No. 01-618

# In the Supreme Court of the United States

OCTOBER TERM, 2001

ERIC ELDRED, *et al.*,

*Petitioners,*

-v.-

JOHN D. ASHCROFT,

in his official capacity as Attorney General,

*Respondent.*

**On Petition forWrit of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF AMICI CURIAE AMSONG, INC. IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS

# TABLE OF CITED AUTHORITIES

***Cases***



***Statutes***



***Reference Materials***

## Interests of Amicus Curiae[1]

This Brief Amicus Curiae in support of the Respondent is submitted pursuant to Rule 37 of the Rules of this Court.

AmSong, Inc. (hereafter "AmSong") is a California corporation dedicated to the protection of musical copyrights. Its mandate is to educate its members regarding issues affecting musical copyrights and to act as an advocate for songwriters and their heirs in the national and international arenas. AmSong was formed in 1994 with the specific and immediate goal of urging Congress to extend the term of copyright in the United States so as to afford American creators and their heirs adequate copyright protection and bring our laws in harmony with the duration provisions enacted by the countries comprising the European Union. The Board of Directors of AmSong are Shana Alexander, Hoagy Bix Carmichael, Ellen Donaldson, Marsha Durham, Molly Hyman, Mick Jones, Laura Joplin, Jack Lawrence, Jo Sullivan Loesser, Thelonious Monk, Jr., Elizabeth Peters, Julia Riva, E. Randol Schoenberg, Paul Schwartz, Mike Stoller, Michael S. Strunsky, Margaret Styne, Jamie Bernstein Thomas, and John Waxman.

AmSong is not a collection society. It depends on the dues and contributions of its members to sustain its activities. AmSong's members include composers, lyricists and the heirs of deceased songwriters who participate in the organization on a voluntary basis. AmSong members represent every genre of American music, including jazz, rock, pop, country, musical theater and classical. Many of the compositions of AmSong members that would have fallen into the public domain if the Copyright Term Extension Act of

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[1] Counsel for Petitioners and Respondent have consented to the filing of this Brief. Their consent letters have been filed with the clerk of the Court. No counsel for a party, or anyone else except for amicus, has authored this Brief in whole or in part, or made any monetary contribution in any form.

1998 (hereinafter "CTEA") had not been enacted can only be described as national treasures. Among these musical compositions are "Rhapsody In Blue" by George Gershwin; "Yes Sir! That's My Baby" by Walter Donaldson and Gus Kahn; "Ain't She Sweet" by Milton Ager and Jack Yellin; "Stardust" by Hoagy Carmichael; and "Let's Do It (Let's Fall In Love)" by Cole Porter.

It is the widows, children and legal successors of the creators of these treasures who would be harmed if the CTEA is declared unconstitutional.

**Introduction**

This Brief will not duplicate the many legal arguments regarding the constitutionality of the CTEA. Amicus AmSong joins the Briefs of Respondent, and those amici joining Respondent, as to the constitutionality of the CTEA. This Brief is submitted to put a "face" to the individuals whom CTEA protects.

While the Petitioners have attempted to focus the Court's attention on certain corporations that lobbied for the copyright term extension, [2] it is submitted that the characterization of the lobbying parties is disingenuous on two levels. First, Plaintiff Eldred and the other Petitioners profit from their exploitation of public domain materials. It is in their respective financial interests to have copyrights expire in the shortest time possible. By their opposition to an extended term, Petitioners ultimately wish to step in and take over the authors' legacy. Second, even if certain corporations benefit from the CTEA, it is the songwriters of AmSong and their heirs who truly reap the benefits of copyright extension, and rightfully so.

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[2] The infamous "Mickey Mouse Extension" moniker, which has attached itself to CTEA.

As stated succinctly in his Amicus Curiae Brief, Professor of Law Edward Samuels:

> The various extensions of copyright over the years, balanced by careful limitations on the rights of copyright owners, are not the result of some nefarious scheme by corporations to cheat the public of their rights. Rather, they are part of the remarkable system envisioned by the framers of the Constitution, and implemented by the Congress and the President, to "Promote the Progress of Science and useful Arts" by doing exactly what the Constitution says they are supposed to do, "by securing, for limited times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."(p. 30)

This Brief will focus on how the CTEA does in fact "promote the progress of Science and useful Arts" as mandated by the Constitution, by offering incentives to songwriters and their heirs to preserve musical works, to create new arrangements and to make never before published works available to the public.

