No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his Official Capacity as Attorney General,

Respondent.

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

BRIEF *AMICI CURIAE* OF DR. SEUSS ENTERPRISES, L.P., ALLENE WHITE, MADELEINE BEMELMANS, AND BARBARA BEMELMANS A.K.A. BARBARA BEMELMANS MARCIANO IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae own copyrights for children's literary works authored by Dr. Seuss, E.B. White and Ludwig Bemelmans. *Amici Curiae* are Dr. Seuss Enterprises, L.P. (owner of the copyrights of Dr. Seuss and referred to as "Seuss"), Allene White (owner of a majority of the copyrights of E.B. White ("White"), and Madeleine Bemelmans and Barbara Bemelmans a.k.a. Barbara Bemelmans Marciano (owners of the copyrights of Ludwig Bemelmans and referred to collectively as "Bemelmans"). *Amici curiae* bring a unique perspective to this matter based on their longstanding association with the advancement of creative arts through famous children's works which have brought delight to succeeding generations of children.

The Works of Dr. Seuss

Seuss is the exclusive owner of most of the copyrights in the books and illustrations of Theodor S. Geisel ("Ted Geisel"). Ted Geisel lived from 1904 to 1991. Over a 60-year period, under the pen names Dr. Seuss and Theo LeSieg, he wrote and illustrated 44 children's books and created the text of numerous others, of which more than 90 million trade book and 200 million book club copies have been sold in the United States and English-speaking Canada. His books are distributed world-wide and have been translated into 24 languages.

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1. Counsel for *Amici Curiae* Seuss, White and Bemelmans authored this brief in its entirety. No person or entity other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of the brief. Consent of the petitioners is on file with the Court and the consent of the respondent is being lodged herewith.

Dr. Seuss' mischievous Cat character with his distinctive red and white stovepipe hat from *The Cat in the Hat* is not only among the most famous and recognizable Dr. Seuss characters and images, it is among the most recognizable images in children's literature. Seuss' *The Cat in the Hat, Green Eggs and Ham* and *One Fish Two Fish Red Fish Blue Fish* are among the top 10 best-selling children's books of all time, and 12 of Dr. Seuss' books are among the top fifty. Seuss' work *Oh, the Places You'll Go* holds the record for the number of years it has appeared on the New York Times bestseller list for fiction (every year since first published in 1990). Dr. Seuss remains the best-selling author of children's books in the world.

E.B. White's Writings

White is the owner of a majority of the copyrights originally obtained by Elwyn Brooks ("E.B.") White. E.B. White, who lived from 1899 to 1985, authored such famous children's works as *Stuart Little* (first published in 1945), *Charlotte's Web* (first published in 1952) and *Trumpet of the Swan* (first published in 1970). White's three children's books, *Charlotte's Web*, *Stuart Little* and *Trumpet of the Swan*, have all become classics of children's literature. White's works continue to fascinate children from generation to generation.

White's writings were not limited to children's books. Prolific and versatile, he had many essays published in The New Yorker and Harpers and later republished in a series of collections, such as *One Man's Meat*, a chronicle of the first years after White's 1938 move to Brooklin, Maine, *The Points of My Compass* published in 1954 and *Essays of E.B. White* published in 1977. White contributed to the New Yorker *Talk*

of the Town section for many years. He wrote several collections of poems and short sketches. White also wrote short non-fiction books such as *Here is New York*, which was recently republished for the centennial of the consolidation of New York City, and humorous works such as *Is Sex Necessary or Why You Feel the Way You Do*, in which he collaborated with James Thurber. Also widely known for his work in the genre of composition and style, White contributed to three editions of the famous *The Elements of Style* with William Strunk, Jr.

Ludwig Bemelmans' Books

Bemelmans holds the copyrights to the works of writer and artist Ludwig Bemelmans who lived from 1898 to 1962. Ludwig Bemelmans' first children's book, *Hansi*, was published in 1934. In the late 1930's, Ludwig Bemelmans created the classic children's character Madeline. The first book in the series, *Madeline*, was published by Viking in 1939 and named a Caldecott Honor Book. Five sequels followed (*Madeline's Rescue*, *Madeline and the Bad Hat*, *Madeline and the Gypsies*, *Madeline in London* and *Madeline's Christmas*). Over the years these books have been translated into several foreign languages and have sold more than ten million copies worldwide. The *Madeline* books tell the adventures of Madeline, a young red haired girl in convent school. The *Madeline* series of books have become children's classics.

