No. 01-618

In the
Supreme Court of the United States

Eric Eldred, et al.,
Petitioners,
v.

John D. Ashcroft, in his official capacity as Attorney General,
Respondent

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

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BRIEF OF HAL ROACH STUDIOS & MICHAEL AGEE AS AMICI CURIAE SUPPORTING PETITIONERS

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CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Congressional Materials:

TABLE OF AUTHORITIES
(continued)

Miscellaneous:

TABLE OF AUTHORITIES
(continued)

STATEMENT OF INTEREST

This brief *amici curiae* in support of Petitioners is submitted under Rule 37 of the Rules of this Court by Hal Roach Studios and by Michael Agee, its Chairman.[1] Mr. Agee is recognized as one of the leading film restorationists in the country, and has devoted his professional life to the restoration of fragile and classic film and television productions. Hal Roach Studios is one of the leading restorers and proprietors of pre-1930 films. Under Mr. Agee's direction, it has restored and holds rights to collections such as the pre-1931 Laurel and Hardy archive, as well as over sixty of the pre-1931 Hal Roach comedies. Mr. Agee himself restored the entire Laurel and Hardy "talking" body of work, comprising forty "shorts" and twelve feature films. Amici submit this brief in order to increase the Court's understanding of the ways in which the Copyright Term Extension Act frustrates the process of film preservation and restoration, impedes commercial and non-commercial attempts to give access to the nation's film heritage and restricts expression and preservation in a manner inconsistent with the Copyright Clause and the First Amendment.

SUMMARY OF ARGUMENT
"A POSTERITY THAT NEVER QUITE ARRIVES"

The Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827, extends the term of existing copyrights by twenty years. This portion of

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief. Assistance in the preparation of this brief was provided by the Program in Intellectual Property and the Public Domain at Duke University School of Law, and in particular by Senior Fellow Daphne Keller.

the statute exceeds the limits of the Copyright Clause's grant of power. It is also subject to heightened First Amendment scrutiny, a scrutiny that it cannot meet.

Though several justifications for retrospective term extension are offered in the legislative record, only one has even an arguable connection to Congress's power under the Copyright Clause: that retrospective term extension is necessary to provide copyright holders with incentives to maintain, restore and digitize fragile works, particularly motion pictures. It is thus not surprising that much stress has been laid on the preservation rationale; this is the only possible justification of the retrospective portion of the CTEA. But possible does not mean actual. Both legally and factually, the preservation rationale, too, turns out to be fatally flawed.

In this brief, amici show that the preservation rationale is outside of the Copyright Clause's grant of power, and that restoration of a few works in one medium cannot be a constitutional basis for extending the copyrights of all works in all media. However even if the preservation rationale were within the boundaries of the Copyright Clause, the effects of the CTEA run in exactly the opposite direction. Review of the actual world of film restoration and preservation reveals that the undeniable effect of the CTEA is to sequester an entire generation of American culture while actively harming film preservation efforts. The CTEA directly impedes restoration of the numerical majority of American films, the so-called "orphan works", the very portion of our film heritage which the Library of Congress identifies as being in the most urgent need of restoration. *Report of the Librarian of Congress, Film Preservation 1993: A Study of the Current State of American Film Preservation*, 5 (1993) [hereinafter "*Librarian of Congress Report*"]. Those who would preserve, restore and digitize this body of works are prevented from doing so by the tangle of rights surrounding the films. The clean blade of term expiration was supposed to cut through this thicket; the CTEA fertilizes it and extends it instead. The majority of commercial feature films owned by major studios fare little better. In

each case, the CTEA's effects are particularly tragic because many of the films at risk will not survive for another twenty years. This error is not reversible.

At the same time, the CTEA impedes access to, and productive use of, the enormous holdings of film in the nation's archives. Films restored at the public's expense are now kept inaccessible to the public for *another* twenty years. In 1993 the Librarian of Congress's report on film preservation observed ruefully that because of the legal restrictions on making films available, "[f]or many of those seeking copies of films, archivists can look as if they are perversely saving films for a posterity that never quite arrives." *Librarian of Congress Report, supra,* at 47. Thanks to the CTEA, posterity will be postponed for another twenty years.

"Copyright", this Court has said, "is the engine of free expression." *Harper & Row v. Nation Enter.*, 471 U.S. 539, 558 (1985). As such it is sometimes mistakenly thought to be immune from First Amendment scrutiny. The Court below took this view. But in this case, the engine has run and has produced its products. The retrospective portion of the CTEA is a naked state restriction of expressive conduct, a restriction which does not pretend to produce incentives for original expression. Therefore it is subject to heightened First Amendment scrutiny, scrutiny which it cannot meet. Even if film restoration were an important government interest within the range of Congress's copyright power, and even if the CTEA furthered that goal rather than dramatically setting it back, the retrospective portion of the CTEA could hardly be said to achieve its goal in a manner no more restrictive than necessary. It locks up an entire generation of American culture, all original works in all media, in order to try – and fail – to save a tiny minority of works in one medium.

ARGUMENT

I. The Copyright Clause imposes limits on Congress's power to create exclusive rights. Those rights must be for limited times and must promote the progress of science. The CTEA's retrospective term extension is outside of those limits and is therefore unconstitutional.

The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" "to Authors" for "limited Times." U.S. Const., art. I, § 8, cl. 8. This clause is both "a grant of power and a limitation." *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966). The CTEA extends the term of existing copyrights by twenty years. Retrospectively extending the term of existing copyrights does not "promote the Progress" and falls outside the limitations imposed by the Constitution. The copyrighted works already exist; clearly the legal monopoly was sufficient to encourage their creation. In extending this monopoly over existing works for another twenty years, Congress is not offering incentives for the creation of original work. It is simply granting windfall profits with one hand while restricting expressive activity with the other. Neither the Copyright Clause nor the First Amendment countenances such action.