This Brief is also submitted to show the necessity of parity between American songwriters and their international counterparts, and to discredit the notion that public domain equates to public benefit.

It is submitted that the facts stated below show that Eldred's position does nothing more than provide profit to those institutions that oppose the CTEA for their own gain by avoiding royalty payments to authors and their heirs once a work enters the public domain.

Ultimately, no constitutional justification exists for Eldred's arguments. Congress acted in compliance with intent of the United States Constitution when it enacted the CTEA.

## Question Presented

The question presented in this case is whether Congress had constitutional power to enact the Copyright Term Extension Act of 1998.

## SUMMARY OF ARGUMENT

### Legislative Background

From the 1920s through the 1940s, several bills were introduced to harmonize the federal copyright law with the minimum life-plus-50-year copyright term established by the Berne Convention.

Beginning in 1962, Congress extended the terms of existing copyrights for successive brief periods of one year or more in order to allow Congress the opportunity to address other aspects of the proposed new Copyright Act. The purpose of these interim extensions was to prevent copyrights nearing the end of their statutory protection from falling into the public domain before proposed legislation containing a longer term became effective.

In the Copyright Act of 1976, duration of copyright for works created or published on or after January 1, 1978 was set as the author's life-plus-50 years. With respect to works published or registered prior to January 1, 1978, the term was established as 75 years from publication or registration. Act of Oct. 19, 1976, §§ 302, 303, Publ. L. No. 94-553, 90 Stat. 2598 (hereinafter "1976

Act").[3]

[3] The report of the House Committee listed the following reasons, among others, for extending the term of copyright:

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

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

In 1998, Congress amended the 1976 Act by enacting the Sonny Bono Copyright Term Extension Act, which was passed by voice votes in both the Senate and the House. The Act extended the federal copyright term by 20 years. See CTEA § 102(b)-(d). Specifically, the CTEA extended the term of copyrights in works created on or after January 1, 1978 to the life of the author plus 70 years. CTEA § 102(b). The term of copyrights in works created prior to January 1, 1978 was also increased by 20 years, to a total term of 95 years from publication or registration. CTEA § 102(d).

The United States Copyright Law is unique in that it provides for two different standards of copyright protection: a flat term of 95 years (prior to the CTEA, it was 75 years) for works registered or published prior to January 1, 1978 and a term measured by the life of the author plus 70 years (prior to the CTEA, it was life-plus-50 years) for works created on or after January 1, 1978. The intent of Congress was that the flat term of protection for pre-1978 works would correspond to the "life plus" standard for works written on or after January 1, 1978. Unfortunately, in many cases there is a vast disparity.

In the most extreme example, the songwriter himself outlived his compositions. Irving Berlin lost twenty songs to the public domain, including the still-popular "Alexander's Ragtime Band" during his lifetime. This surely was not in keeping with the intent of Congress in providing for copyright protection for authors.

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H.R. Rep. No. 94-1476, at 134-35 (1976).

Even where the songs survived the composer, the flat term of protection often proved far shorter than "life plus" protection afforded post January 1, 1978 works. The renowned composer Hoagy Carmichael died in 1981. Prior to the enactment of the CTEA, his works would have been protected through 2031 if they were created on or after January 1, 1978. However, since most of Hoagy Carmichael's compositions were registered or published prior to that date, the works were protected for a far shorter period. For example, the ever-popular "Stardust" was copyrighted in 1928. Absent the CTEA, the song would have entered the public domain at the end of 2003, over 27 years earlier than the term which it would have enjoyed if it was protected by the life-plus-50 term of protection. Another great Carmichael composition, "Georgia On My Mind" was copyrighted in 1930. Prior to the enactment of the CTEA, the work would have entered the public domain at the end of 2005, only 25 years after the death of Hoagy Carmichael.

Similarly, many of the works of the great lyricist Ira Gershwin were accorded an unduly short term of copyright prior to the enactment of the CTEA. Ira Gershwin died in 1983. The pre-CTEA term of life-plus-50 would have caused his works to be protected through 2033. However, the works of Ira Gershwin were subject to the flat term of protection of 75 years, and accordingly many of his greatest works were subject to a shorter term of protection. "Fascinatin' Rhythm" and "The Man I Love" were copyrighted in 1924, and, but for the CTEA, would have entered the public domain at the end of 1999, thirty-four years earlier than the life-plus-50 standard.

