UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 99-65 (JLG)
JANET RENO, in her official capacity as Attorney General of the United States,	)	
Defendant.	)	

BRIEF ON BEHALF OF THE SHERWOOD ANDERSON LITERARY ESTATE TRUST, THE SHERWOOD ANDERSON FOUNDATION, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AMSONG INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., BROADCAST MUSIC, INC., MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, AND THE SONGWRITERS GUILD OF AMERICA AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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June 28, 1999

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During the consideration of the 1976 revision of the federal Copyright Act, the Senate Judiciary Committee observed that "[t]he debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." S. Rep. No. 94-473, at 116-17 (1975). The plaintiffs in this case seek for the first time in history to shift that debate from Congress to the judiciary, and ask this Court to abandon the judiciary's consistent deference to Congress in interpreting the terms of the Copyright Clause of the United States Constitution. This Court should decline plaintiffs' invitation, and should dismiss their Second Amended Complaint.

INTEREST OF AMICI CURIAE

Amici curiae include a diverse group of creators, publishers, and others who hold copyrights affected by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA"):

1. The Sherwood Anderson Literary Estate Trust holds the copyrights for the works of Sherwood Anderson, including the copyright for Anderson's "Horses and Men," a work which, but for the CTEA, would have passed into the public domain at the end of 1998, and which plaintiff Eldred has alleged he would have published on his Internet web site but for the extension of its copyright (Am. Comp. ¶ 31).[1] Income earned from the copyrights held by the Trust is distributed to certain of Anderson's heirs, as well as to The Sherwood Anderson Foundation.

2. The Sherwood Anderson Foundation was established in 1984 to provide grants to promising young writers. It is funded by contributions and by income earned from the copyrights held by The Sherwood Anderson Literary Estate Trust.

3. The American Society of Composers, Authors and Publishers ("ASCAP") is an unincorporated voluntary association of over 80,000 composers, lyricists, and music publishers. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses rights for non-dramatic public performances for the millions of copyrighted compositions in its repertory. ASCAP collects license fees and, after deducting operating expenses, distributes the remainder of the royalties to writers and publishers and their heirs and successors. Works in the ASCAP repertory that would have fallen into the public domain at the end of 1998 but for the CTEA include "That Old Gang of Mine" by Mort Dixon, Ray Henderson, and Billy Rose; "Who's Sorry Now?" by Bert Kalmar, Harry Ruby, and Ted Snyder; and "Yes! We Have No Bananas" by Irving Cohen and Frank Silver. Royalties from performing rights are the largest source of income for songwriters and music

[1] "Am. Comp." citations are to the Second Amended Complaint. The facts regarding the amici curiae are taken from the motion for leave to participate as amici curiae, which is being served and filed with this brief.

publishers, and ASCAP's members and their families rely on the royalties they earn from the use of their copyrighted property to provide for themselves and to run their businesses.

4. AmSong, Inc. is a California corporation dedicated to the protection of musical copyrights. Its mandate is to educate its members regarding issues affecting musical copyrights and to act as an advocate for songwriters and their heirs in the national and international arenas. AmSong is not a collection society. It depends on the dues and contributions of its members to sustain its activities. AmSong's members include composers, lyricists, and the heirs of deceased songwriters who participate in the organization on a voluntary basis. AmSong's members represent every genre of American music, including jazz, rock, country, theater, and classical. Among the compositions of AmSong members that would have fallen into the public domain if the CTEA had not been enacted are "Rhapsody in Blue" by George Gershwin; "Manhattan" by Lorenz Hart and Richard Rodgers; "Yes Sir! That's My Baby" by Walter Donaldson and Gus Kahn; "Ain't She Sweet" by Milton Ager and Walter Yellin; "Stardust" by Hoagy Carmichael; and "Let's Do It (Let's Fall in Love)" by Cole Porter. Each of these great American works remains commercially viable. The widows, children, or heirs of their creators would be harmed if the CTEA were declared unconstitutional.

5. The Association of American Publishers, Inc. ("AAP") is a national trade association of the U.S. book publishing industry. AAP's approximately 250 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary, and professional markets. Members of the Association also produce computer software and electronic products and services, such as online databases and CD-ROM. In seeking to expand secure national and global markets for its members' products, AAP's primary concerns are the protection of intellectual property rights in all media, the defense of free expression and freedom to publish at home and abroad, the creative management of new technologies, and promotion of educational excellence through adequate funding for instructional materials.

6. Broadcast Music, Inc. ("BMI") is a New York corporation that licenses public performing rights in

musical compositions on behalf of approximately 250,000 affiliated songwriters, composers, and publishers and numerous foreign composers through BMI's reciprocal licensing agreements with over 60 foreign performing rights societies. BMI's primary function is to provide licenses for public performing rights for approximately three million musical works to broadcast radio and television stations, cable program services and systems, restaurants, retail establishments, concert promoters, trade shows, and background music providers, among others. BMI operates on a non-profit basis and, except for operating expenses and reasonable reserves, distributes all of the license fees it collects to its affiliated songwriters and publishers.

7. The Motion Picture Association of America, Inc. ("MPAA") serves as the voice and advocate of the American motion picture, home video, and television industries in both domestic and international matters affecting its membership. Among its major functions, the MPAA seeks to preserve and protect the rights of copyright owners, including receiving just compensation for the use of their works; acts as the spokesman and advocate for producers and distributors of motion pictures, television programs, and home videos; and directs an anti-piracy program to protect U.S. films, television programming, and home video. The MPAA also collects and distributes royalties from compulsory licenses granted to domestic cable and satellite television and from European broadcasts of American television shows.

8. The National Music Publishers' Association, Inc. ("NMPA") is the principal trade association representing the interests of music publishers in the United States. The more than 600 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For over eight decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in courts. NMPA's wholly-owned subsidiary, The Harry Fox Agency, Inc. ("HFA"), was founded in 1927, and acts as licensing agent for over 18,000 music publishers, who in turn represent the interests of hundreds of thousands of composers.

9. The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation, whose membership consists of more than 500 sound recording producers and phonorecord manufacturers. RIAA's members create, manufacture, or distribute more than 90% of the authorized sound recordings in the United

States, including compact discs, cassette tapes, and long-playing records. RIAA's purposes include overseeing copyright infringement litigation for member companies, combatting all forms of record piracy throughout the world, and ensuring that copyright legislation maintains an appropriate balance for fostering creativity in music through increased investment, production, and distribution.

10. The Songwriters Guild of America ("SGA") is the nation's oldest and largest organization run exclusively by and for songwriters. SGA is an unincorporated voluntary association of approximately 5,000 songwriters throughout the United States and the estates of deceased SGA members. One of the services provided by SGA is licensing rights in musical works to music users on behalf of its writer-publishers. In addition, SGA provides contract advice, royalty collection, and audit services, copyright renewal and termination filings, and numerous other benefits to its members. SGA is governed by a Board composed entirely of songwriters; the exclusive purpose of the organization is to provide songwriters with the services and guidance they need in order to succeed in the music business. SGA and its educational arm, the Songwriters Guild Foundation, also assist beginning songwriters through scholarships, grants, and specialized programs. Among the works of SGA members that would have fallen into the public domain at the end of 1998 had the CTEA not been enacted are "Who's Sorry Now?" by Ted Snyder, Harry Ruby, and Bert Kalmar, "Swinging Down the Lane" by Isham Jones and Gus Kahn, and "Minnie the Mermaid" by B. G. DeSylva.

