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* THE INTERNET ARCHIVE, PRELINGER ARCHIVES, AND PROJECT GUTENBERG LITERARY ARCHIVE FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This brief *amici curiae* in support of Petitioners is submitted by the Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation ("The Archives") pursuant to Rule 37 of the Rules of this Court. Amici urge that the Court reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The Internet Archive[2] is a public non-profit organization that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format. Founded in 1996 and located in the Presidio of San Francisco, California, the Archive receives data donations and digitizes source material from a multitude of sources, including libraries, educational institutions, and private companies.

Prelinger Archives[3] is a commercial, for-profit moving image and sound archive that licenses footage of historical images and sounds to numerous customers, from Hollywood motion picture studios to broadcast and cable television networks and production companies to software developers and publishers to advertising agencies, concert promoters, government agencies, artists, and non-profit organizations.

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1. Letters from both parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor Lemley contributed to this brief in his personal capacity, and its contents should not be attributed to his employers.

2. For more information on the Internet Archive, *see* http://www.archive.org/about/index.html

3. For more information on Prelinger Archives, *see* http://www.prelinger.com/prelarch.html

Project Gutenberg Literary Archive Foundation ("Project Gutenberg")[4] is the oldest and one of the largest publishers of public domain literary works on the Internet. Beginning in 1971 with the Declaration of Independence, Project Gutenberg has published over 5000 ebooks, and is currently adding almost 50 volumes every week. These are listed at www.gutenberg.net and are available free of charge to anyone with Internet access. Project Gutenberg is a public non-profit organization and operates almost entirely through the efforts of volunteers.

Libraries and archives have traditionally preserved and provided access to society's cultural artifacts. In this era of digital technology, a new breed of libraries has sprung up: digital archives. These archives, like all libraries, foster education, scholarship, and creativity through access to information. But digital archives excel in providing access to the ephemera, the "gray material," the lost classics—material which has been difficult for traditional libraries to locate, acquire, and store. To serve their mission of preservation and access, digital archives depend on volunteers, donations and, most especially, on the public domain. Whether information such as a film is under copyright or in the public domain largely dictates the scope and nature of public access provided by archives. The Sonny Bono Copyright Term Extension Act of 1998 ("CTEA")[5] frustrates the Archives' goals of preservation and universal access, thereby denying the public its rightful access to public domain works. The Internet Archive, Prelinger Archives, and Project Gutenberg submit this brief to increase the Court's understanding of the true cost of the CTEA to our cultural heritage.

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4. For more information on the Project Gutenberg Literary Archive Foundation, *see* http://www.gutenberg.net

5. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

SUMMARY OF ARGUMENT

Digital technology is changing the world. The ones and zeros that travel to, from, and through the computers we use provide powerful opportunities, especially for storage and transmission of media. Digital technology makes flawless copying simple and worldwide distribution instantaneous.[6] This ease of publishing and distributing means that material in the public domain that would otherwise have been lost forever can instead be rediscovered, restored, and made universally available.

As one result of this unprecedented ability to disseminate knowledge, the public domain has assumed a growing role in education in this country and around the world. Projects to digitize and distribute millions of out-of-copyright books, movies, and music are now underway, supported and funded by volunteers, foundations, the government, and corporations.[7] Such projects also reclaim and preserve materials that commercial publishers, distributors, and rights-holders have effectively abandoned, having deemed them commercially unviable. While rights-holders often let these films decay and books disappear, this material is invaluable to scholars researching our history, artists developing new art forms, and anyone seeking to explore our culture.

Digital technology allows us the opportunity to build a "universal" library out of these materials—a library that dwarfs the collections of Alexandria and even our modern Library of Congress. This library will expand our understanding of "public access." It will make information accessible in formats that

6. "But, with the increased availability of broadband Internet access you can bring down a full-length motion picture in less than 15 minutes. . . ." Press Release, Motion Picture Association of America, Valenti Warns The Dangers Of Internet Piracy Before Congressional Subcommittee (October 28, 1999), *at* http://www.mpaa.org/jack/99/99_10_28a.htm

7. Raj Reddy, *Infinite Memory and Bandwidth: Implications for Universal Access to Information* (April 6, 2001) *at* http://www.cc.gatech.edu/external.affairs/anniversary/rajreddy.ppt

uniquely support and promote creativity in the arts and sciences—allowing individuals to clip and sample millions of public domain words, films, and sound recordings with ease. At the same time digitization will greatly reduce the cost of preserving our cultural history[8] and eliminate deterioration caused by the physical handling of cultural artifacts. Through digitization, we can inexpensively open the full contents of this new library to the public, especially to those for whom access has been an ill-kept promise—the distant, the disabled, and the poor.

These projects face one significant limitation: copyright. Because of copyright concerns, groups such as the Archives are effectively limited to making available only works no longer under copyright. Because Congress has repeatedly extended the duration of copyright—adding to the copyright term twelve different times in the last century alone—digital archivists are relegated to working with a public domain that no longer grows with each passing year.[9]

It was not supposed to be this way. Copyright was designed to balance an author's incentive to create with the public's interest in free and unfettered access to most works of authorship. As Justice Story explained, copyright "will promote the progress of science and the useful arts, and admit the people at large, *after a short interval*, to the full possession and enjoyment of all writings and inventions without restraint." Joseph Story, *Commentaries on the Constitution of the United States* § 502,

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8. True preservation aims to save both the content and the media in its original form. Media created in digital form are preserved in digital form; digitizing other works ensures at least some minimal preservation of content but does not meet the full goals of preservation.

9. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 443 n.23 (1984) ("[S]ince copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year."). This Court's assumption about the public domain in *Sony* is undermined by the CTEA's retroactive exclusion of works from entering the public domain.

at 402-03 (R. Rotunda & J. Nowack eds., 1987) (emphasis added). The "short interval" in Justice Story's day was 14 years for most works, and 28 years for a few. By contrast, under the CTEA no work receives less than 70 years of protection, and a large percentage receive more than 100 years. Copyright is out of balance. Congress has focused on protecting authors to the exclusion of providing access to the public.

