

No. 10-545

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**In the Morris Tyler Moot Court of Appeals at Yale**

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LAWRENCE GOLAN; ESTATE OF RICHARD KAPP; S.A. PUBLISHING CO.,  
INC., DOING BUSINESS AS ESS.A.Y. RECORDINGS; SYMPHONY OF THE  
CANYONS; RON HALL, DOING BUSINESS AS FESTIVAL FILMS; JOHN  
MCDONOUGH, DOING BUSINESS AS TIMELESS VIDEO  
ALTERNATIVES INTERNATIONAL,

*Petitioners,*

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL  
OF THE UNITED STATES; MARIA A. PALLANTE, IN HER OFFICIAL CAPACITY  
AS ACTING REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE  
OF THE UNITED STATES,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit**

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**Brief for the Respondents**

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## QUESTIONS PRESENTED

In 1994, Congress fulfilled the United States's obligations under Article 18 of the Berne Convention for the Protection of Literary and Artistic Works, by adopting Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976-81 (1994) (codified as amended at 17 U.S.C. § 104A (2006)). That provision restored U.S. copyright protection to foreign works that had entered the public domain in the United States, though not in their source countries, most often because they had not complied with U.S. copyright formalities.

This case presents the following two questions:

- 1) Did Congress act within its power “[t]o promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, when it restored limited-term copyrights to comply with the United States's obligations under the Berne Convention?
- 2) Is Section 514 consistent with the First Amendment to the U.S. Constitution?

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## **OPINIONS BELOW**

The decision of the U.S. District Court for the District of Colorado, granting in part and denying in part the government's motion to dismiss, is reported at 310 F. Supp. 2d 1215 (D. Colo. 2004). The district court's decision granting the government's motion for summary judgment and denying the plaintiffs' motion for partial summary judgment is not reported but is available at 2005 WL 914754 (D. Colo. Apr. 20, 2005). The decision of the U.S. Court of Appeals for the Tenth Circuit, affirming the grant of summary judgment on the Progress Clause issue but remanding for consideration of the First Amendment issue, is reported at 501 F.3d 1179 (10th Cir. 2007). The district court's decision on remand, granting the plaintiffs' motion and denying the government's motion for summary judgment, is reported at 611 F. Supp. 2d 1165 (D. Colo. 2009). The Tenth Circuit's decision, reversing and remanding with instructions to grant summary judgment for the government, is reported at 609 F.3d 1076 (10th Cir. 2010).

## **STATEMENT OF JURISDICTION**

The court of appeals entered its decision on June 21, 2010. On August 24, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 20, 2010. Petitioners timely filed a petition for a writ of certiorari on that date, and this Court granted the writ on March 7, 2011. This Court's jurisdiction arises under 28 U.S.C. § 1254(1) (2006).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Progress Clause of the U.S. Constitution provides that "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. Const. art. I, § 8, cl. 8.

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

Title 17, Section 104A of the United States Code is reproduced in the appendix.

### **STATEMENT OF FACTS**

This case involves Congress’s effort to protect the works of U.S. authors by complying with the United States’s obligations under international copyright agreements.

#### **A. Background on the Berne Convention**

Since 1886, the Berne Convention for the Protection of Literary and Artistic Works has been the core of the international copyright system. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter “Berne Convention”]; *see* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.01[B][1] (2010). Parties to the Convention must protect the copyrights of works from other member countries to the same extent as they protect their own authors’ works. *Id.* § 17.01[B][1][a]. By joining in the Convention, nations can secure protection for their authors’ works beyond their borders.

For decades, however, the United States resisted entry into the Berne Convention. For the first five years of the Convention’s existence, the United States was “a copyright piracy haven,” providing no protection at all to foreign works. *Id.* § 17.01[C][1][a]. Because the early nation imported more works than it exported, Congress sought “to promote the development of infant copyright industries within the United States” through what amounted to protectionism. David G. Post, *His Napster’s Voice*, 20 Temp. Envtl. L. & Tech. J. 35, 48 (2001). Eventually, domestic authors pushed to change this policy, both because their works “were hard-pressed to compete

with inexpensive editions of foreign works” and because “other nations were . . . reluctant to give copyright protection to American authors when the United States was denying copyright protection to their authors.” *Id.* at 49. In response to this advocacy, Congress adopted the International Copyright Act of 1891, 26 Stat. 1106, which allowed “foreigners whose nations provided reciprocal protection to American nationals” to “obtain United States copyrights for their works,” if “they complied with United States notice, registration and deposit requirements” and manufactured their works in the United States. 4 *Nimmer on Copyright* § 17.01[C][1][a].

Even then, however, the United States refused to enter the Berne Convention for nearly a century. The reason for its reluctance was that Berne repudiated copyright formalities, which were central to U.S. law. *Id.* § 17.01[B][1]. The United States did join a secondary alternative to Berne, the Universal Copyright Convention (UCC), created in the 1950s. *Id.* But U.S. authors who wanted to secure their copyrights beyond the limited scope of bilateral treaties or the UCC began to seek “back door” Berne protection by “publish[ing] their works simultaneously in the United States and in Canada or another Berne country.” *Id.* These half-measures proved inadequate. By the 1980s, not only were U.S. authors losing “billions of dollars” to piracy abroad, but the refusal to join the Berne Convention made the United States look hypocritical in its “efforts to bring copyright piracy havens into the international fold.” *Id.*

In 1988, the United States finally ratified the Berne Convention. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.<sup>1</sup>). Since that time, the United States’s participation in the Berne system has yielded numerous benefits to domestic authors. It has not only resulted in “better protection abroad for U.S. works, providing stronger incentives to create and disseminate those works,” but also

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<sup>1</sup> All references to the United States Code are to the 2006 edition.

enabled “the United States to act as a leader in shaping the balance of the international copyright system to further those policies [it] believe[s] to be advisable.” Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 Loy. L.A. L. Rev. 323, 327 (2002).

