

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	99-65 (JLG)
JANET RENO, in her official)	
capacity as Attorney General)	
of the United States,)	
)	
Defendant.)	

REPLY BRIEF ON BEHALF OF THE SHERWOOD ANDERSON LITERARY ESTATE TRUST, THE SHERWOOD ANDERSON FOUNDATION, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AMSONG INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., BROADCAST MUSIC, INC., MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, AND THE SONGWRITERS GUILD OF AMERICA AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

	<u>PAGE</u>
POINT I--THE COPYRIGHT TERM ESTABLISHED BY THE CTEA IS A "LIMITED TIME" WITHIN THE MEANING OF THE COPYRIGHT CLAUSE OF THE UNITED STATES CONSTITUTION (Answering Pl. Mem. Point I, pp. 23-35)	2
POINT II--PLAINTIFFS' ARGUMENT BASED ON THE FIRST AMENDMENT IS CONTRARY TO ESTABLISHED LAW (Answering Pl. Mem. Point II, pp. 35-58)	7
POINT III--PLAINTIFFS' ARGUMENT BASED ON THE PUBLIC TRUST DOCTRINE IS UNPRECEDENTED AND WITHOUT FOUNDATION (Answering Pl. Mem. Point III, pp. 58-69)	9
POINT IV--PLAINTIFFS' ATTACK ON THE FINDINGS MADE BY CONGRESS IN ENACTING THE CTEA FURNISHES NO BASIS FOR QUESTIONING ITS CONSTITUTIONALITY (Answering Pl. Mem. Point IV, pp. 69-81)	11
CONCLUSION	14

TABLE OF AUTHORITIESCases

* <u>Burrow-Giles Lithographic Co. v. Sarony</u> , 111 U.S. 53 (1884)	4
<u>Feist Publications, Inc. v. Rural Tel. Serv. Co.</u> , 499 U.S. 340 (1991)	5
* <u>Ferguson v. Skrupa</u> , 372 U.S. 726 (1963)	14
<u>Fred Fisher Music Co. v. M. Witmark & Sons</u> , 318 U.S. 643 (1943)	6
* <u>Harper & Row Publishers, Inc. v. Nation Enterprises</u> , 471 U.S. 539 (1985)	7-9
<u>Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.</u> , 452 U.S. 264 (1981)	11
<u>Kleppe v. New Mexico</u> , 426 U.S. 529 (1976)	11
* <u>Pennock & Sellers v. Dialogue</u> , 27 U.S. (2 Pet.) 1 (1829)	7
* <u>Schnapper v. Foley</u> , 667 F.2d 102 (D.C. Cir. 1981)	5, 13
<u>Turner Broadcasting Sys., Inc. v. FCC</u> , 520 U.S. 180 (1997)	8-9, 11-12
<u>Turner Broadcasting Sys., Inc. v. FCC</u> , 512 U.S. 622 (1994)	8-9, 11-12
<u>United Christian Scientists v. Christian Science Bd. of Directors</u> , 829 F.2d 1152 (D.C. Cir. 1987)	6-7
* <u>United States v. Carolene Prods. Co.</u> , 304 U.S. 144 (1938)	11, 13-14
* <u>United Video, Inc. v. FCC</u> , 890 F.2d 1173 (D.C. Cir. 1989)	7-9

* Cases chiefly relied upon are marked with asterisks.

	<u>PAGE</u>
<u>Wheaton v. Peters</u> , 33 U.S. (8 Pet.) 591 (1834)	2-3

Constitutional Provisions,
Statutes, and Rules

U.S. Const., art. I, § 8, cl. 8	2-7
U.S. Const., art. II, § 1, cl. 7	3
U.S. Const., art. III, § 1	3
17 U.S.C. § 106	10
17 U.S.C. § 301(a)	3
Copyright Act of 1790, 1 Stat. 124 (1790)	3, 4
Copyright Act of 1831, 4 Stat. 436 (1831)	3, 4
Copyright Act of 1909, 35 Stat. 1075 (1909)	3, 4
Copyright Act of 1976, 90 Stat. 2541 (1976)	3, 4