In an effort to justify this radical shift, copyright owners sometimes argue that copyright protection actually enhances access by providing incentives for publishers to make works available. Jack Valenti, President of the Motion Picture Association of America once said: "A public domain work is an orphan. No one is responsible for its life . . . it becomes soiled and haggard. . . ." Jessica Litman, *Digital Copyright* 77 (2001).

We demonstrate in this brief, however, that in the digital world older works are much more likely to be preserved and made available to the public once their copyright expires. The ease and economy of digitally capturing, storing, and distributing have reduced these costs to the point of insignificance. Works in the public domain are being digitized and made freely available at an astonishing rate. By contrast, the overwhelming majority of works from the 1920s and 1930s—those first affected by the CTEA—are not available from copyright owners at any price. Extending the copyright term retroactively gives copyright owners a windfall for a few works that they still consider valuable enough to release, while depriving the world of the benefit of tens of thousands of works each year that digital archives are ready, willing, and able to provide.

In the sections that follow, we describe four specific areas where digital archives promise to revolutionize learning and creativity—greater access, preservation, economy, and extension of works. We then demonstrate how the CTEA frustrates each to the detriment of the public interest by further diminishing the richest resource available to digital archives: the public domain. These four areas are not simply fringe benefits or surplusage residual from the creation of copyrighted works; they

are the real benefit of the bargain that the public is entitled to enjoy. The public domain may ultimately prove more important to our nation's progress than access to copyrighted works during their limited term. Should this Court permit the D.C. Circuit's decision to stand, it will be turning its back on the intent of the Framers and this Court's consistent statements that copyright serves public as well as private purposes.

ARGUMENT

I. The Public Domain Is An Essential And Historical Part Of American Intellectual Property Law

In granting Congress the power to create copyrights, the Founding Fathers recognized that information and ideas were powerful yet ephemeral assets that required narrow and limited rights designed to promote American arts and sciences both economically and culturally. They sought to strike a balance between creating incentives for authors and ensuring that the resulting works were made available to the public.

The Founders focused the rights of authors through several explicit Constitutional limitations on Congress' grant of power. First, the Constitution requires that works be original so that copyright owners cannot remove art and information from the public domain, declaring dominion over something they did not create. *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991); *Graham v. John Deere & Co.*, 383 U.S. 1, 5-6 (1966) (noting that Congress may not authorize the removal of knowledge from the public domain or restrict free access to materials already available). Second, works must promote the progress of the arts and sciences so the public receives value in return for each monopoly grant. *Trademark Cases*, 100 U.S. 82 (1879). Third, the First Amendment, at a minimum, requires that copyright law permit certain "fair uses" of protected works to benefit society. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985); 17 U.S.C. § 107. Finally, the Constitution permits the grant of copyrights only for "limited times." U.S. Const. Art. I, § 8, cl. 8. The "limited times"

provision guarantees that copyrights will eventually expire, and that the public will ultimately receive the right to use all works.

A healthy public domain is essential to a healthy intellectual property regime. As this Court stated in *Harper & Row*, "copyright is intended to increase and not to impede the harvest of knowledge." 471 U.S. at 545. To reap these benefits, the public must not only be permitted to make certain uses of works during the copyright term, but must also be free to make unfettered use of works through public consumption, study, and re-exposition after the copyrights expire. As the *Harper & Row* Court explained, copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*" *Id.* at 546 (emphasis added). Thus, promoting public access to information is as important to intellectual property policy as creative incentives.

Striving for balance between these goals is a consistent theme in this Court's intellectual property cases. *See, e.g.*, *Graham*, 383 U.S. at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("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. . . ."); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist*, 499 U.S. at 349-50 (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989)

(noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.").

From its origin in the Copyright Act of 1790 until Congress' explicit revision of the Act in 1976, copyright required authors to register their copyrights for a distinctive first term, with an option to renew for a separate extended term.[10] At the time of the 1976 Act, the term of copyright was 28 years, with an option to renew for an additional 28.[11] The registration and renewal processes were part of the so-called "formalities" of copyright law. Each of these formalities provided different but equally important checks on the limited monopolies granted by copyright. First, registration ensured that authors or those who

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10. *See generally* Tyler T. Ochoa, *Patent and Copyright Term Extension and The Constitution: A Historical Perspective*, 49 J. Copyright Soc'y 19, 29-45 (2002). While this Court interpreted the 1909 Act as requiring at least notice if not registration, *see Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 59 S. Ct. 397, 83 L. Ed. 470 (1939), the language of the Act itself was not officially changed to remove the registration requirement until 1976.

11. *Id*.

held the rights to their works could be located by those who wished to license a work. Second, by requiring the copyright owner to actively renew his or her rights in a work, it forced the owner to consider the value, ensuring added protection was only afforded when the rights-holders remained actively interested in exploiting their works. The formalities eliminated the problems of absent, missing, dead, out of business, or uncaring rights-holders, thus providing some balance to the additional years of protection offered by Congress.

In 1976, Congress undertook a tremendous and unprecedented overhaul of U.S. Copyright Law. Having passed a series of short-term extensions in 1965, 1967, 1968, 1969, 1970, 1971, 1972, and 1974, Congress finally removed the registration requirements, extending copyright for all works, registered or not, to the full life plus 50 or 75 years. Later, in 1992, Congress automatically renewed all remaining copyrights, regardless of whether the owner sought to renew the work.[12] So expired the procedural guardians of the public domain; so began Congress' efforts to undermine the constitutional protections of "promot[ing] . . . Progress" and "limited times."

