No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.,*

Petitioners,

—v.—

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

Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, BROADCAST MUSIC, INC., CHURCH MUSIC PUBLISHERS ASSOCIATION, MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES, AND NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. IN SUPPORT OF RESPONDENT

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Copyright Term, Film Labeling, and Film Pres. Legis.: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary, 104th Cong. ("*1995 House Hearing*") (1995) ....*passim*

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Pre-1978 Distrib. of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 105th Cong. ("*1997 House Hearing*") (1997) ....*passim*

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BMI, *Student Composers Honored at 50th Annual Awards Presentation, at* http://www.bmi.com/news/200206/20020610a.asp (last visited July 31, 2002) . 29

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PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE (2001) 20

Sen. Orrin G. Hatch, *Essay: Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium,* 59 U. PITT. L. REV. 719 (1998) 28

HFA, *Songfile*, at http://www.songfile.com (last visited July 31, 2002) 16

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Nat'l Ctr. For Health Statistics, U.S. Dept. of Health and Human Servs. (2002) 25

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Mike Stoller, Editorial, *Songs That Won't Be Written*, N.Y. TIMES, Oct. 7, 2000, at A15 24

INTERESTS OF *AMICI CURIAE*[1]

Amici represent songwriters, music publishers and performing rights organizations that create, promote and disseminate musical works.[2] Songwriters—the composers and the lyricists—are the authors of the work and those in whom the musical work copyright initially vests. 17 U.S.C. § 201(a). Music publishers, to whom a songwriter typically assigns his or her copyright in exchange for a share of the income received from the work's exploitation, help songwriters exploit their musical works by publishing sheet music, licensing certain rights, and promoting the songwriters' works to record companies and performing artists. Performing rights organizations are instrumental to the dissemination of musical works through their licensing of such works to concert halls, television and radio stations, retail establishments, and Internet web sites, among many other outlets that publicly perform musical works.

The musical work has long been the focus of copyright protection and is today the "heart and soul" of American culture. Early in the twentieth century, music publishers from New York City's "Tin Pan Alley" revolutionized popular music by promoting some of the greatest songwriting talent in the United States. Among

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Two distinct copyrights exist in recorded music: the copyright in the underlying musical work—the interests of *amici* here—and the copyright in the sound recordings of the musical work, that is, recordings by artists of the underlying composition. *See* 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.01 (2002).

those songwriters were a nineteen-year-old Jerome Kern, a rehearsal pianist named George Gershwin, the young songwriting duo of Richard Rodgers and Lorenz Hart, as well as Cole Porter, Howard Dietz, Vernon Duke and Ira Gershwin. From them and others sprang the American popular song—George and Ira Gershwin's "I Got Rhythm," Cole Porter's "Night and Day," Irving Berlin's "Cheek to Cheek," Duke Ellington's and Billy Strayhorn's "Take the 'A' Train," Walter Donaldson's and Gus Kahn's "Yes Sir! That's My Baby," and Hoagy Carmichael's "Star Dust." All of these songs remain popular today and continue to sustain American achievement in music worldwide.

American Society of Composers, Authors and Publishers ("ASCAP") is an unincorporated voluntary association of over 140,000 composers, lyricists, and music publishers. On behalf of its members and affiliated foreign performing rights societies, ASCAP licenses rights for nondramatic public performances for the millions of copyrighted musical works in its repertory. ASCAP collects license fees and, after deducting operating expenses, distributes the remainder of the royalties to the copyright holders or their representatives, including songwriters and music publishers and their heirs and successors.

Association of Independent Music Publishers ("AIMP") is dedicated to serving the music publishing community by providing continuing professional education, analysis of trends and developments in creative, business, and legal areas, and music copyright exploitation opportunities. AIMP's primary focus is to educate and inform music publishers about current industry trends and practices by providing a forum for the discussion of various issues confronting the music publishing industry.

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

in musical works on behalf of approximately 300,000 affiliated songwriters, composers, and publishers, as well as 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 4.5 million musical works to broadcast radio and television stations, cable program services and systems, restaurants, retail establishments, Internet web sites, 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.

Church Music Publishers Association ("CMPA") is an organization of publishers of Christian and religious music who promote worldwide copyright protection and education. Founded in 1926, the CMPA currently includes 47 United States and international member publishers including the major denominational publishing companies for the United Methodist Church, Southern Baptists, Roman Catholic Church, Nazarene Church, Seventh Day Adventists, Church of God, the Lutheran Church Missouri Synod and the Evangelical Lutheran Church of America.

Music Publishers' Association of the United States ("MPA"), established in 1895, is the oldest musical trade organization in the United States. MPA fosters communication among publishers, dealers, music educators and all ultimate users of music, and addresses issues pertaining to all areas of music publishing, with particular emphasis on issues concerning publishers of print music for concert and educational purposes.

National Music Publishers' Association, Inc. ("NMPA"), founded in 1917, is the principal trade association rep-

resenting the interests of music publishers in the United States. NMPA works to protect and advance the interests of the music publishing industry, and, for over eight decades, has served as the leading voice of the American music publishing industry in Congress and the courts. With over 900 members, NMPA represents the most important and influential music publishing firms throughout the United States. In addition, the licensing affiliate of NMPA—the Harry Fox Agency, Inc.—acts as licensing agent for more than 27,000 music publishers, which in turn represent the interests of more than 160,000 songwriters.