Other Authorities

S. Rep. No. 104-315 (1996)	12
Richard A. Epstein, <u>The Public Trust Doctrine</u> , 7 Cato J. 411 (1987)	10

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By an Order entered on July 14, 1999, the Court granted the motion of the above-listed amici (the "Amici") for leave to participate in this action as amici curiae in support of the defendant. Pursuant to this authorization, the Amici supplement their opening brief ("Amici Br.") with this reply to plaintiffs' 90-page memorandum ("Pl. Mem.").

Like plaintiffs' complaint, plaintiffs' memorandum is a manifesto for a revolution in the constitutional law of copyright. It ignores controlling case law and more than 200 years of copyright history. It relies instead on law

review articles, as though they were authoritative sources of law, and on unsupported arguments of plaintiffs' counsel.

At bottom, plaintiffs' quarrel is with the policy choices made by Congress in enacting the Copyright Term Extension Act ("CTEA"). Plaintiffs' memorandum argues at great length that Congress should have made a different set of choices. But it is simply not the role of this Court to second-guess the policy choices made by Congress. Under our constitutional system, those choices are for the elected members of Congress, not for the judiciary.

Plaintiffs' submission of affidavits attacking the factual basis for the CTEA is equally misguided. Under the well-recognized presumption of constitutionality, the courts will not retry the factual foundation for an Act of Congress. Rather, an Act must be sustained if it has a rational basis, which the CTEA unquestionably does.

POINT I

**THE COPYRIGHT TERM ESTABLISHED BY THE CTEA
IS A "LIMITED TIME" WITHIN THE MEANING OF THE
COPYRIGHT CLAUSE OF THE UNITED STATES CONSTITUTION
(Answering Pl. Mem. Point I, pp. 23-35)**

The plain meaning of the "limited times" provision of the Copyright Clause is that the term of copyright cannot be perpetual (see Amici Br. 23-24 & n.35). This limitation distinguished the statutory term of copyright under the Copyright Clause from the perpetual term of the common law copyright in unpublished works, with which the Framers were

familiar (see Amici Br. 6-7, 23-24). See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834). The common law copyright in unpublished works, with its perpetual term, continued to exist until it was abrogated by the Copyright Act of 1976, 90 Stat. 2572 (1976), 17 U.S.C. § 301(a).¹

Dissatisfied with the plain meaning of the "limited times" provision, plaintiffs proffer what they term a "better reading" of the provision, under which "a term is 'limited' if it is for a specified time that cannot be extended" (Pl. Mem. 32). Plaintiffs' novel reading of the "limited times" provision is made up out of whole cloth, and plaintiffs cite no legal authority of any kind that supports it (see id.). Plaintiffs' reading is refuted by the plain language of the Constitution, because when it was their intention to do so, the Framers could and did state that no increase or decrease was permitted.²

Plaintiffs' newly minted reading of the "limited times" provision, and their argument that the terms of existing copyrights cannot be extended, are likewise refuted

¹ Plaintiffs' argument that copyright protection was limited in scope until 1976 (Pl. Mem. 9-12) is misleading, among other reasons, because it ignores the continued importance of common law copyright until that date. This reply brief generally does not attempt to correct plaintiffs' mistaken statements of copyright law, because they are irrelevant to the constitutional issues presented.

