a common culture." *Id.*

history and culture of the United States, offers more than 7 million digital items from more than 100 historical collections with no fee to users.[33] These items include books and other printed texts, manuscripts, sheet music, maps, motion pictures, photos, prints and sound recordings, and the richest parts of the collection appear to be public domain works from prior to 1920. Copyright restrictions manifestly limit the scope of what the Library of Congress can make publicly available.[34]

2. Substantial Numbers of Older Works Are Not Exploited Commercially

It also bears emphasizing that the amount of material that could potentially remain unavailable to the public in a meaningful way for many more years appears to be vast. One indicator of this is the apparent scarcity of books published between 1920 and 1950 that are now in print. According to *Books In Print*[35], the number of books in print for the past three years exceeds 600,000, while all titles for the decades of 1920-1950 number less than 6,000. *Id.* The paucity of republished works exists despite Congress' extending the terms for such works from 56 to 75 years in 1978. The table below indicates approximately how few of these older books have sufficient commercial appeal to warrant their republication.

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33. Library of Congress, American Memory: Historical Collections for the National Digital Library, *available at* http://memory.loc.gov (last visited May 17, 2002).

34. *See* Caroline R. Arms, *Getting the Picture: Observations from the Library of Congress on Providing Online Access to Pictorial Images*, 2 Library Trends 379 (1999) ("For public access, LC has focused on converting materials produced by the U.S. Government, those likely to be out of copyright by virtue of their date of creation, or collections where a single organization or individual appears to hold copyright and commercial interest is unlikely.").

35. *Books In Print Online* (2002), *available at* http://www.booksinprint.com (last visited April 2, 2002).

Comparison: Books Registered (1927-1951) vs. Books Remaining In Print (2002)[36]

Years	Books Registered	Books Remaining In Print	Remaining In Print (%)
1927-31	66,947	646	1.0
1932-36	56,723	682	1.2
1937-41	59,192	929	1.6
1942-46	41,261	911	2.2
1947-51	52,530	1720	3.3

Similar problems exist with regard to works in other media, for example, historically important sound recordings by African Americans in the early 20th century. One scholar estimates that at least 800 commercial recordings were made by African Americans during the period from 1890 to 1919.[37] These include the pre-1920 output of pioneering Broadway star Bert Williams, composer/conductor W.C. Handy and the Tuskeegee Institute Singers, as well as recordings by bandleader and war hero James Reese Europe, tenor Roland Hayes and the Fisk University Jubilee Singers. *Id.* Despite their age, it is estimated that half of these recordings would be protected by existing copyright law due to state law protections for sound recordings that still persist

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36. The column "Books Registered" is derived from information in the Annual Report of the Librarian of Congress for each of the years in question as to the number of hardbound books and softbound books or volumes registered with the U.S. Copyright Office. The column "Books Remaining In Print" is derived from an electronic search of Books In Print Online, *supra* note 35, for books listed as in print and indicating a "Publication Date" of the year in question.

37. E-mail from Timothy Brooks to Arnold Lutzker, Counsel of Record (Apr. 24, 2002).

under federal law. *Id*.[38] Even though phonorecords of most of these recordings still exist, the companies that own the copyrights have apparently reissued only two such titles — less than one percent.[39]

3. CTEA Harms Scholarship, Education and Creative Use of Older Works

Congress conducted no meaningful study to establish that for a significant minority, much less a majority, of copyrighted works, there is any material likelihood that copyright owners have an incentive to republish. To the contrary, as the foregoing examples illustrate, unless a market for a work is provable, owners of older works are not likely to republish them. Aside from a small selection of classic novels, movies and musical

38. The problems created by CTEA are even more complex for pre-1972 sound recordings than for other works. Federal copyright protection does not extend to sound recordings first fixed prior to February 15, 1972, and state common law and statutory protections apply to such sound recordings until February 15, 2067. 17 U.S.C. § 301(c). *See also Goldstein v. California*, 412 U.S. 546 (1973) (state law protections for sound recordings not preempted for those fixed prior to February 15, 1972). Absent this federal preemption, the protection for sound recordings was potentially perpetual. *Id*. at 550, 560-61. Under the 1976 Copyright Act, preemption was to take effect on February 15, 2047. *See* 1976 Copyright Act, *supra* note 14. Under CTEA, that date was extended by twenty years. 17 U.S.C. § 301(c). Consequently, commercially released sound recordings from the turn of the last century will potentially be protected for a total of more than 150 years after their commercial release. *See generally* 1 Nimmer On Copyright § 1.01[B][2][d], § 4.06[B] and 2 Nimmer On Copyright § 8C.03.

