No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,
Petitioners,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE MPAA

The Motion Picture Association of America, Inc. ("MPAA") is a non-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA's seven members produce or distribute approximately ninety percent of the filmed entertainment in the domestic theatrical, television, and home video markets, and they are among the leading producers and distributors of motion pictures overseas. Each MPAA member company owns thousands of valuable copyrights.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution gives Congress the power to create a federal copyright system, and to determine for what "limited Times" the law will afford to "Authors . . . the exclusive Right to their . . . Writings[.]" U.S. Const. Art. I, § 8, cl. 8. Beginning in 1790, each time Congress has set the term of federal copyrights, it has changed the term for existing as well as for new works. It followed that established practice again in 1998, in the Sonny Bono Copyright Term Extension Act ("CTEA").

Throughout the legislative and judicial consideration of the CTEA, special focus has been placed on what effect extending existing terms would have on films. Congress heard arguments on both sides of that issue, and resolved them in favor of term extension. In rejecting petitioners' challenge to the Act, the court of appeals referred (Pet. App. 12a) to Congress's finding that "extending the duration of copyrights on existing works would . . . give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." In this Court, petitioners and their amici spe-

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[1] No counsel for a party authored any part of this brief. No person or entity other than the MPAA, its members, and their counsel made a monetary contribution to the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

cifically dispute (Pet. Br. 32, 44-45) the accuracy and relevance of Congress's conclusions with respect to films. As representative of the world's largest producers and distributors of audiovisual works, and the principal owners of U.S. copyrights in such works, the MPAA offers the Court a real-world perspective on these issues.

Petitioners' arguments are both doctrinally and empirically ill founded. Doctrinally, petitioners' reading of the "limited Times" provision is unpersuasive. It is also inconsistent both with this Court's traditionally broad construction of the Copyright Clause and with Congress's consistent practice since the time of the Founders. There is, moreover, no warrant for petitioners' effort to convert the sweeping purpose of the Copyright Clause, "[t]o promote the Progress of Science," into a test for every detail of each statutory adjustment to the overall balance of the copyright system, or to confine its meaning to the single goal of establishing incentives for the creation of new works. The "Progress of Science" is as surely promoted by establishing a balanced structure of rights and exceptions that can respond flexibly to changed circumstances in the United States and abroad, and by providing incentives for the preservation, restoration, or distribution of existing works, as it is by promoting the creation of new works.

Empirically, the legislative record and the film industry's experience support the reasonableness of Congress's conclusion that the CTEA would serve these goals. For example, many films are chemically fragile and expensive to preserve and restore. Extended copyright terms give existing copyright holders the incentive to bear those expenses, and then to promote wide distribution of the works in order to recoup their investment. Petitioners contest these propositions, but their protests simply make clear that the essence of their argument is not about the meaning of the Constitution, but about which copyright policy will better "promote the Progress of Science." That sort of policy argument, dependent as it is on uncertain empirical judgments about both do-

mestic and international markets, is paradigmatically one to be resolved by Congress, not the courts.

Indeed, recognizing the ordinary limits of judicial review, petitioners seek to couch much of their argument in the language of heightened First Amendment scrutiny. This Court's cases, however, have never suggested a position remotely as sweeping as that advanced by petitioners, which would subject every congressional decision concerning the scope of copyright protection to extensive constitutional litigation. Copyright law restricts the exploitation of expression, not the dissemination of ideas, and itself serves to advance—not threaten—First Amendment values.

ARGUMENT

I. THE CTEA'S UNIFORM EXTENSION OF COPYRIGHT TERMS IS A PERMISSIBLE EXERCISE OF CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE, AS ITS APPLICATION TO FILMS MAKES CLEAR.

"As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Judgments of this sort, including judgments about the appropriate duration of the copyright term, require balancing disparate interests and making predictions about future behavior. These factually complex, predictive determinations are precisely the sort that legislatures are most competent to make, and to which courts should defer once the legislature has decided.[2] Accordingly, "[w]ithin the limits of the constitutional grant" of the Copyright Clause, the Framers left it to Congress to "select[ ] the

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[2] *See, e.g.*, *Pegram* v. *Herdrich*, 530 U.S. 211, 221-22 (2000); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

policy which *in its judgment* best effectuates the constitutional aim." *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966) (emphasis added).[3]

In light of these principles, petitioners concede, as they must, that whether the particular term of copyright protection adopted by Congress in the CTEA is too long or too short is "not a judgment meet for this Court." Pet. Br. 14. They argue, however, that Congress's concomitant decision to extend the same term of protection to subsisting works falls outside the range of Congress's discretion under the Copyright Clause. That argument finds no support in the text or purpose of the Clause, and defies over 200 years of history. Petitioners' reasoning, moreover, could call into question any expansion of rights that applies to subsisting works. As a result, petitioners' contention that Congress has no discretion to apply changes in the copyright laws to subsisting works would invite a deluge of litigation regarding both prior term extensions and prior modifications to the entire range of rules and doctrines applicable to copyrights.[4]

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[3] *Cf. Stewart* v. *Abend*, 495 U.S. 207, 230 (1990) ("This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.' . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) ("It is for Congress to determine if the present system of . . . patents is ineffectual in promoting the useful arts . . . .").

[4] Each such challenge would likely require resolution of unique constitutional issues and engender ongoing uncertainty about the scope of copyright protection. Such a constitutionalization of copyright law would, among other things, require resolution of whether particular copyright provisions could stand under the Copyright Clause, the Commerce Clause, the Treaty Power, and other constitutional provisions.

A. The Text Of The Copyright Clause And The History Of Congress's Exercise Of The Copyright Power Show That Congress May Constitutionally Extend A New Copyright Term To Subsisting Works.

The Constitution confers on Congress the "Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, cl. 8. That language both grants power and defines the limits of the grant. Copyrights may only be granted to "Authors," with respect to "Writings," and for "limited Times." But this Court has always read those textual limits expansively, in light of the broad purpose of the Clause and in recognition that it is part of "the great repository of the powers of congress." *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 56 (1884). As the Court explained in *Goldstein* v. *California*, 412 U.S. 546, 561 (1973), for example, the terms "Authors" and "Writings" have been construed "not . . . in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." Thus, "Authors" has been held to include any person "to whom anything owes its origin; originator; maker," *Burrow-Giles*, 111 U.S. at 58, including cartographers, artists, composers, and photographers. *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.06[B] (2002). Similarly, "Writings" may include not only "script or printed material," but also "any physical rendering of the fruits of creative intellectual or aesthetic labor," *Goldstein*, 412 U.S. at 561, including sculptures and architectural works.