### **B. The Adoption of Section 514**

The 1988 Act did not fully implement the Berne Convention. Article 18 provides that the Convention covers “works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” Berne Convention art. 18. Parties to the Convention must provide copyrights to such works unless they have entered “the public domain of the country where protection is claimed” because a previously-granted copyright has expired. *Id.* In ratifying these provisions, the United States assumed an obligation to restore limited-term copyrights on foreign works that were protected in their countries of origin but that had entered the U.S. public domain for reasons other than the ordinary expiration of their copyright term. For more than five years, the United States did not comply with this obligation.

In 1994, however, the United States acceded to the Uruguay Round General Agreement on Tariffs and Trade, which included the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, 33 I.L.M. 1197. The TRIPS Agreement required compliance with Article 18 of the Berne Convention, *id.* art. 70, and made that obligation enforceable before the World Trade Organization. To fulfill the United States’s obligations under the Uruguay Round, including the TRIPS Agreement, Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

At issue here is Section 514 of the Act, which implements Article 18. 108 Stat. at 4976-81 (codified as amended at 17 U.S.C. § 104A). Section 514 restores limited-term copyrights to

foreign works, 17 U.S.C. § 104A(h)(6)(D), that are “not in the public domain in [their] source country through expiration of term of protection,” *id.* § 104A(h)(6)(B), but are “in the public domain in the United States” for any of three reasons, *id.* § 104A(h)(6)(C). Among those reasons is that the foreign authors failed to comply “with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements.” *Id.* § 104A(h)(6)(C)(i).

Section 514 grants special protections to people, like petitioners, who relied on the use of restored works while those works were in the public domain. It defines reliance to include any use of a work—such as copying, distribution, public display or performance, and the production of derivative works—that would violate 17 U.S.C. § 106 if the work were under copyright. *Id.* § 104A(h)(4). Reliance parties can be held liable for infringing restored copyrights only with actual or constructive notice of the copyright holder’s intent to enforce the copyright. *See id.* § 104A(d)(2)(A)(i) (actual notice); *id.* § 104A(d)(2)(B)(i) (constructive notice by publication in the Federal Register). Even then, reliance parties incur no liability for infringing acts, other than the production of new copies, during a one-year grace period. *Id.* §§ 104A(d)(2)(A)(ii), 104A(d)(2)(B)(ii). Finally, any reliance party who produced a derivative work on the basis of a restored work, while the restored work was in the public domain, “may continue to exploit that derivative work for the duration of the restored copyright” by “pay[ing] to the owner of the restored copyright reasonable compensation.” *Id.* § 104A(d)(3)(A); *see also id.* § 104A(d)(3)(B) (providing that a court may determine reasonable compensation absent agreement by the parties).

### **C. The Plaintiffs**

The plaintiffs are artists and business owners who reproduced, distributed, or publicly performed public-domain works to which Section 514 restored copyright protection. Plaintiff Lawrence Golan directs several musical performance groups, including the Lamont Symphony

Orchestra in Denver, Colorado and the Portland Ballet Company in Portland, Maine. Complaint ¶ 6. Plaintiff Richard Kapp, who died in 2006, founded and directed the Philharmonia Virtuosi orchestra in New York. *Id.* ¶ 7. Kapp also founded Plaintiff S.A. Publishing Company, Inc., doing business as ESS.A.Y. Recordings, a New York-based record label.<sup>2</sup> *Id.* ¶ 8. Plaintiff Symphony of the Canyons is an orchestra based in Kanab, Utah. *Id.* ¶ 9. Plaintiff Ron Hall, doing business as Festival Films, sells recordings of public-domain films and television shows from his base in Shorewood, Minnesota. *Id.* ¶ 10. Plaintiff John McDonough, doing business as Timeless Video Alternatives International, also sells public-domain footage. *Id.* ¶ 11.

Golan and the Symphony of the Canyons complain that they can no longer afford to perform orchestral works to which Section 514 restored copyright protection. *Id.* ¶¶ 57-60, 66-70, 76. S.A. Publishing, which produced a recording of at least one restored work when that work was in the public domain, complains that it must now pay royalties whenever it sells the recording. *Id.* ¶ 71. It also complains that it can no longer earn a profit by recording restored works. *Id.* ¶ 72. Finally, Hall and McDonough complain that they can no longer sell copies of foreign films to which Section 514 restored copyright protection. *Id.* ¶¶ 82-83, 88.

#### **D. Proceedings Below**

On September 19, 2001, the plaintiffs filed this action in the U.S. District Court for the District of Colorado. They sought both an injunction against the enforcement of Section 514 and the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified in scattered sections of 17 U.S.C.), and a declaratory judgment that these measures violated the U.S. Constitution. The district court stayed the action until this Court decided *Eldred*

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<sup>2</sup> Kapp's estate has standing to maintain this action. ESS.A.Y. Recordings, which Kapp founded, has produced at least one recording of a restored work, with the result that ESS.A.Y. must now pay royalties for each sale of the recording. Complaint ¶ 71. If this Court were to enjoin the restoration of copyright to the recorded work, Kapp's estate would presumably benefit from the increased profitability of ESS.A.Y.'s sales of the recording.

*v. Ashcroft*, 537 U.S. 186 (2003). The plaintiffs then amended the complaint, and the government moved to dismiss under Fed. R. Civ. P. 12(b)(6). On March 15, 2004, the district court dismissed the Copyright Term Extension Act claims, finding that *Eldred* precluded them, but allowed the Section 514 claims to proceed. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004).

