No. 10-545

IN THE

Supreme Court of the United States

LAWRENCE GOLAN, et al.,

Petitioners,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL, et al.,

Respondents.

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

BRIEF FOR CREATIVE COMMONS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, Creative Commons ("CC") respectfully submits this brief in support of Petitioners.[1]

Creative Commons is a nonprofit dedicated to helping rights holders make their work more easily available to others, consistent with the requirements of copyright law. Because of the capacities of the Internet and the complexity of traditional copyright licenses, it can be difficult for anyone, especially non-professionals, to share works reliably and legally on the Internet. In response to this difficulty, Creative Commons provides a set of free and standardized copyright licenses, as well as other legal tools, to give any rights holder—from individual creators to large companies and governments—a simpler way to reliably grant permissions to their creative work.

Launched in late 2002, Creative Commons offers six core copyright licenses in its suite. All require that attribution be given to the licensor. All permit at least non-commercial sharing of licensed work. Some go further and permit commercial as well as non-commercial use of licensed work. And some condition the right to

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[1] No counsel for a party authored this brief, in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs. Counsel of Record for *Amicus* is a founder of Creative Commons and serves on its Board of Directors. He is also the Director of the Edmond J. Safra Center for Ethics at Harvard University, and the Roy L. Furman Professor of Law at Harvard Law School. He was counsel for Petitioners at an earlier stage in the litigation.

create derivatives upon the obligation to license any such derivative under a similar license. Each of these licenses is expressed in the language required by courts to be enforceable. But each is also expressed in terms that make it easier for non-lawyers to understand. And content licensed on the Internet carries with it metadata that makes it simple for computers to identify the license that runs with the work. This metadata is then used by search engines, such as Google's, to find freely licensed copyrighted work.

In addition to its copyright licenses, Creative Commons also makes available tools to support the public domain. The CC0 (read "CC Zero") Public Domain Dedication allows creators and rights holders to dedicate works to the worldwide public domain in advance of expiration of their copyright.[2] CC's Public Domain Mark permits work already in the public domain to be labeled in a way that clearly communicates that status to the public.[3] Both public domain tools are accompanied by machine-readable metadata that allows the public to find work free of copyright restrictions. All of CC's copyright licenses and public domain tools are thus designed to ease sharing and discovery of works on the Internet, consistent with the rules of copyright.

Once applied, both the licenses and the CC0 Public Domain Dedication are permanent. Rights holders license their work irrevocably for the balance of the

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[2] *See* About CC0—"No Rights Reserved," http://creativecommons.org/about/cc0, *archived at* http://www.webcitation.org/5zW0x02mF.

[3] *See* About the Public Domain Mark—"No Known Copyright," http://creativecommons.org/about/pdm, *archived at* http://www.webcitation.org/5zW1MsVQU.

term of copyright. The CC0 Public Domain Dedication is likewise irrevocable. This permanence is by design. The complexity of creating an informational database that could provide reliable, up-to-date copyright and licensing status for any particular creative work precludes any solution that is time-limited. A permanent grant is the only mechanism that provides the necessary certainty to allow works to be efficiently shared and reused worldwide.

In the years since CC was launched, more than 400 million works have been marked on the Internet with Creative Commons licenses. Among these are prominent works such as Wikipedia, as well as millions of images in sites such as Flickr and Picasa, and tens of thousands of videos on YouTube, Blip.tv, and Vimeo. The world's largest Open Access publishers use Creative Commons licenses to publish their content online. CC also provides the legal framework for the growing Open Educational Resources ("OER") movement, which provides free learning resources to further universal access to education.[4] Most recently, the U.S. Department of Labor and U.S. Department of Education announced a program that will make available US $2 billion in federal grants over the next four years

[4] For example, the Public Library of Science, chaired by Nobel Prize winner Harold Varmus, licenses its works using Creative Commons. *See* Public Library of Science, http://www.plos.org/, *archived at* http://www.webcitation.org/5zW36CiV0. The MIT OpenCourseWare project also licenses its content under Creative Commons licenses. *See* MIT OpenCourseWare, http://ocw.mit.edu/index.htm, *archived at* http://www.webcitation.org/5zW2f3Hla.

to create OER, the content of which must be released under the Creative Commons Attribution 3.0 license.[5]