SUMMARY OF ARGUMENT

In enacting the Copyright Term Extension Act of 1998 ("CTEA"), Pub. L. No. 105-298, Title I, 112 Stat. 2827 (amending 17 U.S.C. §§ 301-304), Congress properly exercised the power granted to it under the Copyright Clause, U.S. CONST. art. I, § 8, cl. 8. The CTEA's extension of terms for existing works, as well as prospective works, "promote[s] the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."

Congress enacted the CTEA against the backdrop of two centuries of adjustments to copyright that promote the progress of science and useful arts by providing incentives for creating and disseminating works, not only by granting authors exclusive rights to their works for a prescribed term, but also by carving out numerous limitations on copyright that allow authors to build on the work of their predecessors in creating new works. The evolution of the musical work copyright and the resulting resounding achievement in American songwriting illustrate the success of Congress's approach in this area through its responses to changes in economic,

technological and social conditions in the United States and worldwide.

Congress has adjusted the reach of the musical work copyright numerous times over the past two centuries, including to respond to the popularity of the musical stage, the invention of phonograph records and piano rolls, and the development of digital recording technology and the Internet. In addition, Congress established a statutory framework for the musical work copyright that ensures that copyrighted works are widely available to the public for performance as well as for reproduction and further creation. Congress expressly limited its grant of a musical work copyright by imposing a compulsory mechanical license, so that, for a reasonable fee, any person can reproduce and distribute a work once the copyright owner has first publicly released a recording of the work. Congress also limited the musical work copyright owners' right to control public performance of their works with a variety of exemptions for various types of performances. Finally, copyrighted musical works are readily available for nondramatic public performances through nonexclusive blanket licenses from performing rights organizations, including *amici* ASCAP and BMI, that are granted to radio and television stations, restaurants and retail establishments, among others. Even more generally, Congress has provided that copyright protection applies only to expression, not ideas, and has codified the fair use doctrine that allows for free use of copyrighted works in certain circumstances.

The CTEA follows Congress's longstanding practice of adjusting copyright to respond to changed conditions so as to promote the progress of science and useful arts by furthering the goals of copyright protection—the creation and dissemination of original works of authorship. The CTEA's extension of copyright terms for existing works promotes such progress in several respects. It

encourages greater dissemination and exploitation of existing works. The CTEA also encourages preservation of works so that they continue to be available to the public. The CTEA safeguards the strong positive balance of trade in the music industry by ensuring that American works enjoy protection for a term commensurate with that afforded works in Europe and other important markets.

The CTEA also promotes the creation of new works by extending terms in existing works to provide authors with compensation adequate to provide for their families without having to pursue other employment. The CTEA thereby encourages the pursuit of songwriting as a career and inspires young songwriters to devote themselves to creative endeavors because they know that Congress supports copyright protection that will inure to the benefit of their families by providing for their heirs. Finally, the CTEA's extension of terms in existing works funds the creation of new works by providing revenue to current and future authors.

ARGUMENT

I. THE CTEA IS THE LATEST CHAPTER IN A LONG HISTORY OF STATUTORY ADJUSTMENTS THAT HAVE SUCCESSFULLY PROMOTED THE "PROGRESS OF SCIENCE AND USEFUL ARTS"

The CTEA is the latest chapter in a long and successful history of congressional enactments concerning copyright in creative works, including musical works. Over the course of the past two centuries, Congress has adjusted the scope of copyright protection to encourage creation and dissemination of works and has successfully "promot[ed] the Progress of Science and useful Arts" in this country, within the meaning of the Copyright

Clause, U.S. CONST. art I, § 8, cl. 8.[3] As a result of Congress's careful calibration of the appropriate degree of protection for copyrighted musical works, including the CTEA's extension of the term in existing works, the music industry has thrived and continues to thrive, producing a robust body of musical works and advancing American achievement in music worldwide, while affording consumers and future authors ready access to these works at reasonable cost.

Petitioners assert, however, that the CTEA's extension of the copyright term for existing works does not promote the progress of science and useful arts because it cannot act as an incentive for already-created works. *See* Pet. Br. 22-23. But petitioners advance an unreasonably narrow, and overly simplistic, view of what constitutes progress of science and useful arts. As the Court has recognized, the purpose of the Copyright Clause is not only to inspire creation but also to encourage dissemination of copyrighted works. *See*, *e.g.*, *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts."); *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (assigning to Congress "the task of defining the scope" of copyright in

[3] *Amici* disagree with petitioners' view that the preamble of the Copyright Clause, U.S. CONST. art. I, § 8, cl. 8, imposes a substantive limitation on congressional authority. *Amici* do not address that argument, which they demonstrate need not be reached because the CTEA does promote the progress of science and useful arts, as the court of appeals recognized in its alternative holding. Pet. App. 12a. Similarly, although *amici* believe that petitioners' other arguments under the Copyright Clause, as well as under the First Amendment, lack merit, *amici* defer to the brief of the United States and other *amici* in support of respondent on those issues. *See*, *e.g.*, Br. of *Amicus Curiae* The Songwriters Guild of America in Support of Respondent.

order to promote the dissemination of creative works). Dissemination of creative works is critical to the progress of science and useful arts because it publicizes expression, enriches public discourse, and inspires future creation.