² See U.S. Const., art. II, § 1, cl. 7 (President's compensation "shall neither be increased nor diminished during the Period for which he shall have been elected"); id. art. III, § 1 (Judges' compensation "shall not be diminished during their Continuance in Office").

by the history of the Copyright Acts of 1790, 1831, 1909, and 1976, all of which extended the terms of existing copyrights (see Amici Br. 9, 11, 13-14, 31-32).³ Under the holding of the Supreme Court in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1881), this history is "entitled to very great weight" and, indeed, is "almost conclusive" (see Amici Br. 28-29).⁴

Plaintiffs argue that the prior copyright term extensions enacted between 1962 and 1976 mean that the term established by the CTEA is not a "limited time" (Pl. Mem. 29-30). Again, plaintiffs cite no legal authority in support of this argument, but simply rely on their own unsupported assertions (see id.). This argument is also lacking in merit, because if the term established by the CTEA is a "limited time" -- which it clearly is (see Amici Br. 23-24) -- then it is a "limited time" regardless of whether it was preceded by other term extensions.⁵

³ Plaintiffs try to discount the importance of the 1790, 1831, and 1909 copyright acts by arguing that they required registration, deposit of copies, and the payment of fees (Pl. Mem. 84-86). But this is a distinction without a difference. If, as plaintiffs argue, the "limited times" provision of the Copyright Clause means that existing copyright terms cannot be extended, then this would be true regardless of the presence or absence of registration, deposit, and fee requirements.

⁴ Plaintiffs cite the Burrow-Giles case on an unrelated point (Pl. Mem. 7-8), but fail to acknowledge its holding that copyright history is entitled to "great weight" and is "almost conclusive."

⁵ Moreover, the copyright term extensions between 1962 and 1974 were enacted to prevent works from falling out of copyright pending Congress's comprehensive revision of the

Plaintiffs argue that the Copyright Clause provides that Congress may only exercise its copyright power to induce the creation of new copyrighted works (Pl. Mem. 24-25). As is their wont, plaintiffs cite absolutely no legal authority for this proposition (see id.).⁶ The legal authorities are directly to the contrary. The Court of Appeals in Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981), rejected the argument that Congress may only exercise its copyright power when necessary to promote the creation of new works (see Amici Br. 34-35). Congress's broad power under the Copyright Clause to "promote the Progress of Science and useful Arts" includes the power to promote the harmonization of United States and foreign copyright laws, to encourage investment in existing works, and to provide for authors' descendants in a time of lengthening life spans (see Amici Br. 36-38).

Plaintiffs argue that copyrights may not be extended if they have been assigned by the authors (Pl. Mem. 33-35). Once again, plaintiffs cite no legal authority for their argument, relying instead on a law review article and

copyright laws, which reached fruition in 1976 (see Amici Br. 12-13, 29-30 n.40). Plaintiffs do not dispute this.

⁶ Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), which plaintiffs discuss at length (Pl. Mem. 25-27), is not in point. Feist dealt with the originality required for a copyrighted work, and noted that "the requisite level of creativity is extremely low; even a slight amount will suffice." 499 U.S. at 345. Feist did not discuss the "limited times" provision of the Copyright Clause, and does not support any of plaintiffs' arguments.

on the ipse dixit of their counsel (see id.). Plaintiffs' argument is contrary to judicial decisions upholding the validity of copyright assignments (see Amici Br. 28), including Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 647-59 (1943), in which the Supreme Court held, after a careful review of Anglo-American copyright history, that the right to renew a copyright could be exercised by an assignee.

Contrary to plaintiffs' assertion (Pl. Mem. 28, 46, 77-78), the Court of Appeals did not state in United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152 (D.C. Cir. 1987), that there is no justification for extending a subsisting copyright term. That case involved a private act extending the copyright on a religious work beyond the usual copyright term. The Court of Appeals expressly found that the purposes of the private act were religious in nature, rather than "the sort of economic incentives normally associated with copyright legislation."⁷ 829 F.2d at 1164-65, 1168-69 n.84. The

⁷ It was in support of this finding that the Court of Appeals quoted (without endorsing) the statement of Senator Burdick that when the rationale of copyrights is to permit persons to obtain a reasonable profit from literary or artistic effort, "there is no justification for continuing copyright beyond its normal term, particularly by the use of a private bill." 829 F.2d at 1164 (quoted at Pl. Mem. 28). In this context, Senator Burdick clearly was discussing the extension of the term of a single copyright owned by a religious organization beyond the "normal term," not an extension of the "normal term" for all copyrights. Significantly, the Court of Appeals in United Christian Scientists described the 1976 copyright term extension

Court of Appeals therefore struck down the private act as an establishment of religion. 829 F.2d at 1159-71. If, as plaintiffs argue, the Court of Appeals believed that there was no justification for extending a subsisting copyright term, the Court of Appeals could have disposed of the case on that ground, and would have had no need to engage in an extended Establishment Clause analysis.