A quick look at the registration and renewal data for years before 1976 shows that an overwhelming majority of works fell into the public domain because creators did not seek extended copyright protection.[13] For example, of the 25,006

12. Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (June 26, 1992) (amending Sec. 304 of Title 17 to make renewal automatic and renewal registration optional for works originally copyrighted between January 1, 1964 and December 31, 1977). In fact, Congress enacted this unprecedented change directly against the recommendation of the Register of Copyrights. In a report submitted to Congress in 1961, the Register specifically recommended that if a term extension was warranted, Congress should retain the two-term structure and simply extend the renewal term to forty-eight years. Ochoa, *supra* note 10, at 39.

13. *See* Register of the Library of Congress, Register's Report, *in* 2 *Studies on Copyright* at 1251 (Arthur Fisher Memorial ed., June (Cont'd)

works registered in 1883 a mere 894 were renewed in 1910.[14]

(Cont'd)
1960) ("Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works: *less than 15 percent of all registered copyrights are being renewed at the present time*.") (emphasis added); Barbara A. Ringer, Study No. 31: Renewal of Copyright, *in* 1 *Studies on Copyright* 513-514 (Arthur Fisher Memorial ed., June 1960) ("The committee reports accompanying these bills indicate clearly that the purpose of adding the renewal device was to allow the large bulk of copyrighted works to fall into the public domain at the end of a short definite term, while permitting a much longer term for works of lasting value." (discussing Congressional proposals in 1906-1908 to change copyright term and renewal periods)); H.R Rep. No. 7083, pt. I, at 14 (1907):

> It is said that under existing law no extension of the term beyond the first period of twenty-eight years is asked for on 95 percent of the copyrighted books. Your committee provide [sic] in this bill that unless within the year next preceding the expiration of twenty-eight years from first publication the copyright proprietor shall give notice that he desires the full term, the copyright shall cease at the end of twenty-eight years. It is believed that under this provision more than 90 percent of copyrighted books will fall into the public domain as early as they would under existing law.

The comments of the Senate committee were to the same effect. S. Rep. No. 6187, pt. I, at 7 (1907) (noting that "[t]hese provisions were aimed at putting ephemeral works in the public domain after 28 years, and at making it easy for the public to determine when a copyright would expire.")

14.

1883 registrations 25,006	1910 renewals 894	3.57%
1890 registrations 42,789	1917 renewals 1,845	4.31%
1900 registrations 94,798	1927 renewals 4,686	4.94%
1910 registrations 108,067	1937 renewals 8,589	7.94%
1920 registrations 124,450	1947 renewals 13,201	10.60%
1930 registrations 166, 855	1957 renewals 21,473	12.86%
1932 registrations 124,500	1959 renewals 21,500	17.27%

Ringer, *supra* note 13, at 618, Tbl 2**.**

Thus over 96% of works from that year fell into the public domain after only 28 years—despite the availability of additional copyright protection. Later numbers show that copyright owners continued to let the overwhelming majority of their works lapse throughout the first part of the 20th Century.[15] As a result of the 1976 Act and the 1992 amendments, all copyrighted works under this two-tiered system received 47 additional years of protection, regardless of whether or not the copyright owner intended to register the work. Under the CTEA, these works now have 67 more years. If 96% of owners did not care enough to renew their copyrights after 28 years, there is no reason to expect that when handed decades of additional, unsought "protection" they will become devoted caretakers. These are the real orphans of the copyright system—the "soiled and haggard" works that Congress has endowed with unwanted and unsupervised additional protection.

Both the history of this country and the history of this Court have proven that the public domain is a fundamental part of copyright law. The elimination of important constitutional and prudential restraints places extraordinary pressure on the few remaining counterbalances, such as fair use, inhibits the growth of the public domain, and impedes our progress.

II. The CTEA Prevents Works That Have Reached The End Of Their Proper Copyright Term From Entering The Public Domain

By unconstitutionally extending the term of copyright, the CTEA single-handedly deprives our schools, libraries, and children of enjoying almost any benefit that digital archives have to offer. The CTEA's retroactive and prospective extensions have frozen the public domain in time.

When one asks the leading experts on digital archiving "what is the single most significant barrier to preserving our cultural heritage?" one uniform answer resounds: copyright concerns. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), *Digital Libraries: Universal Access to Human Knowledge* 21 (2001), *at* http://www.ccic.gov/pubs/pitac/

15. *Id.*

pitac-dl-9feb01.pdf; Michael Lesk, *Practical Digital Libraries* 223 (1997) ("Issues related to intellectual property law are the most serious problems facing digital libraries.").[16] The future of digital archives depends on a predictable and reasonable limit to copyright terms. Until works reach the end of their term, it is simply impossible for librarians and archivists to seek rights from millions of copyright owners. Unless copyrights expire after "limited times," millions of historical and cultural works will be unavailable to the majority of the public and will continue to disappear in their original form. The ultimate dedication of these works to the public domain will be the promise that never comes due.[17]

Consider some statistics. In the year 1930, 10,027 books were published in the United States.[18] In 2001, all but 174 of

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16. *See also Copyright Term Extension Act: Hearings on H.R. 989 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 104th Cong., 1st Sess. 10 (1995) (statement of Dennis S. Karjala, Professor of Law, Arizona State University College of Law)

> As a result [of passing the CTEA], current authors who wish to make use of *any* work from this period [after 1923], such as historians or biographers, will need to engage in complex negotiations to be able to do so. Faced with the complexities of tracking down and obtaining permission from all those who by now may have a partial interest in the copyright, a hapless historian will be tempted to pick a subject that poses fewer obstacles and annoyances.

17. Project Gutenberg estimates that, based on current growth rates for creating ebooks, at least one million pre-1923 public domain books will be available online by the end of the decade. But for the CTEA, we could already have digital copies of the original *Winnie the Pooh* by A.A. Milne (1926), *The Magic Mountain* by Thomas Mann (1927), *The Great Gatsby* by F. Scott Fitzgerald (1925) and *The Prophet* by Khalil Gibran (1923) to name but a few. *See also* Carnegie Mellon University Million Book Project (creating an Internet collection of one million books) *at* http://zeeb.library.cmu.edu/Libraries/LIT/Projects/1MBooks.html.