39. Brooks e-mail, *supra* note 37. At least 130 such titles have been issued by record labels in countries outside the U.S. in which the recordings are not protected by copyright or by individuals within the U.S. who have not obtained permission to reproduce them. *Id*. *See also* Register of Copyrights, Draft Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 23 (Oct. - Dec. 1975) (Copyright Office was "convinced that a real problem exists with large and growing catalogs of recordings that record companies are sitting on and will neither release nor license.").

works, no reasonable expectation for republication by copyright owners exists.

As is discussed in more detail in other briefs, CTEA imposes huge burdens on creative, educational and scholarly activities involving works protected by extended terms. Users of older works are self-censoring their published research in order not to run afoul of enlarged copyright terms. Because of the Copyright Act's prohibition on creation of derivative works based on a copyrighted work, *see* 17 U.S.C. § 106, the burdens copyright law places on the creative process are as onerous as they are in the republication context.[40] Scholarly journals and publishers are often extremely cautious about publishing scholarship involving older works. One scholarly journal, for example, refused to publish a piece of scholarship involving correspondence from the Civil War era unless the researcher obtained signed permissions from families and other copyright owners of the letters being quoted.[41] The last Civil War veteran died in 1959, so conceivably his correspondence could, due to CTEA, be under copyright until 2039. *Id.* It is the rare scholar who can undertake the costly and time-consuming genealogical and probate inquiries necessary to clear copyrights in such works. As a consequence, new works often cannot extensively quote primary sources, and scholarship and the public understanding of our history suffers.

CTEA also exacerbates the problems of educators who seek to use older works. The Copyright Office's recent study on distance education observes that the difficulty educators face in obtaining clearances to use older works in the digital distance education environment "may have become more acute over recent years" in part because of CTEA's retrospective twenty

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40. *See generally* Bard & Kurlantzick, *supra* note 21 at 41-44, 47 J. Copr. Soc'y (inhibiting effects of term extension on creative uses of works).

41. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use* 48 J. Copyright Soc'y 259 (2001).

year term extension.[42] But digital distance education is not the only context in which educators face these issues.

One law school librarian reports that faculty who teach courses in philosophy of laws and similar topics often draw on texts from the 1920s and 1930s for course readings.[43] Although it is the library's understanding that copyrights in vast numbers of works have lapsed, caution by the library and law school administration deters use of texts from this era without clearance or permission from copyright owners. *Id.* Many publishers no longer exist, and often their assigns do not know the publication in question. *Id.* Some require the institution to obtain parallel permissions from authors or heirs who cannot be located. *Id*. Others request royalties even though they cannot prove copyright ownership. *Id*. This process results in an enormous drain on the institution's time and resources, and often leads faculty to select alternate readings for which clearances may be less problematic. *Id*.

These problems become more complex when newspapers or other periodicals are involved. A librarian at the University of Washington reports that the university's Ethnic & Community Press project has been hindered by CTEA.[44] The collection is a digital compilation of newspapers that document the history of U.S. ethnic and community newspaper publishers. *Id*. The newspapers and stories were selected to complement a course on the history of mass communications offered approximately once per year to over 100 students. *Id*. Uncertainties exist as to whether the newspapers, journalists,

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42. U.S. Copyright Office, Report on Copyright and Digital Distance Education: A Report of the Register of Copyrights 165-66 (1999).

43. E-mail from Laureen C. Urquiaga, Access Services Librarian and Copyright Coordinator for the Howard Hunter Law Library in the Reuben Clark Law School at Brigham Young University, to Carol Ashworth, American Library Association (April 17, 2002).

44. E-mail from Lizabeth Wilson, Director of University Libraries, University of Washington, to Prue Adler, Associate Executive Director, Association of Research Libraries (May 15, 2002).

and/or photographers own rights, and constraints on the library's resources make appropriate inquiries extremely difficult and time-consuming. *Id*. This, in turn, inhibits development of the collection and its use in the classroom. *Id*.