The Supreme Court long ago held that the term of copyright is "subject to the discretion of Congress." Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.) 1, 16-17 (1829) (Amici Br. 24-25). Plaintiffs fail to address this precedent and point to nothing that has undercut its authority. Under this settled principle, plaintiffs' complaint must be dismissed.

POINT II

PLAINTIFFS' ARGUMENT BASED ON THE FIRST AMENDMENT IS CONTRARY TO ESTABLISHED LAW (Answering Pl. Mem. Point II, pp. 35-58)

Plaintiffs argue at great length that the CTEA's extension of the copyright term violates the First Amendment (Pl. Mem. 35-58). This argument is wrong as a matter of established law (see Amici Br. 43-44). Because copyrights protect the author's expression of an idea but do not prevent others from using the idea itself, the Supreme Court

without any suggestion that it was unconstitutional as applied to existing copyrights. See 829 F.2d at 1159-60 n.28.

and the Court of Appeals have held that copyright protection does not infringe upon First Amendment rights. See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555-60 (1985); United Video, Inc. v. FCC, 890 F.2d 1173, 1191 (D.C. Cir. 1989).⁸

Plaintiffs admit (as they must under Harper & Row and United Video) that, because of the dichotomy between idea and expression, the First Amendment does not limit the substantive scope of copyright (Pl. Mem. 51-53). Plaintiffs argue, however, that the First Amendment nevertheless limits the duration of copyright (Pl. Mem. 53-55). Significantly, plaintiffs do not cite any legal authority for this distinction (see id.), and the distinction is untenable. If the dichotomy between idea and expression prevents copyrights from violating the First Amendment (as Harper & Row and United Video hold), then this is true no matter what copyright term Congress adopts, because the length of the copyright term has no effect on the idea/expression dichotomy. It follows that the First Amendment does not limit Congress's power to determine the appropriate duration of copyright, and no court has ever held that it does.

Plaintiffs repeatedly argue that the CTEA should

⁸ In support of their contention that the First Amendment restricts the scope of copyright law, plaintiffs quote a speech made at the Pennsylvania ratifying convention (Pl. Mem. 50). This speech cannot overrule the contrary holdings of the Supreme Court and the Court of Appeals in Harper & Row and United Video.

be judged by the First Amendment intermediate-scrutiny test applied in Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997), and Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622 (1994) (Pl. Mem. 37, 38-41, 44-46, 73-74, 81). This argument is without merit because it rests upon the incorrect assumption that copyright law is to be tested by First Amendment standards -- an assumption which is contrary to both Harper & Row and United Video. Plaintiffs cite no case that has subjected copyright legislation to the Turner Broadcasting test, and there is no such case.⁹

POINT III

PLAINTIFFS' ARGUMENT BASED ON THE PUBLIC TRUST DOCTRINE IS UNPRECEDENTED AND WITHOUT FOUNDATION (Answering Pl. Mem. Point III, pp. 58-69)

Plaintiffs admit that the public trust doctrine "historically has been applied almost exclusively in the context of navigable waters" (Pl. Mem. 63; see Amici Br.

⁹ Even if the First Amendment intermediate-scrutiny test of Turner Broadcasting were applicable to the CTEA -- which it is not -- the CTEA satisfies that test, because it protects important governmental interests unrelated to the suppression of free speech which could not be protected without extending the copyright term for both existing and future works (Amici Br. 44 n.45). Plaintiffs challenge this conclusion (Pl. Mem. 45-49), but their challenge rests on the incorrect argument that copyright legislation is valid only insofar as it induces the creation of new works (see p. 5 supra) -- an argument which ignores the broad scope of Congress's power under the Copyright Clause to "promote the Progress of Science and useful Arts" -- and on an impermissible appeal to this Court to overturn the factual findings made by Congress in enacting the CTEA (see pp. 11-14 infra).