18. *American Library Annual and Book Trade Almanac for 1872-1957* ("*Almanac*").

these titles are out of print.[19] While a copy or two may exist in a library or a used bookstore, the copyright holders cannot or do not make these titles available to the public. But for the CTEA, digital archives could inexpensively make the other 9,853 books published in 1930 available to the reading public starting in 2005. Yet because of the CTEA and the likelihood of future term extensions, we must continue to wait, perhaps eternally, while works disappear and opportunities vanish.

Digital archives can provide public to access these "rare" works that are no longer made available by the copyright holder *if* they enter the public domain. A case in point is the Steven Spielberg Digital Yiddish Library, which houses twelve thousand digitized Yiddish books. This library has helped turn a dying literature into "the most in-print literature on the planet."[20] Digitization of these works, most of which are in the public domain, brings both a literature and an enriched understanding of the Yiddish culture to people across the globe.[21]

Other parts of our culture and heritage remain obscured behind the wall of copyright. The early volumes of periodicals such as *The New Yorker*, *Time Magazine*, and *Reader's Digest* provide an unparalleled window into early 20th century American life and culture.[22] Unlike the Yiddish literature in the Spielberg

19. *Books in Print Online* ("*BIP*"), *at* http://www.bowker.com.

20. Eric Goldsheider, *For a Dying Literature a Digital Savior,* N.Y. Times, May 6, 2002, at A19.

21. *See also The Bibliotheca Alexandrina: A Truly Digital Library for the 21st Century*, at http://www.archive.org/news/bibalex_p_r.html (documenting the Internet Archive's donation of facilities to scan 50,000 Arabic books for distribution on the Internet).

22. The promise of reviving these early icons of Americana from obscurity is not merely speculative. The Frank Capra movie, *It's a Wonderful Life* lay gathering dust in a movie studio until in the early 1970's when its copyright expired. Soon after becoming part of the public domain, it was aired by Public Broadcast Stations and quickly became a Christmas tradition on many stations and for many families. *See* Roger

(Cont'd)

library, few if any of these works can be found online because they are still under copyright. Until they fall into the public domain, the process of clearing rights for each article, drawing, and photograph makes digital archiving of such composite works practically impossible.

The Prelinger Archives faces this dilemma every day. Prelinger began collecting "ephemeral" films in the early 1980s—films of critical social and historic value that have been orphaned or abandoned by their copyright owners. These include industrial motion pictures, home movies, advertising clips, training and educational films, outtakes, and newsreels—the kind of images featured in shows like *The Twentieth Century* with Walter Cronkite and in the ground-breaking historical documentary *Atomic Café*. In 1985, Prelinger formalized his archive to promote the reuse of public domain moving image works.

Of the 48,000 films in the Prelinger Archives, close to 60% (approximately 28,800) are in the public domain. The other 40% (approximately 19,200) remain under copyright. A peculiar attribute of Prelinger's collection, and almost all film archives, is that the dividing line between public domain films and copyrighted films splits almost exactly along the year 1964. Close to 85% of Prelinger's pre-1964 films are in the public domain, compared to only 28% of post-1963 films.[23]

(Cont'd)

Ebert, *It's A Wonderful Life*, The Chicago Sun-Times, *at* http://www.suntimes.com/ebert/greatmovies/wonderful_life.html Had the CTEA extension been in place, this classic film would not have reemerged until 2041.

23. Of the 16,226 films Prelinger has formally researched for copyright clearance, 9,128 (56.26%) are pre-1964 and 7,098 (43.74%) are 1964 and later. Of the pre-1964, 1,110 are still copyrighted (15.81%) and 6,022 (84.19%) are public domain. For films 1964 and later, 1,432 (72.32%) are copyrighted and only 548 (27.68%) are public domain. Prelinger believes these numbers are typical and expects that as he searches the remainder of his collection, he will find similar percentages on either side of the 1964 cut-off date.

This disparity results solely from Congress' multiple extensions of copyright from 1964-1976 and the automatic renewal of 1992, making 1963 the last year that non-renewed works actually fell into the public domain. Prelinger cannot offer copyright protected films for stock footage or allow off-site public access. The 1992 Amendment obliterated the public's pending rights to these films and kept the films cloistered behind the walls of their copyright—despite the lack of interest from their owners in renewal or use of their rights.[24] Because of the elimination of the renewal requirement, the perpetual extension of copyright term and the enormous clearing costs imposed by the post-1976 lack of formalities, a substantial portion of Prelinger's growing collection of important social and historical films remain off limits to the public.

In *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), the District of Columbia Court of Appeals completely ignored the role of the public domain in copyright law as set forth within Art. I, § 8. cl. 8 of the Constitution. The Court of Appeals stated that Congress would exceed its power under the Copyright Clause if it made copyright protection permanent. *Eldred*, 239 F.3d at 377. But then, with a wink and a nod, it gave Congress the go-ahead to perpetually extend copyright protection as long as each "extension" comes with a date certain. In holding that the introductory language of the Copyright Clause fails to impose

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24. *See supra* notes 13-15. *See also* Letter dated March 31, 1997, from Larry Urbanski, Chairman of the American Film Heritage Association, to Senator Strom Thurmond, opposing S. 505, at http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/letters/AFH.html

> There is an important industry in the United States, dependent on film in the public domain. Past copyright legislation has reduced the number of motion pictures in public domain considerably, causing hardship for this industry. Commercial film archiving and film preservation has already stopped for works created after 1962 thanks to 'automatic renewal'. [The CTEA's] extension will further hamper commercial archives.

any substantive limit on congressional power, and that said power is immune from First Amendment scrutiny, the Court of Appeals reduced the public domain to an illusion.