1. Extending the copyright term for subsisting works does not violate the "limited Times" requirement.

Petitioners argue that application of a new copyright term to subsisting works violates the "limited Times" restric-

tion. They concede, however (Br. 13-14), that the term set by the CTEA as it applies to *new* works cannot be challenged on the ground that it is not "limited"; and they are unable to explain why, if that is so, the very same term is not properly "limited" when applied to *subsisting* works. Petitioners would read the Clause as though it permitted grants only for periods that may not be changed once they have begun to run. But that restriction finds no basis in the language the Framers used. *Cf. McClurg* v. *Kingsland*, 42 U.S. 202, 206 (1843) ("[T]he power[ ] of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints upon its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents."). As the court of appeals observed (Pet. App. 12a-13a), "nothing in text or in history . . . suggests that a term of years for copyright is not a 'limited Time' if it may later be extended for another 'limited Time.'" Even if it were possible that a number of successive extensions might yield a total term that, in effect, confers a perpetual copyright, the overall term set by the CTEA does not approach that limit, as petitioners concede (Br. 13-14).

2. Congress's consistent practice, from the First Congress on, confirms its power to extend a new term to subsisting works.

Petitioners' cramped construction of the Clause is inconsistent not only with this Court's approach, but also with the long history of copyright legislation. The first English copyright statute granting rights to authors, the Statute of Anne of 1710, 8 Anne, c. 19, provided protection not only for new works, *id.* §§ 1, 3, but also for "books already printed," *id.* § 1. *See generally* 1 William Patry, *Copyright Law and Practice* 11 (1994). When twelve of the thirteen new American state legislatures passed copyright statutes in the early 1780s, they looked to the Statute of Anne as a model, *id.* at 19-20, and all

of them extended copyright protection to some category of subsisting works.[5]

Congress first exercised the new federal copyright power in 1790, with principal revisions in 1831, 1909, and 1976.[6] Each of those Acts defined particular "limited Times" for which copyrights would be granted for particular categories of works, and each applied the new term to both new and subsisting copyrights.[7] That consistent practice, starting in the time of the Framers, is entitled to great weight in assessing petitioners' novel constitutional argument. *See, e.g.*, *Burrow-Giles*, 111 U.S. at 57.[8]

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[5] Six of those statutes gave copyright protection to subsisting works that had already been printed or published. *See* Copyright Acts of Massachusetts (Mar. 17, 1783), New Hampshire (Nov. 7, 1783), Rhode Island (Dec. 1783), South Carolina (Mar. 26, 1784), Virginia (Oct. 1785), New York (Apr. 29, 1786). All of them gave protection to existing works that had not yet been printed. The texts of all of the early state statutes can be found in Library of Congress, Copyright Office, Copyright Enactments 1-21 (1963).

[6] *See* Act of May 31, 1790, 1 Stat. 124; Act of Feb. 3, 1831, 4 Stat. 436; Act of March 4, 1909, 35 Stat. 1075; Copyright Act of 1976, 90 Stat. 2541.

[7] *See* Act of May 31, 1790, § 1, 1 Stat. 124, 124; Act of Feb. 3, 1831, § 16, 4 Stat. 436, 439; Act of March 4, 1909, § 24, 35 Stat. 1075, 1085; Copyright Act of 1976, § 304, 90 Stat. 2541, 2573. Because the 1976 Act shifted the method of calculating the copyright term from fixed renewable terms to a single term based on the life of the author, it could not apply exactly the same term to all subsisting works as it applied to future works. Congress, though, sought to approximate equal terms for future and subsisting works by extending the term of protection for works that were still in either their initial 28-year term or their renewal term under the 1909 Act to a total of 75 years. *See* H.R. Rep. No. 94-1476, at 135 (1976); *see generally* Paul Goldstein, *Copyright* §§ 4.7-4.8 (2d ed. 2002).

[8] Petitioners argue (Br. 30) that the 1790 legislation addressed "fundamental issues of transition," but they fail to identify any source of congressional power for such a "transition rule" other than the Copyright Clause itself.

3. Extending a new term to subsisting works "promote[s] the Progress of Science."

In pressing their new reading of the Copyright Clause, petitioners place considerable emphasis on the Clause's introductory language—"To promote the Progress of Science and Useful Arts." That phrase is perhaps most naturally read as expressing the judgment of the Framers that having a federal copyright system *would* "promote the Progress of Science." Understood in that way, the introductory language imposes no independent limit on the power granted in the remainder of the Clause—it simply explains why the Framers granted Congress that power.[9] In any event, there is no question that "promot[ing] the Progress of Science" expresses the broad purpose of the grant of power[10]—and the grant should, like any constitutional provision, be construed to give Congress wide discretion to fulfill its purpose.

Petitioners would confine that purpose to a single goal: the establishment of incentives for the creation of new works. The CTEA in fact serves that purpose because, as discussed below, Congress could reasonably conclude that enabling copyright holders to gain the funds necessary to finance new works (including by increased revenues from overseas) is an important way of promoting the creation of new works. But the limitation petitioners suggest is not a tenable reading of the broad terms the Framers chose. "Science," in this context, means the whole of human knowledge.[11] Thus, any

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[9] *See generally* 1 *Nimmer on Copyright* § 1.03[A] (2002) ("Therefore, the phrase 'To promote the progress of science and useful arts . . . .' must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise."); *cf. Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905) (preamble of the Constitution).

[10] *See, e.g.*, *Goldstein*, 412 U.S. at 555 (clause "thus describes both the objective which Congress may seek and the means to achieve it").

[11] Samuel Johnson, *A Dictionary of the English Language* (1755) ("1. Knowledge . . . 3. Art attained by precepts or built on principles. . . . 4. Any art or species of knowledge.").

measure "promote[s] the Progress of Science" so long as Congress could rationally conclude that it contributes to the enrichment of knowledge.