41). They do not dispute that the public trust doctrine has never been applied to property other than real property (see Amici Br. 41). And they admit that it is unclear whether the public trust doctrine even applies to the federal government (Pl. Mem. 65-66; see Amici Br. 41).

Plaintiffs nevertheless argue that this Court should hold that the public trust doctrine is a constitutional principle binding upon the federal government through the medium of the Due Process Clause of the Fifth Amendment, and that the doctrine applies to intellectual property as well as to real property (Pl. Mem. 64-65, 66-67). Plaintiffs cite no legal authority for these sweeping extensions of the public trust doctrine, because there is no such authority. Instead, plaintiffs rely on a frankly theoretical law review article based upon an idealized Lockean concept of the "original position."¹⁰ These arguments might be appropriate for a law review article, but they fail to provide any legal basis for a federal court to hold an Act of Congress unconstitutional.

As if this were not enough, plaintiffs' argument suffers from further fatal flaws. Plaintiffs' argument assumes that members of the public have a vested remainder property interest in copyrights that have not yet expired

¹⁰ See Pl. Mem. 64, 66 (citing Richard A. Epstein, The Public Trust Doctrine, 7 Cato J. 411 (1987)).

(Pl. Mem. 58-59), but no court has ever so held.¹¹ And plaintiffs' argument assumes that the CTEA will produce no public benefit (Pl. Mem. 67-69), which is squarely contrary to the express findings of Congress in enacting the CTEA (see Amici Br. 42 and pp. 11-14 *infra*).

POINT IV

**PLAINTIFFS' ATTACK ON THE FINDINGS MADE BY
CONGRESS IN ENACTING THE CTEA FURNISHES NO
BASIS FOR QUESTIONING ITS CONSTITUTIONALITY
(Answering Pl. Mem. Point IV, pp. 69-81)**

Plaintiffs seek to overturn the findings made by Congress in enacting the CTEA (Pl. Mem. 69-81). They go so far as to submit to the Court two affidavits, by Professor Dennis S. Karjala (Pl. Mem. Ex. A) and Dean Hal R. Varian (Pl. Mem. Ex. B), which quarrel with some of the findings made by Congress.

In making these arguments and submitting these affidavits, plaintiffs have mistaken the proper role of a federal court in passing upon the constitutionality of an Act of Congress. As the Supreme Court has emphasized, it is not the Court's role to make its own findings of fact on the issues examined by Congress in enacting legislation. E.g.,

¹¹ The cases cited by plaintiffs (Pl. Mem. 59-60) are not in point, because they concerned copyrights that had already expired, not copyrights that were still in force. Even upon the expiration of a copyright, all that happens is that the statutory rights of the copyright holder under Section 106 of the Copyright Act terminate; no property right in plaintiffs or any other persons is created thereby.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 280 n.20 (1981); Kleppe v. New Mexico, 426 U.S. 529, 541 n.10 (1976). The only issue for the Court is whether Congress had a rational basis for the findings it made. E.g., Hodel, supra, 452 U.S. at 280 n.20; United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).¹²

Plaintiffs assail Congress's finding that the CTEA is necessary to harmonize United States and European Union copyright laws (Pl. Mem. 70-75). This finding was amply supported by the record before Congress, including the expert opinion of the United States Copyright Office (see Amici Br. 16-19). In attacking this finding, plaintiffs avowedly rely upon the same arguments that Congress has already considered and rejected (see Pl. Mem. 72-73 & n.25).¹³ In particular, plaintiffs argue that the CTEA

¹² Even if the First Amendment intermediate-scrutiny test were applicable -- which it is not (see pp. 7-9 supra) -- it would not support plaintiffs' call for judicial fact-finding. The Supreme Court has held that, in applying the intermediate-scrutiny test, "the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. In making that determination, we are not to 'reweigh the evidence de novo, or to replace Congress' factual predictions with our own.'" Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 211 (1997) (citations omitted), citing and quoting Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (1994).