The copyrighted works by Dr. Seuss, E.B. White and Ludwig Bemelmans have educated and entertained youngsters during the authors' lives and afterwards. Works such as *The Cat in the Hat*, *How the Grinch Stole Christmas!*, *Stuart Little* and *Madeline* continue to appeal to the grandchildren and great grandchildren of the original readers.

Amici support the affirmance of the District of Columbia Circuit Court of Appeals opinion and present this brief to offer the perspective of the copyright owners for three world-renowned children's authors regarding factors pertinent to the determination of this case. As copyright owners, *Amici* represent a view that is distinct from the parties. *Amici* know first-hand how crucial the exclusive rights afforded by copyright protection are to the promotion and development of existing works. *Amici* maintain that the term extensions provided by the Copyright Term Extension Act create incentives for copyright holders to continue the development, evolution and distribution of copyrighted works, both existing and future.

SUMMARY OF ARGUMENT

The Constitution gives Congress the power "To promote the Progress of Science by securing for limited Times to Authors[] the exclusive Right to their respective Writings . . ." U.S. Const. Art. I, § 8, cl. 8. Pursuant to this Constitutional grant, Congress passed the Copyright Term Extension Act of 1998 ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (codified as 17 U.S.C. § 101, *et seq.* (1998)) which extended the term of both existing and future copyrights by an additional twenty years.

Petitioners' challenge to the constitutionality of the CTEA rests primarily on two grounds: First, Petitioners argue that the retrospective extension of existing copyrights exceeded Congress' authority under the Copyright Clause because the CTEA fails to fulfill the Constitutional mandate "*To promote . . . Progress.*" Petitioners argue that once a work has been created, the CTEA cannot possibly stimulate or encourage any further artistic creativity or induce the production of new works. (Pet. Br. at 15.)

Petitioners further argue that the term extensions afforded by the CTEA violate the First Amendment by restricting the speech of those with expectations that works would enter the public domain at some specified time. (Pet. Br. at 41.) While this Court has found that the incentive to create new works provided by copyrights justifies restrictions on speech, Petitioners conclude the CTEA can provide no such incentive because its retroactive extensions were granted long after the moment of creation and in many cases after the author's death. (Pet. Br. at 42.)[2]

The basic premise underlying both arguments is the assumption that once the initial creative effort is complete, there can be no further contribution to the creative process, at least not by the copyright holder. Relying on this assumption, Petitioners conclude that extending an existing copyright can neither promote the creative arts, nor justify a restraint on speech. (Pet. Br. at 22, 42.) This unfounded assumption is central to Petitioners' arguments for if copyright holders do, in fact, make creative use of earlier works, as *Amici* will demonstrate to be the case, then the CTEA's term extensions, both prospective and extant, necessarily afford incentives for creativity that "promote the Progress of Science" and justify the restraint of speech.

The flawed assumption on which both arguments rest is inconsistent with the realities of the marketplace for creative works. Extending the term of copyright protection can and

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2. Petitioners also argue that the CTEA's 20-year retroactive extension to the copyright term creates a perpetually expandable term that is somehow not a "limited Time." (Pet. Br. at 17-18.) Following enactment of the CTEA, copyright terms, for both subsisting and future works, remain fixed, circumscribed and "limited." Thus, a 20-year extension to a period of "limited Time" remains a "limited Time."

does encourage further creative activity by copyright holders. As demonstrated by the legislative record, copyright holders in the real world, such as *Amici* here, have distributed their works in new forms of media not available when the works were originally created. *Amici* have embellished existing works and created and developed derivative works in the form of television programs, videos, motion pictures, stage productions, interactive CD-ROMs and more. None of these activities would have occurred without the exclusivity afforded by the copyrights in the underlying work. The retroactive extensions of the CTEA were intended not to reward the past, as Petitioners suggest, but rather, as Congress reasonably concluded, to stimulate the development of future creative works.