The advancement of knowledge through copyright cannot reasonably be understood to be achieved only through the creation of new works. First, as this Court has recognized, from the beginning of the federal copyright system, creating incentives to publish and thus disseminate works has been a core function of copyright. *See, e.g.*, *Harper & Row Publishers, Inc.* v. *Nation Enters*., 471 U.S. 539, 558 (1985) ("copyright supplies the economic incentive to create *and disseminate* ideas" (emphasis added)). Indeed, before the 1976 revision, most of the federal copyright statute applied only to published works. That restriction, and the incentive for authors to publish that it embodied, powerfully demonstrates Congress's longstanding recognition that dissemination of works by itself "promotes the Progress of Science." In many cases such dissemination will not happen without economic incentives to restore and market the work, as the experience of the film industry illustrates.

Second, as the court of appeals observed (Pet. App. 13a), "[p]reserving 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." Petitioners suggest that every film freed from copyright protection is a film permanently gained for the public domain. In fact, because of film's chemical fragility, active preservation efforts are needed to keep many old films from vanishing altogether. Third, because older works often supply the inspiration for the creation of new works, preservation and distribution serve an essential role in the very innovation that petitioners insist Congress must promote.[12]

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[12] Petitioners contend (Br. 20-21, 32-33, 44-45) that, even if preservation and dissemination promote the "Progress of Science," they cannot support extending the copyright term of existing works because preservation and dissemination do not themselves satisfy the originality re-

Congress may use the copyright power to "promote the Progress of Science," then, by enabling authors to gain the financing essential to the production of new works, by encouraging the preservation of works that would otherwise be lost, by spurring the wide distribution of existing works, or by enhancing the United States' position in the international copyright regime. As shown below, with reference to the CTEA's effects on films, Congress acted well within its discretion in concluding that the CTEA's extension of the copyright term for subsisting works would in fact "promote the Progress of Science" in each of these ways.

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quirement recognized in cases such as *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991). Petitioners misconstrue that requirement. They argue (Br. 20) that the originality requirement is not premised on the "words 'Authors' and 'Writings' alone," and thus applies even when the copyright holder is indisputably the "Author" of the "Writing" at issue. Yet *Feist* made clear that it is precisely the terms "Authors" and "Writings" that "presuppose a degree of originality." 499 U.S. at 346. Subsisting works would not be eligible for extension if they had not *already satisfied* the originality requirement. But nothing in *Feist* or other cases suggests that subsisting works lose their status as "Writings" of "Authors" once they are initially published. Nor does any case suggest that each decision Congress makes in exercising the copyright power, including any alteration to the scope or duration of protection during the term of the original grant, must itself somehow promote the creation of new, original works.

Petitioners' reliance on *Graham* v. *John Deere Co.*, 383 U.S. 1 (1963), fares no better. Dictum in *Graham* states that Congress may not "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict the free access to materials already available." 383 U.S. at 6. Even if that reasoning could be extended generally to copyrights, it would have no application in this case, since the CTEA does not affect works that have already entered the public domain.

B. The Experience Of The Film Industry Supports Congress's Conclusion That Applying The CTEA's Term Extension To Existing Works Would "Promote The Progress Of Science."

1. Congress reasonably found that the CTEA would spur the creation of new works.

Petitioners seem to acknowledge (Br. 41-42) that spurring the creation of new works, including by supplying essential financing, constitutes a legitimate basis for the exercise of Congress's power. They simply deny that the CTEA's term extension has such an effect.

Congress, however, expressly found to the contrary, and evidence both within and outside the legislative record demonstrates the reasonableness of that judgment. The Senate report on the CTEA states that "extended protection for existing works will provide added income with which to subsidize the creation of new works." S. Rep. No. 104-315, at 12 (1996). Such subsidization, the report explains, is "particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors). . . . [T]he ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term." *Id.* at 12-13.

Congress's judgment that term extension promotes the creation of new works through helping to fund those works rested in part on the advice given to Congress by the country's leading copyright officials. Register of Copyrights Marybeth Peters, for example, suggested that extension of the copyright term for subsisting works "could . . . provide additional income that would finance the production and distribu-

tion of new works,"[13] and she gave an old but compelling example. "Authors would not be able to continue to create," she explained, "unless they earned income on their finished works. The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster[,] who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary."[14] Bruce Lehman, then Commissioner of Patents and Trademarks, made the same case with special reference to the "commercial copyright-based industries," which, he noted, would gain from term extension the "considerable financial resources" often essential to making and marketing new products such as movies.[15]

The movie industry illustrates with particular force the importance of revenues from subsisting works in financing, and thus enabling the creation of, new works. The average cost of making a new feature film has reached well over $50 million, and marketing costs add another $25 million.[16] Moreover, revenues from new films are highly uncertain, with headline-grabbing hits often outnumbered by money-losing projects.[17] Cash flows from the re-release of titles

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[13] *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong. 158 (1995) ("*1995 House Hearings*").

[14] *Id.* at 165; *see id.* at 196; *see also id.* at 109 (Directors Guild of America), 583 (Prof. Paul Goldstein).

[15] *Id.* at 212; *see also In the Matter of Duration of Copyright Term of Protection*, Docket No. 93-8 (United States Copyright Office 1993) at 75 (Bernard Sorkin) ("1993 Copyright Office Hearing").

[16] *See* Harold L. Vogel, *Entertainment Industry Economics* 80 (5th ed. 2001).

[17] *See, e.g.*, *id.* at 35 ("In fact, of any ten major theatrical films produced, on average, six or seven may be broadly characterized as unprofitable.").

from studio libraries, whether in theaters, on television, or on videocassettes and digital versatile discs ("DVDs"), thus play a crucial role in financing new works.[18]

Congress also reasonably found that term extension would promote the creation of new works by spurring the production of derivative works such as remakes and sequels. The Senate report on the CTEA noted term extension's likely boost to production of derivative works, *see* S. Rep. No. 104-315, at 12, and a number of witnesses supported that judgment.[19] The economic logic behind it is straightforward. Copyright owners—notably film studios—are unlikely to make the large investments required to produce derivative works, such as new editions of old works that include supplemental material such as never-before-seen outtakes and interviews, if the remaining copyright term on the underlying work is insufficient to assure them of the continued exclusive right to profit from works building on the underlying work.[20]

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[18] Amici George Akerlof et al. suggest (Br. 8-9 & n.14), without documentation, that cash flows should not affect decisions to invest in creation of new works. Whatever the merits of amici's argument *as theory*, "[a] large literature in corporate finance and macroeconomics documents the relationship between liquidity and investment." Owen Lamont, *Cash Flow and Investment: Evidence from Internal Capital Markets*, 52 J. Fin. 83, 84 (1997). A "strong correlation between cash (whether measured as a flow, a stock, or both) and investment is a well-documented fact." *Id.*; *see generally* John R. Meyer & Edwin Kuh, *The Investment Decision: An Empirical Study* (1957); Steven M. Fazzari et al., *Financing Constraints and Corporate Investment*, Brookings Papers on Economic Activity I 1988, 141 (1988); S. Gilchrist et al., *Evidence on the Role of Cash Flow for Investment*, 36 J. Monetary Econ. 541 (1995).