STATEMENT OF THE CASE

The correct resolution of plaintiffs' claims requires an understanding of the historical background of the Copyright Clause of the United States Constitution, and of the copyright term extensions brought about by successive Copyright Acts beginning with the first Copyright Act of 1790, none of which has ever been the subject of any constitutional challenge.

A. The Copyright Clause of the United States Constitution and Its Historical Background

The earliest English copyright statutes were enacted in the sixteenth and seventeenth centuries, and gave publishers a copyright in the works they published.[2] At the same time, authors were generally understood to enjoy a perpetual common law right to their unpublished works.[3]

In 1710, Parliament passed the so-called Statute of Anne, 8 Anne, ch. 19, which granted works published after April 10, 1710 a copyright term of 14 years from the date of publication, and an additional term of 14 years if the author survived the original term. Works published prior to April 10, 1710 received a copyright term of 21 years from that date.[4]

The statute's effect on authors' common law copyright was unclear because of a savings clause that preserved existing rights.[5] In Millar v. Taylor, 99 Eng.

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[2] See Copinger and Skone James on Copyright ¶¶ 2-08 - 2-13 (14th ed. Kevin Garnett, Jonathan Rayner James, and Gillian Davies eds., 1999) (hereinafter "Copinger"); 1 William Winslow Crosskey, Politics and the Constitution in the History of the United States 477-79 (1953) (hereinafter "1 Crosskey"); Eaton S. Drone, A Treatise on the Law of Property in Intellectual Productions 54-68 (1879) (hereinafter "Drone").

[3] See Copinger at ¶ 2-16; 1 Crosskey at 477; Drone at 60-68.

[4] See generally Copinger at ¶ 2-15; 1 Crosskey at 480-81; Drone at 68-70.

[5] See Copinger at ¶ 2-16; 1 Crosskey at 481; Drone at 68-73.

Rep. 201 (K.B. 1769), the King's Bench held that the savings clause preserved authors' perpetual rights under the common law. However, in Donaldson v. Beckett, 99 Eng. Rep. 257 (H.L. 1774), the House of Lords held that the Statute of Anne superseded authors' common law rights in published works, while leaving intact authors' perpetual common law rights in unpublished works.[6]

Following the American Revolution, the states began to enact copyright statutes that were similar to the Statute of Anne. In 1783, Connecticut passed the first such statute, which provided a copyright term of 14 years with a renewal term of 14 years.[7] Other states passed similar laws, also based on the Statute of Anne, but different in numerous details.[8]

Because they varied in many respects, the state copyright statutes failed to establish a workable system of copyright protection for the new nation. See The Federalist No. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961). The Framers therefore provided Congress with a federal

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[6] For discussions of Millar and Donaldson, see Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 655-56 (1834); Copinger at ¶ 2-16; 1 Crosskey at 481-82; Drone at 72-73; and John F. Whicher, The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States--Part I, 9 Bull. Copyright Soc'y U.S.A. 102, 126-30 (1962).

[7] See 1 Crosskey at 483; Drone at 87.

[8] See Francine Crawford, Pre-Constitutional Copyright Statutes, 23 Bull. Copyright Soc'y U.S.A. 11, 13-35 (1976); 1 Crosskey at 483-85; Drone at 87-88.

copyright power when they enumerated the functions of the national government in the Constitution, conferring upon Congress in the Copyright Clause, Article I, section 8, clause 8, "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."[9]

B. Copyright Acts From 1790 to 1976

Beginning with the first Copyright Act in 1790, each major copyright act enacted by Congress has broadened the scope and term of copyrights in pre-existing works, as well as in works created after the statute's enactment.

1. The Copyright Act of 1790

The First Congress enacted the initial federal Copyright Act in 1790. Act of May 31, 1790, ch. 15, 1 Stat. 124 ("1790 Act"). The 1790 Act, which sought "the encouragement of learning," provided that the author of a map, chart, or book or his assignee would have a copyright for a term of 14 years from the date of compliance with certain notice, deposit, and recordation procedures. The 1790 Act also provided that, if the author survived the initial term, he or his "executors, administrators or assigns" could renew the copyright for a renewal term of 14 years.

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[9] See generally Karl Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L.J. 109 (1928).

Importantly, the Copyright Act of 1790 expressly provided for the issuance of federal copyrights for works that were already in existence. Indeed, it specifically identified, as the first-listed beneficiaries of the new federal Copyright Act, "the author and authors of any map, chart, book or books already printed within these United States . . . [or] his or their executors, administrators or assigns," and granted them the exclusive right to publish such works "for the term of fourteen years." 1790 Act, § 1 (emphasis supplied).

2. The Copyright Act of 1831

In 1831, Congress extended the initial copyright term to 28 years. Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 ("1831 Act"). Although the renewal term remained at 14 years, Congress provided that if the author was deceased at the end of the initial term, the right of renewal passed to his widow or children. 1831 Act, §§ 1, 2. Section 16 of the 1831 Act expressly enlarged the term of copyright for those authors who had obtained copyrights prior to the enactment of the 1831 Act, so that their copyright terms would equal those for authors of future works.

The 1831 Act responded to England's extension of the "copyright term [to] twenty-eight years, plus the balance of the author's life if he were still living at the end of the twenty-eighth year." Saul Cohen, Duration, 24 UCLA L. Rev. 1180, 1194 (1977), citing 54 Geo. 3, ch. 156, § 4 (1814). As the Report of the House Committee on the

Judiciary stated:

> "[The Act] chiefly . . . enlarge[s] the period for the enjoyment of copyright, and thereby . . . place[s] authors in this country more nearly upon an equality with authors in other countries. . . .
>
> While . . . the United States ought to be foremost among nations in encouraging science and literature, by securing the fruits of intellectual labor, she is, in this thing, very far behind them all, as a reference to their laws will show."

House of Representatives Committee on the Judiciary, 21st Cong., 2d Sess., Copyright (1830), in 7 Cong. Deb., App. at 119 (1831).

After reviewing England's term extension, France's decision to extend the term to life of the author plus 50 years, Russia's copyright term of life of the author plus 20 years, and the perpetual rights in Germany, Norway, and Sweden, the House Report stated:

> "[W]e ought to present every reasonable inducement to influence men to consecrate their talents to the advancement of science. It cannot be from the interest or honor of our country that intellectual labor should be depreciated, and a life devoted to research and laborious study terminate in disappointment and poverty." Id. at 120.