Although much newer, CC0 (released in 2009) and the Public Domain Mark (released in 2010) have quickly become the standard for improving the discoverability of creative works in the worldwide public domain. CC0 is used by national governments, scientists, and many others to remove all copyright restrictions that otherwise impede the widespread dissemination and free reuse of materials worldwide. Leading adopters include the Dutch national government and the Personal Genome Project. The Public Domain Mark is also well received and leveraged. Prominent adopters include cultural institutions such as Europeana—the European Union's digital library, museum, and archive. Europeana uses the Public Domain Mark to label millions of works that archives, libraries, and museums throughout Europe have identified as free of copyright worldwide.[6]

Taken together, Creative Commons legal and technical infrastructure enables a vast and valuable pool of content to be discovered and lawfully copied, distributed, edited, remixed, and built upon by the public. The Court's decision in this case will directly affect CC's global and rapidly growing community of adopters and users, who depend upon the stability of the public domain to determine what material is safe to build upon to create new works, when CC licenses and

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[5] *See* United States Department of Labor, News Release 10-1436 -NAT, http://www.dol.gov/opa/media/press/eta/eta20101436.htm, *archived at* http://www.webcitation.org/5zW2VYLzS.

[6] *See* Europeana and the Public Domain, http://www.europeana-libraries.eu/web/europeana-project/publications/, *archived at* http://www.webcitation.org/5zW27Pacl.

CC0 are operative, and whether works marked as belonging to the worldwide public domain using the Public Domain Mark are free of copyright restrictions.

SUMMARY OF ARGUMENT

For more than 200 years, the public domain has provided a diverse, rich, and robust body of material for the public to use, share, draw from, and build upon. Throughout this period of time, those who have relied upon the public domain to innovate have been able to trust that work found within its confines would not later be swept back within copyright and the exclusive control of private parties. This case will determine whether this long-standing principle will endure, and along with it, determine the fate of innumerable new works derived from work found within the public domain.

The government argues that the first federal copyright act provides historical precedent for the Uruguay Round Agreements Act (the "URAA"). This claim is founded on a misunderstanding of the copyright status of works at that time in American history. As *Amicus* demonstrates below, at the time of the first copyright act in 1790, copyright was rooted in state common law, which varied by state. Because at least one state granted perpetual common law copyright protection to works following publication, work subject to the first copyright act was not within the "public domain of the United States," as no such "public domain" existed. Thus, there is no legislative precedent for the government's plunder of the public domain under the URAA.

Likewise, there is no judicial precedent for the government's action under the URAA. The URAA sweeps a wide swath of foreign works back under copyright, and it does so via targeted legislation that is

not uniformly applicable to all copyrighted works. Certainly some American authors lost copyright protection for failure to comply with statutory formalities. Yet the URAA only restores copyright to foreign authors who made the same mistakes as many of their American counterparts. Under the government's reasoning in this case, Congress could pull works from the public domain to benefit a particular subset of authors for any "important governmental purpose." If endorsed by this Court, the implications of the government's argument are far-reaching. The certainty of public domain status, and the sizeable and incalculable investment in new work that certainty allows and supports, would be erased. In short, the very body of creative material unfettered by law that is, to quote Justice Brandeis, as "free as the air to common use," *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918), is a shared public resource that could forever be at risk.

ARGUMENT

I. A RELIABLE, STABLE PUBLIC DOMAIN SUPPORTS CRITICAL ACTIVITY AND INVESTMENT.

Creativity builds upon the past, and the vast, shared public domain is arguably the richest source of raw material supporting new creativity. Just as Walt Disney drew from public domain fairy tales to create prolific, culture-defining films like *Snow White and the Seven Dwarfs*, all creators stand upon the shoulders of those who came before them.[7] Deciding whose shoul-

[7] Disney's dependence upon the public domain for new creativity was particularly impressive: *Alice in Wonderland* (1951) was based upon Lewis

ders to stand upon often turns on whether a particular work is in the public domain. Creators have long come to depend upon a public domain filled with work free to use, for any reason, in perpetuity.

To date, countless creators have made incalculable investment relying upon the public domain. One prominent example is the world's largest online open collaboration encyclopedia, Wikipedia. With more than 17 million articles in more than 270 languages, Wikipedia contains an astounding wealth of information, all of which is available free to the public under the Creative Commons Attribution-ShareAlike 3.0 license. Not surprisingly, public domain material is critical to this massive collaboration. Hundreds of thousands of Wikipedia articles utilize public domain images, videos, and sound files to enhance the educational value of its articles. If public domain status is impermanent, this game-changing collaboration is compromised.