[19] *See 1995 House Hearings* at 141-42 (Judith Saffer), 582-83 (Prof. Paul Goldstein), 600-01 (Prof. Shira Perlmutter); *see also* 1993 Copyright Office Hearing at 38 (Susan Mann).

[20] The recently released 50th anniversary DVD of "Citizen Kane" (1941) serves as one example of such works. In addition to a painstakingly restored version of the film, the two-DVD set includes newsreel footage of the film's New York premiere, a 1996 documentary on the controversy it caused when it was first released, and running commentary

Petitioners may take issue with this logic, but predictive economic judgments of this sort are properly left to Congress.

2. Congress reasonably found that uniform term extension would also encourage the preservation, restoration, or wider distribution of existing works, notably older films.

The House Report on the CTEA expressly states that term extension would, among other things, "provide copyright owners generally with the incentive to restore older works and further disseminate them to the public." H.R. Rep. No. 105-452, at 4 (1998). The Senate report similarly notes that term extension would "provide enhanced economic incentives to preserve existing works." S. Rep. No. 104-315, at 3; *see also id*. at 13. As Senator Hatch stated at a 1995 hearing on the CTEA, "[o]wnership of a work includes the incentive to exploit a work, and with that incentive goes the incentive to preserve the work in a high quality form."[21] The experience of the film industry confirms the reasonableness of that legislative judgment.

Three considerations make those incentives particularly important in the film industry. Films are chemically fragile; they are very costly to preserve and restore; and yet they have the potential—particularly because of recent technologies such as cable television, videocassettes, and DVDs—to remain commercially valuable for many decades after they were originally released. The first two of those considerations explain why an economic incentive is important to ensuring the preservation of many movies: preventing films from being lost forever and maintaining film quality cost a

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by director Peter Bogdanovich and film critic Roger Ebert. *See, e.g.*, Tom Shales, *Raising "Kane": A DVD-luxe Model, Classic Films Get Special Treatment*, Wash. Post, Oct. 21, 2001, at G1. Copies of the DVD have been lodged with the Court.

[21] *Copyright Term Extension Act of 1995: Hearing Before the Senate Judiciary Comm.*, 104th Cong. 3 (1995) ("*1995 Senate Hearing*").

great deal. The third explains why copyright term extension supplies an effective incentive, particularly for older films: term extension enables the owners of those films to release them through the new modes of distribution and thus recoup the money needed for their preservation and restoration.

a. *Films are fragile.*[22] Until 1950, films in the United States were made on nitrocellulose, which is both volatile and subject to relatively rapid chemical deterioration at room temperature. Largely because of that instability, more than half of the feature films produced in the United States before 1950 have been lost. In 1950, film makers switched to an acetate-based film popularly known as "safety film" because it lacks nitrate film's flammability, but safety film has proven to suffer from its own forms of deterioration and fading.

The loss of so many old films helps demonstrate the very point that petitioners deny: commercial incentives—incentives made possible by extended copyright terms—are an essential engine for film preservation. If, before the last few decades, the studios—like virtually all film makers and distributors—did not invest substantial sums in preservation, that failure was due in significant part to the absence of an economic incentive to do so. With the emergence of cable television and home video, and the extension of copyright terms to a length enabling old movies to be re-released profitably in those new media, studios have started to devote millions of dollars each year to preservation and restoration. As one study of lost films notes: "It may be dollars and cents to

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[22] The representations in this paragraph rest on Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* 1-5 (repr. ed. 2000); Library of Congress, *Redefining Film Preservation: A National Plan: Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 1, 3 (1994) ("*1994 Librarian of Congress Report*"); Library of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation, Vol. 1: Report* 2-3, 7-15 (1993) ("*1993 Librarian of Congress Report*"); *Film Preservation 1993, Vol. 4: Submissions* 181-85 (1993) ("*1993 Librarian of Congress Submissions*").

[the studios], but it's a welcome turn of events for movie lovers who now have greater access to more films than at any time in history." Frank Thompson, *Lost Films* xiii (1996).

b. *Restoring and preserving old films is expensive.* Restoration and preservation typically involve several steps, including locating or piecing together a complete copy of the film, often from a variety of components created during the original production of the film, some of which may be scattered among different repositories; fixing physical and chemical damage; copying the film onto new film stock; making "separation masters" that preserve the film's visual richness more effectively than a single print; and storing the film in a cold, dry vault.[23] The exact cost of restoration and preservation depends on the type of film and its state of decay, but a decade ago the Librarian of Congress estimated that preserving a color feature film typically cost $25,000 to $40,000, and sometimes much more—not including the cost of ongoing storage.[24] In recent years, those costs have only risen, with many films costing hundreds of thousands of dollars, and some millions of dollars, to preserve and restore.[25] Universal Studios, for example, spent $500,000 restoring the Alfred Hitchcock classic "Rear Window" (1954).[26] Warner Bros. spent more than $350,000 restoring "Casablanca" (1942) and close to $1,000,000 reviving "Gone With the Wind" (1939).[27]

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[23] *See, e.g.*, *1993 Librarian of Congress Report* at 7-12.

[24] *See id.* at 11 & n.28.

[25] The National Film Preservation Board now puts the average cost of restoring and preserving a color feature at $50,000 to $300,000. *See* Doug Nye, *Old Films, Fading Fast*, The State, July 8, 2001, at E3.

[26] *See, e.g.*, Jami Bernard, *Window Dressing: Hitchcock's Classic Thriller Is Lovingly Restored—And Sealed with A 70G Kiss*, N. Y. Daily News, Jan. 16, 2000, at 21.

[27] Copies of the restored version of "Casablanca" on DVD have been lodged with the Court.