3. The Copyright Act of 1909

By 1909, when Congress next considered extending the copyright term, many countries had adopted a life-plus-50-year copyright term. Saul Cohen, Duration, 24 UCLA L. Rev. 1180, 1196, 1197 (1977). The Berne Convention for the Protection of Literary and Artistic Works, an international copyright treaty which was first entered into in 1886 and which the United States finally joined in 1989, initially

encouraged and later required its member countries to adopt at least a life-plus-50-year copyright term.[10]

As evidenced by the reports in both the House and Senate on the 1909 Copyright Act, Congress considered adopting a life-plus-50-year term in 1909,[11] but ultimately decided to maintain an initial copyright period of 28 years and to extend the renewal term to 28 years as well. Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 ("1909 Act"). The 1909 Act provided that, in addition to living authors, the widows, widowers, children, executors, or next of kin of deceased authors could exercise the renewal right. 1909 Act, §§ 23, 24. Section 24 of the 1909 Act provided that copyrights already in existence would be extended "such that the entire term shall be equal to that secured by this Act, including the renewal period."

The House and Senate reports for the 1909 Act set forth a number of reasons for Congress's extension of the scope and term of copyrights. First, Congress was concerned that the 1831 Act did not adequately reward authors because serious works often "make their way more slowly in the public regard," and that the term then in existence did not

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[10] See, e.g., 1 Stephen P. Ladas, The International Protection of Literary and Artistic Property 75-103 (1938); Stephen M. Stewart, International Copyright and Neighbouring Rights ¶¶ 5.05 - 5.13, 5.54 (1983).

[11] S. Rep. No. 59-6187, at 6-7 (1907), reprinted in 6 Legislative History of the 1909 Copyright Act (E. Fulton Brylawski & Abe Goldman eds., 1976) (hereinafter "History of the 1909 Act"); H.R. Rep. No. 59-7083, at 13-14 (1907), reprinted in 6 History of the 1909 Act.

ensure that authors would benefit from their works during their old age.[12] Second, Congress wanted to encourage continued development of already-created works.[13] Third, Congress observed that the 1831 Act did not provide for spouses, parents, or grandchildren if the children were deceased.[14] Fourth, Congress, mindful of international standards, was concerned that the United States had the second shortest copyright term of any nation.[15]

4. The Copyright Act of 1976

From the 1920s through the 1940s, several bills were introduced to harmonize the federal copyright law with the life-plus-50-year copyright term of the Berne Convention. Saul Cohen, Duration, 24 UCLA L. Rev. 1180, 1196, 1200-01 (1977). Congress continued to consider moving to a life-plus-50-year copyright term during the 1960s and 1970s.

Beginning in 1962, and looking toward the enactment of comprehensive legislation revising the 1909 Copyright Act, Congress extended the terms of existing copyrights for successive brief periods of a year or more

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[12] S. Rep. No. 59-6187, at 6 (1907), reprinted in 6 History of the 1909 Act; H.R. Rep. No. 59-7083, at 13 (1907), reprinted in 6 History of the 1909 Act.

[13] S. Rep. No. 59-6187, at 6 (1907), reprinted in 6 History of the 1909 Act.

[14] H.R. Rep. No. 59-7083, at 13 (1907), reprinted in 6 History of the 1909 Act.

[15] Id.

(see Am. Comp. ¶ 62). The intent and effect of these enactments was to preserve copyrights nearing the end of their statutory protection from falling into the public domain before proposed legislation containing a longer term was passed and became effective. In this regard, the House Judiciary Committee reported that "[t]here is an urgent need for copyright legislation that takes full account of the continuing technological revolution in communications." H.R. Rep. No. 90-83, at 3 (1967).

In the Copyright Act of 1976, Congress finally embraced the international standard established by the Berne Convention, and enacted a term of life of the author plus 50 years for works created or published after January 1, 1978. Act of Oct. 19, 1976, §§ 302, 303, Pub. L. No. 94-553, 90 Stat. 2598 ("1976 Act"). Because Congress believed that the new life-plus-50-year term would be difficult to administer for copyrights already in existence, it developed different statutory formulas to approximate the new copyright term of life of the author plus 50 years for various categories of existing works. A total term of 75 years was established for existing copyrighted works, so that any copyright still in its initial term of 28 years would be eligible for a renewal term of 47 years, and a work already in its renewal term would have it extended to 47 years. 1976 Act, §

304(a), (b).[16] Thus, a work already protected for 56 years under the 1909 Act would have its term extended for an additional 19 years by the 1976 Act.

The reports of the House and Senate Judiciary Committees listed the following reasons, among others, for extending the term of copyright:

> "1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes . . . .
>
> 2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works . . . whose value may not be recognized until after many years.
>
> 3. . . . [T]oo short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works. . . . In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.
>
> . . . .
>
> 7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. . . . Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. . . . Even more important, a change in the basis of our

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[16] For anonymous and pseudonymous works and works made for hire, Congress established a term of 75 years from the year of publication or 100 years from the year of creation, whichever expired first. 1976 Act, § 302(c). Finally, Section 305 of the 1976 Act provided that copyright terms would "run to the end of the calendar year in which they would otherwise expire."

> copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. . . ."

H.R. Rep. No. 94-1476, at 134-35 (1976); S. Rep. No. 94-473, at 117-18 (1975).

The Copyright Act of 1976 paved the way for United States adherence to the Berne Convention, which finally came about on March 1, 1989, pursuant to the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

C. The Sonny Bono Copyright Term Extension Act

In 1998, Congress amended the 1976 Act by enacting the Sonny Bono Copyright Term Extension Act ("CTEA"), named after the deceased Congressman and well-known songwriter Sonny Bono, who was one of the original sponsors of the legislation. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). Described as "bipartisan, noncontroversial legislation" by Representative Howard Coble, the Chairman of the House Judiciary Subcommittee on Courts and Intellectual Property,[17] the

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[17] 144 Cong. Rec. H1458 (daily ed. Mar. 25, 1998) (statement of Rep. Coble). Representative Barney Frank, then the ranking minority member of the House Judiciary Subcommittee on Courts and Intellectual Property, told his colleagues that "[t]here is an overwhelming consensus on the part of the Committee on the Judiciary, which as some of you might have noticed is not always united." Id. at H1459 (statement of Rep. Frank). Senator Edward M. Kennedy, a senior minority member of the Senate Judiciary Committee, stated: "I commend the bipartisan cooperation that has

CTEA was passed by voice votes in both the Senate and the House.

The CTEA extended federal copyright terms by 20 years. See CTEA § 102(b)-(d). In particular, the CTEA extended the term of copyrights in works created on or after January 1, 1978 to the life of the author plus 70 years. CTEA § 102(b). The term of copyrights in works created prior to January 1, 1978 (which predated the change in the 1976 Act to a term based on the life of the author) was also increased by 20 years. CTEA § 102(d).

The legislative history of the CTEA makes clear that Congress recognized a number of public policy reasons for enacting it. Senator Orrin Hatch, Chairman of the Senate Judiciary Committee and one of the original sponsors of the CTEA, noted that these reasons paralleled those that led Congress to adopt the life-plus-50-year copyright term in 1976.[18] These reasons included the following:

1. Harmonization With the European Union and Strengthening the United States Balance of Payments. The European Union had recently adopted a directive requiring its member states to establish a new copyright term of the life of the author plus 70 years.