A. The only congressional justification for retrospective term extension that is potentially relevant to "promot[ing] the Progress" is the film preservation rationale.

Precisely because the retrospective extension of existing rights has no connection to the constitutional goals of the Copyright Clause that is "visible to the naked eye", Congressional findings about the goals of the statute assume greater importance. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

Congress declared a number of purposes behind the CTEA, ranging from the constitutionally risible (providing for two generations of the author's heirs) to the questionably international (harmonization with the European Union). Even as to the prospective portion of the CTEA, amici would argue that these purposes are not sufficient to meet the standards set up by the Copyright Clause or the First Amendment; as to the retrospective portion they offer no justification whatsoever. Retrospective "harmonization" does not induce greater creativity in the past. Even if one believed that increased generosity to an author's heirs would yield greater incentives for the future, extension of the copyright term over existing works provides no incentive effect at all.

Congress provides only one finding that could logically relate retrospective term extension to promoting progress, namely that term extension is supposed to create "incentives to preserve existing works", particularly film.[2] In fact, the

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[2] S. Rep. No. 315, at 13, 104th Cong. 2d Sess. (1996). Thirteen of the thirty-seven pieces of testimony given during the Senate and House hearings on copyright term extension referred to preservation problems. Of those thirteen, all but three exclusively addressed film preservation. The remainder talked generically about preserving "works." *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989 Before the Subcomm. on Courts and Intellectual Property, House Comm. on the Judiciary*, 104th Cong. (1995); *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. (1995); and *Pre-1978 Distribution of Recordings Containing Musical Compositions, Copyright Term Extension, and Copyright Per Program Licenses: Hearings Before the Subcomm. on Courts and Intellectual Property, House Comm. on the Judiciary,* 105th Cong. (1997). In fact, film is the only medium which presents the combined problem to which term extension is supposed to be the solution; the problem of a particularly volatile medium prone to rapid degeneration coupled with a comparatively high cost of restoration and digitization. To a much lesser extent, analog audio tapes present some similar problems, but both the scope of the danger and the cost of remedying it are lower. The preservation and digitization issues really revolve around film and it is there that the remainder of the brief's analysis will concentrate.

Court of Appeals emphasized this finding in reaching its decision below:

> The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration . . . If called upon to do so, therefore, we might well hold that the application of the CTEA to subsisting copyrights is "plainly adapted" and "appropriate" to "promot[ing] progress." *Eldred v. Reno*, 239 F.3d 372 at 378-79 (D.C. Cir. 2001) (alteration in original, citations omitted).

The film preservation rationale thus assumes particular importance in this case. It is there, and only there, that we find an argument that extending copyrights on existing works is necessary in order to achieve a constitutionally appropriate goal. As the discussion below will demonstrate, however, this argument is deeply flawed, both legally and factually.

B. The film preservation rationale is logically and legally unsound.

1. Giving incentives for film preservation through retrospective term extension is not within the ambit of Congress's power to promote the progress of science by encouraging the creation of original works.

Congress has numerous available methods to encourage film preservation, ranging from tax subsidies to the creation of state archives. However, it may not use a retrospective extension of exclusive rights under the Copyright Clause to accomplish this goal. In the patent context, this Court has held that it is unconstitutional to remove material from the public domain. *Graham,* 383 U.S. at 4. Why? In part it is because the works already exist. The extension of an intellectual property right to an existing work does not encourage the

creation of original expression or novel invention. Instead it acts merely as a reward for socially useful labor. If "encouraging restoration" is a valid goal under the Copyright Clause, it is hard to see what remains of the rationale behind *Graham's* limitation. Again, the works already exist and Congress is trying to provide incentives in order to encourage some socially desirable investment of sweat and capital.

The same point is made in this Court's copyright jurisprudence. This Court has held that unoriginal compilations of material may not be copyrighted; "sweat of the brow" protection lies outside the ambit of the Copyright Clause. *Feist Publications, Inc. v. Rural Telephone Co.*, 499 U.S. 340 (1991). Yet retrospective extension of copyright over existing works does something that is indistinguishable in principle from these forbidden uses of the patent and copyright power. The only restorations which have need of the CTEA are those which are unoriginal; if they were original, a new copyright term would be available and term extension therefore would be unnecessary in order to encourage them. Retrospective extension gives no incentive to create original works; the only incentive is for the straightforward labor and investment involved in restoration. Therefore, as has been noted in the scholarly literature,[3] Congress is conferring a de facto "sweat of the brow" protection on existing works. As amici will describe below, it is also doing so in a way that undeniably harms rather than helps the task of film preservation for the majority of American films.

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[3] L. Ray Patterson, *Eldred v. Reno: an Example of the Law of Unintended Consequences,* 8 J. Intell. Prop. L. 223, 235-6 (2001).

2. The argument that the CTEA is justified by the need to encourage digitization and "media migration" is an argument without a limiting principle and thus flies in the face of this Court's recent holdings.

According to the Congressional findings, the continuing exclusive rights guaranteed by extension of copyright will give copyright holders an incentive to invest in restoring films and transferring them to new digital media. But as a basis for Congressional power, this is a rationale with no limiting principle. There will always be new media onto which we need to move our older cultural works. Indeed, the Librarian of Congress's Report makes clear that no known medium represents a "stopping point" for preservation or distribution of film. The Report expressed great concern about the rapid obsolescence of digital media and noted that proposed HDTV standards capture less than half of the visual information from a 35 mm film frame.[4] *Librarian of Congress Report*, *supra*, at 15-16. If inevitable changes in media are grounds for term extension, Congress may rely on the same rationalization every twenty years to justify moving asymptotically towards perpetual copyright (a goal that the sponsor of the legislation reportedly favored).[5]

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[4] The Report noted that in video alone, "at least six major incompatible formats have evolved into obsolescence the last 20 years." *Librarian of Congress Report*, *supra*, at 16.