"The Adventures of Tom Sawyer" (1938), a classic just now being released on DVD, helps illustrate the difficulty and expense involved in restoring old films. Originally produced on nitrate stock, "Tom Sawyer" ran 93 minutes. By the time serious restoration efforts began in 2000, 13 minutes of the film were missing and much of it had suffered shrinkage and color fading. The sound track was riddled with clicks and pops. Over the course of a year and a half, with an investment of 1000 hours of labor and more than $300,000 in chemical and physical repairs, the 13 missing minutes were reconstructed through hundreds of frame-by-frame insertions, high-quality three-color negatives and master prints were recreated, and the film was translated onto a digital medium. The result will be available around the world on DVD by the end of the year.

c. *Term extension enables copyright owners to defray the costs of restoration and preservation and promote distribution.* Relatively new media such as cable television, videocassettes, and DVDs offer holders of copyrighted films vehicles for generating the substantial sums required for restoration and preservation. As Senator Feinstein noted in her opening statement during the Senate Judiciary Committee's hearing on the CTEA, "[v]ideocassettes, cable television, and new satellite delivery systems have extended the commercial life of movies and television series."[28] And that extended life enables older films to generate the dollars needed to recoup the cost of their restoration.[29]

But the costs of preservation and restoration must be invested up front, and, as many witnesses at the CTEA hearings noted, individuals or firms are unlikely to make the re-

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[28] *1995 Senate Hearing* at 4; *see* S. Rep. No. 104-315, at 6, 12; *1995 House Hearings* at 190 (Marybeth Peters), 283 (Prof. John Belton) (1995); *see also* 1993 Copyright Office Hearing at 9-10 (Hal David), 58-59 (Bernard Sorkin).

[29] *See, e.g.*, Darrell Satzman, *Building A Future in Preserving Films' Past*, Los Angeles Bus. J., Jan. 28, 2002, at 24.

quired investment in the absence of copyright protection. Films that enter the public domain thus fall prey to a "tragedy of the commons," in which no one steps forward to invest in their restoration or preservation.[30] As then Commissioner Bruce Lehman explained at the Senate Judiciary Committee's hearing on the CTEA, many public domain films "have been lost to the public forever and never reissued . . . because nobody had the economic incentive to do so."[31] By contrast, it is the films protected by copyright that are properly preserved and restored.[32]

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[30] *See 1995 House Hearings* at 52, 54-55 (Jack Valenti), 86 (Marilyn Bergman), 95 (Jack Valenti), 96 (Edward P. Murphy), 217-18 (Bruce Lehman); *1995 Senate Hearing* at 41 (Jack Valenti); *see also* 1993 Copyright Office Hearing at 30-31 (Susan Mann), 50 (Eric Schwartz) ("during the automatic renewal bill [debate], Congress was convinced . . . that works are more likely to be available when they are under copyright protection than when the term of protection expires for most commercial works.").

[31] *1995 Senate Hearing* at 38.

[32] *See, e.g.*, *1995 House Hearings* at 431 (reprinting *1994 Librarian of Congress Report*) ("there is increasing reason to believe that the preservation of the older Hollywood feature, long the central emphasis among public archives, might be supported by commercial interests"); *see also* Orrin G. Hatch, *Toward A Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 736-37 (1998).

The history of Frank Capra's "It's A Wonderful Life" (1946) shows that copyright protection promotes preservation and distribution. For a period, it was believed that "It's A Wonderful Life" was in the public domain. During that period, no one invested in restoring and preserving it, and consequently the copies shown on television and released on videocassette were "horrid." *Two Days of Christmas Classics*, Toronto Star, Dec. 24, 2000, at E1. Only when the holder of the copyright in the musical score and the underlying story used those rights to regain control over distribution of the movie did the film get the preservation attention it required. At that time, the copyright holder invested the money needed to restore the film's picture quality and to return it to its full length. The restored version, showing the "sharp, crisp production made by Capra in 1946," Larry Bonko, *"Wonderful Life" Has Become a TV Treasure*, Vir-

The importance of copyright as a tool for promoting film preservation gains powerful support, then, from the very contrast between the fate of copyrighted and public domain films that petitioners appear to acknowledge. The contrast is both quantitative and qualitative. As for quantity, petitioners concede (Br. 46) that the CTEA's term extension may help encourage the preservation of as many as 14,000 films from the years before 1943 alone. Although petitioners suggest that 14,000 is a trifling number, they offer no figure for public domain films privately preserved, perhaps because that figure is much smaller. As for quality, the copyrighted films preserved by the studios include hundreds of classics of American cinema. For example, films released in 1939 alone include "Beau Geste," "Destry Rides Again," "Gone With the Wind," "Goodbye Mr. Chips," "Gunga Din," "Mr. Smith Goes to Washington," "Stagecoach," "The Wizard of Oz," "Wuthering Heights," and "Young Mr. Lincoln." While many of the "orphan" films petitioners emphasize are culturally significant, they are of no greater value than the copyrighted titles being preserved in studio libraries. Moreover, while restorations done by the studios have, by and large, been of the highest quality, by contrast old public domain films that have been privately re-issued have generally been poor quality copies of prints that have not been properly restored.[33]

Copyright protection promotes not only preservation but also wider distribution of older films. In general, distributors of public domain films have not invested as much as copyright holders in promoting wide distribution of their titles and

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ginia-Pilot (Norfolk, VA), Dec. 24, 1999, at E2, is widely available on videocassette.

[33] *See 1995 Senate Hearing* at 42 (Jack Valenti); 1993 Copyright Office Hearing at 62-63, 66-67, 72 (Bernard Sorkin); *see also 1995 House Hearings* at 593 (Prof. Shira Perlmutter), 633-34 (Coalition of Creators and Copyright Owners); *1995 Senate Hearing* at 3 (Sen. Hatch).

thus in ensuring widespread public access to those titles.[34] As Register of Copyrights Marybeth Peters explained in response to a question from the Senate Judiciary Committee during consideration of the CTEA, "many works may be more readily available [to] the public, and in better and more usable condition, when they are still protected by copyright. Copyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update, and restore older works."[35]

3. Congress reasonably rejected petitioners' contrary arguments about preservation, restoration, and distribution of films.

Petitioners and amici Hal Roach Studios and Michael Agee ("HRS") offer a number of arguments why, contrary to Congress's express finding, term extension will not promote the preservation of older films. Congress considered those arguments and reasonably rejected them. Petitioners and HRS now ask the Court to second-guess that factually complex, predictive judgment, which it was Congress's prerogative—and responsibility—to make.