A. The Statutory Evolution Of The Musical Work Copyright Over The Past Two Centuries Has Successfully Promoted American Music By Encouraging Creation And Dissemination Of Musical Works

The first copyright law of the United States, enacted in 1790, applied only to "maps, charts, and books"—including existing works. Act of May 31, 1790, ch. 15, 1 Stat. 124. Although that statute did not expressly apply to musical works, some authors registered song lyrics as "books." 1 WILLIAM PATRY, COPYRIGHT LAW AND PRACTICE 30-31 n.91, 39 n.115 (1994). In 1831, Congress enacted the first copyright legislation expressly covering musical compositions. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436. At the same time, Congress also extended the term of copyright protection from fourteen years to twenty-eight years (plus a renewal term of fourteen years). That extension, which applied both to already existing works and works not yet created, *id.* at sec. 16, was intended "to place authors in this country more nearly upon an equality with authors of other countries." *See* 7 REG. DEB. 119-20 (1830).

The 1831 Act's grant of copyright to musical works was far from comprehensive. Musical work copyright owners received the right to prevent only the unauthorized publication of their sheet music. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436. They could not stop others from performing their works without permission, even as the musical stage grew to become one of the country's most popular forms of entertainment by the latter part of the nineteenth century. Stephen Foster—the most pop-

ular songwriter of his day and author of, among other well-known songs, "Oh! Susanna," "My Old Kentucky Home," and "Jeannie With the Light Brown Hair"—died nearly penniless in 1864, never having benefited financially from the countless performances of his works. Finally, in 1897, Congress expanded the scope of copyright to grant songwriters exclusive rights in the public performances of their musical works, including both dramatic (*e.g.*, musical drama) and nondramatic (*e.g.*, concert) performances—the so-called "performance right." Act of Jan. 6, 1897, ch. 4, 29 Stat. 694.

In the early part of the twentieth century, the commercial value of musical copyright was again threatened, this time by the advent of the player piano and the phonograph, which enabled the making of copies of sound by mechanical means without permission from, or compensation to, the musical work copyright owner. In 1908, the Court rejected a challenge to such unauthorized reproductions, holding that, under the terms of the then-applicable copyright statute, a reproduction by a piano roll did not infringe the copyright in a musical work. *White-Smith Pub'g Co.* v. *Apollo Co.*, 209 U.S. 1, 18 (1908).

Congress again responded to promote the progress of American songwriting by ensuring compensation to the musical work copyright owner for these uses and, at the same time, ensuring competition in a free market for recorded music. In revising the Copyright Act in 1909, Congress granted musical work copyright owners the right to make mechanical reproductions of their works. Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. § 1(e) (1909)). But, mindful of the potential for a "music monopoly" in the hands of a single piano roll manufacturer that had entered into exclusive contracts with many music publishers, Congress subjected

the mechanical right to a limitation.[4] The copyright owner could choose whether to make the initial recording of the musical work, and at what price, but, once the initial recording was released, the copyright owner could no longer control or prohibit subsequent reproduction or distribution. *Id.* Rather, Congress required that a compulsory license—or "mechanical license" as it is known in the music industry—be granted to any user seeking to record a musical work, in exchange for the user's payment of a statutorily-set royalty rate. *Id.* The 1909 Act also reaffirmed the performance right of the musical work copyright owner originally granted in 1897. *Id.* at § 1(c).

In 1976, Congress again revised the Copyright Act. Pub. L. No. 94-553, 90 Stat. 2598 (codified as amended at 17 U.S.C. §§ 101-1101). The 1976 Copyright Act retained the compulsory mechanical license for musical works so that, once a copyright owner has authorized distribution of "phonorecords" (any material objects in which sound can be fixed including audiocassettes and compact discs) of a nondramatic musical work to the public in the United States, a license is available to anyone to produce his or her own phonorecord containing the work. 17 U.S.C. §§ 101, 106, 115.

The 1976 Act revised the performance right. First, the Act clarified that every public rendition of a copyrighted work constitutes a separate and distinct performance for which a license must be obtained. 17 U.S.C. § 101. Second, the Act excepted from the definition of "public" such truly private performances as those before a circle of family or social acquaintances. *Id.* Third, the Act removed the "for profit" requirement imposed by the 1909 Act, thus making not-for-profit performances gen-

[4] 2 NIMMER, *supra* note 2, at § 804[A] (quoting H.R. REP. NO. 60-2222, at 6 (1909)); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 682-690 (3d ed. 2002).

erally subject to copyright. *Id.* Congress balanced those expansions of the musical work copyright, however, by carving out numerous exceptions from infringement liability, among them: face-to-face teaching activities of a nonprofit educational institution, *id.* § 110(1); certain governmental and non-profit educational broadcasts, *id.* § 110(2); performances in the course of religious services at a place of worship or other religious assembly, *id.* § 110(3); and other purely noncommercial performances, *id.* § 110(4).

Congress also demonstrated in the 1976 Act its concern over the inability of authors and their beneficiaries to be compensated fairly for works in which they had previously transferred their copyright. Early in their careers, lacking business sophistication and unable to earn an adequate living, many songwriters surrendered significant portions of their rights to third parties for little compensation. *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. ("*1995 Senate Hearing*") 238-239 (1995) (statement of Quincy Jones). As a result, Congress granted authors—of both existing and future works—and their heirs a "termination right," allowing them to recapture copyright ownership after a specified period of years. 17 U.S.C. §§ 203, 304(c). *See* 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 494-500 (1994).

Congress's revisions of the Copyright Act did not end there. Among other adjustments, Congress, in 1982, again added certain exemptions to the public performance right. Act of Oct. 25, 1982, Pub. L. No. 97-366, 96 Stat. 1759 (codified at 17 U.S.C. § 110(10)). In 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), after Congress paved the way by passing the Berne Convention Implementation Act of 1988, Pub. L.