ARGUMENT

I. *AMICI'S* EXPERIENCE SUPPORTS CONGRESS' CONCLUSION THAT EXTENDING THE COPYRIGHT TERM WOULD 'PROMOTE PROGRESS'.

Petitioners' view that the CTEA cannot stimulate or encourage the creation of new works is inconsistent with the legislative record and the experience of *Amici*. Senate Report No. 104-315 contains the Committee on the Judiciary's July 10, 1996 report on the bill that later became the CTEA. This report recited certain legislative history and explored the many considerations and rationales for enacting the CTEA. *Inter alia*, this report acknowledged that technological advancements in communications and electronic media were accelerating, causing an increased likelihood that copyright terms would be insufficient for American authors to benefit from those advancements. The Committee specifically recognized that copyright holders had incentives to create

new and derivative works and that an additional twenty years for copyright terms would increase those incentives. S. Rep. No. 104-315, at 11-12 (1996). This legislative record is consistent with *Amici's* experience.

A. Dr. Seuss

Seuss' works have been adapted into a variety of new media over the years. Having originally appeared in magazine or book form, these works have been transformed into animated television programs, videos, motion pictures, legitimate stage productions, phonograph recordings, interactive CD-ROMs, a theme park, a memorial park and a broad spectrum of learning tools and merchandise.

Seuss' classic work *How the Grinch Stole Christmas!* was first published in 1957. *The Grinch* became an animated television special produced by Metro-Goldwyn-Mayer, Inc. in 1966. This work became a big screen feature film starring Jim Carrey in 2000 — 43 years after the original publication. The 2000 Universal Studios film, directed by Ron Howard, tells the heartwarming Christmas story in an entirely new fashion. Although the 2000 *Grinch* film, which cost more than $125 million to create, is derived from the original 1957 work, it transforms the story into a new medium with a new spin, and with special effects, sets, makeup, costumes, and musical score not imaginable back in 1957. The set for the *Grinch* film was reported to be the biggest ever built at Universal Studios in Hollywood.[3]

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3. Andy Seiler, *How the Grinch Stole Hollywood*, USA Today, November 15, 2000 at 1D.

The Academy of Motion Picture Arts and Sciences recognized the *Grinch* film with three Oscar® nominations (for art direction, costume design and makeup) and the Academy Award for best makeup in film. In 2001, the *Grinch* film was released in another new format, on Digital Video Disk ("DVD") which contained bonus materials on topics such as the film's visual effects, set decoration, makeup application and makeup design, as well as outtakes, deleted scenes, recipes, music videos, an interactive play set and sing-alongs.

The release of the *Grinch* film also created renewed interest in the 1957 original work, stimulating the growth of U.S. sales of the 1957 Grinch book by more than 20% over the same period the previous year and spurring demand for publication of the original 1957 work in nine additional foreign languages.

Seuss' children's books have led to the creation of a variety of additional works in other media. The Broadway show "Seussical the Musical" debuted in 2000 at a cost of over 10 million dollars. This musical tells an entirely new story based on the characters created long ago by Dr. Seuss. The show will tour the nation beginning in September 2002, starring Cathy Rigby as the Cat in the Hat. The original cast recording from "Seussical the Musical" contains twenty-eight newly created songs, some with verses from Seuss' books as well as newly written lyrics.

The Children's Theater Company in Minneapolis, Minnesota, the largest children's theater in North America, is featuring a play based on a Seuss work in its 2002-03 season. This play, "The 500 Hats of Bartholomew Cubbins," adapts Seuss' 1938 work into a stage play with newly created

music. The Minneapolis theater also commissioned a legitimate stage version of *How the Grinch Stole Christmas*, which is not only periodically performed there, but also annually at the Old Globe Theater in San Diego.

Seuss' works also have been transformed into a children's theme park. Built at a cost of more than $100 million, "Seuss Landing" is a 15-acre section of Universal's Orlando, Florida "Islands of Adventure," where many Dr. Seuss characters are brought to life. The Seuss Landing area of the theme park is immediately recognizable to youngsters. At Seuss Landing, children can enjoy a "Caro-Seuss-el" merry-go-round and other rides derived from such famous Seuss books as *The Cat in the Hat* and *One Fish Two Fish Red Fish Blue Fish.* In addition to entertaining children, the theme park also creates and renews interest in the original Seuss works.[4] This park would never have been created had the Seuss works not been protected by copyrights.