This result follows for all work that builds upon the public domain, whether licensed publicly using Creative Commons or shared via privately negotiated licensing agreements. For work such as Wikipedia ar-

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Carroll's 1865 novel; *Snow White* (1937) and *Cinderella* (1950) were based upon *Grimms' Fairy Tales*; *Pinocchio* (1940) was based upon work by Carlo Collodi; *The Little Mermaid* (1989) was based upon work by Hans Christian Andersen; *The Jungle Book* (1967) was based upon work by Rudyard Kipling; and *Hunchback of Notre Dame* (1996) was based upon work by Victor Hugo. *Fantasia* (1940) used public domain music extensively. In each case, the work that Disney relied upon was in the public domain when Disney's derivative was released. *See* Russell Merritt & J.B. Kaufman, *Walt in Wonderland* 86–119 (1993). Were Congress to have a general power to "restore" copyright, each of these works would potentially be vulnerable. *See generally* Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 21–25 (2004).

ticles licensed using a CC license, however, a modification of the principle of irrevocability that has governed the public domain to date would have a disproportionately large and destructive effect. By design, CC licenses facilitate discovery and reuse at unprecedented speed by many thousand licensees. Work so licensed can be quickly discovered, viewed, downloaded, modified (where the CC license permits), and re-published online. Thus, the number of people depending upon the ongoing public domain status of material underlying CC-licensed work—whether licensors or licensees—is vast, and would be compromised if the URAA is upheld. If copyright may be restored in underlying public domain work, CC licensors of derived work would find themselves in the untenable position of having no choice but to secure permission from the restored rights holders or be at risk for infringement, as revocation of CC licenses is not possible. Without that permission (which could be freely withheld by the rights holder), CC licensors and all downstream users of CC-licensed work built on public domain material become potential copyright infringers, through no fault of their own.

II. THE ACTION OF THE FRAMERS IN ESTABLISHING THE FIRST COPYRIGHT ACT PROVIDES NO PRECEDENT FOR THE URAA.

The government argues that the action of the First Congress in establishing the first copyright act (the "Act of 1790") is precedent for the URAA. Brief for the Respondents in Opposition at 14 n.7. This argument rests upon confusion, based on an imprecise use of the term "public domain."

A. "The public domain" only exists relative to the laws of a particular legal jurisdiction.

As Justice Story described it, the Progress Clause was designed to: "admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint." J. Story, *Commentaries on the Constitution of the United States* § 502, p. 402 (R. Rotunda & J. Nowak eds., 1987).

That "full possession and enjoyment … without restraint" is "the public domain." But as copyright law is local law, any reference to "the public domain" must necessarily be relative to the laws of a particular jurisdiction. Thus, with respect to a particular work and a particular jurisdiction, "the people" may have "the full possession and enjoyment … without restraint." But for the same work in a different jurisdiction, the law may still impose a "restraint," and thus not be in "the public domain."

To see this point clearly, consider three jurisdictions, the United States, Canada, and North America, and one work, E.M. Forster's novel, *A Room with a View*.

A Room with a View was published in the United States in 1908. It therefore passed into the public domain of the United States in 1983 (75 years after publication). In Canada, the term of copyright is reckoned differently. Under Canadian law, *A Room with a View* will not enter the public domain of Canada until 2020 (50 years after the death of Forster). Thus, *A Room with a View* is now in the public domain of the United States, but not in the public domain of Canada. And thus it follows, *A Room with a View* is also not in the

public domain of the jurisdiction comprised by the United States and Canada together—North America.

This example throws into relief the confusion at the core of the government's argument. The government asserts that the Act of 1790 restored the copyrights in work that was in the public domain of the United States. Brief for the Respondents in Opposition at 14 n.7. But for that claim to be true in 1790, the restored work must have been in the public domain of every state in the country in 1790. That plainly was not the case. As *Amicus* argues below, even if a work was in the public domain of some states in 1790 (like *A Room with a View* is in the public domain of the United States today), if it was not in the public domain of every state (as *A Room with a View* is not in the public domain of Canada), then it was not in the public domain of the jurisdiction comprised by every state—"the United States" (just as *A Room with a View* is not in the public domain of North America).

B. In 1790, there was no "public domain of the United States" because at least one state granted perpetual common law copyright protection even after publication.

The Act of 1790 secured a federal copyright under U.S. law to work that was "already printed." Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. Certainly, some of the work eligible for protection under that statute may have been in the public domain *of some states*. But *none* of the work eligible for protection under the Act of 1790 was in the public domain *of every state*. And thus, *none* of the work secured by the Act of 1790 could be said to have been within "the public domain of the United States."