100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.). In 1995, Congress addressed technological change in the music industry by enacting the Digital Performance Right in Sound Recordings Act, which confirmed that the compulsory mechanical license for musical works applied to digital distribution, including over the Internet. Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. § 115). In 1998, Congress enacted the Fairness in Music Licensing Act, which expanded the exemptions from the public performance right for certain small businesses, bars, and restaurants that perform music from licensed radio, television, cable and satellite sources. Pub. L. No. 105-298, 112 Stat. 2830 (codified at 17 U.S.C. §§ 110, 513).

In 1998, Congress also addressed global threats to copyrighted works posed by the Internet by enacting the Digital Millennium Copyright Act ("DMCA"), Pub. L. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.). The DMCA protects the "rights of proprietors whose works are exploited over the Internet, by strengthening the protections enjoyed by copyright owners through barring certain anti-circumvention techniques and devices." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 12B-16 (2002). Among other things, the DMCA also encourages dissemination by limiting the liability of certain categories of online service providers if they comply with specified procedures. 17 U.S.C. § 512.

B. Petitioners' Assertion That The CTEA Will Stifle The Creation And Dissemination Of Original Works Of Authorship Is Belied By The Adjustments That Congress Has Made To Copyright Law To Ensure The Public's Broad Access To Copyrighted Works

Petitioners maintain that extended copyright protection will inhibit the creation and dissemination of orig-

inal works of authorship. Pet. Br. 5-7. But petitioners ignore the extensive limitations—beyond those specific to the musical work copyright—that Congress has codified in the Copyright Act to preserve access to copyrighted works by users. Far from the monopoly petitioners complain about, copyright protects only expression and not ideas. 17 U.S.C. § 102(b). Unlike a patent, which "empowers its owner to prevent anyone else from making or using his invention[,] a copyright just empowers its owner to prevent others from copying the particular verbal or pictorial or aural pattern in which he chooses to express himself." *Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987) (Posner, J.). Copyright "does not forbid the making [by others] of close substitutes." *Id.* at 1198-99. Nor does it forbid independent creation of the same work. As a result, competition abounds notwithstanding copyright protection: that Irving Berlin wrote "God Bless America" did not prevent Woody Guthrie from writing "This Land Is Your Land."

Similarly, Congress subjected the exclusive rights granted in Section 106 of the 1976 Act to significant limitations. 17 U.S.C. §§ 107-122.[5] The most prominent of those limitations is the fair use doctrine, upon which authors routinely rely to make use of copyrighted works. 17 U.S.C. § 107. For example, in *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court, remanding the case, held that the group 2 Live Crew's unauthorized use of Roy Orbison's "Pretty Woman" could be a permissible parody under fair use.

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[5] These limitations include certain reproductions by libraries and archives, 17 U.S.C. § 108; resale of authorized copies, *id.* § 109; certain performance and displays, *id.* § 110; certain secondary transmissions, *id.* §§ 111, 119, 122; certain ephemeral recordings, *id.* § 112; compulsory licensing, *see*, *e.g.*, *id.* §§ 114(d)(2), 115, 118; and certain copies of computer programs, *id.* § 117.

Congress's longstanding practice of adjusting the scope of copyright by expanding and contracting it as appropriate has encouraged the creation and dissemination of American musical works. Congress has thereby succeeded in promoting progress in American songwriting so that American music today stands at the core of American culture and is enjoyed worldwide. Congress's enactment of the CTEA similarly promotes the continued progress of American songwriting and other "Science and useful Arts" in American culture.

II. AS EVIDENCED BY THE EXTENSIVE RECORD BEFORE CONGRESS, THE CTEA'S EXTENSION OF COPYRIGHT TERMS FOR EXISTING WORKS PROMOTES THE PROGRESS OF SCIENCE AND USEFUL ARTS BY ENCOURAGING DISSEMINATION OF THOSE WORKS AND CREATION OF NEW WORKS

In enacting the CTEA, Congress learned of the importance of term extension to the musical work copyright through the testimony and statements of *amici* and numerous songwriters and musical work copyright owners. Congress enacted the CTEA in the face of extensive evidence of the importance of a vital American musical culture to the public, to the economy, and to creativity. The record before Congress demonstrated that the CTEA—like earlier revisions to copyright—was essential to the continued achievement of those objectives and 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).

Moreover, Congress's application of the CTEA's term extension to existing works was consistent with Congress's prior practice, when revising the Copyright Act, to apply term extensions, as well as certain other revisions, to existing works no less than to future works. For exam-

ple, the 1976 Act not only extended the terms of copyright in existing works to make them comparable to the longer terms of copyright in newly-created works, 17 U.S.C. § 304, it also extended the Act's exclusive rights, and limitations on rights, to existing works generally. Act of Oct. 19, 1976, Pub. L. No. 94-553, sec. 102-103, 90 Stat. 2598 (codified in scattered sections of 17 U.S.C.). One justification for this comprehensive approach to copyright reform is equity: the author of a work created on December 31, 1977, the eve of the 1976 Act's effective date, should be treated comparably to the author of a work created on January 1, 1978. Another justification is greater efficiency: it avoids adding another layer of confusion by applying term extensions to all works under copyright. *See Copyright Term, Film Labeling, and Film Pres. Legis.: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. ("*1995 House Hearing*") 592 n.11 (1995) (memorandum of Professor Shira Perlmutter).