Without some check on Congressional power, it is unlikely that any of the cultural and historical works from the first half of this century will *ever* enter the public domain. Limits must be found. If this Court does not require Congress to respect the limitations of "promoting" and "limited times," the public will never experience the value of the vast majority of works created—the value made real by digital archives.

III. Digital Archives Breathe New Life Into The Public Domain

In the modern world of publishing, the public domain presents a thriving and vibrant area of learning and creativity. Far from the moldering books and deteriorating dusty film canisters of previous decades, today's collections can be digitally stored, accessed and distributed. This new global decentralized platform revolutionizes access and use of public domain works.

A. Digital Archives Allow Us To Preserve Our Cultural Heritage

1. Copyright Owners Fail To Preserve The Vast Majority Of Creative Works For Public Access

Millions of copyrighted works are created every year. In comparison, the number of works actually maintained and available to the public is quite small. Today, the number of volumes available for purchase in the U.S. is a tiny fraction of the volumes published in the United States.[25] Libraries and

25. For example, in 1910, 13,470 books were published in the United States. *Almanac*, *supra* note 19. In 2001, only *180* of these titles are available for purchase from any publisher worldwide. *BIP*, *supra* note 19. The numbers for other decade years are similar: 1920 (8422 published, 307 in print in 2001); 1930 (10,027 published, 174 in print); 1940 (11,328 published, 224 in print); 1950 (11,022 published, 431 in print). *Compare Almanac with BIP*. The number of published books has (Cont'd)

archives preserve some of the books no longer for sale. However, public access to literary works under a system of physical archiving is fiscally and spatially constrained. The combined archives of public research libraries in the United States hold approximately 600 million titles total, a small percentage of the world's published works over the last 200 years.[26] Moreover, every year, physical decay and accidental loss (not to mention limited shelf and storage space) reduce the number of books actually available. This diminution of available copies applies equally to movies and sound recordings.[27]

Like the D.C. Circuit, Amici believe that "preserving access to works that would otherwise disappear . . . 'promotes Progress'." *Eldred*, 239 F.3d at 380. Despite the supposed incentives copyright offers to authors and publishers, today much of our cultural heritage lies fallow, withheld from the public domain by bloated copyright terms, and removed from the

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(Cont'd)
dramatically increased, e.g. 1984 (57,087), 1995 (65,288), 1996 (57,132). *BIP*, *supra*. Thus, the number eventually lost to the public because of excessive copyright terms will be even greater in years to come.

26. National Center for Education Statistics, U.S. Department of Education, NCES 2001-341. *Academic Libraries in the United States: Fiscal Year 1998*, Tbl 5A (providing total number of paper volumes: 878,906,177; total number of paper titles: 495,724,813; total number of microform units: 1,062,082,077; total number of electronic titles: 3,473,225, and total number of audio-visual materials-units: 92,305,707).

27. In 1994, the Librarian of Congress stated, "Of America's feature films of the 1920s fewer than 20% survive; and for the 1910s, the survival rate falls to half that." James H. Billington, Librarian of Congress, *Preface to Redefining Film Preservation: A National Plan: Recommendations of the Librarian of Congress in consultation with the National Film Preservation Board* (August, 1994) *at* http://www.loc.gov/film/plan.html. According to Rick Prelinger, many films are lost every year because many small copyright holders, like educational publishers, must eliminate their stock for next year's supply; worse yet, these firms commonly go out of business or file for bankruptcy, often resulting in loss of all copies of past works.

stream of commerce because copyright holders reap little profit from them.[28] The truth is that by the time even pre-CTEA copyright terms expire, few books, movies, or musical works are being published for profit. Most copyright owners let their works fall out of print, letting them languish in literary limbo.[29]

The full benefits of our entire cultural heritage are forestalled while a few copyright holders derive profit from a relatively small number of works. For some works, extending the period between their decline in profitability and their entry into the public domain is more than just a delay—it is abandonment. For works recorded on film and other less stable mediums, the CTEA extension threatens to lock them up beyond the time when they can be truly preserved. If the CTEA stands, the public's share of the copyright bargain will in many instances literally blow away on a breeze. The only way to revive these works is to let them reach the natural end of their term so that they fall squarely into the public domain. Once there, digital archives can save these works for future generations.

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28. *See also* Kai-Lung Hui & Ivan P.L. Png, *On the Supply of Creative Work: Evidence from the Movies*, 92 Am. Econ. Rev. 217 (2002) (concluding that the extended copyright term of the CTEA had relatively little impact on new creative activity in the movie industry).

29. *See supra* note 25 and accompanying text. It is worthy to note that the rights afforded to copyright owners under 17 U.S.C. § 106 do not address maintenance of works. Therefore, it can be presumed that there are few if any incentives for copyright owners to preserve works. That responsibility has been, and should be, left to our public libraries and archives as guardians of the public domain.

2. Digital Archives Preserve Copyrighted Works and Prevent Their Permanent Loss

Digital archives offer a solution to the problem of preservation. Films, books, and sound recordings that enter the public domain can be digitized quickly, efficiently and cost-effectively ensuring the availability of their content and protecting the original work against further deterioration. Every week, Project Gutenberg publishes the e-texts of almost fifty public domain books.[30] Digitizing a film, a book, or a sound recording makes a perfect copy of the work. Without harming the original, further copies can be rendered as backups, preventing a catastrophe such as the great fire in Alexandria from destroying our heritage.

Our culture is exploding off the printed page into film, video, and sound. The world produces between one and two exabytes (a billion, billion bytes) of information each year.[31] Only a tiny percentage (0.003) of this creativity takes the form of a printed page.[32] The vast majority of this information takes the form of sound, images, and numeric data.[33] With each passing day it becomes increasingly important that our libraries have the ability to collect and store these formats. Without digital archiving, the increasing cost and diminishing opportunity to preserve these works will nullify our efforts to save them for future generations. Utilizing currently available digital

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30. Project Gutenberg, with the support of the Vital Spark Foundation and in conjunction with ClassicalArchives.com, is currently putting the scores of 50 works of classical music on line. These scores are available for use by students and performers. They can be marked up for their own performances. Creation of computer-generated performance from the scores is also supported.