The government then moved for summary judgment. After engaging in discovery and filing a second amended complaint, the plaintiffs moved for partial summary judgment on the question whether Congress acted beyond its constitutional power in enacting Section 514. On April 20, 2005, the district court granted the government's motion and denied the plaintiffs'. *Golan v. Gonzales (Golan I)*, No. 01-CV-1854, 2005 WL 914754 (D. Colo. Apr. 20, 2005).

The plaintiffs filed an appeal in the Tenth Circuit. On September 4, 2007, that court affirmed the entry of summary judgment as to the claim that Section 514 exceeded Congress's power under the Progress Clause. *Golan v. Gonzales (Golan II)*, 501 F.3d 1179 (10th Cir. 2007). Looking to the D.C. Circuit's decision in *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005), which involved a similar challenge, the Tenth Circuit unanimously rejected the argument that "the decision to comply with the Berne Convention, which secures copyright protections for American works abroad, [was] so irrational or so unrelated to the aims of the Copyright Clause that it exceed[ed] the reach of congressional power." 501 F.3d at 1187. The Tenth Circuit remanded the First Amendment claims, concluding that Section 514 had "altered the traditional contours of copyright protection." *Id.* at 1192; *see Eldred*, 537 U.S. at 221.

On remand, the plaintiffs and the government filed cross-motions for summary judgment on the question whether Section 514 violated the First Amendment. On April 3, 2009, the district court granted the plaintiffs' motion and denied the government's. *Golan v. Holder (Golan III)*, 611 F. Supp. 2d 1165 (D. Colo. 2009).

The government filed an appeal in the Tenth Circuit. On June 21, 2010, that court unanimously reversed and remanded with instructions to grant summary judgment for the government. *Golan v. Holder* (*Golan IV*), 609 F.3d 1076 (10th Cir. 2010). It held “that because Section 514 advances a substantial government interest, and it does not burden substantially more speech than necessary to advance that interest, it is consistent with the First Amendment.” *Id.* at 1094. The court also rejected the plaintiffs’ facial challenge to the constitutionality of Section 514, on the basis of its First Amendment holding and its prior decision. *Id.* at 1094-95.

### **SUMMARY OF ARGUMENT**

In enacting Section 514, Congress fulfilled the United States’s international obligations in a manner that promoted domestic authorship and respected the freedom of expression. Section 514 is well within the scope of the Progress Clause and consistent with the First Amendment.

The constitutional text, the long history of congressional practice, and this Court’s jurisprudence all support Congress’s power to enact Section 514. The Progress Clause grants Congress broad authority to design a copyright system that promotes domestic authorship. “[I]t is generally for Congress, not the courts, to decide how best to pursue” that purpose. *Eldred*, 537 U.S. at 212. In their effort to supplant Congress’s judgment, petitioners contravene not only this Court’s holding that Congress may grant retroactive protection for intellectual property, *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), but also Congress’s long history of doing just that. Taken together, these precedents overwhelmingly support the validity of Section 514.

In enacting Section 514, Congress acted rationally “[t]o promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, by providing incentives for domestic authorship. Not only did it signal its willingness to protect copyrights against inadvertent loss, increasing the expected reward for authorship, but it protected the country’s creative industries against the

threat of overseas piracy. This Court may not “second-guess” Congress’s “determinations and policy judgments” as to the exercise of the Progress Clause power. *Eldred*, 537 U.S. at 208.

In challenging Section 514 on First Amendment grounds, petitioners fail to grasp that copyright doctrine *incorporates* the First Amendment. Freedom of expression is protected by the idea/expression dichotomy and the fair use doctrine. Because Section 514 preserves these “built-in First Amendment accommodations,” *id.* at 219, it is consistent with the First Amendment. Petitioners’ attempts to resuscitate their First Amendment claim by importing issues from the Progress Clause context, or by asserting reliance interests, lack constitutional support.

Nevertheless, if this Court were to apply intermediate scrutiny, Section 514 easily meets that standard. By restoring foreign copyrights, Congress was setting a model for other countries to restore the copyrights of U.S. works, eliminating billions of dollars in losses due to piracy. Anything short of Section 514 would not have ensured the necessary protection for U.S. works.

## **ARGUMENT**

Section 514 reflects Congress’s considered judgment that U.S. authors benefit from their country’s participation in international copyright agreements. By acting to comply with the Berne Convention, Congress fulfilled the Founders’ vision of “promot[ing] the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, while maintaining copyright’s traditional protections for free expression. The Tenth Circuit and the D.C. Circuit have agreed that Section 514 respects constitutional limits. *Golan IV*, 609 F.3d 1076; *Golan II*, 501 F.3d 1179; *Luck’s Music Library*, 407 F.3d 1262. This Court should affirm.

### **I. SECTION 514 IS CONSISTENT WITH THE PROGRESS CLAUSE.**

The Constitution’s Progress Clause empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. This Court has

consistently explained “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred*, 537 U.S. at 212 (citing *Stewart v. Abend*, 495 U.S. 207, 230 (1990); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966)). Congress acted within its Progress Clause power when it adopted Section 514.

### **A. Congress Has the Authority to Restore Copyrights.**

The constitutional text, the lengthy history of congressional practice, and this Court’s jurisprudence all weigh in favor of Section 514’s validity. When Congress restored copyrights to a limited set of public-domain works, as it has done on other occasions dating back to 1790, it acted in a manner consistent with this Court’s commands and with its constitutional mandate “[t]o promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8.