A. The CTEA's Extension Of Copyright Terms For Existing Works Promotes The Progress Of Science And Useful Arts By Encouraging Dissemination, Public Use, And Preservation Of Musical Works

Petitioners' challenge to the CTEA's extension of copyright terms for existing works is premised on the view that the public domain makes works more widely available for greater exploitation. Pet. Br. 5-7. That view is contrary, however, to both the extensive evidence before Congress and the experience of the music industry, which demonstrate that copyrighted works—especially copyrighted musical works—are more widely disseminated and exploited than works that have entered the public domain.

Copyrighted musical works are widely available to the public, as well as to those who want to reproduce, distribute, or perform them. As explained above, musical work copyright owners can exercise no control over recordings made of a work after public release of an initial recording of that work, because the compulsory license allows reproduction and distribution by others of such works.

The scope and terms of compulsory licenses are statutorily prescribed, as are the license fees to be paid by a compulsory licensee. For sixty-seven years—from 1909 to 1977—the statutorily-set license fee for a compulsory mechanical license was 2¢ per copy. 17 U.S.C. § 1(e) (1909). In 1976, Congress finally increased the fee to 2.75¢ per copy (or, for longer works, .50¢ per minute of playing time), and that fee—an amount still far short of what inflation warranted—became effective in 1978. 17 U.S.C. § 115(c)(2). The 1976 Act further provided for future rate increases, and, in 2002, the rates increased to 8¢ per copy (or 1.55¢ per minute of playing time). 37 C.F.R. § 255.3(k).

The licensing affiliate of *amicus* NMPA, the Harry Fox Agency ("HFA"), acts as a licensing agent for music publishers to facilitate grants of compulsory licenses for reproduction and distribution. HFA's song list is posted online. HFA, *Songfile*, *at* http://www.songfile.com (last visited July 31, 2002). The ready accessibility of musical works for reproduction and distribution by potential users is best evidenced by the hundreds of versions of Irving Berlin's "White Christmas" (first published in 1942) that have been recorded to date. *Id.* (listing renditions). There will be many more.

Licenses for nondramatic public performances of musical works are also readily available. Because of the vast number of nondramatic public performances occur-

ring each day in the United States—including radio and television broadcasts and commercials, and broadcasts by retail establishments and restaurants—performing rights organizations such as *amici* ASCAP and BMI were formed. They act on behalf of copyright owners to license public performances of their musical works and thus make licensing easier for both copyright owners and licensees. Congress recognized the role of such performing rights organizations in the Copyright Act. *See* 17 U.S.C. §§ 101, 114(3)(C), 114(d)(3)(E)(ii), 513, 801(b).

Songwriters and music publishers join or affiliate with performing rights organizations. These organizations issue nondramatic public performance licenses on a blanket basis for an annual fee required to be reasonable, 37 C.F.R. § 251.61, granting the user the right to perform all works of all the members or affiliates of the organization. The song databases of ASCAP and BMI are readily accessible online and are searchable and updated frequently by those organizations. ASCAP, *ACE on the Web*, *at* http://www.ascap.com/ace (last visited July 31, 2002); BMI, *BMI Repertoire*, *at* http://www.repertoire.bmi.com/startpage.asp (last visited July 31, 2002). Licenses for dramatic performances (*e.g.*, musical drama) of copyrighted musical works are negotiated directly with the songwriter or music publisher.

Congress's extension of copyright terms in the CTEA further encourages dissemination and exploitation of existing works in several ways. First, extended terms provide an incentive for copyright owners to invest in high-quality dissemination of their works in view of the increased revenue potential resulting from copyright protection during a work's extended term. *1995 House Hearing* 593 (memorandum of Professor Shira Perlmutter). For example, in early 2000, Peer Music, a music publishing firm and member of *amicus* NMPA, purchased (in reliance on the CTEA) the United States rights to the

catalog of Hoagy Carmichael, including "Star Dust" and other works whose terms were extended by the CTEA. Since acquiring such rights, Peer Music has exploited Carmichael's works in many ways, such as by promoting his lesser-known songs, and by funding recordings of new masters of well-known works and releasing new editions. The music industry, in particular, is much more likely to continue exploiting only works protected by copyright, given the extremely high costs of production, distribution and advertising of such works. *Id.* at 142 (statement of Judith M. Saffer, Assistant Gen. Counsel, BMI).

Extended copyright terms also allow copyright owners to take advantage of technological advances that have greatly increased the commercial value of works, ultimately leading to greater dissemination of works to the public. Because term extension gives copyright owners the incentive to exploit these opportunities, existing works have been published in new, more usable and versatile formats, and disseminated widely. *See 1995 Senate Hearing* 34 (statement of Bruce Lehman, Assistant Sec'y of Commerce and Commissioner of Patents and Trademarks).

Finally, the extension of copyright term provides necessary incentives for authors and their heirs to maintain and enhance access to existing works by strengthening archival and preservation efforts. The end result is that the public has greater access to works under extended copyright protection. Songwriter Alan Menken testified that "once works fall into the public domain, the families of the creators have no incentive to maintain the works in a format that is useful to the public . . . . It is the public who will wind up losing if an unreasonably short copyright term puts the archives of these master songwriters out of business." *1995 Senate Hearing* 45.