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produced this worthwhile legislation." 144 Cong. Rec. S11673 (daily ed. Oct. 7, 1998) (statement of Sen. Kennedy).

[18] 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). See also Senator Orrin G. Hatch, Toward a Principled Approach to Copyright Legislation at the Turn of the Millenium, 59 U. Pitt. L. Rev. 719, 728 (1998).

See Council Directive 93/98, 1993 O.J. (L. 290/0). United States copyright owners of works used in Europe could benefit from the European term extension only if the term of United States copyrights was similarly adjusted. Otherwise, under the so-called "rule of the shorter term," United States copyrights would not be protected in Europe past the expiration of the shorter United States term.[19]

Harmonization of the copyright terms of the United States and the European Union was thus an important purpose of the CTEA.[20] The United States Copyright Office supported the CTEA for two basic reasons:

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[19] Arthur R. Miller, Copyright Term Extension: Boon for American Creators and the American Economy, 45 J. Copyright Soc'y U.S.A. 319, 325 (1997) (hereinafter "Miller").

[20] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (noting that, upon enactment of extension, "U.S. works will generally be protected for the same amount of time as works created by European Union Authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States."); The Copyright Term Extension Act of 1995: Hearing before the Committee on the Judiciary of the United States Senate, 104th Cong. 4 (1995) (hereinafter "Senate Term Extension Hearing") (statement of Sen. Feinstein) ("Perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms."); Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing before the Subcommittee on Courts and Intellectual Property of the Judiciary Committee of the House of Representatives, 105th Cong. 3 (1997) (hereinafter "House Term Extension Hearing") (statement of Rep. Coble) ("The change would bring United States copyright protection up to similar levels of protection provided in the European Union member countries."); Miller at 326-27.

> "First, in the global information society, there is a need to harmonize copyright terms throughout the world. Moreover, we believe that the life-plus-70 term will become the international norm.
>
> Second, as a leader of creating copyrighted works, the United States should not wait until it is forced to increase its term; rather, it should set an example for other countries."[21]

Congress agreed that "the United States should assert its position as a world leader in the protection of intellectual property by adopting what is increasingly becoming viewed as the future standard of international copyright protection."[22]

Congress found copyright term extension essential to strengthen the United States balance of payments.[23] As Senator Patrick Leahy, Ranking Minority Member of

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[21] Senate Term Extension Hearing at 7 (statement of Marybeth Peters). The importance of international harmonization of copyright laws is enhanced by "the explosion of the global information infrastructure," which means that "[c]opyrighted works now may be transmitted, virtually instantly, almost anywhere in the world." Miller at 325-26.

[22] S. Rep. No. 104-315, at 8 (1996).

[23] See Senate Term Extension Hearing at 1-2 (statement of Sen. Hatch) ("Intellectual property is, in fact, our second-largest export; it is an area in which we possess a large trade surplus. At a time when we face trade deficits in many other areas, we cannot afford to abandon 20 years' worth of valuable international protection. So in my opinion, we must adopt [the CTEA] term of copyright if we wish to improve our international balance."); House Term Extension Hearing at 3 (statement of Rep. Coble) ("EU countries are huge markets for U.S. intellectual property, and the United States would lose millions of dollars in export revenues. Any imbalance would be harmful to the United States and would, therefore, work a hardship on American creators and their families.").

the Senate Judiciary Committee, explained:

> "from the years 1977 through 1996, the U.S. copyright industries' share of the gross national product grew more than twice as fast as the remainder of the economy. During those same 20 years, job growth in core copyright industries was nearly three times the employment growth of the economy as a whole. These statistics underscore why it is so important that we finally pass this legislation today."[24]

2. Encouraging Investment in Existing Copyrighted Works. Congress also determined that the CTEA is essential to encourage additional investment in existing copyrighted works (such as, for example, through conversion of such works into a digital format).[25] Congress found that such investments will not be made unless a period of exclusivity exists during which owners of copyrights can recoup the costs of such additional investments.[26]

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[24] 144 Cong. Rec. S11672 (daily ed. Oct. 7, 1998) (statement of Sen. Leahy); see also S. Rep. No. 104-315, at 9 (1996) ("Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.").

[25] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (extension will provide "copyright owners generally with the incentive to restore older works and further disseminate them to the public").

[26] See, e.g., S. Rep. No. 104-315, at 13 (1996) (finding that "there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment."). Chairman Hatch stated during the hearing before the Senate Judiciary Committee:

> "Many works which are now preserved in perishable media, such as film or analog tape recordings, could be

3. Fair Provision for Authors' Descendants.

Another reason for term extension was the desire of Congress to adopt a copyright term that would make adequate provision for the children and grandchildren of authors.[27] As Senator Hatch stated, "the vast majority of authors expect their copyrights to be a potentially valuable resource to be passed on to their children and through them to the succeeding generation."[28] Congress found that longer life spans and other demographic changes had made the life-plus-50-year copyright term of the Berne Convention

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more permanently preserved — and more widely disseminated — in digital formats, using emerging technology. But if we want the substantial investment in digitizing these works to be made, we must choose to either have the taxpayer fund investment in public domain works or to give private parties the incentives to invest by allowing them to recoup their investment." Senate Term Extension Hearing at 3 (statement of Sen. Hatch).

[27] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (stating that "[a]uthors will be able to pass along to their children and grandchildren the financial benefits of their works").

[28] Senate Term Extension Hearing at 2 (statement of Sen. Hatch); see also S. Rep. No. 104-315, at 10 (1996) ("Based on the numerous viewpoints presented to the Committee as it has considered these issues, the Committee concludes that the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation. The Committee believes that this general anticipation of familial benefit is consistent with both the role of copyrights in promoting creativity and the constitutionally based constraint that such rights be conferred for 'limited times.'").

increasingly inadequate.[29]

4. Encouragement for the Creation of New Works. Congress intended the CTEA to provide "an incentive for U.S. authors to continue using their creativity to produce works . . . ."[30] Numerous creators testified before Congress that the expectation of adequate copyright protection, not only now but in the future, and not only for oneself but also for one's children and grandchildren, is an important incentive for creators.[31] For example, noted songwriter Alan Menken testified:

> "While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, or a dentist in my case, it is the reality of life in the 1990's that one must work in order to support oneself and one's family. It is also the reality that we must support our children longer than ever, often into adulthood,

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[29] See Senate Term Extension Hearing at 3 (statement of Sen. Hatch) (noting "demographic factors that point to the need for a longer term if copyright is truly to reflect the natural desire of authors to provide for their heirs. Principal among these would be increasing life span of the average American, as well as the increasing fact of children being born far later in marriages than in the last decades."). The Senate Judiciary Committee stated: "In order to reflect more accurately Congress' intent and the expectation of America's creators that the copyright term will provide protection for the lifetime of the author and at least one generation of heirs, the bill extends copyright protection for an additional 20 years for both existing and future works." S. Rep. No. 104-315, at 11 (1996).

[30] H.R. Rep. No. 105-452, at 4 (1998).

[31] See, e.g., Senate Term Extension Hearing at 42-70, 90-95 (testimony and statements of Alan Menken, Bob Dylan, Don Henley, Carlos Santana, Patrick Alger, and other songwriters and authors); House Term Extension Hearing at 35-42, 44-45 (testimony of George David Weiss).