#### *1. Copyright Restoration is Consistent with the Text of the Progress Clause.*

The Progress Clause “is both a grant of power and a limitation,” *Graham*, 383 U.S. at 5, but its limits are few. So long as Congress rewards only original authors, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47 (1991), and only for “limited Times,” U.S. Const. art. I, § 8, cl. 8, it may “implement the stated purpose” of the Clause “by selecting the policy which in its judgment best effectuates the constitutional aim.” *Graham*, 383 U.S. at 6. The text thus gives Congress broad authority to choose among possible ways to promote domestic authorship and “the general benefits derived by the public from the labors of authors,” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). When Congress exercises this authority, its purpose is to design a *structure* of incentives—“a ‘system’ that ‘promote[s] the Progress of Science’”—rather than to induce the creation of any particular work. *Eldred*, 537 U.S. at 212 (emphasis added) (alteration in original) (quoting *Graham*, 383 U.S. at 6); *cf.* Transcript of Oral Argument at 6, *Eldred*, 537 U.S. 186 (No. 01-618) (question by Justice Souter, distinguishing a “specific

causation theory” from a “systemic theory of promotion”). Section 514 represents one way in which Congress can systematically promote authorship: by fulfilling U.S. obligations under international copyright treaties. *See infra* Section I.B.2. As long as the system that Congress designs bears a rational relationship to its “constitutional aim,” *Graham*, 383 U.S. at 6, then Congress is acting within the textual bounds of the Progress Clause.

The prefatory section of the Progress Clause—“To promote the Progress of Science and useful Arts”—articulates this “constitutional aim,” *id.* It reflects the Framers’ “economic philosophy . . . that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). As the field’s foremost treatise argues, “the phrase ‘To promote the Progress of Science and useful Arts . . .’ must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.” 1 *Nimmer on Copyright* § 1.03[A]; *cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (“[A] prefatory clause does not limit or expand the scope of the operative clause.”). Multiple circuits have agreed. *Hutchinson Tel. Co. v. Frontier Directory Co. of Minnesota, Inc.*, 770 F.2d 128, 130 (8th Cir. 1985), *overruled on other grounds by Feist*, 499 U.S. 340; *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981). Even the *Eldred* petitioners “acknowledge[d] ‘that the preamble of the Copyright Clause is not a substantive limit on Congress’ legislative power.’” *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (cited in *Eldred*, 537 U.S. at 211). The Framers gave “Congress, not the courts,” a broad choice of means to promote authorship. *Eldred*, 537 U.S. at 212. The restoration of limited-term copyrights is one of those permissible means.

Petitioners could pose two challenges to this reading of the constitutional text, neither of which is compelling. First, they could argue that works that have fallen into the public domain do

not meet the “constitutional requirement” of “[o]riginality,” which inheres in the textual meaning of “authors” and “writings.” *Feist*, 499 U.S. at 346 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *The Trade-Mark Cases*, 100 U.S. 82 (1879)). Second, they could argue that the restoration of protected status to public-domain works violates the requirement that copyrights be granted for “limited Times,” U.S. Const. art. I, § 8, cl. 8.

The first objection fails because Section 514 restores copyrights only to original works. It gives foreign works no more protection than they “would have . . . been granted” under U.S. law had they complied with formalities. 17 U.S.C. § 104A(a)(1)(B). Only original works qualify for U.S. copyrights in the first place. *Id.* § 102(a).

Because the originality of a work has to do with the circumstances of its creation, *Eldred* rejected the idea that “once published, a work is no longer original.” 537 U.S. at 211. Unlike patents, which are available only for *novel* inventions, 35 U.S.C. § 102, “[o]riginality” in copyright law “does not signify novelty.” *Feist*, 499 U.S. at 345. It “means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.” *Id.* Whatever their current copyright status, works are *always* original as to the author who created them.<sup>3</sup> The originality requirement therefore does not bar the restoration of copyrights to the original authors of works that have entered the public domain.

Nor does the requirement that copyrights be granted for “limited Times,” U.S. Const. art. I, § 8, cl. 8. Petitioners argued below that “Congress *could* adopt a practice of copyrighting works as they fall into public domain,” effectively creating perpetual copyrights. *Golan II*, 501 F.3d at 1186 (emphasis added). But as in *Eldred*, that argument amounts to conjecture: “a regime

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<sup>3</sup> This Court said in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), that when an author appropriates “materials in the public domain” as elements of his or her work, those elements are “not original” to the subsequent work. *Id.* at 548. That is because the subsequent author did not create the materials, not because the materials happen to have entered the public domain by the time the subsequent author used them.

of perpetual copyrights clearly is not the situation before [the Court].” 537 U.S. at 209 (internal quotation marks omitted). This Court does not render advisory opinions. *See, e.g., United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947), *overruled on other grounds by Adler v. Board of Education*, 342 U.S. 485 (1952).

In fact, petitioners’ “limited Times” argument is weaker here than in *Eldred*. Whereas the statute in *Eldred* lengthened copyright terms, the copyrights restored by Section 514 last only “for the remainder of the term of copyright that the work would have” received had it “never entered the public domain in the United States.” 17 U.S.C. § 104A(a)(1)(B). Rather than extending copyright terms, Section 514 restores only the limited term of protection that foreign works would have enjoyed had they complied with obsolete formalities.

## 2. *Congress Has Repeatedly Restored Copyrights.*

“To comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’” *Eldred*, 537 U.S. at 200 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)). Congress’s long history of restoring copyrights to public-domain works—beginning with the Copyright Act of 1790 and continuing with multiple enactments in the nineteenth and twentieth centuries—is strong evidence that Section 514 falls within its constitutional power.

### a. The Copyright Act of 1790 Granted Copyrights to Public-Domain Works.

Just three years after the ratification of the Constitution, the First Congress adopted the Copyright Act of 1790, 1 Stat. 124, granting copyright protection to maps, charts, and books “already printed within the[] United States.” *Id.* Because these works were “already printed,” they would have been in the public domain—and thus the Act would have removed them from the public domain—unless they were already protected by statutory or common-law copyright in each of the thirteen states.