The public domain does not provide the same stimulus for dissemination, exploitation, or preservation of musical works. In contrast to the copyright owner's incentive to continue such efforts during an extended term, public domain users have little incentive to publish, let alone promote, works that fall into the public domain. This is because "[w]hen a work goes into the public domain, the two parties (namely the music publisher and the author) that had the most interest in exploiting that work no longer participate in the revenue flow. What generally happens is that works become harder to find and works that were marginally popular disappear altogether." *1995 Senate Hearing* 123 (statement of Patrick Alger, President, Nashville Songwriters' Assoc. Int'l).

Moreover, "[t]he only products that do tend to be made available after a copyright expires are 'down and dirty' reproductions of such poor quality that they degrade the original copyrighted work." 141 CONG. REC. S3,394 (1995) (article by Professor Arthur Miller). *See 1995 House Hearing* 668 (article by Lisa M. Brownlee). Nor is there any indication that musical works would be more cheaply available in the public domain. *See id.* at 218 (statement of Bruce Lehman) ("In fact, the public frequently pays the same for works in the public domain as it does for copyrighted works."); *id.* at 238-39 (statement of Quincy Jones) ("The price of a quality compact disc recording of Beethoven is no less expensive than the price of a Pearl Jam CD. The record company that manufactures the CD does not have to pay royalties to the Beethoven estate and these cost savings are not passed on to the consumer.").

B. The CTEA's Extension Of Copyright Terms For Existing Works Promotes The Progress Of Science And Useful Arts By Safeguarding The Strong Positive Balance Of Trade That The United States Enjoys In Copyrighted Musical Works

As it has done with copyright legislation in the past, Congress enacted the CTEA—including extending the term of existing as well as future copyrights—to better harmonize American copyright terms with foreign copyright terms. That move toward closer harmonization is aimed at maintaining the United States' strong positive balance of trade in copyright industries, including music. It ensures that protection for American creative efforts is on a more equal footing with the protection afforded by other nations, which has been a concern of Congress for almost two centuries. *See* 7 REG. DEB. 119-20 (1830).

In 1993, the European Union adopted the life-plus-70 year term, which has now become the "prevailing worldwide standard of copyright protection." *See* Council Directive 93/98/EEC, 1993 O.J. (L. 290/0). Under Article 7(8) of the Berne Convention (Paris Act 1971) (known as the "rule of the shorter term"), the "protection afforded a foreign work [is limited] to the term of protection of its country of origin if that nation's term is shorter."[6] Therefore, absent the CTEA, American works would be protected for twenty fewer years than their European counterparts, not only in the United States but in all EU countries. *1995 House Hearing* 2 (statement of Rep. Moorhead).

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[6] Although the Berne Convention makes application of the shorter term optional on its member countries, the EU Council Directive mandates application of the shorter term. PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 238-239 (2001).

As a result, the United States and its copyright industries would suffer significant economic harm if the American term is not extended in a comparable manner. Core copyright industries—the music, motion picture, television, print and computer software industries—are critical to the United States economy and balance of trade. In 2001, copyright industries contributed an estimated $535.1 billion to the United States economy, accounting for roughly 5.24% of the gross domestic product (GDP). Stephen E. Siwek, *Copyright Indus. in the U.S. Economy: The 2002 Report*, 2002 ECONOMISTS INC./INT'L INTELLECTUAL PROP. ALLIANCE 3. Copyright industries grew—as they have consistently for the past 24 years—at an annual rate (adjusted for inflation) more than double the growth rate of the economy as a whole. *Id*. at 4. Exports and foreign sales by copyright industries totaled at least $88.97 billion, representing a 9.4% annual gain over 1999, and leading all major industry sectors including the agriculture, aircraft and aircraft parts, chemical and allied products, equipment/parts and motor vehicles sectors. *Id*. at 1, 4.[7] During the course of its consideration of the CTEA, Congress heard compelling evidence concerning the worldwide popularity of American copyrighted works.[8]

[7] The same was true at the time of Congress's enactment of the CTEA. S. Rep. No. 104-315, at 9 (1996).

[8] *See 1995 House Hearing* 276 (statement of Quincy Jones) ("[T]he youth of the entire planet have [adopted] *our* music as their Esperanto," making American popular music "one of the most powerful exports that we have."); *Pre-1978 Distrib. of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. ("*1997 House Hearing*") 34 (1997) (statement of Frances W. Preston, President and CEO, BMI) ("Our music travels worldwide. When American music is performed in the international market, American creators benefit and that [money comes] back into the U.S. market.").

With respect to the music publishing industry specifically, combined performance, reproduction and distribution-based licensing income (including income from sales of printed editions) for 1999 totaled more than $1.8 billion in the United States and $6.5 billion worldwide. NMPA, INT'L SURVEY OF MUSIC PUBL'G REVENUES (10th ed.) 9-10 (2000). Of the worldwide total of more than $730 million in distribution-based licensing income (including income from sales of printed editions), 46.7% came from European Union countries alone, compared to 30.1% from North American countries (including the United States). *Id.* at 14. The European music market (including recorded music sound carrier sales) accounted for roughly 30% of world sales in 1999, totaling more than $11.2 billion. *Id.* at 18. During that same period, the value of the United States' music market (including recorded music sound carrier sales)—the world's largest—was $14.04 billion. *Id.* at 20. Foreign sales for the American pre-recorded record and tape industry were $9.51 billion in 2001. Siwek, *supra*, at 17.

In 1994, songwriters and publishers received $103 million from ASCAP, alone, for performances of copyrighted American music abroad. (Songwriters and music publishers who affiliate with BMI similarly receive royalties from performances abroad.) Adding amounts received for such performances by foreign subsidiaries of American music publishers increases the total received to approximately $200 million. By contrast, ASCAP sent only $27 million overseas to compensate for performances of foreign music in the United States. *1995 Senate Hearing* 138 (statement of ASCAP). S*ee 1995 House Hearing* 229 (statement of Ambassador Charlene Barshefsky, Principal Deputy U.S. Trade Rep.).