B. E.B. White

All three of White's works have spawned recorded readings, stage plays for stock and amateur theater and motion pictures. Paramount released the motion picture *Charlotte's Web* in 1973. Columbia TriStar released the first Stuart Little film (*Stuart Little*) in 1999 and Columbia Pictures released the sequel, *Stuart Little 2*, in July 2002. Columbia TriStar released the animated film *Trumpet of the Swan* in 2001. The 1999 film *Stuart Little*, based on the 1945 work, stars

4. Seuss Landing also supports the Make a Wish Foundation and Give Kids the World programs.

Michael J. Fox as the voice for the mouse named Stuart being raised by a human family. This film is estimated to have cost more than $90 million to bring to market.

The Academy of Motion Picture Arts and Sciences nominated the 1999 *Stuart Little* film for Best Achievement in Visual Effects. Visual effects creators John Dykstra, Jerome Chen, Henry F. Anderson III and Eric Allard won this Academy Award nomination for their innovative digital creations of characters including the mouse Stuart Little. This film renewed interest in the original *Stuart Little* book and created interest in new adaptations of the original work. The success of the *Stuart Little* film led directly to the creation of yet another derivative work — the film *Stuart Little 2* — released in July 2002.

C. Ludwig Bemelmans

Bemelmans published his six *Madeline* books beginning in 1939. Madeline's popularity has continued unabated, and the original 1939 story has repeatedly been adapted in other media, including a 1952 animated short (nominated for the Best Short Subject - Cartoon Oscar® in that year) and the 1998 live-action TriStar film *Madeline*. *Madeline* animated television series have appeared on the Family Channel and ABC, and the current animated *Madeline* series, now airing on the Disney Channel, recently won the 2002 Daytime Emmy for Best Children's Animated Program. The half hour *Madeline* animations have also been produced in VHS and DVD formats.

II. CHILDREN'S BOOKS TYPICALLY TAKE DECADES TO BECOME CLASSICS AND TO GENERATE DERIVATIVE WORKS.

Successful children's books have an enduring shelf life compared to the transitory nature of most adult fiction. While it is the smash bestseller that supports adult trade fiction, it is the incremental backlist that supports children's publishing. The backbone of the backlist is, of course, the Copyright Act. One of the principle victims of a reduction in the term of copyright would be the children's book publishing industry.

CHILDREN'S BOOKS

As depicted on the chart below, it typically takes decades to bring children's classics to the large screen. Of the more than 50 children's books created by *Amici*, White's *Charlotte's Web* was the only book to have a children's film produced during its author's lifetime.

Title	Author	Year Of Publication	Year Of Motion Picture	Years Between Publication And Motion Picture Release
How the Grinch Stole Christmas	Dr. Seuss	1957	2000	43
The Cat in the Hat	Dr. Seuss	1957	2003	46
Charlotte's Web	E. B. White	1952	1973	21
Stuart Little	E. B. White	1945	1999	54
Trumpet of the Swan	E. B. White	1970	2001	31
Madeline	Ludwig Bemelmans	1939	1998	59

Title	Author	Year Of Publication	Year Of Motion Picture	Years Between Publication And Motion Picture Release
The Wizard of Oz	Frank Baum	1900	1925 (1st pic)	25
Dr. Doolittle	Hugh Lofting	1922	1967	45
Mary Poppins	P. L. Travers	1934	1964	30
Lord of the Rings	J. R. R. Tolkien	1954	2002	48
James and the Giant Peach	Roald Dahl	1961	1996	35

It is the continued existence of exclusive copyrights for these classic works, decades after their initial publication, that provides the incentive to the producers of these films to devote the immense resources necessary to bring the *Grinch*, *Stuart Little* and *Madeline* works into the medium of modern day feature films or to invest millions to create musicals for the legitimate stage. It is the exclusivity of copyright protection that provides the incentive for the producers of other derivative works to invest the capital to transform these books into new media.