The composer Milton Ager wrote "Happy Days Are Here Again" in 1929. Under the pre-CTEA term of protection, the work would have entered the public domain at the end of 2004, only 25 years after Ager's death in 1979.

While a discrepancy still exists between the flat term of 95 years of copyright protection accorded pre-1978 works under the CTEA and the life-plus-70 standard accorded works written on or after January 1, 1978 pursuant to the 1976 Act, the authors of these great American standards, and their heirs, find some relief in the additional 20 years of protection. If the CTEA is overturned, these pre-1978 works will not endure for the life of the author plus two generations of successors, which is the traditional standard of protection. *See, e.g.*, H.R. Rep. No. 105 452, at 4 (1998).

## I. The CTEA Promotes the Progress of Science and the Useful Arts

There is no question but that term extension motivates the creative activity of authors.

> "[T]he basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. *The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren... Second, extended protection for existing works will provide added income with which to subsidize the creation of new works.*"

S. Rep. No. 104-315 at 12 (1996) (emphasis added).

> As this Court has previously noted:
> "[Term extension] is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

AmSong member and composer-lyricist Alan Menken is the author (together with his friend and co-author Howard Ashman) of such recognizable songs and scores as the classic "Little Shop of Horrors". He stated during his testimony to Congress:

> "While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, or a dentist in my case, it is the reality of life in the 1990s that one must work in order to support oneself and one's family. It is also the reality that we must support our children longer than ever, often into adulthood and the costs of doing so are rising steadily. There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Alan Menken) 1995 W.L. 557177 (F.D.C.H.).

The Supreme Court, in Mazer v. Stein, 347 U.S. 201, 219 (1954), stated the purpose as follows:

> "the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."[4]

Simply, those who create must be assured of an adequate copyright term.

## II. The CTEA Provides Harmonization with the European Union and Parity Between European and American Songwriters

Pursuant to the directive of the European Union, United States copyright owners of works used in Europe would benefit from the European term extension only if the United States copyright term were similarly adjusted. Otherwise, under the so-called "rule of the shorter term," United States copyrights would not be protected in Europe past the expiration of the shorter United States term.[5]

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[4] Note that the Senate report on a 1992 amendment to the Copyright Act rejects the notion that the public benefits from increasing the volume of works in the public domain as "contrary to the real public purpose for copyright protection . . . . " S. Rep. No. 102-194, 102d Cong. 1st Sess. 6 (1991).

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

The copyright laws in most European communities encompass life plus a period of time past the death of the author.

In the late 1920s (around the same time George Gershwin created "Rhapsody in Blue"), German authors Berthold Brecht and Kurt Weill wrote "Three Penny Opera" which produced the classic, "Mack the Knife." The Copyright Act of 1909 limited the term of copyright of Gershwin's classic to what would have been a maximum period of protection of fifty-six years. Without the various term extensions, "Rhapsody in Blue" would have entered the public domain in 1980. Brecht and Weill's "Mack the Knife" would be protected for at least fifty years post mortem, substantially longer than Gershwin's work would have been protected in the United States. [6] Thus the extensions which secured the additional term protection for "Rhapsody in Blue" did nothing more than provide parity of copyright term to Mr. Gershwin's European counterparts.

> The CTEA accomplished harmonization of the copyright terms of the United States and the European Union, an important purpose of the CTEA.[7] The United States Copyright Office

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[6] In 1950, at the time of Mr. Weill's death, German copyright law was fifty years post mortem. In 1965, the copyright term was extended to seventy years post mortem. *See* Germany's 1901 Act concerning Copyright in Literary and Musical Works and the 1965 Copyright Act.

[7] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (noting that upon enactment of extension, "U.S. works will generally be protected for the same amount of time as works created by European Union Authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States."); The Copyright Term Extension Act of 1995: Hearing before the Committee on the Judiciary of the United States Senate, 104th Cong. 4 (1995) (hereinafter "Senate Term Extension Hearing") (statement of Sen. Feinstein) ("Perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms."); Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term

supported the CTEA for two basic reasons:

"First, in the global information society, there is a need to harmonize copyright terms throughout the world. Moreover, we believe that the life-plus-70 term will become the international norm.