> and the costs of doing so are rising steadily. There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator."[32]

Congress also expected that term extension would spur the production of new works by U.S. copyright industries, which export over $45 billion annually to the rest of the world.[33] The Senate Judiciary Committee found that

> "extended protection for existing works will provide added income with which to subsidize the creation of new works. This 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). In either case, whether the benefit accrues to individual creators or corporate copyright owners, the ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term."[34]

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[32] Senate Term Extension Hearing at 44 (testimony of Alan Menken).

[33] See, e.g., Senate Term Extension Hearing at 3-4 (statement of Sen. Feinstein); id. at 40 (statement of Jack Valenti); House Term Extension Hearing at 32 (statement of Frances W. Preston).

[34] S. Rep. No. 104-315, at 12-13 (1996).

ARGUMENT

POINT I

THE COPYRIGHT TERM ESTABLISHED BY THE CTEA IS A "LIMITED TIME" WITHIN THE MEANING OF THE COPYRIGHT CLAUSE OF THE UNITED STATES CONSTITUTION

The Copyright Clause of the United States Constitution, Article I, section 8, clause 8, gives 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." Plaintiffs argue that the 95-year term of copyright established by the CTEA violates the "limited time" provision of the Copyright Clause (see Am. Comp. ¶ 63). This argument ignores the entire history of copyright in this country, as well as the established judicial interpretation of the Copyright Clause.

The Framers drafted the Copyright Clause against the backdrop of the statutory and common law rights of copyright in England and the several states in the Eighteenth Century, under which authors possessed a perpetual common law copyright in unpublished works (see pp. 6-7 supra). The purpose of the "limited time" provision of the Copyright Clause was to prohibit Congress from granting a perpetual copyright term. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834) (holding that an author may not assert "a perpetual and exclusive property in the future publication of the work, after the author shall have

published it to the world").[35]

The CTEA's copyright term is not perpetual. On the contrary, it is "limited," as the Constitution requires, and is consistent with the meaning and purposes of the Copyright Clause and prior copyright legislation.

Plaintiffs' Second Amended Complaint is based on the apparent premise that the courts have the power to impose a precise quantitative meaning upon the "limited time" provision of the Copyright Clause by deciding, for example, that a 75-year copyright term is short enough to be "limited" within the meaning of the Copyright Clause, but a 95-year term is not (see Am. Comp. ¶ 63). The Supreme Court has made clear that the courts have no such power. To the contrary, in Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.)

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[35] See also, e.g., 1 Crosskey at 486; James J. Guinan, Jr., Duration of Copyright, in 1 Studies on Copyright 473, 493 (Copyright Soc'y U.S.A. ed., 1957) ("There have been from the beginning of copyright legislation some who favored perpetual copyright. It is clear that this was not intended as a possibility under the Constitution."); Edward Samuels, The Public Domain in Copyright Law, 41 J. Copyright Soc'y U.S.A. 137, 152 n.73 (1993) ("When the Constitution was written, however, it was already established in England that common law copyright would protect works in perpetuity if they were not published, and it was early established that the result was the same in this country. . . . It therefore might be argued that the limited times provision, as interpreted by the original founders, should only be applied to published works, since the right of first publication was historically recognized to extend in perpetuity."); John F. Whicher, The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States--Part I, 9 Bull. Copyright Soc'y U.S.A. 102, 145 (1962) (arguing that the "limited time" provision does not apply to the states, but recognizing that it bars Congress from granting perpetual copyrights).

1, 16-17 (1829), the Supreme Court, in a unanimous opinion by Justice Story, held that the term of patents and copyrights is "subject to the discretion of Congress":

> "The Constitution of the United States has declared, that Congress shall have 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.' It contemplates, therefore, that this exclusive right shall exist but for a limited period, and that the period shall be subject to the discretion of Congress." (Emphasis supplied.)

The federal courts have repeatedly applied a deferential standard of judicial review to congressional legislation under the Copyright Clause.[36] For example, in Goldstein v. California, 412 U.S. 546, 562 (1973), the Supreme Court held that "whether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress."[37]

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[36] Such a deferential standard of judicial review is especially appropriate here, because Congress received and considered various views on the wisdom and constitutionality of the CTEA. See S. Rep. No. 104-315, at 10, 11, 12-13, 16-17 (1996); H.R. Rep. No. 105-452, at 3-4 (1998); Senate Term Extension Hearing 14-22 (statement of Marybeth Peters); id. at 72-78 (statement of Peter A. Jaszi); id. at 78-90 (statement of Dennis S. Karjala); House Term Extension Hearing 48-82 (statement of Jerome Reichman).

[37] See also, e.g., Sony Corp. of America, Inc. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.").

The Court of Appeals for this Circuit likewise has held that the standard of judicial review to be applied by the courts in reviewing federal copyright legislation is extremely deferential. In Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981), the Court of Appeals specifically "endorsed," as "the proper scope for judicial review of challenges to congressional power based upon the supposed limits of the Copyright Clause," the deferential standard of review adopted by the Fifth Circuit in Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979):

> "Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, including its copyright power, and the court's role in judging whether Congress has exceeded its Article I powers is limited. The Courts will not find that Congress has exceeded its power so long as the means adopted by Congress for achieving a constitutional end are 'appropriate' and 'plainly adapted' to achieving that end. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). It is by the lenient standard of McCulloch that we must judge whether Congress has exceeded its constitutional powers . . . ."[38]

Thus plaintiffs' attempt to have this Court second-guess the considered judgment of Congress as to the

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[38] In United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152 (D.C. Cir. 1987), the Court of Appeals confronted a private act that extended the copyright on a religious work for a term of 140 years from the date of its first publication. Although the plaintiffs in that case argued that this unprecedented term violated the "limited time" provision of the Copyright Clause, the Court of Appeals did not so hold, but instead held that the act was unconstitutional as an establishment of religion. See 829 F.2d at 1159-71 & n.104.

proper term of copyrights must be rejected. As the Supreme Court long ago made clear in Pennock & Sellers v. Dialogue, supra, 27 U.S. (2 Pet.) at 17, the proper length of the copyright term is "subject to the discretion of Congress."

Plaintiffs further suggest that the term of copyright is constitutionally limited to the lifetime of the author, by arguing that copyright terms cannot be extended for assignees of deceased authors (Am. Comp. ¶ 65(c)). This argument has no legal foundation in the language of the Copyright Clause, any copyright statute, or any decided case. Indeed, the contrary is true. Beginning with the Copyright Act of 1790, Congress has enacted copyright legislation to protect, not only authors, but also their heirs, descendants, and assignees. For example, the 1790 Copyright Act provided that, if the author survived the initial copyright term, either the author or his "executors, administrators or assigns" could renew the copyright (see pp. 8-9 supra). Similarly, the Copyright Act of 1831 provided that if the author was deceased at the end of the initial copyright term, the right of renewal passed to his widow or children (see p. 9 supra).