[5] "Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [Motion Picture Association of America President] Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress." 144 Cong. Rec. H9952 (1998) (statement of Congresswoman Mary Bono).

The "media migration" justification for retrospective term extension eviscerates the "limited times" restriction of the Copyright Clause and flies in the face of this Court's recent jurisprudence. This Court has recently stressed that basic canons of constitutional construction militate against accepting *types* of justification for Congressional action which logically eliminate "judicially enforceable outer limits" on Article I powers. *Morrison*, 529 U.S. at 610. In this case, the "media migration" justification would support limitless term extension. Like the claims of Congressional authority rejected in *Morrison*, the CTEA relies on "a method of reasoning that [would fail] to maintain the Constitution's enumeration of powers." *Id.* at 615. In addition, Congress may not rely on "attenuated" links between legislation and Congress's constitutional authority. *Morrison*, 529 U.S. at 612 (citing *United States v. Lopez*, 514 U.S. 549, 563-567 (1995)). The CTEA's digitization and media migration rationale has only the most attenuated relation to the Copyright Clause power, and allows for a new retrospective extension with each change in format, thus making a mockery of the limited times requirement. To borrow a phrase from the law of standing, the practice would be "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

3. Even if term extension did inspire film preservation, this would not be sufficient reason retrospectively to extend the copyright term in *every* medium.

Although Congress alluded to a range of existing works, the legislative record makes clear that only a single body of material affected by retrospective term extension is under urgent threat of physical decomposition or in need of expensive digitization: motion pictures. Yet copyright covers "works of authorship" across a wide range of fields: literary works, music, drama, sculpture, computer programs, sound recordings, pantomime and dance. 17 U.S.C. § 102 (2000).

Even if the Congress were correct in its claims about the effect of term extension on movie preservation and digitization, one can hardly justify extending the term of every subsisting copyright over every type of work in order to preserve works of single industry, in a single medium. Such an extension – even if it *were* truly effective as to film – is plainly not adapted or appropriate to promoting overall progress. This point is perhaps the most important of all. As was argued earlier, the only legislative purpose given in the record which both justifies retrospective term extension and has an arguable connection to Congress's power under the Copyright Clause is the film preservation rationale. But Congress may not use a claim that the CTEA will help preserve films, a fraction of American cultural production, as a basis for placing an entire generation of culture off-limits for an additional twenty years.

C. The CTEA actually impedes public access to our film heritage and hurts film preservation, restoration and digitization.

1. Copyright term extension does not promote film preservation but instead reduces preservationists' incentives and limits public access to films.

This Court has repeatedly held that the purpose of copyright lies in "the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). This benefit, it has explained, depends on public *access* to works of authorship – copyright "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Aiken*, 422 U.S. at 156. Without access, the public does not receive the benefit of the copyright bargain – individuals can neither experience the works as consumers nor become add-on innovators after term expiration.

For early twentieth century American film, copyright law plays a major role in *preventing* "broad public availability" and in deterring preservation efforts that might make films available in the future. The rare remaining copies of these rapidly deteriorating works are often held by individuals or archives which, because of copyright law, are forbidden from copying and distributing the films to the public; as a result, these neglected films simply rot on the shelf. Of the tens or hundreds of thousands[6] of movies made before 1950, fully 50% are irretrievably lost. *Librarian of Congress Report*, *supra*, at 3.[7] For films made before 1929, the loss rate is far worse: 80% of films of the 1920's, and 90% of films from the 1910's are gone. *Redefining Film Preservation: A National Plan; Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 23 (Annette Melville & Scott Simmon eds., 1994) [hereinafter *Librarian of Congress Recommendations*].[8] The physical properties of film stock are partly responsible for this tragic attrition. Nitrate film reels were famously combustible.[9] Early distributors' practice of destroying their older films, sometimes to salvage silver content from the nitrate stock, further contributed to the rate of loss.[10]

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[6] By 1917, over 30,000 films had been made. Charles H. Tarbox, *Lost Films: 1895-1917* 3 (1983).

[7] The Library of Congress points out that this statistic needs to be qualified by the fact that it applies to feature films; other forms of film fared worse. Silent films did more poorly than the 50% figure would suggest while sound pictures did better. *Librarian of Congress Report*, *supra*, at 3.

[8] *See also* Frank Thompson, *Lost Films: Important Movies That Disappeared ix* (1996).

[9] Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* 3 (1992); Doug Herrick, *Toward a National Film Collection: Motion Pictures and the Library of Congress*, 13 Film Library Quarterly 5, 9 (1980).

[10] Herrick, *supra* note 9, at 11; Charles Grimm, *A History of Early*

The cost of copying unique reels of pre-1951 nitrate film alone is estimated at $243 million. *Librarian of Congress Report*, *supra*, at 56. But nitrate film is far from alone in needing restoration; so-called "safety" film is also subject to acetate-base decay, *id.* at 8-9, and "virtually all of the images captured on film [are] susceptible to similar loss within the next century or two." [11]

In the U.S., about 100 million feet of unique nitrate film, and untold amounts of "safety" film, remain unrestored.[12] A small amount is held by studios – as of 1993, Universal held 2300 feature films, MGM 1800, Fox 4000. *Librarian of Congress Report*, *supra*, at 18 fig.4. Much more is in large public archives – the 1993 figures show the Library of Congress holding over 150,000 titles, UCLA Film & Television Archive 46,000, the Museum of Modern Art 13,000. (These figures include non-feature films as well.) *Id.* at 26-27 fig.5. And untold numbers of films are scattered in private hands or small public collections – one expert estimates that some 1750 separate small collections hold unique or difficult-to-find footage. *Id.* at 29-30. For innumerable 20th century films, only a single tattered copy remains.