Second, as a leader of creating copyrighted works, the United States should not wait until it is forced to increase its term; rather, it should set an example for other countries."[8]

AmSong member Carlos Santana was one of the first musicians to combine Latin influences and rock. Carlos Santana's musical career has spanned five decades. Long before 'world music'

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Extension; and Copyright Per Program Licenses: Hearing before the Subcommittee on Courts and Intellectual Property of the Judiciary Committee of the House of Representatives, 105th Cong. 3 (1997) (hereinafter "House Term Extension hearing") (statement of Rep. Coble) ("The change would bring United States copyright protection up to similar levels of protection provided in the European Union member countries."); Miller at 326-27.

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

was coined as a phrase, Santana was popularizing it. Mr. Santana stated during Congressional hearings:

> "The discrepancy between the duration of copyright protection in America versus Europe is troubling on several grounds. First, as an American, I am not assured that my creative works will be secure for the lifetimes of my children, to say nothing of my grandchildren.
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> "Second, as an American songwriter whose works are performed throughout the world, I find it unacceptable that I am accorded inferior copyright protection in the world marketplace." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Carols Santana) 1995 W.L. 557183 (F.D.C.H.)

Congress agreed that "the United States should assert its position as a world leader in the protection of intellectual property by adopting what is increasingly becoming viewed as the future standard of international copyright protection."[9]

AmSong member Bob Dylan's influence on popular music is incalculable. As a songwriter, he pioneered several different schools of pop songwriting. As a musician, he sparked several

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

genres of pop music, including electrified folk-rock and country-rock.

Bob Dylan submitted a statement in favor of the CTEA and spoke eloquently on the point:

> "Our current term of copyright is a flat 75 years for works written prior to 1978, and life-plus-50 years for works written on or after January 1, 1978. This term is significantly shorter than the term of copyright adopted by the fifteen member nations of the European Union, the countries making up the European economic area and the numerous other countries which will be changing their copyright laws to provide a term of life of the author plus 70 years.

The discrepancy between the term of protection offered to American creators and the term of protection offered to European creators is particularly striking. European audiences have always enthusiastically welcomed American popular musicians. They buy our records, they play our music over the airways, and they attend our concerts, often in sell-out crowds. And yet, due to the application of the rule of the shorter term, our works will cease to be protected long before European works of comparable age. The enactment of H.R. 989 will go a long way towards equalizing the playing field for American and European works and rectifying the injustice to American creators." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property Comm. Comm.* (statement of Bob Dylan) 1995 W.L. 418349 (F.D.C.H.).

AmSong member Don Henley, a prolific songwriter and founding member of the Eagles (and one of America's best selling artists for almost 30 years) stated during his testimony:

> "As much as I believe that we are inextricably connected to one another in our individual and collective impact on the global environment, I also believe ours has become a global economy, and American creators should be accorded at least as favorable a protection at law as creators in other countries. We cannot chastise countries which do not provide as high a level of copyright protection as is provided under American law, when American law does not provide as high a level of protection as laws in other western countries, such as the European Community." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Don Henley) 1995 W.L. 557182 (F.D.C.H.)

Ellen Donaldson, the daughter of famed Tin Pan Alley songwriter Walter Donaldson, has helped build the entire family business around the songs of her father, in keeping with her father's intention. The 1919 composition "How Ya' Gonna Keep 'Em Down On The Farm After They've Seen Paree" was a World War I anthem which provided substantial income to the family. Prior to the enactment of the CTEA the family lost the song to the public domain. In fact, prior to the enactment of the CTEA, the Donaldson family lost approximately one hundred and fifty economically viable songs to the public domain, including "Carolina In The Morning" and "My Buddy" - - works which would not have gone into the public domain had they been created subject to European copyright terms.

The Berne Copyright Convention and the domestic law of many European countries dictate that the rule of shorter term provides that foreign works are only entitled to the copyright term established by the law in their country of origin if the term there is shorter than that given in the receiving country. Thus, the pre-CTEA term of life of the author plus 50 years created a situation where United States works by American authors not be afforded the additional 20 years of protection provided by the European countries to their nationals.

Petitioners insist that harmonization is "a fantasy." Petitioner's Brief at 43. Congress, however, based on extensive legislative record, found that the CTEA would promote harmonization. By providing the various term extensions, Congress has given parity to American authors' works on a level with their European counterparts.