B. Purported Benefits For Preservation and Access are Largely Unfounded

As noted above, Congress believed that CTEA would benefit the public by encouraging copyright owners to preserve and make the works they own accessible to the public. But it appears that this benefit is largely illusory. First, the historical record raises serious questions as to whether copyright protection has consistently or effectively induced copyright owners to preserve even unique embodiments of creative works. As shown below, some owners (especially in the sound recording and film industries) have neglected unique and numerically-limited embodiments of works to the point that they are deteriorated and unusable. In many cases, they have deliberately destroyed such materials.

According to one investigative report, "as many as a million or more recordings from long-defunct or inactive small [independent record] labels are lying unattended and gathering dust in storage rooms, basements, and garages all over the country — or have been destroyed or buried in landfills."[45] The most dramatic story of neglect and destruction in the sound recording industry is RCA's demolition of its Camden, New Jersey warehouse in the early 1960s. "The warehouse, according to collectors and industry veterans, held four floors of catalog product — pre-tape-era material ranging from metal parts, acetates, shellac disc masters, and alternate takes to test pressings, master matrix books and session rehearsal recordings." *Id.* Though some material was salvaged before the destruction, the building was dynamited and the wreckage bulldozed into the Delaware River. *Id*.[46]

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45. Bill Holland, *Labels Strive to Rectify Past Archival Problems*, Billboard, July 12, 1997.

46. Similar problems exist with motion pictures. *See* 1 National Film Preservation Board, Film Preservation 1993: A Study of the Current State of American Film Preservation: Report of the Librarian of Congress

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Second, additional copyright protection cannot induce copyright owners to preserve embodiments of creative works unless the copyright owner receiving this benefit has custody and control over the (presumably rare and deteriorating) physical medium in which the work is embodied. Because ownership of rights in works and ownership of rights in the physical media in which they are embodied often become separated over time,[47] the benefits of CTEA for preservation are often not forthcoming. For example, the Library of Congress makes its extensive collections of sound recordings available to record companies who have used it as a haven of last resort.[48] In the collection, "reissue producers have discovered copies of rare recordings that the labels themselves have lost or thrown away the masters of in periodic misguided 'housecleaning' efforts over the years." *Id*.[49] Thus, there is a significant blind spot in the purported rationale for an additional twenty years of copyright protection.

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§ 2 (1993) ("1993 Film Study") ("a great percentage of American film has already been irretrievably lost — intentionally thrown away or allowed to deteriorate"; "fewer than 20% of the features of the 1920s survive in complete form"; preservation problems most acute for works of little commercial value, like newsreels, documentaries, avant-garde and independent productions); *see also* 1 National Film Preservation Board, Television and Video Preservation 1997: A Report on the Current State of American Television and Video Preservation: Report of the Librarian of Congress, Executive Summary (1997) (kinescope or film copies of early live television broadcasts were made selectively, other programs deliberately destroyed, videotapes erased and recycled; most devastating losses are of local television station news footage).

47. *See* 17 U.S.C. § 202 (ownership of copyright is distinct from ownership of any material object in which a work is embodied).

48. Bill Holland, *Library of Congress To Grow Sound, Visual Archives Getting New Facility*, Billboard, Dec. 13, 1997.

49. *See also* 1993 Film Study, *supra*, §§ 6A, 8, and 9 (material objects embodying motion pictures frequently preserved at public expense by public archives who are restricted by copyright law and contractual agreements from making motion picture works widely available to the public; studio deposit agreements prohibit commercial use of publicly archived film materials after copyrights expire).

C. Harmonization Is An Illusory Rationale

A chief rationale advanced in support of CTEA was that it would "harmonize" U.S. copyright law terms with those of countries in the European Union ("EU"). *See*, *e.g.*, Sen. Rep. at 7-10. This is not only a dubious goal as a legal matter, it is overstated as a factual matter. As the briefs of Petitioners and others make clear, CTEA actually "harmonizes" on a selective basis, and in fact creates substantial disharmony with the laws of countries of the EU and other nations with whom the U.S. conducts substantial trade.[50] Most EU countries limit the term of works owned by corporate entities to seventy years, and CTEA expands the disharmony between these terms and U.S. terms from five to twenty-five years. Sen. Rep. at 31 (Minority views of Sen. Brown). As to an individual's term of copyright, Australia, Canada, China, and Japan grant protection for life of the author plus fifty years.[51] This is consistent with the requirements of the Berne Convention, to which the U.S. adhered in 1989.[52] Whatever dubious "harmony" CTEA may create as to European Union countries, it certainly creates disharmony with other countries' copyright laws.