Preservation of deteriorating film is costly. In 1992, preservation of a ninety minute black-and-white silent feature cost an average $10,222. *Id.* at 41 fig.9. Storage, too, is very expensive, in part because films must be kept under conditions of controlled temperature and humidity. In some cases, studios negotiated donations to archives, effectively shifting storage and preservation costs while retaining copyright control. *Transamerica Corporation v. United States,* 902 F.2d 1540 (Fed. Cir. 1990). In other cases, studios which hold copyrights did not themselves retain physical copies of the

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Nitrate Testing and Storage, 1910-1945, The Moving Image 21, 22 (2001).

[11] Michael Friend, *Film/Digital/Film*, 24 J. Film Preservation 36, 36 (1995).

[12] Slide, *supra* note 9, at 5.

films and do not necessarily have legal access to those copies which are extant. Universal, for example, destroyed "all but a handful of their silent negatives" in 1948;[13] most of the few remaining copies of the studio's pre-1929 works owe their survival to collectors or flukes of history.

This separation of physical control from copyright ownership is highly damaging both to preservation efforts and to the public's ability ever to *see* the preserved films. *Librarian of Congress Report*, *supra*, at 24-25, 32. It ensures that the entity with restoration expertise, interest and actual possession of the film lacks any economic incentive to restore because copyright law will prevent sharing of the work with others. (Libraries and archives have limited rights to copy deteriorating works, but cannot distribute them. 17 U.S.C. §108 (2000)). Even if the copyright holder both knows and cares about the film, it cannot undertake restoration because it possesses no physical copy. In the words of one highly respected archivist, "[a]rchives will be allowed to restore [films] (as restoration itself does not require the permission of the copyright owner), but then they will have to pay in order to exhibit them to the public, even if the legitimate owner did nothing to protect the physical integrity of their assets."[14] The Museum of Modern Art began its collection in the 1930s, obtaining films under a contract which left copyright with production companies.[15] Of the 13,000 titles it held by 1993, less than half were available for viewing even by researchers. *Librarian of Congress Report*, *supra*, at 26-27 fig.5. Similar figures obtain elsewhere: visitors and researchers can see only

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[13] David Pierce, *The Legion of the Condemned: Why American Silent Films Perished,* 9 Film History 5, 9 (1997); *see also* G. Myrent & G.P. Langlois, *Henri Langlois: First Citizen of Cinema* 29 (1995).

[14] Glenn Myrent, *Ma vie d'architecte paysagiste: entretien avec le conservateur de la George Eastman House* (interview with Paolo cherchi Usai, Senior Curator of the George Eastman House), 19 Cinémathéque 3, 24 (Spring 2001).

[15] Herrick, *supra* note 9, at 12.

40% of the Northeast Historic Film Archive's holdings, for example. *Id.* Under these circumstances, many copyrighted works have been lost to decay, while others have been restored at public expense yet remain unavailable to the public.

It is important to stress here the profoundly negative effect that the CTEA has had and will have on public film restoration efforts. Over fifty percent of the public AFI-NEA grant money spent by 1993 went to restore pre-1929 works. *Librarian of Congress Report*, *supra*, at 35. Films from 1923-1927 were to have passed out of copyright by this year; instead, the CTEA keeps them off limits until 2018 at the earliest. As the Library of Congress Report noted, because of the legal restrictions on making films available, "[f]or many of those seeking copies of films, archivists can look as if they are perversely saving films for a posterity that never quite arrives." *Id.* at 47. This result furthers neither the Copyright Clause's goal of granting access, nor the more specific goal of encouraging effective film preservation.

In sum, for the vast majority of these deteriorating films, continued copyright protection actually deters preservation. It locks up publicly restored films for an additional twenty years and denies those few individuals and archives with the incentive and capacity to restore a neglected film the legal right to distribute their work. The CTEA therefore effectively ensures that many works will fall to dust before the public ever gains the access that is copyright's goal.

2. Copyright term extension undeniably deters or impedes preservation of the numerical majority of deteriorating films, the "orphan" works.

The Congress did not err in believing that there is a preservation crisis in American film. The CTEA, however, is aimed at precisely the wrong target and manages in the process to make it harder to solve the problems that actually exist. According to the Library of Congress's 1993 *Report on*

the Current State of American Film Preservation, the ongoing preservation crisis does not primarily affect famous and marketable Hollywood features. *Id.* at 2. These works constitute a relatively small proportion of the surviving film population and are already the objects of substantial preservation efforts.[16] Indeed, the Librarian of Congress noted that "preservation efforts directed largely toward the Hollywood feature seem shortsighted" in light of the ongoing loss of less glamorous, but historically important works. *Id.* Rather, the works in most urgent need of preservation are "orphan" films – "films of long-term cultural and historical value that are not being protected by commercial interests." *Librarian of Congress Recommendations*, *supra*, at 25. Orphan films are "numerically the majority" of the movies remaining in our film legacy, and constitute a vital section of our cultural history. *Librarian of Congress Report*, *supra*, at 5. They include documentaries, newsreels, independent productions, rare historic footage documenting daily life for ethnic minorities, "certain Hollywood sound films from now defunct studios," *id.*, and other commercial works "whose owners are unwilling or unable to provide long-term preservation." *Librarian of Congress Recommendations*, *supra*, at 26. The Library of Congress declared that it is in the task of restoring these "orphan films" that "the urgency may be greatest." *Librarian of Congress Report*, *supra*, at 5.