31. Peter Lyman and Hal R. Varian, *How Much Information*, Executive Summary (2000), *at* http://www.sims.berkeley.edu/how-much-info

32. *Id*.

33. *Id*.

technology, we can build comprehensive collections that capture media works in their most pristine forms and preserve them forever.

Librarians and archivists have long been the stewards of our cultural history. The passage of the CTEA does not change authorial incentives in support of preservation. Instead, it keeps creative works from librarians and archivists who stand ready to preserve them *all*, not just a favored few.

B. Digital Archives Promote Full Public Access To Our Cultural Heritage

Digital archives hold out the promise of universal access to our cultural heritage. Today's libraries provide free public access for some people to some of this heritage. However, any single physical library can contain only a small fraction of humanity's cultural artifacts[34] and primarily serves its proximate community. As mentioned above, millions of copyrighted works are created every year, yet after 95 years, few remain in circulation. Most books are out-of-print; many movie reels and recordings are lost or damaged.[35] For a large segment of the public, especially those in rural and remote locations and those searching for material on a tight timetable, our cultural reserves are essentially out of reach.

In contrast, the Internet—the dominant platform for access to digital archives—provides relatively unlimited low cost capacity to support both the archiving of, and universal access to, traditional printed works, as well as audio, video, and still

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34. United States public libraries contain approximately 784,562,000 volumes. National Center for Education Statistics, U.S. Department of Education, NCES 2001-307, *Public Libraries in the United States: Fiscal Year 1998*, Table 7 (2001).

35. *See supra* notes 18-19 and accompanying text. *See also Redefining Film Preservation*, *supra* note 27 § 1 ("The key conclusion of Film Preservation 1993 is that motion pictures of all types are deteriorating faster than archives can preserve them. Film is a fragile medium, intended for brief commercial life. . . .").

images.[36] As this Court explained in *Reno v. ACLU*, the Internet is comparable to "a vast library including millions of readily available and indexed publications." *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997). The Internet "was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world." *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). Just as this platform has lifted so-called "public records" out of "practical obscurity" and provided the fodder for controversial new products and services, it offers the chance to bring the creative works housed in the stacks and files of our libraries and archives to the public on a scale that heretofore seemed unimaginable. For example, the public downloads a million copies of ebooks from Project Gutenberg's main server each month.[37] Internet-based digital archives are the true embodiment of the public domain.

Most libraries have a copy of the *Complete Works* of Shakespeare, a few volumes of Plato, two or three of Mark Twain's novels, perhaps a smattering of Dickens. Project Gutenberg offers several editions of Shakespeare, 31 works of Plato, 50 of Twain and 56 of Dickens.[38] Online access to Milton's *Aeropagitica* (Gutenberg #608) or Leonardo Da Vinci's *Notebooks* (Gutenberg # 5,000) is also available. Whether one's taste runs to *Gulliver's Travels* (Gutenberg #829) by Jonathan

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36. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), *Digital Libraries: Universal Access to Human Knowledge* 21 (2001) page 2, *at* http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf

37. Project Gutenberg publishes from scores of servers around the world; including over a dozen in the U.S.; thus, the total monthly downloads worldwide are probably several times those downloaded from the main U.S. servers.

38. Sinclair Lewis is represented with four works in Project Gutenberg, but his *Elmer Gantry* (1927) will not be available for another 19 years under the CTEA.

Swift or *The Adventures of Tom Swift* by Victor Appleton (25 volumes), access is easy, no matter how small or underfunded the local library.

Digital film archives provide unique benefits. The analog nature of film means that every viewing of the original work slowly consumes the very film being viewed. The Internet Archive recently borrowed 1,001 key public domain archival films from Prelinger Archives. These films were transferred to videotape, digitized, and published online at http://www.moviearchive.org. Between January 2001 and April 2002 alone, these movie files were downloaded over 1.2 million times by individuals some distance from New York or San Francisco. By contrast, in the entire year 2000, the public only accessed approximately 2,000 physical film clips through Prelinger's designated representatives and held approximately 200 physical access events. Removing the barriers of time and distance digital access allowed the public to view Prelinger's films over 500 times more often than physical access while still preserving the original copies for future generations.

This kind of exponential increase in access is the key to disseminating some of our nation's most influential moments in history. Consider for instance, the Zapruder film, which documents President Kennedy's assassination. Television specials every year license this clip. It is one of the most shocking and important bits of film in American history. Almost every analysis of the assassination of John F. Kennedy depends on the film's contents, just as it requires the Warren report. When will the Zapruder film, like the Warren Report, be available to the public unconditionally?

The importance of these ephemeral films to our society cannot be overlooked. Film is the rare medium of full immersion. Its ability to transport us to distant times and places is unmatched. It imparts intimate knowledge of ourselves as a society and documents our advances and shortfalls in technology, culture, politics, economic, and civil rights. It literally allows us to bear witness. Films provide contemporaneous and visceral exposure

to the real events, feelings, and reactions of Americans during critical moments in our history—the violence in Birmingham, Alabama, Martin Luther King's March on Selma, the Watergate Hearings, and the Tet Offensive influenced the political and moral opinions of millions of Americans.[39] Similarly the images from September 11th 2001 shaped our views of national security, terrorism, and world affairs. Under the CTEA, these works will not be available until 2097. Most of us who witnessed the tragedy will be deceased by the time Americans can view them freely.[40]

As the public domain shrinks, so too does the ability of digital archivists to preserve and provide public access to cultural works. Digital archives can bring the public domain into schools, libraries, and homes across the globe. Indeed, for most works, *only* digital archives could do so.