The first two arguments concern so-called "orphan" films, that is, films that lack "either clear copyright holders or commercial potential to pay for their continued preservation."[36] Even if petitioners and HRS were right that the

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[34] *See 1995 Senate Hearing* at 34-35 (Bruce Lehman); *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 105th Cong. 47 (Fritz Attaway) (1997) ("*1997 House Hearing*"); *see also* 1993 Copyright Office Hearing at 31, 35 (Susan Mann), 80 (Bernard Sorkin); Library of Congress, *Film Preservation 1993, Vol. 2: Los Angeles, CA Hearing* 59 (Philip Murphy) (1993) ("*1993 Librarian of Congress L.A. Hearing*").

[35] *1995 Senate Hearing* at 115.

[36] *1993 Librarian of Congress Report* at 5.

CTEA's term extension fails to promote the preservation of such films, Congress could reasonably have determined that term extension *would* promote the preservation of another large, and culturally significant, body of older films. The latter group includes, but is not limited to, the movies made during Hollywood's golden age—for example, "All Quiet on the Western Front" (1930), "Frankenstein" (1931),"Grand Hotel" (1932), "King Kong" (1933), "It Happened One Night" (1934), "The Thin Man" (1934), "Top Hat" (1935), "Mr. Deeds Goes to Town" (1936), "Snow White" (1937), "Boy's Town" (1938), "Fantasia" (1940), and "The Maltese Falcon" (1941). A focus on studio films seems all the more reasonable when one recognizes, as petitioners fail to do, that Congress had already addressed the broader issue of film preservation, and the problem of orphan films in particular, through other vehicles.[37]

Petitioners and HRS contend that uncertainty over copyright status constitutes the major obstacle to the preservation of many films, and that the CTEA's term extension prolongs that uncertainty for 20 years. *See* Pet. Br. 44-45; Brief of

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[37] Congress has addressed the broader problem of film preservation through a trio of National Film Preservation Acts. *See* National Film Preservation Act of 1988, Pub. L. No. 100-446, 102 Stat. 1782-87; National Film Preservation Act of 1992, Pub. L. No. 102-307, 106 Stat. 267-72; National Film Preservation Act of 1996, Pub. L. No. 104-285, 110 Stat. 3377-82. The first of those statutes created the National Film Preservation Board, which identifies films of particular historical or cultural importance. Pursuant to the second, the Librarian of Congress, in conjunction with the Board, established a national film preservation strategy based on collaboration between studios, archives, collectors, and the government. The third established the National Film Preservation Foundation, which has raised millions of dollars from private sources for preservation efforts and which possesses the authority to distribute federal matching grants as well. It is principally through these enactments that Congress has sought to ensure the survival of our nation's entire film heritage, and to address the problem of orphan films in particular. As the House report on the 1996 Act noted, "'orphan' films . . . are the focus of this legislation." H.R. Rep. No. 104-558, pt. I, at 10 (1996).

HRS 14-18. In a rare case, the expense of difficult copyright research and the risk of infringement litigation might deter investment in the preservation and distribution of a film. But as a general matter it is lack of funding, not uncertainties about copyright status, that impedes the preservation and restoration of orphan films.[38] Indeed, the Librarian of Congress's 1993 report on film preservation called lack of funding "[t]he defining problem for public archive preservation programs."[39] That chronic shortage of money, which Congress has sought to address in part by establishing the National Film Preservation Foundation, predates the CTEA.

Furthermore, whether or not a film has a clear copyright holder, under statutory provisions such as § 108 pertaining to libraries and archives, the Copyright Act leaves considerable room for preservation activities. *See* 17 U.S.C. § 108(a)-(c). Moreover, the CTEA added a subsection to § 108 that broadens these rights during the extended term. *See* 17 U.S.C. § 108(h). Section 108 is a perfect illustration of how Congress has rationally exercised its power under the Copyright Clause by striking a careful balance among the interests of the public, libraries, archives, and copyright holders. The CTEA cannot be viewed in a vacuum, but must be recognized as just one piece of a complex and comprehensive copyright scheme that serves many interests, not just those of copyright holders, and that, as a whole, "promote[s] the Progress of Science."

HRS contends (Br. 18-21) that the CTEA will not help spur the restoration and preservation even of films with readily identifiable copyright holders. They assert that only a small fraction of these films have immediate commercial potential and that the rest, including many silent features, will

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[38] Several witnesses made this point during the hearings on the CTEA. *See, e.g., 1995 House Hearings* at 65, 87, 93 (Edward Richmond), 110 (Martha Coolidge).

[39] *1993 Librarian of Congress Report* at 24.

be abandoned to decay. This argument misses the mark for three reasons. *First*, as the Librarian of Congress's 1993 study of film preservation found, cold, dry storage is normally the essential first step in preserving films for the long term.[40] In recent years, in response to the commercial incentives created by copyright protection, the studios have begun to invest tens of millions of dollars in creating and maintaining state-of-the-art storage vaults. Entire libraries, not just titles with obvious, immediate commercial potential, have been placed in the new storage facilities.[41] *Second*, HRS mistakenly assumes that the major studios can readily identify those films that will have the greatest commercial potential throughout their copyright term. The studios in fact lack such prescience, which is one reason their comprehensive preservation programs are economically rational.[42] *Third*, films are often most valuable not in isolation, but as part of collections or libraries. Thus, the incentive to preserve well known titles often carries with it an incentive to preserve other, less well known films. For all these reasons, commercial incentives resting on copyright prompt the major studios

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[40] The Librarian of Congress's national plan for film preservation described cold, dry storage as "the cornerstone of national film preservation policy." *1994 Librarian of Congress Report* at 6; *see id.* at 5-7; *1993 Librarian of Congress Report* at 12-15; Library of Congress, *Film Preservation 1993, Vol. 3: Washington D.C. Hearing* at 117-18; *1993 Librarian of Congress Submissions* at 181-85; Karen Kalish, *Film Preservation: A Practical Guide*, 77 Am. Cinematographer 123 (1996).

[41] *See The State of the Art*, 82 Am. Cinematographer 86 (2001).