It is hard to overstate the importance of this point. Obviously, term extension provides no incentive to restore orphan and abandoned films. In many cases, the orphan films have no identifiable owners. The owners who have abandoned their films over a period of seventy-five years are not about to reclaim and refurbish them when that period is extended to ninety-five. Worse still, those who might otherwise restore orphan films will actually be deterred by term extension from doing so. The copyright status of films from the relevant period is often profoundly uncertain. The

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[16] Slide, *supra* note 9, at 6, 152.

films are often covered by multiple overlapping copyrights, all of which have to be cleared. There are rights over the film, over the soundtrack and so on.[17] It can be practically impossible to identify successors in interest, or to trace every possible transfer and assignment of copyrights over a period of more than seventy-five years. Thus, even though a film may in fact be in the public domain, or have been "abandoned" by an owner who is either willing to relinquish all rights, or who simply long ago lost track of and interest in the film, both commercial and non-commercial entities may be unwilling to restore or preserve it. Copyright is a strict liability system and the cost of defending or insuring against liability, or paying large legal fees to research and clear a complicated tangle of rights, is simply too great. The clean blade of term expiration is supposed to clear away this legal thicket; the CTEA leaves it in place. Far from encouraging the preservation, restoration and digitization of motion pictures, the CTEA will leave the golden years of the American movie industry rotting in the can, or surrounded by a tangle of poorly documented copyright claims which, through the uncertainty brought by time and legal complexity, impede both commercial and non-commercial use.

This inhibiting effect of lengthened copyright terms on both public access and restoration efforts is no mere speculation. Some archives simply do not release films until enough time has passed for the copyright term to expire. *Librarian of Congress Report*, *supra*, at 48-49. Until now, this has meant that access and distribution had to wait seventy-five years. Now they must wait ninety-five, frequently well beyond the effective life of the media on which the films are stored.

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[17] *It's a Wonderful Life* may provide the best-known example of this legal complexity. The film itself entered the public domain in 1974, but Republic Pictures used rights over the underlying short story and the soundtrack to prevent unauthorized television broadcast and videocasette distribution of the film. *See* Steven Schiffman, *Movies in the Public Domain: A Threatened Species*, 20 Colum.-VLA J.L. & Arts 663, 671-72 (1996).

Given the liability that archives could incur, and the expense and complexity of researching the copyright, this blanket denial of access is economically rational for underfunded archives. But it hardly serves copyright's constitutional goal of "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). And it certainly undermines Congress's asserted goal, with the CTEA, of encouraging film preservation. Discussing some of the similar difficulties introduced for stock footage libraries by automatic term renewal, the Library of Congress's *Report on Film Preservation* noted, that because of the difficulty and expense of ascertaining the copyright status of the films in question, the effect of such legal changes is to make it commercially infeasible to restore, use or digitize films that in all likelihood are "abandoned." *Id*. at 22. The CTEA simply continues and expands these impediments. These effects might be acceptable in an otherwise constitutionally unremarkable copyright statute. In a copyright statute which relies heavily for its constitutionality on its beneficial effect on film preservation, they are not.

It is undeniable that, but for the CTEA, any film from before 1927 would be freely and clearly available for any institution, company or individual to copy, restore, digitize or transform. No lawyer would have to be consulted, no tangle of rights negotiated, no copyright insurance procured. But for the CTEA, by 2018, all films made before 1943 would be available in this way. It is also undeniable that after the CTEA, the expense and trouble involved in clearing copyright is considerably higher for every year to which the Act applies, even for those films that have in fact been "abandoned" by their owners. Thus, in a tragic irony, the CTEA's undeniable effect on the majority of American films for the relevant period, the films for which the urgency of the task of restoration is the greatest, is to make preservation and restoration harder, more expensive and often completely impracticable.

3. The CTEA's term extension does not effectively spur restoration or digitization for the remaining minority of American films.

It was pointed out earlier that the predominant effect of term extension is to restrict public and archival access to films of the period. In addition, as was just shown, the CTEA demonstrably harms the project of preservation, restoration and digitization of orphan works. But the law's effect on the remaining portion of our film heritage, those films with some potential for protection by commercial interests, is hardly better. U.S. movie studios retain substantial holdings over feature films from 1923-1929, the blockbusters of their day. It is believed that some 1400 silent feature films were released in those years, of which about 1200 remain under copyright.[18] According to the Internet Movie Database, only 63 of these films are commercially available on DVD.[19] These documents of the silent era's end were to have entered the public domain by 2004; thanks to the CTEA, they will be sealed to all but a few archivists for another twenty years.

Beyond its obvious potential for undermining the restraints that the Framers so carefully wrote into the Copyright Clause, the CTEA's restoration rationale is implausible even when applied to the tiny minority of films for which it could possibly work, namely those with both identified owners and commercial potential.

Studios hold rights to a giant backlog of feature films. *Library of Congress Report supra* at 18 fig.4. Even if films from seventy-five years ago had the kind of high return favored by the major film studios, which they do not, term extension cannot possibly hope to provide incentives to restore and

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[18] Unpublished data courtesy of the archive of Dr. Jon C. Mirsalis. Correspondence on file with amici.