A purported benefit of "harmonization" for U.S. copyright owners is that it will result in substantial revenue for U.S. copyright interests. *See* Sen. Rep. at 7, 9. But Congress largely overlooked the costs that CTEA will impose on the American

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50. The amount of "harmony" even within the EU appears to have been overstated. *See* Julian Barnes, *Copyright Wrongs*, Wall Street J. Jan. 31, 2002, at A16 (national anomalies complicate EU term calculations); *see also* Peter Groves, *Toad and Ratty In Clover*, The Times, June 6, 1995 (complications arising from EU restoration of copyrights to public domain works).

51. Paul Edward Geller, International Copyright Law and Practice § 3[1] at AUS-30, CAN-37, CHI-27 and JAP-21 (2000).

52. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). In 1976, Congress noted the then German copyright term of life plus 70 years, *see* 1976 Act House Report at 135-36, but nevertheless deemed harmonization with the Berne standard of life plus 50 years to be essential to passage of the 1976 Act, rather than longer terms by individual nation standards.

public.[53] The U.S. must recognize longer copyright protection for works of authors in the EU and pay a premium for the privilege of acquiring copies of such works.[54] Congress's failure to balance CTEA's perceived benefits against these added costs and losses undermines any claim that the enlargement of copyright terms was congruent and proportional to the aim of promoting the progress of science and useful arts.

D. Section 108(h) Does Not Significantly Mitigate the Harms Imposed By CTEA on the Public Domain

CTEA does contain a limited exemption for libraries and archives to enable them to reproduce, distribute, display, and perform certain works in the final twenty years of their extended terms for research and preservation purposes. 17 U.S.C. § 108(h). Although that provision on its face appears useful to the covered institutions, the exemption may ultimately do little, as a practical matter, to mitigate the substantial burdens imposed by CTEA. By its terms, it only covers "published" works. *Id*. It only applies when the works are not subject to "normal commercial exploitation," when a copy cannot "be obtained at a reasonable price," and when the copyright owner has not filed proper notice with the Copyright Office advising that the work is available on those terms. *Id*.

The "normal commercial exploitation" and "obtained at a reasonable price" requirements are particularly problematic. In December 1998, the Copyright Office issued interim regulations and requested comments on how a copyright owner or its agent may provide notice to libraries and archives that a published work in the final twenty years of its extended term of copyright is subject to normal commercial exploitation or that a copy can be obtained at a reasonable price. 63 Fed. Reg. 71,785-71,788 (1998). A number of groups filed comments, including copyright owner industry groups such as the Motion Picture Association of America. They assert that if a work is

53. *See generally* Bard & Kurlantzick, *supra* note 21, 47 J. Copr. Soc'y at 17-18, 30-35.

54. *See id.* at 56-61.

subject to licensing by the copyright owner, *even when the copyright owner has no access to or control over a copy of it*, then it is subject to "normal commercial exploitation" under Section 108(h).[55] Further, if a copy is available at a second-hand store or rental outlet for a reasonable sum — even if it is available only in an obsolete format — they claim it can be "obtained at a reasonable price." *Id.* at 9-11.

The Copyright Office has not, more than three years after issuing its notice, acted upon these comments or issued final rules. Intense challenge from copyright owner groups and lack of guidance from the Copyright Office render Section 108(h) an uncertain allowance on which libraries and archives cannot rely. Beyond these limitations, Section 108(h) does nothing to protect the activities of persons who are not qualifying institutions or whose activities are not covered by its limited scope. Most importantly, it does not permit the dissemination of works in extended terms or sanction any subsequent uses by other users.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and reversed.

Respectfully submitted,

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55. National Music Publishers Ass'n, *et al.*, Reply Comments on Interim Rule, Docket No. 98-13, at 8-9 (filed April 1, 1999).