[42] Even some films that today we think of as classics did not show their commercial potential until many years after their initial release. When "The Wizard of Oz" came out in 1939, for example, it was a failure at the box office, costing Metro-Goldwyn-Mayer nearly $1 million (the equivalent of $10 million today). It only gained wide popularity through re-release on television in the 1950s and 1960s, and eventually on videocassette and DVD. *See* Aljean Harmetz, *The Making of the Wizard of Oz* 288-90 (1977).

to preserve and restore entire film libraries, as numerous sources have recognized.[43]

4. Congress reasonably concluded that bringing U.S. copyright terms more closely in line with those of the European Union countries would "promote the Progress of Science."

Harmonizing U.S. copyright laws with those of our European Union ("E.U.") trading partners strengthens our cultural vitality and thus "promote[s] the Progress of Science" in at least two significant ways, each of which Congress considered. First, in light of the "rule of the shorter term,"[44] bringing U.S. copyright terms more closely in line with those in the E.U. boosts the export income of U.S. copyright holders and thus helps subsidize the creation of new works.[45] Second, international harmonization enables the

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[43] *See, e.g.*, *1993 Librarian of Congress L.A. Hearing* at 28 (Robert Heiber), 34-35, 41, 59 (Philip Murphy); *1993 Librarian of Congress Submissions* at 35; *Copyright Amendments Act of 1991: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Judiciary Comm.*, 102d Cong. 351-53 (1991) (Nicholas Counter III). It is the very power of the commercial incentives supporting preservation and restoration of copyrighted films that has led to the recognition of the "orphan film" problem. *See 1994 Librarian of Congress Report* at 3.

[44] The "rule of the shorter term," as implemented by member countries of the E.U., provides that a non-E.U. copyrighted work cannot be protected longer than it is in the work's country of origin. Prior to enactment of the CTEA, U.S. films that were works made for hire (*i.e.*, almost all U.S. films) were entitled to receive copyright protection for no more than 75 years after publication. After the end of that term, U.S. films could continue to be exploited in the E.U., but, in contrast to E.U. films of the same age, neither the U.S. copyright owners, nor the other participants in the U.S. films' revenues would be paid.

[45] *See, e.g.*, *1995 House Hearings* at 2 (Rep. Moorhead), 61-62 (Marilyn Bergman), 109 (Martha Coolidge), 212, 215-17 (Bruce Lehman), 589-90 (Prof. Shira Perlmutter); *1995 Senate Hearings* at 2 (Sen. Hatch), 25 (Bruce Lehman), 140 (Intellectual Property Law Section, American Bar Ass'n), 142 (George David Weiss).

United States to play a leading role in shaping global standards for effective and balanced copyright protection, including encouraging stronger copyright protection in the developing world.[46]

Petitioners insist (Br. 43) that harmonization is "a fantasy." Congress, however, expressly found that the CTEA would boost harmonization, and it did so based on an extensive record. Both the House and Senate reports identify "substantially harmonizing U.S. copyright law to that of the European Union" as one of the CTEA's principal benefits. S. Rep. No. 104-315, at 3; *see id.* at 7-8; H.R. Rep. No. 105-452, at 4. The Register of Copyrights, the United States Trade Representative, the Commissioner of Patents and Trademarks, and many others at the hearings on the CTEA testified that the CTEA would bring significant improvement in the alignment of U.S. and E.U. copyright terms.[47]

The basis for that collective judgment is clear. In 1993 the Council of the E.U. issued a directive requiring member states to bring their basic copyright terms to life of the author

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[46] *See, e.g.*, *1995 House Hearings* at 142 (Judith Saffer), 159 (Marybeth Peters), 207 (Charlene Barshefsky); *1995 Senate Hearing* at 30 (Marybeth Peters); *see also* 1993 Copyright Office Hearing at 11 (Hal David), 30-33 (Susan Mann).

[47] *See 1995 House Hearings* at 158, 161-63, 174-78, 196-97, 201 (Marybeth Peters, Register of Copyrights), 205-06, 209-10 (Charlene Barshefsky, U.S. Trade Representative), 215 (Bruce Lehman, Commissioner of Patents and Trademarks), 224 (Rep. Patricia Schroeder), 605-15 (Coalition of Creators and Copyright Owners), 641-74 (Lisa M. Brownlee); *1995 Senate Hearing* at 1 (Sen. Hatch), 4 (Sen. Feinstein), 6, 8-9, 11-12, 20-21 (Marybeth Peters), 25, 28 (Bruce Lehman), 44 (Alan Menken), 114-15 (Marybeth Peters), 117-18 (Bruce Lehman), 128-31 (Coalition of Creators and Copyright Owners), 139-41 (Intellectual Property Law Section, American Bar Ass'n,), 147 (Jonathan Tasini), *1997 House Hearing* at 3 (Rep. Coble), 32-33 (Francis Preston), 38 (George David Weiss), 46-48 (Fritz Attaway).

plus 70 years by July 1, 1995.[48] By the time of the CTEA's enactment, every E.U. country had done so.[49] By making the term for works by natural authors life plus 70 years, the CTEA clearly brings the United States into agreement with our E.U. trading partners on the duration of the most basic copyright term.

Petitioners make two sorts of arguments to deflect attention from that fact. Congress considered and rejected both. First, they note that, while the CTEA made the term for works by single authors identical to the basic term in the E.U., it left the terms for various special categories of works different from E.U. standards. This argument sets up a straw man. Proponents of the CTEA did not urge, and Congress did not find, that the CTEA would bring U.S. copyright terms into perfect alignment with those in the E.U. As the Senate report carefully put it, the CTEA would "substantially" harmonize U.S. and E.U. terms. S. Rep. No. 104-315, at 3. Petitioners offer no evidence to call that cautious judgment into question.[50]

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[48] *See* Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, art. 1, ¶ 1; art. 13.

[49] *See* 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (Sen. Hatch). When the Senate held hearings on the CTEA in the fall of 1995, many European countries had already adopted the new standard. *See 1995 Senate Hearing* at 114-15 (Marybeth Peters).