1. Before 1790, New York common law copyright protected creative work after publication.

Since the early 18th century, the common law of the several states has secured copyright protection to authors for their creative work. The scope of that protection, however, has differed depending upon the state. In every state, the common law granted protection prior to a work's publication. But in some states, before 1790, the common law secured protection for a work *even after its publication*. It follows that in those states, at least before 1790, there was no public domain—since again, the law protected a work even after publication, wherever that work had originally been created.

New York is one such jurisdiction. As the New York Court of Appeals confirmed in *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250 (N.Y. 2005), the common law of New York secured copyright protection to creative work even after publication.[8] For literary work, that protection was preempted by the Act of 1790. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. But prior to 1790, both literary and other creative work in New York received the benefit of a perpetual copyright, wherever it was created, and even after

[8] The issue in *Capitol Records* was whether New York common law copyright protected a sound recording that had entered the public domain in the jurisdiction in which it was created. 830 N.E.2d at 253–54. In the Court's careful and extensive opinion, it surveyed the history of common law copyright in the state, and concluded that the law had always protected creative work perpetually, whether or not published. *Id.* at 264–65. That protection thus extended to recordings not preempted by federal law (as all recordings fixed prior to 1972 are until 2067).

publication. It follows that in 1790, there was no creative work in New York that was free of copyright restraints. Or put differently, it follows that in 1790, there was no public domain in New York.

This finding by New York's highest court must guide this Court in its understanding of New York state law. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). It should also guide this Court in its determination of whether in 1790 there was a "public domain of the United States."[9] If the "public domain of the United States" is comprised of that work free of copyright "restraint" throughout the United States, then *Capitol Records* means that before the Act of 1790, there was no "public domain of the United States." Since under the law of at least one state, copyright was perpetual, even after publication, there was no work that was free of copyright restraint throughout the jurisdiction of the United States.

2. The view that common law copyright would protect a work after publication was not uncommon at the Framing.

New York's rule was not the majority rule. But, as shown below, neither was it likely unique. The question of whether common law copyright survived publication was the central question about the nature of copyright throughout much of the 18th and 19th centuries. Whether the right survived publication was precisely the issue in the two most famous British common law copyright cases—*Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769); 4 Burr. 2303, and *Donaldson v.*

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[9] This conclusion was not certain when this Court decided *Eldred v. Ashcroft,* 537 U.S. 186 (2003). The Court, therefore, explicitly reserved the question in that case. *See id.* at 196 n.3.

Beckett, 1 Eng. Rep. 837 (H.L. 1774); 2 Bro. P.C. 129. It was also precisely the question at issue in all but two of the cases cited and discussed by this Court in *Wheaton v. Peters,* 33 U.S. 591 (1834).[10] Even at the time of *Wheaton*—almost 50 years after the founding and exactly 60 years after *Donaldson*—this Court could remark that the question of any common law right after publication was "still considered, in England, as a question by no means free from doubt." 33 U.S. at 657. For even then, while some jurisdictions recognized perpetual copyright after publication, others did not.

There is no extensive record of the Framers' views about common law copyright. But it is clear that at least James Madison believed that copyright after publication was protected by the common law. In Federalist 43, Madison wrote, "the copyright of authors has been solemnly adjudged in Great Britain to be a right of common law." *The Federalist No. 43* (James Madison). The "common law copyright" Madison was referring to was copyright after publication. His view is consistent with the only prominent British cases, and certainly the only cases for which Madison is likely to have had any reports—*Millar* and *Donaldson. Millar* found a common law right after publication. *See generally,* 98 Eng. Rep. 201. *Donaldson* held that even if a claim for post-publication rights "would have lain, at common law, [it is] taken away by the statute of Anne." *Wheaton*, 33 U.S. at 679.[11] As the Statute of

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[10] The two are *Percival v. Phipps*, 2 Ves. & Beam. 19 (1813), and *Pope v. Curl*, 26 Eng. Rep. 608 (Ch. 1741); 2 Atk. 342. *See Wheaton*, 33 U.S. at 675–76.

[11] The New York Court of Appeals in *Capitol Records* explained that in *Donaldson*, "The judges determined that the common law

Anne did not reach the United States, Madison's opinion about the common law in the several states was plainly reasonable, if not obviously correct.[12] It is also consistent with the holding of the New York Court of Appeals, and therefore with the conclusion that there was no "public domain of the United States" in 1790 from which the Act of 1790 could have restored any work to copyright.