The Supreme Court has repeatedly recognized that the copyright laws protect the family members and assignees of authors, as well as the authors themselves. For example, the Court has held that "[t]he evident purpose of [the renewal provision] is to provide for the family of the author after his death." Stewart v. Abend, 495 U.S. 207,

218 (1990), quoting DeSylva v. Ballentine, 351 U.S. 570, 582 (1956). The Supreme Court has further held that the assignability of copyrights has been recognized since the Copyright Act of 1790, and that it protects the author's ability to realize the value of the copyright. See, e.g., Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 649-57 (1943). It has thus been established by more than two centuries of congressional legislation and decisional law that Congress may constitutionally use the copyright laws to protect the family members, descendants, and assignees of authors. Plaintiffs' argument to the contrary lacks any basis in law.[39]

Plaintiffs' theory that the proper term of copyright protection is limited to the lifetime of the author, if accepted, would run counter to more than two centuries of congressional copyright legislation, beginning with the Copyright Act of 1790, and the numerous precedents applying it. This would contravene the explicit decision of the Supreme Court in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), that Congress's construction of

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[39] Plaintiffs' Second Amended Complaint alleges that "[t]he CTEA confers benefits to someone to whom the creator of the work transferred or sold the rights in the work in a transaction that contemplated a shorter copyright term" (Am. Comp. ¶ 65(b)). Plaintiffs fail to mention that Congress carefully considered this question, and dealt with it (as it had done in the 1976 Copyright Act) by providing certain termination rights to authors or their family members or personal representatives, in order "to allow the original authors of works and their beneficiaries to benefit from the extended copyright protection." H.R. Rep. No. 105-452, at 8 (1998); see CTEA §§ 102(d)(1)(D), 103.

the Copyright Clause in the early copyright acts is "entitled to very great weight" and, indeed, is "almost conclusive." In that case, it was argued that the term "Writings" in the Copyright Clause was not broad enough to include photographs. The Supreme Court, although admitting that the question was "not free from difficulty," held that the term "Writings" was broad enough to include photographs, in light of the Copyright Acts of 1790, 1802, and 1831, which provided for the copyrighting of maps, charts, musical compositions, cuts, engravings, and prints. 111 U.S. at 55-57. The Supreme Court held that:

> "The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." 111 U.S. at 57.

Thus plaintiffs' unsupported and unsupportable invitation to this Court to overturn more than two centuries of federal copyright law, and to hold that copyrights must be limited to the life expectancy of the author, must be rejected.[40]

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[40] Plaintiffs' Second Amended Complaint seeks to buttress their argument by alleging that the CTEA's copyright terms are unconstitutional because Congress has allegedly engaged in a "practice" of extending copyright terms multiple times from 1962 through 1998 (Am. Comp. ¶¶ 62-63). This argument is illogical and fallacious on its face. If Congress has discretion to fix the length of the copyright term -- as the language of the clause indicates and as the Supreme Court has held it does (see pp. 24-27 supra) -- then it may change the length of the copyright term from time to time. Moreover, all but two of the copyright term extensions listed by plaintiffs (see Am. Comp. ¶ 62) took place during the period leading up to the

POINT II

CONGRESS MAY CONSTITUTIONALLY EXTEND THE TERM OF EXISTING COPYRIGHTS

Plaintiffs make the argument that the CTEA is unconstitutional because it extends the term of copyrights on existing works, and "no incentive to future individual creativity is provided by conferring an economic reward upon someone who has already created the work in question" (Am. Comp. ¶ 65(a)).[41] Plaintiffs further argue that Congress may not extend the term of copyrights that have already been assigned to others (Am. Comp. ¶¶ 65(b), (c)). These arguments are untenable as a matter of law. Beginning with the first Copyright Act in 1790, Congress has consistently expanded the scope and term of pre-existing copyrights, including those which have previously been assigned to others, whenever it has expanded the scope and term of future copyrights. Moreover, the courts have made clear that the power of Congress to grant copyrights is not

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Copyright Act of 1976, when Congress enacted year-to-year copyright extensions to prevent works from falling into the public domain pending its comprehensive revision of the copyright laws (see pp. 12-13 supra). See United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152, 1160 n.28 (D.C. Cir. 1987).

[41] Plaintiffs assert that this amounts to a "retroactive extension" of copyrights (Am. Comp. ¶ 64; see also Am. Comp. ¶ 65(a)). This is incorrect. While Congress may reinstate copyrights in works that have fallen into the public domain (and did so, for example, as part of the GATT legislation, Pub. L. No. 103-465, § 514, 108 Stat. 4976 (1994)), the CTEA did not reinstate any copyright that had already expired, but simply lengthened the terms of existing and future copyrights.

limited, as plaintiffs argue, merely to cases in which it will provide an "incentive to future individual creativity."

A. More Than Two Centuries of Constitutional Practice Support the Power of Congress to Extend the Term of Copyrights in Pre-Existing Works

If plaintiffs were correct that Congress cannot extend the terms of pre-existing copyrights, or the terms of copyrights that have previously been assigned, then Congress would have acted unconstitutionally on virtually every occasion when it legislated with respect to copyrights since the first Copyright Act of 1790. As the Supreme Court made clear in Burrow-Giles Lithographic Co. v. Sarony, supra, 111 U.S. at 57, this history is powerful evidence that the true constitutional rule is precisely contrary to the one plaintiffs advance (see pp. 28-29 supra).

The very first federal copyright act, enacted by the First Congress in 1790, expressly authorized the granting of copyrights in existing works "already printed within these United States" to the author or to the author's "executors, administrators or assigns" (see pp. 8-9 supra). This first federal grant of copyright would have been unconstitutional under plaintiffs' theory, because the granting of copyrights in works "already printed" could not have induced the creation of such works. Yet the First Congress plainly did not regard the 1790 Act as inconsistent with the Copyright Clause. As the Supreme Court held in Burrow-Giles Lithographic Co. v. Sarony, supra, 111 U.S. at 57, the judgment of the First Congress is entitled to "very

great weight," made as it was by members who were "contemporary with [the] formation [of the Constitution], many of whom were members of the convention which framed it . . . ."

Nor was the first copyright act a special case. The interpretation of the Copyright Clause reflected in the 1790 Act has been repeatedly reaffirmed over more than two centuries of consistent practice. The Copyright Act of 1831, which extended the initial copyright term from 14 years to 28 years, applied in equal measure to existing as well as future works (see p. 9 supra). The next extension of the copyright term, in 1909, which lengthened the renewal term from 14 to 28 years, likewise operated with respect to existing as well as future works (see p. 11 supra). The Copyright Act of 1976 provides yet another demonstration of Congress's consistent policy of extending rights in existing as well as future works when revising the federal copyright laws. The 1976 legislation specifically expanded the terms of the copyrights for pre-existing works, using various formulas that were intended to approximate the new copyright term of life of the author plus 50 years (see pp. 13-14 & n.16 supra).