The statutory question is easy to answer. Although ten of the thirteen states had established copyright regimes, Delaware, Maryland, and Pennsylvania had not. *See Golan I*, 2005 WL 914754, at \*6; *see also Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 114 (D.D.C. 2004) (citing Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* 123-24 (1967)). The question, then, is whether Delaware, Maryland, and Pennsylvania all protected copyrights as a matter of common law.

In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), this Court answered that question in the negative. The question in *Wheaton* was whether Pennsylvania’s common law granted copyright protection after the general publication of a work.<sup>4</sup> This question had vexed judges in eighteenth-century England. No one contested “[t]hat an author, at common law, has a property in his manuscript, and may obtain redress” for theft or unauthorized publication. *Id.* at 657. The question was whether copyright persisted once the author published the manuscript. *Id.* In *Donaldson v. Beckett*, 98 Eng. Rep. 257 (H.L. 1774), a divided House of Lords held that common-law copyright did extend beyond publication. *See Wheaton*, 33 U.S. at 655. But the *Wheaton* Court recognized that even the existence of post-publication copyright under English common law need not imply that “the same right exist[ed], and to the same extent, in this country,” *id.* at 658. After all, *Donaldson* and its predecessor, *Millar v. Taylor*, 98 Eng. Rep. 201 (H.L. 1769), had not been decided at the time of Pennsylvania’s settlement. 33 U.S. at 659-60.

In holding that Pennsylvania’s common law did not protect copyrights after publication, *Wheaton* reasoned in three ways from the fact that common law granted no protection to

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<sup>4</sup> “The common law recognizes three ways of exposing a work to the public: exhibition or performance, limited publication, and general publication. Of these, only general publication results in loss of the common law copyright by the creator. . . . A general publication occurs when a work is made available to members of the public at large without regard to who they are or what they propose to do with it.” *Burke v. National Broadcasting Co., Inc.*, 598 F.2d 688, 691 (1st Cir. 1979). “A ‘limited publication,’ by contrast, occurs when tangible copies of the work are distributed, but to a limited class of persons and for a limited purpose.” *Id.* at 692.

*inventions* after their first sale. *Id.* at 658, 661. First, the Court approached the question as one of fairness. As the Court observed, an inventor’s “mind has been as intensely engaged, as long; and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.” *Id.* at 657. The Court therefore “doubted” that the common law, “founded on principles of justice” and “sound reason,” would have granted post-publication copyrights to authors without granting post-sale patents to inventors. *Id.* at 658.

Second, the Court reasoned from textual analysis. The Progress Clause empowers Congress to “secur[e] . . . exclusive Right[s]” for both “Authors and Inventors.” U.S. Const. art. I, § 8, cl. 8; *see Wheaton*, 33 U.S. at 661. Since the meaning of the word “secure” is presumably consistent as to both authors and inventors, the Court explained, it “could not mean the protection of an acknowledged legal right,” because inventors lacked such rights at common law. *Id.* And if the Constitution used the word “secure” to mean the conferral of “a *future* right,” the Court wrote, then “secure” must have had the same meaning in the title of the 1790 Act: “[A]n act for the encouragement of learning, by *securing* the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned.” *Id.* at 660-61 (emphasis added). The Court thus concluded that the 1790 Act, “instead of sanctioning an existing right, . . . created” a new right to protect works after publication. 33 U.S. at 661.

Finally, the Court reasoned from legislative intent: Congress would not have included statutory language to grant authors “the sole right and liberty of printing” their published works if it believed that the common law already protected such a right. *Id.* The same inference arises from copyright statutes enacted by twelve state legislatures between 1783 and 1786.<sup>5</sup> *Golan I*,

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<sup>5</sup> As noted earlier, the statutes took effect in only ten states. The reason is that “[t]he Maryland and Pennsylvania statutes . . . declar[ed] that [they] did not go into effect unless ‘all and every of the States’ passed similar laws. Since Delaware did not pass a copyright law, Maryland’s and Pennsylvania’s copyright laws arguably never went into effect.” 1 William F. Patry, *Copyright Law and Practice* § 1:17 n.29 (2010).

2005 WL 914754, at \*9-\*10. In prefatory statements, *id.* at \*9, these legislatures made clear that they “viewed the then-existent common law copyright protection”—that is, copyright prior to publication—“as either inadequate or insufficiently defined to provide authors with the desired protection from infringement.” *Id.* at \*10. Neither Congress nor the state legislatures would “have deemed it necessary to vest a right already vested.” *Wheaton*, 33 U.S. at 661. They must have believed that common-law copyright ended at the time of publication.

The district court wrongly reads *Wheaton* as ambiguous, suggesting that it “did not . . . decide the question whether the common law of Pennsylvania provided a copyright before passage of the 1790 Act but rather whether the copyright was before that time perpetual.” *Golan I*, 2005 WL 914754, at \*6. In the district court’s view, *Wheaton* distinguished between a post-publication “copyright of a particular length,” such as the renewable fourteen-year term established by the 1790 Act, and a “perpetual” post-publication copyright. *Id.* at \*7. But that interpretation ignores the historical context. The key distinction in *Wheaton*, as in *Donaldson*, was not between limited-term and perpetual copyrights; it was between pre- and post-publication copyrights. *See* 33 U.S. at 657 (“That an author, at common law, has a property in his manuscript . . . cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.”). *Wheaton* did not just concern the “extent and duration” of post-publication copyright, as the district court suggests, 2005 WL 914754, at \*7; it held that Pennsylvania’s common law granted no post-publication copyright at all.