## III. The CTEA Encourages Investment in Existing Copyrighted Works

Congress also determined that the CTEA is essential to encourage additional investment in existing copyrighted works (such as conversion of works into a digital format).[10] Congress found that such investments will not be made unless a period of exclusivity exists during which owners of copyrights can recoup the costs of such additional investments. Additionally, the CTEA acts as an incentive for songwriters' heirs to expose unpublished works to the public, by ensuring these songs' copyright protection.

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

The Ira and Lenore Gershwin Trusts is an organization created to manage the copyright interests of one of America's great 20th century lyricists, Ira Gershwin[11]. The Trusts were created by Leonore Gershwin, Ira's wife of 56 years, during her stewardship of his estate. From their inception, the Trusts were imbued with Mrs. Gershwin's imaginative vision, for they were not created merely to collect royalties. Beyond the normal business of managing Ira's copyright interests, the Trusts were charged with creating an archive to acquire, collect, collate and reconstruct materials related to the Gershwin brothers and make the material available to qualified researchers. Eventually this material will join the Gershwin Collection in the Music Division at the Library of Congress, which not coincidentally is one of the major beneficiaries of Mr. and Mrs. Gershwin's estate. The substantial funds that have been forwarded to the Library over the last decade comprise one of the largest donations ever made to our nation's library. These funds have underwritten restorations of works thought to have been lost forever, as well as major acquisitions in the field of American musical theatre and film, and have provided the capital for the creation of new works. The Ira and Leonore Gershwin Philanthropic Fund, the other major beneficiary of the estate, primarily endows three areas that were of concern to Mr. and Mrs. Gershwin: the arts, education and medical research.

AmSong member Quincy Jones has been involved in the music business since the early 1950s. He has influenced every style of music from jazz to bop with his work as a producer, vocalist, musician, composer, arranger, and record company president. Quincy Jones stated in his testimony before the House Subcommittee on Courts and Intellectual Property:

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[11] The Ira Gershwin Musical Estate is a founding member of AmSong and is the entity represented by Amicus herein.

> ". . . compelling economic factors mandate an extension of our copyright laws. American intellectual property is this country's second largest export and it also provides a significant revenue base at home. Our country's culture is universally popular; it is heard, seen, performed, and enjoyed everywhere throughout the world. In light of the recent European Union action, copyright term extension in the United States has become an essential element in safeguarding our national economic security. Moreover, every year more and more works are falling into the public domain while they are still commercially viable. This not only deprives the owner of the works and their families the benefits of income, but it diminishes the flowback of taxable revenues generated from overseas sales. We must extend the term of copyright in the United States if we are to continue to reap the economic benefits of our intellectual property in the world and domestic marketplaces." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property* (statement of Quincy Jones) 1995 W.L. 418350 (F.D.C.H.).

Public endowments by AmSong members made possible by their continued ownership of copyrights include:

- The awarding of gratis licenses to public television stations, schools, libraries and museums for the use of songs by composer Walter Donaldson by his heirs.

- The opening of the George and Ira Gershwin

Room at the Library of Congress, which was made possible by the Gershwin heirs.

- The creation of the Hoagy Carmichael Digital Library Program at Indiana University, which makes available 250 hours of sound recordings and 4,550 pages of printed material available in digital form.

- The commencement of the Community Outreach Initiate by the Henry Mancini Institute, which targets schools in disadvantaged communities with live music programs.

- The funding of the Aaron Copland Fund for Music, Inc., which has awarded more than $9 million to support the recording, performance and dissemination of American music around the world.

The public benefits not by the casting of works into the public domain, but by the distribution of works, both known and unknown, by creators and their heirs - - heirs who in many cases continue to exploit the works by virtue of directives from the creator themselves. (*See also* Brief of Amici Symphonic and Concert Composers Jack Beeson, et al. (hereinafter "Brief of Amici Beeson" pp. 14-20)

## IV. The CTEA Provides Fair benefits for Authors' Descendants

To provide creators of artistic works fair compensation for their contributions to American culture, the copyright term has historically been intended to cover the life of the author plus two generations. *See, e.g.*, H.R. Rep. No. 105-452, at 4 (1998); (*see also* Brief of Amici Curiae American Society of Composers, Authors and Publishers, et al. and Brief of Amici Beeson).

Copyright law has always sought to ensure adequate protection for authors, their children and their grandchildren. The CTEA is no different. 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").