Thus the CTEA, by extending the terms of existing as well as future copyrights, is part of an unbroken chain of similar congressional enactments spanning more than two centuries from 1790 to 1998. As the Supreme Court held with respect to a record of congressional actions less than half

as long in Burrow-Giles Lithographic Co. v. Sarony, supra, 111 U.S. at 57, this history not only is entitled to "very great weight," but is "almost conclusive" with respect to the constitutionality of extending the terms of existing as well as future copyrights (see pp. 28-29 supra). Viewed in light of this history, plaintiffs' Second Amended Complaint in this case reads less like a legal pleading than like a manifesto for a revolution -- the overthrow of more than two centuries of consistent constitutional congressional practice under the Copyright Clause.[42]

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[42] Nor is the history traced above exhaustive. When Congress has expanded the scope of copyright protection to embrace new media of expression and new modes of communication, it has made the new scope of protection available to existing works, thereby conferring new rights with respect to old works. Thus, in addition to the examples of copyright term extensions discussed in the text,

> "there are many cases in which rights in existing works have been expanded, even though they can hardly be imagined to induce the creation of works that have already been created. When Congress . . . expanded the scope of copyright to include the right of public display (presumably applying to existing works as well), or of public performance of musical works whether or not for profit, or added the cable compulsory license, or added certain moral rights for visual artists in 1990, all of which affected existing as well as future works, it expanded rights in a way that can hardly be said to 'induce' the creation of new works. It is simply incorrect to conclude that every aspect of a new copyright law can be justified if and only if it 'promotes' the creation of new works. It is enough that the copyright laws generally promote such progress."

Edward Samuels, The Public Domain in Copyright Law, J. Copyright Soc'y U.S.A. 137, 172-73 (1993) (footnotes omitted).

B. The Basic Premise of Plaintiffs' Argument -- That Copyrights Are Valid Only Insofar as They Induce the Creation of New Works -- Has Already Been Authoritatively Rejected

In Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981), the Court of Appeals for this Circuit explicitly rejected the fundamental premise underlying plaintiffs' argument -- that copyrights are permissible only insofar as they serve to encourage the creation of new works (see Am. Comp. ¶¶ 64, 65(a)).

In Schnapper, the plaintiff argued that copyrights cannot constitutionally be granted in works commissioned by the federal government. In support of this position, the plaintiff argued that copyrights can be granted only when there is a "need to provide economic incentives in the form of royalties," which he claimed did not exist in the case of works commissioned by the Government. 667 F.2d at 111. As authority for his argument, the plaintiff relied upon the introductory language of the Copyright Clause regarding the "promot[ion of] the Progress of Science and useful Arts." Id.

The Court of Appeals in Schnapper rejected the argument that a copyright is constitutionally permissible only insofar as it creates economic incentives for new works. "[W]e cannot accept," the Court declared, "that the introductory language of the Copyright Clause constitutes a limit on congressional power." 667 F.2d at 112. Instead, the Court held, all that is required is that the overall

copyright legislation enacted by Congress be "appropriate" and "plainly adapted" under the "lenient standard" of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Id. Directly controlling authority, Schnapper disposes of the fundamental premise of plaintiffs' argument -- that copyrights are valid only insofar as they induce the creation of new works.

C. The CTEA's Extension of the Term of Pre-Existing Copyrights Has a Rational Relation to Valid Legislative Purposes

Plaintiffs argue that the CTEA's extension of the term of existing copyrights "can have no rational basis" because it cannot encourage the creation of new works (Am. Comp. ¶ 65(a)). This argument is redolent of a bygone era in constitutional adjudication, when federal courts sat as "superlegislatures" to weigh the wisdom or rationality of economic legislation. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (refusing to reassume the role of a "superlegislature"). It is now established beyond dispute that economic legislation "is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (footnote omitted).

Especially under this deferential standard of judicial review, it was clearly rational for Congress to

conclude that the extension of the copyright term on existing as well as future works would provide "an incentive for U.S. authors to continue using their creativity to produce works . . . ." H.R. Rep. No. 105-452, at 4 (1998). It was likewise rational for Congress to conclude that term extension not only would provide "added income with which to subsidize the creation of new works," S. Rep. No. 104-315, at 12-13 (1996), but also would spur creative efforts by demonstrating to creators that Congress deals even-handedly with existing as well as future works when it revises the copyright laws (see pp. 21-22 supra).

In addition to encouraging the creation of new works, the CTEA had additional purposes -- which plaintiffs completely fail to mention -- which also serve the broad constitutional goal of "promot[ing] the Progress of Science and useful Arts." All of these purposes have their counterparts in past copyright acts, and further support the constitutionality of the CTEA.

An important purpose of the CTEA is harmonization of the terms of United States copyrights with the life-plus-70-year term recently adopted by the European Union, which will avoid discrimination against United States authors and will produce significant concomitant benefits to the United States balance of payments (see pp. 16-19 supra). This purpose is just as vital for existing copyrights as it is for future copyrights; indeed, the immediate positive impact of term extension on the United States balance of payments

can be achieved only if the terms of existing as well as future United States copyrights are extended.

Harmonization of copyright terms is a long-standing goal of federal copyright law. The very inclusion of the Copyright Clause in the Constitution reflected a desire to replace varying state copyright laws with a uniform federal statute (see pp. 7-8 supra). See, e.g., The Federalist No. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961). Over the years, Congress has often taken international factors into account in enacting federal copyright legislation, notably in the Copyright Acts of 1831, 1909, and 1976 and in the Berne Convention Implementation Act of 1988 (see pp. 9-10, 11-12, 14-15 supra).[43] Among the many benefits of harmonization of United States copyright terms with those of other nations is the simplification of international copyright transactions and, with it, encouragement of exchanges of intellectual property -- all of which plainly advances the aims of the Copyright Clause by "promot[ing] the Progress of Science and useful Arts."

Another significant objective of the CTEA is to encourage investment in existing copyrighted works (for

[43] Among the more recent landmarks in the international harmonization of copyright laws are the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty and their implementing legislation and the Digital Millennium Copyright Act. See generally, e.g., Senator Orrin G. Hatch, Toward a Principled Approach to Copyright Legislation at the Turn of the Millenium, 59 U. Pitt. L. Rev. 719, 745-56 (1998).

example, by the conversion of such works into a digital medium or into new media that might be created in the future) (see p. 19 supra). As Congress explicitly recognized in enacting the CTEA, the achievement of this objective requires extending the term of existing copyrights (see id.). Clearly, encouraging digitization and other means of investment in existing copyrighted works furthers the goals of the Copyright Clause by "promot[ing] the Progress of Science and useful Arts."

Another key purpose of the CTEA is to make fair provision for the children and grandchildren of authors in an era of lengthening life spans (see pp. 19-21 supra). Congress has repeatedly shown its concern for authors' descendants in extending the terms of copyrights, notably in the Copyright Acts of 1831, 1909, and 1976 (see pp. 9, 11-12, 14 supra), and the Supreme Court has recognized the strength of this concern. See, e.g., Stewart v. Abend, 495 U.S. 207, 218 (1990); DeSylva v. Ballentine, 351 U.S. 570, 582 (1956). Each time it has lengthened copyright terms, Congress has lengthened the terms of existing as well as future copyrights (see pp. 8-9, 11, 13-14 supra). The knowledge that Congress has consistently treated existing copyrights even-handedly in this regard is itself an important incentive to the creators of new works, and thereby serves to "promote the Progress of Science and useful Arts" (see pp. 21-22, 36 supra).