To the extent that *Wheaton* is at all ambiguous, later decisions have clarified this Court’s view of the common-law copyright that applied before the 1790 Act. In *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182 (1909), for example, this Court explained the rule of *Wheaton* as

follows: “At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.” *Id.* at 188 (citing *Wheaton*, 33 U.S. at 661); *see also Mazer*, 347 U.S. at 214-15 (“Congress may after publication protect by copyright any writing of an author. Its statute creates the copyright. It did not exist at common law even though he had a property right in his unpublished work.”). Even the *Eldred* petitioners agreed with this view. *See* Brief for Petitioners at 29, *Eldred*, 537 U.S. 186 (No. 01-618) (“[T]his Court in 1834 concluded in the *Wheaton* case that there was no common law copyright that protected an author after a work was published . . . .”). This Court has not read *Wheaton* as ambiguous in the way that the district court suggests.

By establishing post-publication copyrights, therefore, the First Congress granted to the “already printed” works of Pennsylvania authors—and presumably also Maryland and Delaware authors—a form of protection that they had not enjoyed under state statutes or at common law. Copyright Act of 1790, 1 Stat. 124. Because these works had entered the public domain at the time of publication, the 1790 Act restored copyrights precisely as Section 514 does.

The 1790 Act is therefore strong evidence that the Framers empowered Congress to grant copyrights to public-domain works. In 1884, this Court wrote:

The construction placed upon the Constitution by the [] act of 1790 . . . by the men who were contemporary with [the Constitution’s] formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

*Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884). That admonition holds with even greater force when no one has challenged the validity of the 1790 Act for more than *two* centuries. It is reason enough for this Court to hold that Congress may restore copyrights to public-domain works.

b. Congress Has Restored Copyrights on Several Occasions Since 1790.

Subsequent congressional enactments have strengthened the historical argument in favor of Section 514. In 1919 and 1941, Congress acted to allow the restoration of copyrights to foreign works that had entered the U.S. public domain during the First and Second World Wars. Act of Dec. 18, 1919, Pub. L. No. 66-102, 41 Stat. 368; Act of Sept. 25, 1941, Pub. L. No. 77-258, 55 Stat. 732. The 1919 Act provided that works by certain foreign authors, “produced or published abroad” during World War I, could receive U.S. copyrights if the authors complied with the requisite “conditions and formalities” within fifteen months of the war’s end. 41 Stat. at 369. The 1941 Act provided for the restoration of U.S. copyrights to “works first published or produced abroad” upon a finding that their authors “may have been temporarily unable to comply with the conditions and formalities” required by U.S. law, “because of the disruption or suspension of facilities essential for such compliance.” 55 Stat. at 732. Since works that failed to comply with formalities would have had no copyright protection absent the 1919 and 1941 Acts, these statutes—like the Act of 1790—must have restored copyrights to public-domain works.

Petitioners could argue that Congress meant to give foreign authors additional time to register works that had not yet actually entered the U.S. public domain. But that argument ignores provisions in both Acts to protect parties who had relied on the public availability of foreign-authored works.<sup>6</sup> As the House Committee on Patents explained in its Report on the 1941 Act, Congress meant to “protect rights lawfully exercised by American users or publishers of copyrighted works protection of which had lapsed.” H.R. Rep. No. 77-619, at 2 (1941).

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<sup>6</sup> The 1919 Act provides that nothing in the Act “shall be construed to deprive any person of any right which he may have acquired by the republication of such foreign work in the United States prior to the approval of [the] Act.” 41 Stat. at 369. The 1941 Act provides “[t]hat no liability shall attach under the Copyright Act for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.” 55 Stat. at 732.

Petitioners also argued below that this interpretation of the 1919 and 1941 Acts would conflict with the 1909 Copyright Act's statement "[t]hat no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published . . . and has not been already copyrighted in the United States." Act of March 4, 1909, § 7, Pub. L. No. 60-349, 35 Stat. 1075, 1077. As the district court recognized, however, this provision does no more than reiterate the requirement of originality: an author cannot take a public-domain work and seek to protect it as his own. *See Golan I*, 2005 WL 914754, at \*14. The application of a strained reading of the 1909 Act, to undermine the clear text and purpose of the 1919 and 1941 Acts, would defy this Court's admonition that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Yet another instance of intellectual property restoration is the 1832 Patent Act, which authorized the issuance of "a new patent" for any invention on which a patent had become "invalid or inoperative" because the inventor had, "by inadvertence, accident, or mistake," failed to comply with "terms or conditions prescribed in the third section of" the 1793 Patent Act. Act of July 3, 1832, 4 Stat. 559, 559; *see* Act of Feb. 21, 1793, 1 Stat. 318, 321-22 (enacting written description, enablement, and other requirements). Petitioners argued below "that the effect of the Act was merely to provide procedural redress for inventors who submitted patent applications with deficient specifications and that the integrity of the resulting patents would not, in those cases, have been suspect." *Golan I*, 2005 WL 914754, at \*12. But the Act restored patents that actually had been "invalid or inoperative"; when a patent is "invalid or inoperative," the invention has necessarily entered the public domain. *Id.* The 1832 Patent Act thus did in the patent context precisely what Section 514 did in the copyright context.

That the 1832 Act restored patents, rather than copyrights, only strengthens its support for Section 514. The Progress Clause affords greater authority for Congress to restore copyrights than to restore patents, because of a key distinction between these forms of intellectual property: whereas patents grant fully exclusive rights as to a given invention, copyrights protect “only . . . the expression of [an] idea—not the idea itself.” *Mazer v. Stein*, 347 U.S. 201, 217 (1954); see 17 U.S.C. § 102(b) (codifying the idea/expression dichotomy); *Baker v. Selden*, 101 U.S. 99 (1879) (establishing it). If Congress can withdraw an invention entirely from the public domain, consistent with its constitutional mandate to “promote . . . Progress,” U.S. Const. art. I, § 8, cl. 8, then it can restore copyrights to public-domain works.