3. The Act of 1790 was designed to abolish this conflict in common law copyright among the states.

In the courts below, the government has cited the late Professor Crosskey for the proposition that most states were hostile to the notion of common law copyright. *See* 1 William Crosskey, *Politics and the Constitution in the History of the United States* 477 (1953), *quoted in* Brief for Appellees in No. 05-1259 (CA10). No doubt that is correct. But even if "most states" were "hostile," the relevant question is whether all states had abolished it.

Plainly, they had not. *Capitol Records*, for one, holds that New York had not. Two other states besides New York had likely not either. Connecticut and

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recognized a right of first publication [vote was 8-3] and that the common-law copyright protection extended beyond first publication into perpetuity. By a 6-5 margin, the judges . . . concluded that the Statute of Anne was intended to abrogate the common law with respect to the duration of copyright protection." 830 N.E.2d at 256 (citations omitted).

[12] Again, as the *Capitol Records* court reasoned, "In the midst of the Revolutionary War and transformation of the British colonies into independent states and commonwealths, it was generally presumed that colonial common law, derived from English law, should be applied as long as it was consistent with the acts of the colonial legislatures." 830 N.E.2d at 256.

Georgia both had identical common law savings clauses in their state law—the same clause relied upon by the New York Court of Appeals to conclude that New York common law recognized a perpetual copyright even after publication. *See* U.S. Copyright Office, Library of Congress, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright* Bulletin Nos. 3, 18 (rev. ed. 1973). In all three of these states, therefore, it is likely that state law recognized perpetual rights even after publication.

It was in part to eliminate this conflict, as Professor Crosskey explained, that the Framers established the federal power. As Crosskey wrote, the Constitution's aim was "to extinguish, by plain implication of 'the supreme Law of the Land,' the perpetual rights which authors had, or were supposed by some to have, under the Common Law." 1 William Crosskey, *Politics and the Constitution in the History of the United States* 486 (1953). Until that conflict was extinguished, there would be no uniform copyright law across the United States, and therefore, no possibility of a "public domain of the United States." Crosskey's argument thus confirms the point Petitioners in this case have made: that the Act of 1790 created the public domain. It did not restore work from a public domain, since no such public domain existed prior to that Act.

C. The First Congress' treatment of state common law copyrights by the Act of 1790 is consistent with the treatment of analogous rights by subsequent Congresses.

Since 1790, Congress has dealt at least twice with state created rights that were perpetual in at least some states. In both cases, Congress' treatment of

those perpetual rights was identical to its treatment in the Act of 1790.

In 1976, for example, Congress preempted state protection of "sound recordings." Prior to the 1976 Act, federal law did not protect sound recordings. Any copyright protection for those creative works thus came from state law. As this Court held in *Goldstein v. California*, 412 U.S. 546 (1973), state common law copyright protected sound recordings in at least some states. Where state law did protect sound recordings, that protection was ordinarily "perpetual."

The 1976 Act, however, preempted this regime of state protection. Under the 1976 Act, sound recordings fixed after February 15, 1972, received a federal copyright. Sound recordings fixed before February 15, 1972, were unaffected by the federal act until 2047 (now 2067 as amended by the Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 301(c)). Thus, the effect of the 1976 Act was to terminate the perpetual protection of sound recordings that existed in some states, and secure a federal right to creators of sound recordings that would operate in all states.

This is precisely the pattern of the Act of 1790. In 1976, as in 1790 with literary work, one could not have said that any sound recording was "in the public domain of the United States," since even if a particular state did not grant copyright protection for sound recordings, many states did. When Congress then established a federal right, it did not "restore" from the public domain of the United States the copyright to sound recordings, free under some states' laws while not free under others. It instead terminated the perpetual right that existed in some states, in order to give a uniform right throughout the United States. As the House Committee Report stated, state copyright own-

ers should not "in effect be accorded perpetual protection," H.R. Rep. No. 94-1476, § 301, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5749, even when "the scope of common law rights" might have been greater than the rights granted by Congress. *Id.* at 5747.