¹³ Indeed, Professor Karjala, one of plaintiffs' affiants, submitted statements to Congress in opposition to the CTEA (Pl. Mem. 72-73 & n.25). Plaintiffs repeatedly cite as authorities academic opponents of copyright term extension such as Professors Jaszi, Karjala, Patry, and Reichman (Pl. Mem. 34, 48-49 n.16, 70, 72-73 & n.25, 76-77, 79 n.26), despite the fact that their views were considered

exacerbates differences between United States and European Union copyright laws relating to certain types of works such as works for hire (Pl. Mem. 71-73), an argument which was carefully analyzed and rejected by Congress. See S. Rep. No. 104-315, at 15-17 (1996).

Congress found, on the basis of evidence in the record before it, that the CTEA would encourage the creation of new works by both individual and corporate copyright owners (Amici Br. 21-22). Plaintiffs attack this finding as "absurd" based upon their own notions of "common sense and economics" (Pl. Mem. 75-76). Clearly, however, Congress had a rational basis for the contrary finding that it made.

Congress found that the CTEA would encourage additional investment in the preservation, enhancement, and distribution of existing copyrighted works (Amici Br. 19-20). Plaintiffs argue that not all copyrighted works are candidates for such investment (Pl. Mem. 78-79). But, as plaintiffs effectively admit elsewhere (see Pl. Mem. 86-87), the Court of Appeals made clear in Schnapper v. Foley, 667 F.2d 102, 111-12 (D.C. Cir. 1981), that the constitutional test is not whether each individual application of a copyright statute furthers the congressional purpose, but whether the statute as a whole furthers that purpose.

Plaintiffs argue that Congress gave insufficient weight to what plaintiffs view as the desirability of having

and rejected by Congress (see Amici Br. 25 n.36).

copyrighted works fall into the public domain at an earlier date (see Pl. Mem. 18-20, 46-47). But there was contrary evidence before Congress, including testimony by the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks (Amici Br. 39). Under our constitutional system, this policy issue is one to be resolved by the elected members of Congress, not by the courts.

In short, the evidence before Congress was more than sufficient to satisfy the rational basis test of United States v. Carolene Prods. Co., supra, 304 U.S. at 152.¹⁴ It is not this Court's function to sit as a "superlegislature" to weigh the wisdom or rationality of the CTEA. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). Although plaintiffs assert that they are not asking the Court to reweigh the evidence that was before Congress (Pl. Mem. 81), they say in the next breath that the Court should find that it is "not plausible" that Congress acted for the reasons it stated (id.). Such a recalibration of the balance struck by Congress is not the proper function of this Court. For this reason as well, plaintiffs' complaint must be dismissed.

¹⁴ Indeed, plaintiffs expressly admit this, although they contend (wrongly) that the evidence was insufficient to satisfy the First Amendment intermediate-scrutiny test (Pl. Mem. 81), which does not apply in any event (see pp. 7-9 supra).

CONCLUSION

For the reasons set forth above, defendant's motion for judgment on the pleadings should be granted, plaintiffs' motion for judgment on the pleadings or, in the alternative, for summary judgment should be denied, and plaintiffs' Second Amended Complaint should be dismissed.

Dated: August 23, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 1999, I caused a copy of the foregoing Reply Brief on Behalf of The Sherwood Anderson Foundation, The Sherwood Anderson Trust, American Society of Composers, Authors and Publishers, AmSong, Inc., Association of American Publishers, Inc., Broadcast Music, Inc., Motion Picture Association of America, Inc., National Music Publishers' Association, Recording Industry Association of America, and The Songwriters Guild of America as Amici Curiae in Support of Defendant's Motion for Judgment on the Pleadings and in Opposition to Plaintiffs' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment to be served upon the attorneys for the parties as follows:

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