[50] Petitioners' argument that the CTEA actually increases disharmony between U.S. and E.U. copyright terms also markedly understates the degree of increased harmony achieved for certain categories of works, particularly those for which the methods of calculating the term differ between the United States and the E.U. countries. Movies, for example, typically receive a flat term in the United States as works for hire. The CTEA increased that term from the lesser of 75 years from publication or 100 years from creation to the lesser of 95 years from publication or 120 years from creation. The E.U. countries by and large do not treat works for hire as a separate category. For movies in particular, the term runs until 70 years after the death of the last survivor of four principal contributors (director, screenplay author, dialogue author, composer), a term

Petitioners' second argument is that life plus 70 years is further out of line with the rest of the world's copyright regimes than is life plus 50 years. Again, this argument is misleading. Supporters of the CTEA argued, and Congress found, that the CTEA would improve harmony between U.S. copyright terms and those of the E.U. nations, not necessarily with countries outside of the E.U.[51] Congress had a compelling reason for focusing on Europe: Europe accounts for a large percentage of U.S. trade in copyrighted goods.[52]

But in the end, petitioners' contention that Congress erred in finding that the CTEA would increase the harmony between the U.S. and E.U. copyright systems suffers from one overarching, and fatal, flaw. Every factual argument against harmonization made by petitioners before this Court was presented to Congress during its consideration of the CTEA.[53] Congress considered both those arguments and the arguments on the other side, and concluded that the CTEA would, overall, improve harmony between the U.S. and E.U. copyright regimes. Petitioners may disagree with that judgment, but it was Congress's to make.

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which is normally in excess of 95 years from publication. Thus, although U.S. law uses a different method of calculating the duration of the term, the CTEA's shift from 75 to 95 years from publication has the effect of moving the U.S. term closer to the typical E.U. term.

[51] In fact, many countries outside the E.U. have adopted a basic term of life plus 70 years. Those countries include Argentina, Brazil, Bulgaria, Croatia, the Czech Republic, Ecuador, Egypt, Indonesia, Iceland, Israel, Hungary, Lithuania, Nicaragua, Nigeria, Norway, Paraguay, Peru, Poland, Romania, Slovakia, and Slovenia.

[52] For example, in 1999, the E.U. countries accounted for approximately 66 percent of the revenues from rental of U.S. movies and videos overseas. *See* U.S. Dep't of Commerce, Bureau of Economic Analysis, *Survey of Current Business* 148 (2000).

[53] *See, e.g.*, *1995 House Hearings* at 281-82 (Prof. John Belton), 304-308 (Prof. Dennis Karjala), 355-407 (Prof. J.H. Reichman); *1995 Senate Hearing* at 86-89 (Prof. Dennis Karjala).

II. THE FIRST AMENDMENT DOES NOT REQUIRE HEIGHTENED SCRUTINY OF CONGRESS'S DECISION TO APPLY A TERM EXTENSION TO EXISTING WORKS.

Presumably recognizing that they cannot prevail under the ordinary standard of review, petitioners couch much of their argument (Br. 34-48) in the language of "intermediate scrutiny" under the First Amendment. In petitioners' view (Br. 37-38), essentially every provision of the copyright laws "regulates speech" in the First Amendment sense. Thus, under petitioners' theory, almost every decision Congress makes with respect to the scope or other aspects of copyright protection would be subject to judicial inquiry into whether the provision is "narrowly tailored" to serve an "important governmental interest." Such challenges would require extensive litigation to consider not only what Congress could reasonably have concluded, but also what evidence it considered and whether it could have adopted some other rule that would have "promote[d] the Progress of Science" in a more "narrowly tailored" fashion.[54] That approach would have surprised those who drafted both the First Amendment and the Copyright Clause.[55]

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[54] *See* Pet. Br. 39-40, 47-8. Petitioners concede (Br. 14) that, for purposes of the Copyright Clause, there is no basis for the Court to second-guess the length of the copyright term established by the CTEA for new copyrights. They make no similar concession, however, for purposes of the First Amendment—raising the specter that courts will be asked to determine whether each substantive provision and each term of protection is "narrowly tailored" to serve an "important governmental interest." For example, courts might be called on to consider whether hot news stories require the same length of protection as classical music compositions, or whether different levels of protection are required to satisfy the narrow tailoring requirement.

[55] The court of appeals may have overstated its point in the other direction when it suggested in dictum (Pet. App. 6a) that all copyright enactments are "categorically immune" from First Amendment challenge. A law granting copyright protection to works that speak favorably of the

To begin with, the Court has observed, in considering an alleged conflict between copyright and the First Amendment, that "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. It has further noted that the right of free speech includes not only the right to speak, but also the right "to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and that copyright also serves that "countervailing First Amendment value." *Harper & Row*, 471 U.S. at 559-60 (citing *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981)). Thus, the Court has recognized that copyright generally promotes, rather than conflicts with, First Amendment values. Moreover, while the First Amendment protects each individual's right to control his or her own expression, what petitioners seek to establish is something quite different: a constitutional right to "make commercial use of the copyrighted works of others."[56] Pet. App. 6a. This Court has never recognized such a right.

Whatever tension remains between copyright and the First Amendment is fully accommodated, as the court of appeals recognized (Pet. App. 5a-8a), through the idea/expression distinction and the doctrine of fair use—without subjecting all of copyright law to heightened consti-

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government, but not to those that are critical of it, for example, would certainly fail First Amendment scrutiny. This Court's cases, however, have never suggested any position remotely as sweeping as that advanced by petitioners.

[56] As one scholar has noted, "[w]hat Eric Eldred proposes to do is recirculate other people's speech. The First Amendment is certainly about the freedom to make your own speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt." Jane Ginsburg, *Symposi[um]: The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 Cardozo Arts & Ent. L.J. 651, 701 (2000).

tutional review. The former leaves ideas free of copyright regulation, allowing protection only for an author's particular expression. 17 U.S.C. § 102(b); *see, e.g.*, *Feist*, 499 U.S. at 345 ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'" (quoting *Harper & Row*, 471 U.S. at 556)). The Court has described with approval Justice Brennan's resulting conclusion that "[c]opyright laws are not restrictions on freedom of speech[,] as copyright protects only form of expression and not the ideas expressed." *Harper & Row*, 471 U.S. at 556 (describing *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring)).[57]

As to expression, the fair-use doctrine excludes from infringing activities reasonable uses of a copyrighted work for "purposes such as criticism [or] comment." 17 U.S.C. § 107. Judicial application of the "latitude for scholarship and comment traditionally afforded by fair-use" suffices to protect any speech values not already protected by the idea/expression distinction and the very nature of copyright, without constitutionalizing every copyright case. *Harper & Row*, 471 U.S. at 560.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[57] The idea/expression distinction also deflates petitioners' argument (Br. 7) that present copyright terms critically diminish public discourse. Every idea, theory, or fact embodied in a copyrighted work becomes freely available to the public at the moment of its publication. All that copyright law protects is an author's particular expression.

Respectfully submitted.

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