As numerous parties testified during Congress's consideration of the CTEA, the impact of a shorter copyright term on the United States would be devastating.

Failure to extend the copyright term would cause copyright industries to lose millions upon millions of dollars, "and the United States balance of trade would suffer commensurately." 144 CONG. REC. H1,460 (1998) (statement of Rep. Berman).

The impact from the loss of protection for musical works would be particularly severe. Hoagy Bix Carmichael, President of AmSong and son of Hoagy Carmichael, cautioned Congress that the prior copyright term "is not only a minimum of 20 years shorter than the term of protection for European authors, but due to the shorter term of copyright in the U.S. our authors are not guaranteed equivalent protection in foreign countries. As a result, some of our greatest cultural treasures are falling into the public domain while they are still commercially viable and would continue to generate significant revenues for the U.S. from abroad." *1997 House Hearing* 133-34 (noting that the "term of copyright protection afforded American creators is woefully inadequate"). *See 1995 House Hearing* 239 (statement of Quincy Jones); *1995 Senate Hearing* 138 (statement of ASCAP).

The evidence before Congress illustrated the impact of such inequity on American authors, including songwriters. Songwriter and President of The Songwriters Guild of America ("SGA") George David Weiss testified that, "[i]f we are to foster the creativity responsible for such national treasures [as "Stars and Stripes Forever," "Over There," and "Swanee,"] we must make certain that writers are treated fairly and have the incentive to create new works." *1997 House Hearing* 39; *id.* at 44 (statement of SGA members).

C. The CTEA's Extension Of Copyright Terms For Existing Works Promotes The Progress Of Science And Useful Arts By Enabling Songwriters To Pursue Songwriting As A Career That Will Provide For Their Families And By Supporting The Creation Of New Works

Successful songwriting of the kind that has propelled and sustained the popularity of American music requires steadfast dedication and cannot be pursued as a mere hobby. But for songwriters to pursue their talent as a career, they must have a means to provide for their families or they will be reluctant to devote their lives to writing music. *See* Mike Stoller, Editorial, *Songs That Won't Be Written,* N.Y. TIMES, Oct. 7, 2000, at A15 ("Many say that since making music is an art, artists like me should do it simply for the love of it. But how free can artists be to do what we love if we must spend most of our days doing something else to make a living?"). By extending the copyright term for both existing and future works, Congress provided songwriters assurance that their families, including their heirs, would be adequately compensated for their efforts.

The CTEA's extension of the copyright term to life-plus-70 years is necessary to further the longstanding goal of copyright law to ensure adequate provision for an author and two succeeding generations—the author's children and grandchildren (to the age of majority). *See*, *e.g.*, H.R. Rep. No. 105-452, at 4 (1998) ("Authors will be able to pass along to their children and grandchildren the financial benefits of their works."). Congress's selection of the life of the author and two generations as the appropriate term of copyright is not arbitrary. That goal inspired the Berne Convention's initial life-plus-50 year term adopted in 1908 and the passage of the EU's life-plus-70 year term in 1993. *See* Council Directive

93/98/EEC, 1993 O.J. (L. 290/0) 9, 11. That goal has long been the focus of debate in Congress, dating back as early as 1905 during deliberations on the 1909 Copyright Act. *See* 1 E. FULTON BRYLAWSKI & ABE GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT C-75 (1976).

Like the European Union, Congress determined that the copyright term of life-plus-50 years was no longer sufficient to provide adequately for copyright owners' heirs. First, American authors have greater life expectancy today—approximately 26 years more since the initial adoption of the life plus two generations concept (then defined as life-plus-50 years) by Berne signatories in 1908. *See* Berne Convention for the Protection of Literary and Artistic Works (1908) (revised and signed at Rome June 2, 1928), Library of Congress, U.S. Copyright Office, Circular No. 4, C (Oct. 1929). Average life expectancy in the United States around 1910 was 50.0 years; average life expectancy in the United States rose to 75.8 years in 1995 and 76.1 years in 1996, the two years during which Congress debated passage of the CTEA. Nat'l Ctr. For Health Statistics, U.S. Dept. of Health and Human Servs. (2002). The European Union's copyright term was extended to account for precisely the same demographic realities regarding average life span. Council Directive 93/98/EEC, 1993 O.J. (L. 290/0) 9, 11, which directed member states to adopt the life-plus-70 year term, observed that "the average life span in the Community has grown longer, to the point where this term [the life of the author and 50 years] is no longer sufficient to cover two generations . . . ." In addition, Americans are having children later in life. *See, e.g., 1995 House Hearing* 238 (Statement of Quincy Jones) ("Like so many people today, I have been blessed with children later in my life. . . . Without an extension of the current copyright period, my children . . . will be

deprived of their legacy from me while they are still young adults [and] be denied that which I intended for them").

A longer term for existing works is particularly important to songwriters and their heirs because songwriting has always been a profession characterized by a high degree of failure, a low probability of success, constant threats to rights, and, in most cases, little—and frequently delayed—remuneration. The total average annual income of a professional songwriter is between $5,000 and $20,000. *1997 House Hearing* 134 (statement of Hoagy Bix Carmichael).