[19] These figures come from the Internet Movie Database's Advanced Search Page, at http://us.imdb.com/list, which allows users to search by year and by current release format (last visited May 7, 2002).

digitize more than a tiny fraction of these holdings. The concentration of the film industry in recent years has left many of the copyrights to the feature films of the past in the hands of a few companies. As of 1989, nine major studios held a 95% share of the U.S. domestic market for theatrical film exhibition. [20] A wave of mergers has since reduced the number of major studios still further. Even with the expansion of potential programming provided by digital cable TV and the multiplication of channels, there is a limit to the amount of material that a company might reasonably digitize and release, or license to others, without cannibalizing its own business. The flow of restored works from major copyright-holders could never be more than a trickle. For decades, eight major studios kept up a release rate of roughly one new feature per week. IV *Report of the Librarian of Congress, Film Preservation 1993: A Study of the Current State of American Film Preservation: Submissions*, 62 (1993) *(Submission of The Committee for Film Preservation and Public Access).* If, every year, one quarter of all releases onto DVD were to be devoted to films from seventy-five years ago – a ludicrous proposition – it would hardly put a dent in the accumulated libraries of the major studios. Even if a larger output could be maintained and the studios were able to switch their business model from making new films to refurbishing old ones, this would hardly serve the constitutional goal of promoting original expression!

The market-driven, monopoly right-of-exclusion, business model is unlikely to provide the incentives for anything even like that rate of release, particularly when the studios face the danger of diverting audiences from their own contemporary products. There is a simple reason for this; today's TV and video marketplace is more segmented than it was, but still responds much better to volume of preference than to intensity of preference for a particular entertainment

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[20] 10 Stephen Prince, *History of the American Cinema*, 1980-1989, at 41 (2000).

product. In most cases it is the number of viewers, rather than the avidity with which they devour the images on the screen, that drives the market. There *are* those who are passionate about old film, those who might well be willing to invest the time and money necessary to restore, digitize or make derivative works from a wide range of our older films if they did not have to pay the post-CTEA copyright tax to do so: the fan who devotes years to restoring fragments of Buster Keaton's work, the small company that re-releases public domain movies with commentary and scholarly apparatus, the Foundation that wishes to restore the works of the great African-American producer Oscar Micheaux, the archive which attempts to bring public domain classics to the Internet. But though those groups, prominently including both plaintiffs and amici in this case, have shown demonstrable interest in restoration and digitization, their passion does not translate into a workable market to which the movie studios can sell copyrighted entertainment.

The contemporary Internet is a shining example of the power of distributed, non-profit, and volunteer labor to provide global information and culture. There are small companies specializing in public domain films, and conspicuous public restoration programs. The Library of Congress has the largest film collection in the world,[21] many of the films painstakingly restored at public expense. The fruits of this public restoration could be available to all. Internet archiving, volunteer digitization, public domain film companies, federally funded restoration: each has its place in saving America's films. But these are also exactly the types of activity that term extension either forecloses, or leaves fruitless. Term extension gives the parties who are unlikely to restore and distribute films the exclusive right to do so, while denying rights to parties with demonstrated interest and capability. And it does so even within the commercial

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[21] Herrick, *supra* note 9, at 6.

sphere, the area that is supposed to provide the strongest case for the power of term extension to spur restoration.

4. The CTEA effectively undermines the deposit requirements of the Copyright Act.

The retrospective portion of the CTEA has a final pernicious consequence for film preservation; increasingly, it will impede the eventual physical access to movies supposedly guaranteed by the deposit requirements of Section 407 of the Copyright Act.[22] The deposit requirements are part of the copyright bargain. They operate to guarantee, among other things, that there is a copy of the work available to the public,

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[22] 17 U.S.C. § 407 (2000). The Library of Congress has a enormous collection of films assembled both from the fruits of the deposit requirement and by independent collection and bequest. Starting in 1894 the Library of Congress began collecting motion pictures, as collections of still photographs – frequently in so called "paper print" form. Initially, the Library of Congress did not retain nitrate films at all, because of the dangers posed in their storage. This practice stopped in 1942. However, subsequent acquisitions have attempted to fill in some of the gaps in the early collection and thus restore it to the condition it might have been in, had the early deposits been retained. For example, major collections include "preprint material for approximately 3,000 motion pictures from the pre- 1949 film library of Warner Bros. pictures. The collection contains 50 silent features (1913-30); 750 sound features (1927- 48); 1800 sound short subjects(1926-48); and 400 cartoons, among them "Looney Tunes" and "Merrie Melodies." The collection also contains "nearly 200 sound features released by Monogram Pictures Corporation and a number of "Popeye" cartoons released by Fleischer Studios [and] . . . an enormous collection of nitrate negatives and masters. . . as well as "70 well known Warner Bros. features (among the most popular of all American films), including "The Jazz Singer" (1927); "Little Caesar" (1930); and "Knute Rockne, All American" (1940)." As the Library notes in its description of the Warner Brothers collection, "[c]opyrights are still in effect for most of the films . . . in this collection." Motion Pictures in the Library of Congress "excerpted from Footage 89: North American Film and Video Sources, New York: Prelinger Associates, 1989" at http://lcweb.loc.gov/rr/mopic/mpcoll.html (last visited May 15, 2002).

so that at the end of the copyright term the copyright holder is not in sole possession of the *res,* able to have both a lengthy legal monopoly and then also to exploit the position of market advantage conveyed by exclusive physical control.

The volatile cellulose nitrate base used on most pre-1950 films is prone to shrinkage, to outgassing that destroys the film's emulsion and even to spontaneous combustion. We are already at or beyond the normal life of many of the films that have been deposited with the Library of Congress. It has been estimated that over 50% of the movies made before 1950 have already been lost. *Librarian of Congress Report*, *supra*, at 3. The CTEA's extension of copyright for another twenty years is likely to mean that many of the deposit copies simply turn to powder.[23] In some cases, these deposit copies will be the only remaining copies of the film.[24] In other cases, they will be the only publicly available copy; by encouraging Congress to extend the term until the deposit copies literally decompose, the copyright owners have effectively managed to ensure that they can either avoid the consequences of the deposit requirement, or dramatically increase the cost to the public of maintaining a deposit copy.