The same pattern held for copyrights in unpublished work. Here again, prior to the 1976 Act, unpublished work was only protected by state common law copyright. In the ordinary case, the term of that protection was perpetual. In the 1976 Act, Congress preempted that state protection. As the House Report stated, "the bill would place a time limit on the duration of exclusive rights in them [and make] unpublished undisseminated manuscripts available for publication after a reasonable period." *Id.* at 5749. Congress' purpose again was not to restore to copyright any work that might have passed, under the laws of any state, into its public domain. Rather, Congress' purpose was to terminate any perpetual copyright after a "reasonable period," *id.*, so that it would pass into the public domain uniformly under U.S. law.

In both cases, Congress approached the problem of perpetual state rights in the same way that it addressed that problem in 1790: by federalizing the protection, terminating the perpetual right, and securing a federal right for a uniform period to all. In none of these three cases could one accurately state that Congress had "restored the copyright" to work that was in "the public domain of the United States." No doubt, in each case, the effect of Congress' act might have been to secure protection in particular states where copyright protection had lapsed. But it did not restore protection in every state, and so, not in the United States as a whole, since in each case protection had not lapsed in all of the states.

D. Unlike the Act of 1790, the URAA restored copyright to work that was in the "public domain of the United States."

The URAA purports to "restore" the copyright to work that had clearly passed into the "public domain of the United States." Prior to the URAA, that work was free of "any restraint" under the laws in existence *throughout the jurisdiction* of the United States. After the URAA, the work was again subject to copyright's "restraint" throughout the jurisdiction of the United States.

In neither 1790 (with respect to state common law copyrights), nor 1976 (with respect to sound recordings, and unpublished works) can the same be said. In neither case was there work that was "free of 'any restraint' throughout the jurisdictions comprising the United States.'" In both cases, while particular works may have been free of restraint under laws in particular parts of the United States, none was free of restraint throughout all of the United States.

This fundamental difference demonstrates that the Act of 1790 is not precedent for the URAA. Instead, the URAA is unique in the history of American copyright law in its massive restoration of work from the public domain *of the United States.*

III. *ELDRED V. ASHCROFT* PROVIDES NO PRECEDENT FOR THE URAA.

Petitioners have rightly emphasized the fundamental distinction between the URAA and the Sonny Bono Copyright Term Extension Act (the "CTEA"). The CTEA continued a practice begun with the Act of 1831, extending the term of subsisting copyrights when it extended the term for new copyrights. By con-

trast, the URAA begins a radically different and new practice of restoring work from the public domain in the United States.

There is, however, a second sense in which the URAA is unique.

The CTEA was part of a general statute revising the term of copyright. It did not legislate with respect to any particular work. It instead applied its rule to all subsisting works, and all future work.

By contrast, the URAA is not a general statute. It instead picks out a select set of work in the public domain of the United States, and restores that work to select copyright holders.

The general practice upheld in *Eldred* does not justify this targeted restoration. More importantly, the precedent that would be established from upholding a targeted restoration would certainly render the public domain perpetually vulnerable.

As the government has argued this case, the only question this Court should ask when reviewing a statute that restores work to copyright from the public domain is whether there is an "important governmental interest" behind the restoration.

In this case, that interest is harmonization. But there is nothing in the government's reasoning that would limit the particular federal interest. On the government's account, Congress ought to be free to auction off the public domain as a way to help raise funds for the Treasury, just as the government auctions spectrum, or sells public lands.

The difference, however, between copyrights and spectrum or public lands is that the Constitution explicitly conditions Congress' power over copyrights,

and does not explicitly condition Congress' power over these other public resources.[13] The Progress Clause requires that copyright terms be "limited." The purpose of that plain language is to secure a public domain. This Court should read that clause in a manner that respects that purpose, and gives meaning to its limits on Congress' power.

Congress is free to set the term of copyright as long as it likes (so long as the term is limited); it is even free to extend the term of a subsisting copyright (again, so long as the extension is "limited"). But it should not, under the Progress Clause, have the power to restore a copyright to a work that has entered the public domain—at least if the Progress Clause is to be accorded any substantial meaning.

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[13] Though the Public Trust Doctrine historically did limit Congress' power to dispose of public resources, and some have argued that same limitation should constrain Congress' power over intellectual property. *E.g.*, Richard Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 Loy. L.A. L. Rev. 123, 156–57 (2002).

CONCLUSION

Our Constitution is unique in the manner in which it secures the power to grant monopolies over speech. *Amicus* urges this Court to honor this difference, by recognizing limits in the scope of the Progress Clause that would make sense of the plain intent of our Framers to cabin this power carefully.

For the foregoing reasons, the decision of the 10th Circuit Court of Appeals should be reversed.

Respectfully submitted,

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