In order to compete for the interest of the viewing public, films like *Men in Black*, *Spiderman*, and *Star Wars* create demand for movies with cutting-edge sets and special effects, all of which come at significant cost. Had the original *Grinch* and *Stuart Little* works already been in the public domain, the producers and film studios would never have invested a hundred million dollars or more to bring the adaptations of these works to the big screen with such dramatic and award-winning special effects. Moreover, without copyrights, there is no ability to maintain control over the quality of the work or to manage the merchandising that accompanies such movies and which provides an important secondary source of revenues, reducing the risk of the initial investment.[5] In light of the legislative record and publicly available information, Congress reasonably understood that without the exclusivity

5. The Committee on the Judiciary specifically recognized the desire to allow copyright holders to maximize the return on creative investment by exploiting their works throughout the course of the works' marketable lives. S. Rep. No. 104-315, at 11-12 (1996). Similarly, the Brief of Amicus MPAA further documents Congress' desire to provide financial incentives to copyright holders to create new works as well as to restore existing works such as films.

of copyrights movie studios are far less likely to gamble on these ventures which add so much to the creative arts.[6]

As a further example, Universal Pictures, DreamWorks Pictures and Imagine Entertainment are currently making a feature film live-action adaptation of Dr. Seuss' 1957 work *The Cat in the Hat*. The film version of the 1957 work *The Cat in the Hat*, starring Mike Myers in the title role, is projected for a 2003 release. It will require a significant investment to bring this film to market. Without the exclusive rights afforded by copyrights, this work would not be made.

III. CONGRESS REASONABLY FOUND THAT THE TERM EXTENSIONS OF THE CTEA DO "PROMOTE THE PROGRESS OF SCIENCE."

A. The Promotion of Progress Occurs Through the Creation of New Works as Well as Through Enhancement of Knowledge.

The Copyright Clause gives Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

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6. Congress recognized the need to provide incentive to motion picture studios and publishers to take risks in financing films by extending the terms of copyrights. The Committee on the Judiciary reported that "extended protection for existing works will provide added income with which to subsidize the creation of new works." S. Rep. No. 104-315, at 11-12 (1996). Although the examples the Committee referenced were the financing of marginal works and works of young or emerging authors, the principle applies equally to financing films of famous children's works based upon the great risk taken to bring these works to the big screen.

> Inventors the exclusive Right to their respective Writings and Discoveries;

U.S. Const. Art. I, § 8, cl. 8. As noted by Petitioners, this Court has said the words "To promote . . . Progress" means to stimulate, encourage or induce artistic creation, *Goldstein v. California*, 412 U.S. 546 (1973); to stimulate artistic creativity, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), or to "motivate the creative activity of authors," *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984)). This Constitutional phrase is not, however, limited solely to the creation of incentives. It also means the enhancement of knowledge.[7] The Copyright clause was intended to advance knowledge and the public welfare.[8] *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Harper & Row* 471 U.S. at 558. Congress thus fulfills its Constitutional mandate to "promote . . . Progress," by spurring the creation of new works as well as by encouraging the broad dissemination of existing works and other acts that enhance knowledge. As demonstrated by the legislative record as well as Amici's experience, the exclusivity afforded by copyrights does stimulate the creation of new works as well as the enhancement of knowledge and the public good.

7. At the time of the framing, the term "science" meant "knowledge." The power to promote knowledge was through the exclusive grant known as a copyright. The useful Arts were to be promoted through the exclusive grant known as a patent. Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 J. Pat. & Trademark Off. Soc'y 763, 781 (2001).

8. *Id.* at 769-770, citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in The Republic of Letters 630 n.11 (James Morton Smith, ed., 1995).

Amici have over the years undertaken significant efforts that have enhanced both knowledge and the public good. Works by Ted Geisel, E.B. White and Ludwig Bemelmans promote children's literacy and the love of reading. Ted Geisel won the 1984 Pulitzer Prize for his special contribution to the education and enjoyment of America's children and their parents. The National Education Association celebrates Dr. Seuss' birthday with its annual Read Across America day during which children throughout the nation read Dr. Seuss' books. Approximately 40 million people participated in the March 2002 event. In 1999, the Cat in the Hat was selected by school children of America for depiction on a postal stamp and was the only book character so honored.

Seuss' *The Lorax* is widely used for imparting to children lessons regarding the environment and conservation. Seuss granted the United Nations the gratis right to create a special edition of *The Lorax* for worldwide distribution in connection with a 1983 conservation campaign.