5. The Congressional findings cannot sustain the legislation.

Amici have shown that the CTEA actively hurts the cause of film preservation and restoration for the majority of

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[23] Unless the Library of Congress exercises its rights under Section 108 of the Copyright Act, and engages in the expensive process of restoring – while being unable to distribute -- its entire collection from those years. *See* 17 U.S.C. § 108 (2000).

[24] The Library of Congress Report noted the case of independent film maker Victor Nunez. Nunez was left without a copy of one film after his distributor went out of business, and believes that the copy deposited for copyright protection may be the only remaining one. *Librarian of Congress Report*, *supra*, at 20.

American films. In a record devoid of details, Congress "found" otherwise. S. Rep. No. 104-315, at 13 (1996). But, even where Congress develops a more substantial record, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of . . . legislation" when the rationale underlying the findings does not support Congressional power. *United States v. Morrison*, 529 U.S. 598, 614 (2000). As this Court pointed out in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 (quoting *Hodel v. Va. Surface Min. and Reclamation,* 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)). Rather, the scope of Congress's constitutional power "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Morrison*, 529 U.S. at 614 (citations omitted). What is true for asserted effects on interstate commerce, is also true for asserted effects on the progress of science through film preservation.

The retrospective portion of the CTEA is already far outside the normal boundaries of the power conferred by the Copyright Clause, involving as it does not a single incentive to create new and original works. It would be perverse for the CTEA's extension of the copyright term on all works in any medium to be justified by its role in encouraging preservation of a few works in one medium. When, even within that medium, it can be demonstrated that the CTEA's effect on the majority of works from the relevant period is actively and undeniably to impede restoration and preservation, no "finding" of Congress to the contrary could possibly be sufficient to make such an enactment constitutional.

II. The retrospective portion of the CTEA violates the First Amendment.[25]

Congress passed a statute that has in it a provision with the following effect: an entire generation of American culture that, starting in 1998, would have become available year by year, is instead to be controlled under the terms of a statutory scheme for an additional twenty years. These works would have been free for all to use, reproduce, modify, transform, publish, display and perform. Now those who wish to adapt these plays, make these films available over the Internet, sing these songs publicly, or who wish to make new works based on those of prior generation, must ask permission of a private party. If they proceed without authorization they are subject to serious criminal and civil penalties. This portion of the statute has no possibility of encouraging new works. In fact, it applies only to works that have already been created. Is such a provision subject to First Amendment scrutiny? How could it not be?

A. The CTEA is subject to First Amendment heightened scrutiny that its retrospective portion is incapable of meeting.

The CTEA is a content neutral statute that restricts expressive activity. Such a statute may only be upheld "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Dealing recently with another statutory scheme which has as its ostensible goal the improvement of

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[25] Amici believe that the prospective portion of the CTEA likewise cannot pass First Amendment scrutiny but, as in the prior Section, concentrate on the retrospective action of the statute.

the information environment, the Court ruled that Congress must show that the statute serves an important government interest in a manner no more restrictive than necessary. *See Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 662, 662 (1994). The Second Circuit has applied the *Turner* standard to Section 1201 of the Copyright Act. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001). Thus, *Turner*-level scrutiny would seem to be the appropriate standard of review here. It is a standard that amici believe this statute cannot meet.

1. The important government interest used to justify the CTEA's retrospective extension must both be within the scope of the Copyright Clause and be furthered by the extension of subsisting copyrights. The only "interest" which has any potential to meet both of these criteria is the film preservation rationale.

Obviously, the constitutionally cognizable "important government interests" that are served by the provisions at issue are limited by the constitutional clause from which the Congress drew its power. Congress may not engage in a constitutional two-step, claiming one set of legislative goals in order to show that the legislation falls within the bounds of the power-conferring clause and then offering a second and different set of "important government interests" in order to allow the statute to pass First Amendment scrutiny. Therefore, in applying First Amendment scrutiny to the CTEA, it is only those goals that are within Congress's power under the Copyright Clause that may be considered as potential "important government interests." As was pointed out earlier, neither "harmonization" nor the need to encourage authors by giving greater monopoly rents to their impecunious grandchildren can qualify. When looked at through the filter of the Copyright Clause these are dubious bases even for the prospective extension of copyright. Clearly

neither can provide a cognizable reason *under the Copyright Clause* for the *retrospective* extension of existing copyrights.

The only "important government interests" that may be considered in assessing whether the retrospective extension of copyright passes First Amendment scrutiny are those which are a) arguably within the bounds of the Copyright Clause's "promote the Progress" language and b) arguably furthered by extension of subsisting copyrights. In reality, this is a set with a single member: the film preservation rationale.

2. Retrospective term extension of all copyrights is more restrictive than necessary to secure the asserted goal of film preservation.

Assuming *arguendo* that the film preservation rationale is within the bounds of the Copyright Clause, may the CTEA's restriction over all original works in all media be justified by an empirically dubious claim that it will give a tiny number of private parties the incentives necessary to restore a tiny number of works in one particular medium? Under the *Turner* or *O'Brien* tests only one answer is possible. On its face, the retrospective portion of the CTEA clearly does not serve an important government interest in a manner *no more restrictive than necessary*. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court ruled that narrow tailoring of content neutral statutes restricting speech requires that the means chosen not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. By contrast, the CTEA's provisions sweep with incomparable breadth, extending the copyrights of all original works in all media for twenty years, when the only potential constitutionally cognizable interest is at best limited to a single subset of a single medium. It is hard to think of a better example of burdening more speech than

necessary.[26] This Court could find now that it is unconstitutional for that reason, or could remand to the lower court for review under heightened scrutiny.