In enacting the CTEA, Congress concluded that the terms of 75 years or life-plus-50 years under the previous copyright statute proved insufficient to accomplish that long-standing goal, especially in light of increased life expectancy and later-in-life child bearing in the United States. (*See also* Senate CTEA Hearing 3 (statement of Sen. Hatch); Id. at 140 (statement of American Bar Association Section on Intellectual Property).

No statutory analysis can provide the rationale better than the poignant statements made by the individuals who create the very works that the framers of the Constitution and Copyright Laws sought to protect:

Carlos Santana submitted this statement to Congress:

> "I began writing music in 1968. At that time I was a young man, with no children. Since then, I have

written over 200 songs, married, and am fortunate to have three children, now aged 12, 10 and 5.

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. It never occurred to me that because of the application of our copyright laws, my songs would not be sufficiently protected. Yet this is exactly what will happen if S. 483 is not enacted.

In July of this year, the countries of the European Union adopted a term of copyright of life of the author plus 70 years. This term is much more beneficial to authors than the term currently provided for under United States law. Under our law, the works which I wrote prior to 1978 are only protected for a term of 75 years from creation. It is likely that many of these works, including *Samba Pa Ti* and *Europa* will fall into the public domain during the lifetime of my children. The songs which I wrote from January 1, 1978 on will be protected for a term of my life plus 50 years – again, a significantly shorter term than is guaranteed to European authors." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Carols Santana) 1995 W.L. 557183 (F.D.C.H.).

Bob Dylan echoed this sentiment:

> "My first song was published by Witmark Music in 1961. My status at the time was 20 years old, unmarried, with no children. My situation changed to include a wife and family and the writing of many more songs.
>
> The impression given to me was that a composer's songs would remain in his or her family and that they would, one day, become the property of the children and their children after them. It never occurred to me that these songs would fall into the public domain while my grandchildren are still teenagers or young adults. Yet this is exactly what will occur if [the CTEA] is not enacted." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property Comm. Comm.* (statement of Bob Dylan) 1995 W.L. 418349 (F.D.C.H.).

Alan Menken further noted:

> ". . . the sad reality [is] 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. Most of the estates represented by AmSong maintain extensive archives that are not only sources of information for scholars, but also serve as cultural resource centers for the public, anxious to perform a special piano concerto by George Gershwin or an orchestral arrangement by Leonard Bernstein. 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." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Alan Menken) 1995 W.L. 557177 (F.D.C.H.).

Quincy Jones also noted:

> "My songs are my legacy to my children. Because my pre-1978 works, which represent at least 40% of my catalogue, are only protected for a fixed term of 75 years from registration, my catalogue will begin to fall into the public domain when my youngest child is only 30 years old. Without an extension of the current copyright period, my children - - my most immediate successors - - will be deprived of their legacy from me while they are still young adults. I have no desire to see my children be denied that which I intended for them.
>
> Fortunately, I have written well over 400 songs in my lifetime. But we must not forget that there are many songwriter/musicians, particularly blues and jazz musicians, who support themselves and their families on the royalties earned from the three or four songs that they composed. An extended term of copyright will make an acute difference in the quality of life for these artists." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property* (statement of Quincy Jones) 1995 W.L. 418350 (F.D.C.H.).

E. Randol Schoenberg, grandson of Arnold Schoenberg, added:

> "My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his position as the leading composition teacher at the Academy of Arts in Berlin, Germany. He worked and taught in Boston and New York, and from 1934 until his death in 1951, in Los Angeles, where my family still resides. After his death, UCLA named its music building Schoenberg Hall in his honor, and USC built the Arnold Schoenberg Institute to house his archives. He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music."
>
> We are informed that, notwithstanding its longer copyright term, the European Community has decided not to recognize the copyrights of American authors and composers beyond the term for protection provided in the United States. If this "rule of the shorter term" were applied to my grandfather's works, many of them might lose their copyright protection in the year 2001.
>
> As you might imagine, our family receives a large portion of our royalty income from European performances. It would be a tremendous loss for us if in 2001 the European Community stopped protecting my grandfather's landmark American works, such as Violin Concerto, the Piano Concerto, and "A Survivor from Warsaw" (which

> was performed at the opening of the Holocaust Museum in Washington, D.C.).
>
> The extension of the copyright term will assist the families who are the intended beneficiaries of the copyright term. Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of E. Randol Schoenberg) 1995 W.L. 557176 (F.D.C.H.)