In 1997, Seuss allowed the United States Centers for Disease Control and Prevention the free right to use Seuss' 1939 work *The King's Stilts* and a variety of other books for a two-year poster campaign. This initiative encouraged parents to have their children inoculated as part of the Department of Health and Human Services' national Dr. Seuss Immunization Awareness Campaign. This campaign featured Seuss characters that told immunization stories in rhyme in order to increase childhood immunization rates while reducing the rates of vaccine preventable childhood illnesses. The CDC characterized the Seuss posters as incredible tools to promote immunization awareness.

In 1997, Seuss donated rights for the creation of a Dr. Seuss interactive learning exhibit at the Children's Museum of Manhattan. This exhibit, featuring displays based on Seuss works such as *The Cat in the Hat* and *Green Eggs and Ham*, drew 700,000 visitors in its two year run at the Children's Museum of Manhattan. The exhibit has since toured 11 other children's museums around the United States and has attracted over 2 million visitors.

As a contribution to the economic rejuvenation of Springfield, Massachusetts, Ted Geisel's hometown, Seuss participated in the creation of a multimillion-dollar Dr. Seuss National Memorial sculpture garden, which opened in June 2002. The garden consists of bronze replicas of Mr. Geisel and many of his most popular characters erected in the quadrangle of the Springfield library and museums.[9]

The efforts of Seuss, White and Bemelmans demonstrate that copyright holders contribute to the promotion of the progress of science, in many different ways, long after a work's original publication.

B. Enriching the Public Domain Was Not the Framer's Purpose.

While there may be little record of what the Framers intended by the phrase "to promote the Progress of Science and useful Arts,"[10] they perceived that putting works directly into

9. The Seuss works also fund a foundation which supports a variety of philanthropic activities and medical and academic institutions. Participation in royalties provides one of the largest alumni contributions to Dartmouth College (Ted Geisel's alma mater). In 1995, Ted Geisel's widow provided a multi-million dollar endowment for the libraries at the University of California, San Diego.

10. Walterscheid, *supra*, at 766, 774-775.

the public domain would not achieve this end.[11] Otherwise, there would be no need for a Copyright Clause, and works would go directly into the public domain upon creation.[12] Thus, the very existence of the Copyright Clause belies Petitioners' argument that the Progress of Science is not promoted until works reach the public domain.

While Petitioners contend that the CTEA denies a generation of creative work to another generation of creators (Pet. Br. at 18), this argument is simply a red herring, as Petitioners themselves are not creators. They do not create something "new to the world"; rather, they merely seek to repackage and redistribute, sometimes by electronic means, the works of others. While in no way seeking to disparage the intent of Petitioners, others having access to works through the public domain make use of well-known characters to glorify drugs or to create pornography. These uses, especially for children's works, demean and dilute the original works and discourage their continued popularity. In passing the CTEA, Congress, like the Framers, understood that putting works in the Public Domain does not *ipso facto* "promote . . . Progress."

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11. *Id.* at 770.

12. While, apparently, this would have been Jefferson's preference, since he believed that government should neither restrain nor aid its citizens in their individual pursuits, Jefferson was serving as Minister to France and played no active part in drafting the Constitution. In contrast, Madison, who was one of the Framers and a supporter of the clause, advocated the need to protect the few from the dictates of the many, expressing the view that copyrights and patents were monopolies that should be tolerated because of the public good they could produce. Walterscheid, *supra*, at 769-770.

C. The Incentives of the Copyright Term Extension Act Promote the Creation of New Works.

Petitioners argue that the extension of existing copyrights cannot promote the Progress of Science because, no matter what is offered to Hawthorne, Hemingway or Gershwin, they will not produce anything more. (Pet. Br. at 22.) The incentives of the CTEA, they contend, are given for work that has already been produced. Petitioners' argument in this regard is unfounded. As discussed above, this argument is contrary to the legislative record and the experience of *Amici*. The legislative record demonstrates that by extending copyright terms, Congress specifically sought to "increase existing incentives to create new and derivative works." S. Rep. No. 104-315, at 12 (1996). The term extensions of the CTEA do provide incentives for copyright holders to further develop creative works that otherwise would not be created, as well as to distribute existing works in new forms of media.