Finally, Congress has continued to exercise its copyright restoration authority in recent years, to respond to technological developments that have taxed copyright law in unforeseen ways. In 1995, the Ninth Circuit held “that selling recordings constitutes ‘publication’ under the Copyright Act of 1909.” *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995). On the basis of that holding, the court concluded that the 1948 and 1950 recordings of a song called *Boogie Chillen* had entered the public domain because their copyrights had expired, even though copyright notices for these recordings were not filed until 1967 and 1970. *Id.* at 954. Two years later, Congress “restore[d] copyright protection to *Boogie Chillen* and all similarly situated compositions,” 3 *Nimmer on Copyright* § 9A.05[B], providing that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.” Act of Nov. 13, 1997, Pub. L. No. 105-80, § 11, 111 Stat. 1529, 1534 (codified at 17 U.S.C. § 303(b)).

The holding that petitioners seek would upset more than two centuries of settled expectations. It would call into question the validity of the 1790 Copyright Act, the 1832 Patent

Act, the 1919 and 1941 measures, the 1997 phonorecord amendment, and the commercial relationships relying on those statutes. *Cf.* Transcript of Oral Argument at 9, *Eldred*, 537 U.S. 186 (No. 01-618) (Justice Breyer, suggesting that if the petitioners’ theory would require invalidating the 1976 Copyright Act, “[m]aybe [the Court] ought to find another theory”). The Court need not undermine long-settled rules. Congress’s history of granting retroactive protection for intellectual property, dating back to the earliest days of the Constitution, is “almost conclusive” evidence that it had the power to enact Section 514. *Burrow-Giles*, 111 U.S. at 57.

3. *This Court Has Recognized Congress’s Power to Restore Intellectual Property.*

In *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), this Court held that Congress could retroactively grant protection for intellectual property. *McClurg* involved a patent, issued to James Harley, for an improved metalworking technique. *Id.* at 204. Harley had conducted his research at the foundry where he worked, while drawing wages, and he had allowed the foundry to use his invention without paying for it. *Id.* at 205. Eventually, Harley left the foundry and applied for the patent, which he assigned. *Id.* The assignees then sued the foundry for infringing Harley’s patent. *Id.* The patent was void “under the law in force when [it] issued because [Harley] had allowed his employer briefly to practice the invention before he obtained the patent. Only upon enactment, two years later, of an exemption for such allowances did the patent become valid, retroactive to the time it issued.” *Eldred*, 537 U.S. at 203. *McClurg* recognized the validity of this retroactive patent, explaining that the resolution of the suit “must depend on the law as it stood at the emanation of the patent, *together with such changes* as have been since made.” 42 U.S. at 206 (emphasis added). Although those “changes . . . may be retrospective in their operation,” the Court held, “that is not a sound objection to their validity.” *Id.*

The district court wrongly read *McClurg* as establishing no power to restore exclusive patent protection. The district court is correct that *McClurg* did not allow Harley’s assignees to

assert exclusive rights. *McClurg* “shielded” the foundry “from liability” for infringement, effectively granting it a license to practice Harley’s invention, because of the foundry’s reliance interest and because its resources had contributed to the invention. *Golan I*, 2005 WL 914754, at \*4. But that in no way undermines the case’s core holding: that Congress has the authority to grant retroactive protection. At most, it could imply that when Congress does so, it must protect reliance interests. Even that reading, however, gives too much constitutional weight to reliance: *McClurg* allowed the foundry to continue practicing Harley’s invention not as a constitutional matter but as a matter of equity. See *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188-89 (1933), *amended on other grounds*, 289 U.S. 706 (1933) (explaining *McClurg* as “an application of equitable principles,” namely that when a “servant uses his master’s time, facilities, and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property”); *Gill v. United States*, 160 U.S. 426, 430-31 (1896) (explaining that *McClurg* had applied “the law of estoppel in pais, by which a person looking on and assenting to that which he has power to prevent is held to be precluded ever afterwards from maintaining an action for damages”). *McClurg* thus establishes Congress’s power to grant retroactive protection for intellectual property.

*Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), is not to the contrary. Petitioners have relied on *Graham*’s statement that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” 383 U.S. at 6. But that argument fails for two reasons.

First, *Graham* is consistent with *McClurg*. Patents—unlike copyrights—are available only for novel and nonobvious work. 35 U.S.C. §§ 102, 103. The quoted language from *Graham* means simply that public-domain material cannot be patented because it is neither novel nor

nonobvious. Even if Harley’s invention was initially unprotected by a patent, it had (in Congress’s judgment) never lost its novelty, because it was never practiced publicly—only under a narrow license from Harley to his employer. The restoration of Harley’s patent did not “restrict free access to materials already available,” 383 U.S. at 6, because the invention had never been “available” to the public; it was used only within the foundry.<sup>7</sup>

Second, one cannot extend *Graham*’s rationale from patent to copyright law without ignoring basic differences between these bodies of law. One difference is that unlike patents, copyrights do not require novelty or nonobviousness. As Judge Learned Hand explained, “if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936). Patent and copyright thus treat public-domain material in different ways. *Graham* held that public-domain material cannot be patented because lacks novelty or nonobviousness. But these are not prerequisites for copyright protection. Only originality is required, and Section 514 respects this requirement.