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39. *See generally* David J. Garrow, *Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965* (1978) (discussing the influence of television on the politics of the civil rights movement); *see also* http://exchanges.state.gov/education/engteaching/pubs/AmLnC/br40.htm (". . . police violence, shown on national television, sickened the country; within hours, tens of thousands of volunteers were heading south to join King in the march."); Peter Braestrup, *Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet 1968 in Vietnam and Washington* (1977); Robert J. Donovan and Ray Scherer, *Unsilent Revolution: Television News and American Public Life, 1948-1991* (1992), *excerpted at* http://www.mtr.org/seminars/satellite/civilrights/civil1.htm.

40. *See, e.g.*, Letter dated October 10, 2001, from David K. Allison, Chairman, Information Technology and Society, Smithsonian National Museum of American History, to Brewster Kahle, Founder, Internet Archive, *at* http://www.archive.org/images/smithsonian50pct1.jpg

> Much of the most valuable historical information of our time is being communicated over the Internet and broadcast channels. By developing a systematic and cost effective way to preserve this information in a central repository, you are building an invaluable collection that will serve scholars and the general public for years to come. . . . I can think of no better example of the importance of your work than your capture of the global response to September 11.

C. Digital Archives Support Rich And Diverse Use Of Our Cultural Heritage

Digital archives foster new and innovative use of works in the public domain. For the Prelinger Archives, the transition to digital format created a dramatic increase in public screenings, classroom screenings, individual scholarly research projects, and low-budget productions. Very few if any of these users would have been able to access the archives previously, according to Prelinger.

Digital archives also offer academics and cultural inquisitors the opportunity to exploit highly efficient and productive search tools. The Library of Congress ("LOC") preserves a collection of nearly 121 million items, more than two-thirds of which are in media other than books. Previously, physically searching through the index to this collection, assuming one was able to make the trip to our nation's capital, took days or even weeks. Now, one can simply go to www.loc.gov and search the catalog within minutes.

But many answers needed by researchers lie beyond a title, author or abstract, especially for media other than books. Technologies now exist that allow one to search the actual *contents* of the LOC collection, i.e. the words on the pages, the images on the films, or the sounds on the recordings, from one's home, school, or office computer. Many software programs now include the capability to perform Optical Character Recognition ("OCR"), a process by which the program will allow the user to search the pages of the digitized document for each and every occurrence of a word.[41] The ebooks at Project Gutenberg are already available for search via OCR technology.

Imagine that any child, student, philosopher, reporter, or scholar could simply go to an Internet library the size of the LOC from his or her home or work computer, search for

41. For more information on OCR Technology, *see* Adobe Systems Incorporated, *Adobe Acrobat Capture 3.0, at* http://www.adobe.com/products/acrcapture/fullfeature.html

documents in the public domain, and then search and view those documents within a matter of minutes. Imagine that those who are blind or deaf can use tools that translate these works—on the fly—into a format that meets their needs. Imagine that individuals in other countries have the tools to translate these works into their native tongue in real-time. Think of the difference it could make in bringing our cultural heritage to the public and educating the populace. This is where technology and imagination are leading us; this is where the CTEA forbids us to go.

D. Digital Archives Extend Our Cultural Heritage

Beyond preservation and accessibility digital archives provide the public with unprecedented opportunities to use our cultural heritage as the creative basis for the next generation of artistic and informative works.[42] The ability to digitize vastly increases the capacity to incorporate our history and culture into new works. Unlike physical media, digital media allow the average individual to easily quote and cite movies, by clipping and sampling. Such quotation and citation not only augment the quality of scholarly work but also reintroduce older works into present-day popular consciousness.[43]

This ability is made more important—and more powerful—as audio and visual recordings flourish. One can allude to or reference a printed work by quoting a short passage or citing the publication. Visual and auditory media, however, present a far more complex arena for allusion and citation. If one wishes to reference a visual image, it is often necessary, if not essential, to show that image within one's own work, a process made simple by digital archives.

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42. *See generally* Jessica Litman, *The Public Domain*, 39 Emory L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

43. Businesses recognize the value of their corporate heritage for developing their message and image today. They too are creating digital archives of their creative works. *See* Allison Fass, *Online Archive for Coke Advertising*, N. Y. Times, December 10, 2001.

Recently, the Internet Archive held a filmmaking contest. It asked amateur filmmakers around the world to create a short film of less than 10 minutes showing a perspective on an historical event associated with war. The films could be true stories, parodies or fiction. In creating these films, the Archive asked filmmakers to limit their resources to free content found in archives across the Internet, including the 1,001 films of the Prelinger Archives stored at moviearchive.org. The submissions each conveyed a powerful and timely message about war and society. These new creative works were built exclusively through the use and reuse of public domain digitized film.[44] Submissions came from such diverse participants as a fifth grade class in a District of Columbia public school and an individual in Finland. Such commentary, from such creators, would not have been possible before the advent of digital film archiving.[45]

Similarly, younger generations of Americans immerse themselves in their musical heritage, interacting with it rather than merely reacting to it. An emerging form of music called "mash-up" showcases the creativity of youth through the creation of entirely new songs using only bits of older music—the more eclectic, even odd, the combination the better.[46] Yet, this new

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44. To view the winning film as well as the other submissions, go to http://ftp.archive.org/html/contest01/gallery.htm

45. *See also* Amy Harmon, "*Star Wars" Fan Films Come Tumbling Back to Earth*, N. Y. Times, April 28, 2002, at 2-28. ("When word began circulating on the Internet in December that Lucasfilm would be a co-sponsor of a 'Star Wars' contest for fan-made films, to be judged by George Lucas himself, members of the growing digital underground felt as if the Force was finally with them. 'How cool is this?' read the first of many messages on TheForce.net, the home to more than 50 amateur films inspired by Mr. Lucas's 'Star Wars' series.").