IV. NEITHER COPYRIGHT LAW IN GENERAL NOR THE CTEA IMPINGE ON THE IMPORTANT RIGHTS ASSOCIATED WITH THE FIRST AMENDMENT.

A. Petitioners' First Amendment Position is Fundamentally Flawed.

Petitioners' First Amendment arguments are fundamentally flawed. Petitioners erroneously argue that the term extensions of the CTEA are subject to First Amendment challenge because they restrict the speech of those who anticipate that works would soon fall into the public domain. (Pet. Br. at 39-41.) Although Petitioners recognize that this Court has found the incentive to

create new works provided by copyrights justifies such a restriction, they simply conclude that Congress could not reasonably have believed that the CTEA advanced copyright holders' incentive to create.

Notwithstanding Petitioners' denial, the legislative record demonstrates that Congress had a reasonable basis to conclude that the enactment of the CTEA would increase the existing incentives to create new and derivative works. S. Rep. No. 104-315, at 12 (1996). Petitioners' unfounded contention that copyright holders are no more likely to make creative use of earlier works than those like Petitioners (who only republish or copy the works of others) is both inaccurate and without support, as demonstrated by *Amici*'s various experiences set forth herein. As noted previously, the motion picture of *Charlotte's Web* was released in 1973. The *Madeline* story first became an animated short film in 1952 and the feature film *Madeline* was released in 1998. Six weeks before the CTEA was enacted in October, 1998, Seuss publicly announced that its 1957 work *How the Grinch Stole Christmas!* was being made into a full-length feature film.[13] Congress had ample evidence from which to conclude that extending the exclusivity afforded by copyrights would provide copyright holders with further incentives to create new works.

The CTEA also meets First Amendment scrutiny under the authorities cited by Petitioner. Petitioner cites to *Harper & Row*, 471 U.S. at 558, for the proposition that copyright law may be upheld against First Amendment challenge only insofar as it protects an "engine of free expression." As demonstrated above, *Amici* Seuss, White and Bemelmans have all shown that their existing copyrights have served as just such an "engine of expression."

13. The Associated Press, *Universal Strikes Deal for Dr. Seuss*, AP Online, September 16, 1998, available on Westlaw.

B. The Constitutional Interests at Stake Under the First Amendment Challenge to the CTEA are Protected by the Idea/Expression Dichotomy, Fair Use and Parody Law.

Copyright law — whatever the duration of the limited term — only provides specific and limited rights. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984); *Twentieth Century Music*, 422 U.S. at 155. The tensions between those rights and the First Amendment have long since been resolved. This Court has held that First Amendment rights are protected by (1) the "idea/expression dichotomy, i.e., the fact that copyright only prohibits the copying of actual "expression" and not "ideas" under 17 U.S.C. § 102(b); and (2) the provision for fair use of copyrighted works under 17 U.S.C. § 107. *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918); *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971), *Harper & Row*, 471 U.S. at 556. *Amici* submit that these fundamental copyright principles fully address legitimate First Amendment concerns.

What Petitioners seek is not traditional First Amendment protection for their own words and expression but, rather, the right to make commercial use of the protected expression of others. Petitioners offer no support or authority, nor is there any, for such a right. Quoting *Sony*, Petitioners contend that the idea/ expression dichotomy and fair use limitations are irrelevant to First Amendment interests "protected by the limitation on the duration of copyrights." (Pet. Br. at 36.) The reason for this argument is simple. Whatever the length of the copyright term, Petitioners' proposed uses would not be protected by traditional notions of fair use.

Petitioners seek to use protected works for commercial purposes or in ways which would substantially impact the market for and value of the work. Fair use, however, requires consideration of the commercial nature of the proposed use and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107(1),(4); *Sony*, 464 U.S. at 450; *Harper & Row*, 471 U.S. at 562. *Sony*, then, does not support Petitioners' contention, because the use at issue in *Sony* — the time-shifted viewing of broadcast television shows afforded by video recorders — was found to have no demonstrable effect on the market for or value of the copyrighted works. *Sony*, 464 U.S. at 450. This Court noted in *Sony* that if the video recorder were used for a commercial or profit-making purpose, such use would be "presumptively unfair." *Id.* at 449. The same would be true here where Petitioners' proposed uses include republication of others' works and making such works freely available on the Internet. Such uses would unquestionably have a dramatic effect on the market for and value of the work in question. Contrary to Petitioners' argument, their problem is not that fair use does not adequately protect First Amendment interests, but rather that Petitioners' proposed commercial uses would not qualify as a fair use.