Shana Alexander, a noted author in her own right, and daughter of Milton Ager, stated:

> "My father Milton Ager, a lifelong songwriter, well understood the importance of copyright. His first compositions were copyrighted in 1910, before he finished high school, and his last in 1979, the year of his death at the age of 85. In a family such as ours, intellectual property is the only property. In the nation as a whole, it is — I am told — the second-largest export. Hence failure to properly protect our intellectual property in the international marketplace will result in an unfavorable trade balance for the United States. Furthermore, it appears to me monstrously unfair that other recognized forms of property — lands, businesses, and so on — can be handed down indefinitely, so long as proper taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created." *Copyright Term Extension Act of*

*1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Shana Alexander) 1995 W.L. 557155 (F.D.C.H.)

Ellen Donaldson, who manages her father's copyright interest in the family business, Donaldson Publishing Co., stated:

> "I believe the intent was that the term of copyright should be enlarged to cover the lifetime of the author and his immediate family. Yet here we are, my father's immediate family: my mother, in her 80's; my sister, 59; and me, 55 ... all going strong, running a thriving publishing business, and facing a daunting prospect: the loss of our copyrights upon which our business is based. Surely the issue of current life expectancy must be reconsidered; yet another reason for much needed moratorium until a final decision is made on extension of term.
>
> The current 'market' is very healthy indeed for the old songs. I would venture a guess that it will continue to be healthy for at least another 20 years. The songs, because they are good, will continue to be used. Artists will be paid for recording them, records will be sold, vintage records will continue to be re-mastered, re-issued and sold, record companies will be paid, the stores selling the recordings will make money, an ad agency will use a song to sell its clients' products, a motion picture company will include it on a soundtrack to help sell tickets. But the creator's share, meant, according to the intent of the 1976 copyright law, for his heirs, will be left out. Everyone will benefit from the creator's work except his heirs." Letter from Ellen Donaldson, Vice President, AmSong, Inc., to Barbara Ringer, Acting Registrar of Copyrights (1994).

The testimony of Ginny Mancini, widow of "Moon River" author, Henry Mancini:

> "My husband always intended that his work would be a legacy for his children. Indeed, our children are actively involved in the business aspects of my husband's catalogue and ensuring that his works continue to be available to the public. It is inconceivable that such works would go into the public domain at a time when our children will most need the support form the copyrights left to them by their father. It is particularly egregious because foreign works written contemporaneously with my husband's works will continue to be protected for 70 years beyond the author's death." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Ginny Mancini) 1995 W.L. 557156 (F.D.C.H.)

Congress has protected the interests of songwriters' heirs in the past. Under the Copyright Act of 1909, which governed musical compositions until the passage of the Copyright Act of 1976, the duration of protection was for 28 years from the first date of registration or publication and was renewable for an additional 28 years. Under the 1976 Act, this second term of copyright, i.e., the renewal term, was automatically extended for pre-1978 works from 28 years to 47 years. In addition to this 19-year extension, Congress gave the author and his heirs a valuable termination right for copyrights in their initial *or* renewal term of transfers or licenses executed before January 1, 1978. This termination right was enforceable by the author or his or her heirs even if they had given away the termination right in a prior agreement (provided that such agreement was executed before rights vested in the author or his

heirs). Thus, Congress intended that heirs of songwriters recapture the income from songs created by previous generations.

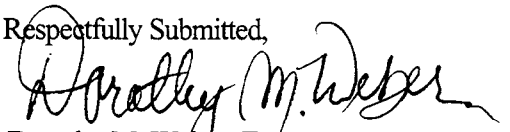
## Conclusion

The extensions of the term of copyright by Congress reflect a consistent and proper exercise of congressional judgment that a creator's works should enjoy an extended term of copyright protection. Petitioners seek by their petition to override that considered judgment and to impose restrictions that would preclude a grant of additional rights in existing works. This request is neither supported by precedent nor by the Constitution. Petitioners' legal position seeks to effectively overturn two centuries of consistent constitutional understanding and practice.

The statements made to Congress by the actual creators of the "useful arts and science" show most eloquently that the copyright laws envisioned by the framers of the Constitution, and the term extension as implemented by Congress, does exactly what was intended by ". . . securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

For the reasons set forth above, the decision of the District Court of Columbia Circuit Court of Appeals should be affirmed.

Respectfully Submitted,



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