Many songwriters spend their lives struggling for a successful song—success that, in many instances, comes only posthumously. Indeed, many "hit" songs were written decades before achieving any financial recognition. Thus, the increased term is often essential for songwriters' heirs to realize adequate returns on their work. Congress heard extensive testimony to this effect. *See 1997 House Hearing* 39 (statement of George David Weiss) ("Whether it is because their music is avant-garde—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish their heirs —if the duration of protection is sufficient. What was lost to the creator should not be lost to his or her heirs"); *id.* at 134 (statement of Hoagy Bix Carmichael).

Beyond the significant hurdles in their craft, musical work copyright owners are fighting increasingly widespread piracy, which has already significantly and irrevocably diminished the economic value of their copyrights during their term. *1995 Senate Hearing* 4 (statement of Sen. Feinstein) (global piracy of copyrighted works cost American copyright owners roughly $7.8 bil-

lion, including more than $2 billion lost to pirated musical recordings).

Moreover, as noted above, many authors of musical works that would have fallen into the public domain but for the CTEA were victims of transactions that forced them to convey their ownership interests to third parties early in their careers. Recognizing these inequities, Congress, as noted above, granted heirs—two generations' worth—a termination right. 17 U.S.C. § 203(a)(2)(B) ("the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest"); *id.* § 304(c)(2)(b) (same). By exercising the termination right, authors' heirs have only recently begun to reap any benefits from recaptured copyright ownership, and, as Congress heard, this right is only meaningful if the term of copyright is extended to allow them to realize those benefits. *See 1995 House Hearing* 238-39 (statement of Quincy Jones) ("An extension in the term of copyright would also benefit the families of songwriters such as Muddy Waters, Willie Dixon, and Duke Ellington, who early in their careers, were often required to enter into agreements relinquishing ownership of their works.").

Finally, the CTEA ensures that authors' expectations that the copyright laws will protect their legacies—relied upon in their choice to pursue a creative, and risky, profession—will be realized, thereby encouraging future generations of authors. Congress heard extensive testimony from prominent writers about the increased value of a legacy for an author's heirs being directly tied to the author's incentive to persevere in their creative careers:

> As anyone who sets out in the music business knows, the path is neither smooth nor direct. My early years were spent not in concert halls, but in ballet classes, cabarets, and studios, where I earned my money as an accompanist while struggling for recognition as

> a songwriter. I often wondered if I would ever realize my dream of writing music that would be sung and loved by people the world over. But I never doubted if I did realize this dream that, as an American, I would be supported by a system of laws and rights that would secure my creations not only for me but for my children and their children after them.

1995 Senate Hearing 43 (statement of Alan Menken). *See also 1997 House Hearing* 39 (same); *1995 Senate Hearing* 55 (statement of Bob Dylan) ("The impression given to me was that a composer's songs would remain in his or her family and that they would, one day, be the property of the children and their children after them."); *id.* at 57 (statement of Carlos Santana) ("When I began my career as a songwriter, I believed that I was building a business that would not only bring enjoyment to people throughout the world, but would also give my children a secure base from which they could, in turn, build their own lives"); *1997 House Hearing* 134 (statement of Hoagy Bix Carmichael) ("The failure of our laws to ensure that the writer will be compensated for a reasonable period of time will have a chilling effect on the decision of our creators to continue to practice their craft.").

Moreover, the CTEA's extension of the copyright term for existing works results in an expanded "incentive to create new works that will ultimately enrich the public domain and our nation's cultural wealth." Sen. Orrin G. Hatch, *Essay: Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 734 (1998). An extended period of copyright protection for existing works provides an increased royalty stream and, thus, "added income with which to subsidize the creation of new works." S. Rep. 104-315, at 12 (1996). The legislative record is replete with examples. *See 1995 House Hearing* 591 (statement

of Prof. Shira Perlmutter) (term extension for existing works encourages owners of catalogues of such works to invest in new works); *id*. at 219 (statement of Bruce Lehman) (term extension for existing works encourages copyright owners to increase exposure of those works and invest returns in creating new works).

The record before Congress also demonstrated that extending the term of existing copyrights of one author subsidizes experimental works by that author and new works of other authors. *See 1995 Senate Hearing* 17, 20 (statement of Marybeth Peters, Register of Copyright and Assoc. Librarian for Copyright Servs., U.S. Copyright Office, Library of Congress) ("[T]here is a risk involved in publishing or producing work; successful ventures subsidize marginal works. . . . In order for publishers to keep publishing these less popular authors, there must be sufficient reason to believe that they can recover their investments on other works."); S. Rep. No. 104-315, at 12-13 (1996).

Indeed, some of *amici* use royalties from existing works, including works under the CTEA's extended term, to fund programs and grants for emerging artists. Many prominent classical composers received grants early in their careers from the BMI Student Composer Awards; eleven later won the Pulitzer Prize in music. BMI, *Student Composers Honored at 50th Annual Awards Presentation*, *at* http://www.bmi.com/news/200206/20020610a.asp (last visited July 31, 2002). *Amicus* ASCAP also uses royalties to grant awards and scholarships to and encourage young lyricists and composers in all music genres. *See*, *e.g.*, *ASCAP, The ASCAP Foundation/Morton Gould Young Composer Awards Information*, *at* http://www. ascap.com/concert/gould-info.html (last visited July 31, 2002).

By virtue of the CTEA, the achievements of American songwriters continue to contribute to the "Progress of Science and useful Arts." Irving Berlin summed it up best: "The song is ended/But the melody lingers on."

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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