The foregoing review of the goals of Congress in

enacting the CTEA makes clear that plaintiffs' simplistic syllogism -- that extending the terms of existing copyrights cannot "promote the Progress of Science and useful Arts" because, by definition, the works covered by existing copyrights have already been created (see Am. Comp. ¶ 64) -- overlooks the actual purposes of the Copyright Clause itself and the CTEA, and the ways in which those purposes are served by extending the terms of existing copyrights.

Plaintiffs argue that it is in the public interest for copyrighted works to fall into the public domain sooner than the CTEA provides (see Am. Comp. ¶¶ 59-60, 69). This policy argument ignores the fact that the appropriate balance between the term of copyright and the public domain is one to be determined by the elected members of Congress, not by the courts (see pp. 24-27 supra). In addition, plaintiffs' argument is rebutted by the record that was before Congress when it enacted the CTEA. For example, Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, stated that "there is ample evidence that shows that once a work falls into the public domain it is neither cheaper nor more widely available than works protected by copyright."[44]

Finally, plaintiffs' arguments also overlook the deferential standard of constitutional review of federal copyright legislation which was adopted by the Court of

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[44] Senate Term Extension Hearing at 25 (statement of Bruce A. Lehman).

Appeals for this Circuit in Schnapper v. Foley, 667 F.2d 102, 111 (D.C. Cir. 1981), and by the Fifth Circuit in Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) (see p. 26 supra). As the Fifth Circuit made clear in Mitchell Bros., the Constitution does not demand that copyright legislation be perfectly coextensive with Congress's purposes; it is enough that the legislation as a whole bears a rational relationship to a permissible legislative objective. 604 F.2d at 858-60. It is beyond dispute that the CTEA meets this test.

Congress's repeated extensions of the terms of existing and future copyrights alike, each time it has extended the copyright term, reflect a consistent congressional judgment that yesterday's work should not enjoy lesser copyright protection than tomorrow's simply because new copyright legislation was passed today. Plaintiffs ask this Court to override the considered judgment of Congress, and to impose a new constitutional rule that would preclude any grant of additional rights in existing works. This request is totally unsupported by precedent or the Constitution, and would overturn more than two centuries of consistent constitutional understanding and practice.

POINT III

PLAINTIFFS' ARGUMENT BASED ON THE PUBLIC TRUST DOCTRINE IS UNPRECEDENTED AND WITHOUT FOUNDATION

In the second count of their Second Amended Complaint, plaintiffs assert that "[t]he Public Trust Doctrine holds that government may not transfer the public property of a commons into private hands in the absence of any public benefit in exchange" (Am. Comp. ¶ 69). Plaintiffs then argue that the CTEA's extension of the term of existing copyrights is "an abdication by the government of control of public resources held for the common use in violation of the Public Trust Doctrine" (Am. Comp. ¶ 72). Plaintiffs' argument is made up out of whole cloth. It has no support in law, and represents a fanciful misapplication of the public trust doctrine.

The public trust doctrine relates solely to real property. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81 (1988); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). It is not clear whether the public trust doctrine applies to real property held by the federal government, as opposed to the states. See, e.g., District of Columbia v. Air Florida, Inc., supra, 750 F.2d at 1083-84. What is clear is that the public trust doctrine does not apply to property other than real property. A fortiori,

the public trust doctrine has not been applied to create constitutional rights, such as those plaintiffs claim, in contingent, inchoate, intangible expectancies, such as expectations about when works presently subject to copyright will be in the public domain.

In addition, plaintiffs' allegation that the CTEA represents a transfer of public property into private hands without "any public benefit in exchange" (Am. Comp. ¶ 69) simply ignores the well-documented purposes of Congress in enacting the CTEA. Those purposes -- including harmonization of copyright terms, balance of trade, encouragement of investment in copyrighted works, fairness to authors and their descendants, and encouragement of the creation of new works (see pp. 16-22 supra) -- clearly constitute ample public benefits supporting the enactment of the CTEA (see pp. 35-39 supra).

Plaintiffs obviously disagree with the judgment of Congress that these public benefits justify the enactment of the CTEA, but this issue is for Congress, not this Court, to resolve. Throughout their Second Amended Complaint, plaintiffs forget that the federal courts do not sit as a "superlegislature" to pass upon the wisdom or advisability of legislation. See, e.g., Ferguson v. Skrupa, supra, 372 U.S. at 731. The Court should therefore dismiss plaintiffs' attempt to use the judicial system to further their own economic and philosophical agenda.

POINT IV

PLAINTIFFS' ARGUMENT BASED ON THE FIRST AMENDMENT IS CONTRARY TO ESTABLISHED LAW

In their Second Amended Complaint, as an obvious afterthought, plaintiffs added a third claim based on the First Amendment (Am. Compl. ¶¶ 75-81). In this claim, plaintiffs argue that "[t]he CTEA restricts plaintiffs' speech" (Am. Compl. ¶ 77), and that the CTEA must therefore be tested by the First Amendment intermediate-scrutiny test of United States v. O'Brien, 391 U.S. 367, 377 (1968), and Turner Broadcasting Sys. v. FCC, 520 U.S. 180, 189 (1997) (Am. Comp. ¶ 79).

Plaintiffs' argument is wrong as a matter of established law. In United Video, Inc. v. FCC, 890 F.2d 1173, 1190 (D.C. Cir. 1989), the Court of Appeals squarely held that "[c]ases in which a first amendment defense is raised to a copyright claim do not utilize an O'Brien analysis." Because copyrights protect the author's expression of an idea but do not prevent the use of the idea itself, the courts have held that copyrights do not infringe upon First Amendment rights. See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555-60 (1985); United Video, Inc. v. FCC, supra, 890 F.2d at 1191. To the contrary, the Supreme Court has emphasized that copyright law itself advances First Amendment values. Harper & Row Publishers, Inc. v. Nation Enterprises, supra, 471 U.S. at 558-60. Thus plaintiffs' First Amendment claim

is untenable as a matter of established law.[45]

CONCLUSION

For the reasons set forth above, defendant's motion for judgment on the pleadings should be granted, and plaintiffs' Second Amended Complaint should be dismissed.

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Respectfully submitted,

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[45] Even if O'Brien analysis were applicable to the CTEA -- which it is not -- the CTEA is valid under the standards of O'Brien, because it protects important governmental interests unrelated to the suppression of free speech which could not be protected without extending the copyright term for existing and future works (see pp. 16-22, 35-39 supra).

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 1999, I caused a copy of the foregoing Brief on Behalf of The Sherwood Anderson Foundation, The Sherwood Anderson Trust, American Society of Composers, Authors and Publishers, AmSong, Inc., Association of American Publishers, Inc., Broadcast Music, Inc., Motion Picture Association of America, Inc., National Music Publishers' Association, Recording Industry Association of America, and The Songwriters Guild of America as Amici Curiae in Support of Defendant's Motion for Judgment on the Pleadings to be served upon the attorneys for the parties as follows:

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