1. The Idea-Expression Dichotomy Addresses First Amendment Concerns.

Copyright law prevents the unauthorized copying of protected expression. The "idea/expression dichotomy" of copyright law addresses First Amendment rights in the context of copyrighted works. *Harper & Row*, 471 U.S. at 556. Under the "idea/expression dichotomy," ideas are free for all to use but particular expressions of ideas are subject to copyright protection. 17 U.S.C. § 102(b). Copyright law

would not prevent Petitioners from creating new works about cats, mice, or redheaded young girls so long as such new works are not substantially similar to the protected expression in *The Cat in the Hat*, *Stuart Little* or *Madeline.*

Thus, in the business world, the "idea/expression dichotomy" allows for First Amendment expression while preserving protected expression for limited times. In the marketplace for children's literature, a reader may choose from stories about Beatrix Potter's Peter Rabbit, Warner Brothers' Bugs Bunny, Anita Jeram's Big Nutbrown Hare, Donna Green's Velveteen Rabbit, and Margaret Wise Brown's Runaway Bunny.

Likewise, children interested in stories about mice can select from White's Stuart Little, Disney's Mickey Mouse, Lucy Cousins' Maisy, and Katharine Holabird's Angelina. Seuss' *The Cat in the Hat* co-exists with Richard Scarry's extensive works about cats named Huckle, Sally, Daddy Cat and Mummy Cat. It is at least in part because of the protection of particular expression under copyright that authors set out to develop entirely new works. The variety of works on these same subjects demonstrates the vitality of First Amendment rights.

2. Fair Use and Parody Law Also Protect First Amendment Interests in Copyrighted Works.

The copyright laws specifically provide that the fair use of copyrighted works includes uses for purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. None of these uses constitutes copyright infringement.

Parody is one example of fair use that demonstrates the protection of speech by the First Amendment, which the copyright laws would not inhibit. "Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment." *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

As demonstrated by this case, the current system which balances the interests of the author against limits on free speech is clearly working. "Copyright law accommodates the concerns of the First Amendment through its exclusion of protection for ideas, and through the fair use doctrine." *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1575 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997). In *Penguin Books*, the district court enjoined publication of *The Cat NOT in the Hat*, a story of the O.J. Simpson murder trial set in Seussian-like prose, based on findings of a strong likelihood of success on Seuss' claim of a substantial taking of protected expression. *Id.* at 1562.

The Ninth Circuit affirmed the district court. *Id.* After evaluating the application of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Ninth Circuit found the work failed to qualify as a parody of *The Cat in the Hat*; instead, it parodied the Simpson trial.

This experience demonstrates the co-existence and interaction of First Amendment rights with copyright laws. Some copying falls outside the protections of copyright law and into the arena of fair use and parody. When this occurs, the First Amendment prevails. Otherwise, authors' limited rights are protected by copyright law as provided by the United States Constitution, Article I, Section 8, Clause 8.

Thus, the existing framework in United States copyright law — which allows the free use of ideas, and which has exceptions for fair use and parody — sufficiently addresses legitimate First Amendment concerns. What is plainly not addressed by this framework is what Petitioners seek here, the reallocation of the right to speak, favoring Petitioners, and substituting Petitioners' judgment for that of Congress. As Petitioners concede, such a reallocation of rights is not sanctioned by the First Amendment. (Pet. Br. at 41.)

CONCLUSION

The United States copyright system, as amended by the CTEA, works in real life under the Constitutional framework put into place more than two hundred years ago. With the CTEA, copyrights continue to exist for "limited times." Copyright owners continue to promote the progress of science and useful arts throughout the limited terms of copyrights. In enacting the CTEA, Congress considered Petitioners' arguments and rejected them. Nothing about the copyright laws — or the CTEA — impinges on any First Amendment rights. The ruling of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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