46. *See* Neil Strauss, *Spreading by the Web, Pop's Bootleg Remix*, N. Y. Times Online, May 5, 2002, *at* http://www.nytimes.com/2002/05/09/arts/09MASH.html The desire to interact with music to create a newly meaningful pieces is not only the dominion of the young. Traditional art

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musical genre suffers under Congress' habitual copyright extensions and the abolition of the formalities. Though a mash-up album by a Belgian group was cited by music executives as one of the best recordings of 2002, the group managed to clear the rights for it only after nine months of work and then only in Belgium, Luxembourg and Holland.[47]

The ability to interact with one's culture to create newly meaningful works is a precious piece of the public's interest in copyright.[48] Authors and other creators should not have to wait

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forms such as classical, folk, blues and bluegrass have all benefited from use of old melodies and phrases to create new, fresh sounds. Digital technology, however, gives rise to the promise that culturally important musical derivative works will flourish, as complex combinations are simple and relatively inexpensive to create. Copyright term extensions deprive the young of what older generations of musicians have taken for granted.

47. *See id*.

48. As one copyright scholar stated:

> Artistic freedom to create derivative works from the public domain is a significant public benefit, as shown by musical plays like *Les Miserables*, *Jesus Christ Superstar*, and *West Side Story*, the recent spate of high production quality films based on the works of Shakespeare and Jane Austen, satires like *Rosencrantz and Guildenstern are Dead*, and even literary classics like James Joyce's *Ulysses*.

Denis S. Karjala, *The Term of Copyright, Growing Pains: Adapting Copyright for Education and Society* 7 (1997). *See generally also Recent Derivative Works Based on Frances Hodgson Burnett's Classic* The Secret Garden (1911) *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain/SecretGardenDWs.html; *Wind Done Gone Suit Settles*, Washington Post, May 9, 2001 *at* http://www.washingtonpost.com/wp-dyn/articles/A63137-2002May9.html; Gregory Maguire, *Wicked: The Life and Times of the Wicked Witch of the West* (1996); Gregory Maguire,
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nearly a century until copyright has expired to cast "new light" on our cultural heritage. Under the CTEA, such works will only be penned by strangers to the time and place of the original work and not by those alive during the era of its creation.[49]

E. Digital Archives Make Preservation And Access More Economical

Although much is currently done with volunteer labor and donations, digital archiving is not free. Yet because we need only a single digital copy of a work to preserve it in perfect condition for a virtually unlimited duration and for universal use, digital archives make preservation and enhanced access realistic and cost effective.

For example, the costs for physically preserving a single color feature film by copying can run to $40,000 or more, and the short lifespans once thought to be a problem only for nitrate now confront nearly all films.[50] By contrast, the entire cost of digitizing a film is $200 per hour of footage.[51] It is a single cost, paid once per film per lifetime. Once digitized, the cost of storing, maintaining, transmitting and making back up copies of the film approaches

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Confessions of an Ugly Stepsister (2000); *Anne Of Green Gables - The Continuing Story at* http://www.anne3.com; Verena Dobnik, *"Lolita" causes a different kind of controversy*, Associated Press, October 10, 1998 *at* http://www.boston.com/news/daily/10/lolita.htm; Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (2001).

49. For example, under the 1909 copyright Act, a child who grew up reading Depression-era literature from the 1930s could expect to write an adaptation of these works by 1970 after the 28 year initial term or by 1990 if the owner had renewed for the 56 year term. Under the CTEA, however, no such adaptation could be written until at least the later 2020s, close to 100 years later.

50. *See Redefining Film Preservation, supra* note 27 § 3, ¶ 3.

51. Notes from Interview with Brewster Kahle, Founder, Internet Archive (on file with authors).

zero.[52] Digital files can be maintained, transferred, and backed up automatically by current software without human intervention. Digital archives will cheaply and efficiently save millions of works from dereliction and destruction.[53]

The return on digital archiving is higher still. Federal and state governments continue to spend taxpayer funds to "wire" our schools, libraries, and community centers—to connect them to the Internet.[54] As a nation we have made a commitment to provide a broad swathe of the public with access to this new platform for communication, research, and publishing. But to what have we provided access? If the CTEA stands it will not be the wealth of information and knowledge housed in our cultural institutions. For the rest of this century no new treasures will enter the public domain—they will remain offline and out of reach. We will have given our children the keys to this library, but they will enter only to find half-empty shelves.

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52. The cost estimates for maintaining a digital book range from Michael Lesk's low of $4 to the National Archives and Records Administration (NARA) estimate of $13.99 to Yale University's estimate of $15.37 to the EPA's estimate of $250 per book. *See* Anne R. Kenney, *Digital to Microfilm Conversion: A Demonstration Project, Final Report to the National Endowment for the Humanities*, Tbl 6, *at* http://www.library.cornell.edu/preservation/publications.html

53. For example, the Bibliotheca Alexandria's Digital Manuscripts Library digitizes manuscripts and rare books and makes them available on CDs. *See* http://www.archive.org/news/bibalex_p_r.html

54. For example, the Telecommunications Act of 1996, created the Universal Service Fund for Schools and Libraries (commonly known as the "E-Rate" program), which provides discounts on the cost of telecommunications services, including Internet access and equipment, to all public and private schools and libraries. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 110 Stat. 56 (1996).

CONCLUSION

Digital archives constitute the difference between a nominal public domain and a real, robust public domain. Their growth and maturity depends on limits to copyright. Digital archives are ready to serve the needs of children, researchers, and the public. But they will never get that chance unless Congress is prevented from making copyright protection perpetual. Amici Internet Archive, Prelinger Archives and Project Gutenberg respectfully request this Court to enforce the public's right to preserve and access its heritage by striking down the CTEA as an unconstitutional extension of the copyright term beyond the enumerated powers given to Congress by the United States Constitution.

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