Copyright is sometimes said to be the "engine of free expression." *Harper & Row v. Nation Enter.*, 471 U.S. 539, 558 (1985). This has led some to the mistaken conclusion that it is somehow partially immune from First Amendment scrutiny. Yet all would concede that even where the "engine of free expression" is operating, copyright still has a number of limitations imposed by the First Amendment – the idea-expression distinction, the limitations on exclusive rights that come from fair use and so on. What then of the case when the engine has already run, has already produced the original expression it is designed to produce? What of the case when we know that the extent of the legal monopoly was sufficient to encourage creation of the expressive work, know it for a certainty because the work has already been created? What of the situation where after the work has been created, after the creators have had the full extent of their lengthy legal monopoly, the Congress then seeks for an additional period of twenty years to deny citizens the ability to copy onto new media, to transform, to restore, to create derivative works or place them on the Internet? In that case we have naked government action which actually criminalizes expressive behavior and does so entirely without the protective coloration of the legitimate goal of copyright law: to encourage new expression. If there *were* some constitutional doctrine granting partial First Amendment immunity for copyright law, which amici do not concede, it could exist only so long

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[26] Congress has a large number of alternative methods of accomplishing this goal, ranging from extensions of existing film preservation statutes such as the National Film Preservation Act of 1996, 2 U.S.C. § 179l (1996) (continuing the National Film Registry, where the Library of Congress designates 25 movies a year as valuable for U.S. cultural heritage) and the National Film Preservation Foundation, (*see* 36 U.S.C. §§ 151701 *et seq.* (1998)) to direct government subsidy for preservation or digitization.

as the reason for the rule was present. *Cessante ratione, cessat ipsa lex*. With the end of any possible incentive for new creation, any "immunity" from the First Amendment would logically vanish.

The CTEA is not a statute which imposes some incidental restrictions on expression as part of a larger regime of conduct regulation. For example, the documentary filmmaker who wishes to produce DVD's of classic movies with an historical introduction and a critical interpretation at the end, or the studio that specializes in mining "orphan films" for stock footage used in contemporary works, must each apply for permission to the owner of the copyright, assuming that the owner of the copyright (or copyrights) can ever be identified. In the absence of such permission, to distribute, reproduce, or publicly perform copyrighted films, or to create derivative works, is potentially to commit a criminal act. The criminal prohibition applies to each of these activities, despite the fact that they lie at the heart of First Amendment protection, that the works being placed off limits require no additional incentive for their creation, and that the lengthened term will, in all probability, mean the irrevocable physical decomposition of a large fraction of the golden years of American cinema.

CONCLUSION

The CTEA's retrospective extension of existing copyrights exceeds the Copyright Clause's grant of power. While the Congress offered a number of legislative goals for the CTEA, the only one that both has an arguable connection to the Copyright power and that purportedly justifies retrospective term extension is the film preservation rationale. It may be for that reason that the Court of Appeals mentioned preservation and digitization specifically. *Eldred v. Reno*, 239 F.3d 372 at 378-79 (D.C. Cir. 2001). Yet the CTEA cannot be justified in this way. Encouraging restoration turns out to be a thinly disguised "sweat of the brow" protection outside

Congress's power. The scope of the extension is also fatal to the rationale. The extension of all copyrights in all media cannot be justified by the need to motivate restoration of a few works in one medium. Above all, the CTEA plainly does not accomplish the goal of encouraging preservation and digitization of American film; in fact, it substantially impedes it.

As to the majority of American films, the "orphan works" for which the "the urgency may be greatest." *Librarian of Congress Report*, *supra*, at 5, the CTEA's undeniable effect is to frustrate preservation attempts. It leaves the majority of films caught in a tangle of rights which term expiration would have cleared. By the time the lengthened term expires it may well be too late. The CTEA also keeps the public from making effective use of the vast holdings of films in the nation's archives, some of them already restored with public funds. It restricts both the restorer and the entrepreneur, the digitizer and the fan. It prevents them from copying, displaying, making derivative works and popularizing anew. Copyright seeks to promote public access; the CTEA forecloses it. Again, by the time the new term expires it may be too late. Even as to the minority of films for which it might be thought to work, namely commercial works under active copyright management, the CTEA turns out to complicate rather than to encourage the process of restoration. For all these reasons, the retrospective portion of the CTEA is outside Congress's Copyright Clause power.

The retrospective portion of the CTEA also violates the First Amendment. It is true that in many cases the courts need never reach the First Amendment in deciding a copyright issue. Yet the First Amendment status of legislation is not inherited by placement; it does not automatically apply to any provision placed in Title 17 of the U.S. Code. It lives or dies with the reasons that gave it birth. Congress might be able to set up a regime of censorship during wartime. It could not, without First Amendment review, extend that regime for twenty years after the war, no matter how unquestionably

constitutional the original scheme had been. Similarly Congress may not substantially extend copyrights over existing works without First Amendment review. Such a review has a double filter. It looks within the statutory purposes for an "important government interest" that is both cognizable under the Copyright Clause *and* that requires the extension of subsisting copyrights. Only the preservation rationale has any potential for satisfying both of these requirements (though as amici have shown, retrospective term extension will actually hurt the cause of preservation for the majority of American films.) Next the review must look to see if these important government interests are accomplished in a way that is no more restrictive of expression than necessary. But the CTEA restricts expressive activity across the entire corpus of American culture for twenty years in the name of a dubious claim to save a minority of the works within a particular medium. This is neither within Congress's powers under the Copyright Clause, nor capable of surviving First Amendment review.

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