A second crucial difference between patent and copyright law is that copyrights, unlike patents, do not “remove” any “knowledge from the public domain,” 383 U.S. at 6. Whereas a patent confers an “exclusive right to practice the invention,” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989), copyright protects “only . . . the expression of [an] idea—not the idea itself.” *Mazer v. Stein*, 347 U.S. 201, 217 (1954). *Graham*’s statement that Congress

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<sup>7</sup> The same argument explains why *Graham* poses no challenge to the 1832 Patent Act. As discussed earlier, the 1832 Act authorized the issuance of “a new patent” for any invention on which a patent had become “invalid or inoperative” because the inventor had, “by inadvertence, accident, or mistake,” failed to comply with “terms or conditions prescribed in the third section of” the 1793 Patent Act. Act of July 3, 1832, 4 Stat. 559, 559. Those “terms or conditions” include various formal requirements for disclosure, but not the novelty requirement, which is imposed by Section 1 of the Act. *See* Act of Feb. 21, 1793, 1 Stat. 318, 319, 321-22. The 1832 Act did not confer patent protection on non-novel inventions.

cannot “remove existent knowledge from the public domain” therefore has no force in the domain of copyright. Section 514 removes only particular expressions of knowledge, not knowledge itself, from the public domain.

This is the Court’s first occasion to address whether Congress may grant *copyrights*, rather than patents, to works in the public domain. Patent precedents are useful guides, however, as long as they are read in light of the differences between patents and copyrights. The *Eldred* Court found *McClurg* relevant to copyright law, 537 U.S. at 202-04, for good reason: *McClurg* dealt with the general scope of Congress’s power to protect intellectual property, not with particular elements of patentability or features of the constitutional power unique to the patent context. Because *Graham* concerned patent-specific requirements; it cannot extend to copyright in a similar manner. Read in light of the differences between patent and copyright law, this Court’s precedents therefore weigh in favor of Congress’s power to enact Section 514.

Like the arguments from constitutional text and historical practice, the argument from judicial precedent would on its own be enough for this Court to find Section 514 consistent with the Progress Clause. The combined force of all three arguments leaves little doubt that Congress has acted within its constitutional power.

**B. Section 514 Is a Rational Exercise of Congress’s Progress Clause Power.**

When Congress legislates under the Progress Clause, its actions are subject to judicial review only for rationality. *See Eldred*, 537 U.S. at 204. Section 514 therefore “bear[s] a strong presumption of validity,” and petitioners “have the burden ‘to negative every conceivable basis which might support it.’” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). This Court “defer[s] substantially” when it reviews Congress’s judgments about how to design a national copyright system. *Eldred*, 537 U.S. at 204.

Section 514 was a rational exercise of the Progress Clause power for two reasons: it signaled Congress's willingness to protect domestic works against the inadvertent loss of their copyrights, and it safeguarded the country's creative industries from the economic threat of overseas piracy. In enacting Section 514, Congress thus fulfilled the "the ultimate aim" of copyright: "to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

*1. Section 514 Reassures Domestic Authors That Congress Will Act When Necessary to Prevent the Inadvertent Loss of Their Copyrights.*

Section 514 provides a "direct incentive" to domestic authors, by signaling Congress's willingness to protect their works against the inadvertent loss of copyright protection: in basic economic terms, "the expected benefits of creating new works are greater if Congress can remedy the loss of copyright protection for works that have fallen accidentally into the public domain." *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1264 (D.C. Cir. 2005). If Section 514 offers *any* direct incentive for domestic authors to create new works, then it fulfills the constitutional purpose of the Progress Clause. *See id.* (noting that the *Eldred* "majority did not contest" Justice Breyer's estimate that the copyright term extension upheld by the Court might "have a total present value of seven cents") (citing *Eldred*, 537 U.S. at 254-55 (Breyer, J., dissenting); *id.* at 209-10 n.16 (majority opinion)). *Eldred* forecloses the argument that additional protection "for works already in existence could not possibly affect authors' incentives to create those works." *Luck's Music*, 407 F.3d at 1263. Just as an author "would reasonably comprehend" the offer of a copyright to include protection not only for the initial term "but also for any renewal or extension legislated during that time," *Eldred*, 537 U.S. at 215, an author would expect to benefit from Congress's periodic measures to strengthen copyrights by preventing their accidental termination.

The fact that Section 514 restores copyrights only to foreign works does not negate its direct incentive to domestic authors. Congress had good reason to limit Section 514 itself to foreign works. Certain copyright formalities, such as the manufacturing clause, burdened foreign authors more severely than their domestic counterparts. *See* 1 William F. Patry, *Copyright Law and Practice* §§ 1:38, 1:58 (2010). “[T]he Berne Convention does not mandate standards for domestic claimants,” 3 *Nimmer on Copyright* § 9A.01, and Congress had no reason to limit the public domain more than it had to. “A statute is not invalid under the Constitution because it might have gone farther than it did.” *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

Congress *has* addressed similar concerns domestically, and it will continue to do so in the future. It most recently restored copyrights to domestic works in the wake of *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995), which—as discussed earlier—had construed the copyright statute in a way that Congress had not foreseen. Act of November 13, 1997, Pub. L. No. 105-80, § 11, 111 Stat. 1529, 1534 (codified at 17 U.S.C. § 303(b)). In an age of rapid technological development, courts will always face a difficult challenge in applying outdated doctrines to new modes of authorship. *See, e.g., Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (analyzing the authorship of a film with multiple collaborators); *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (analyzing the infringement of a software copyright). Congress must have the flexibility to respond to new developments, technological and legal, in ways that fulfill the purpose of the Progress Clause. As the D.C. Circuit observed, “the knowledge that Congress may pass laws like [Section 514] in the future does affect the returns” that authors expect “from investing time and effort in producing works.” *Luck’s Music*, 407 F.3d at 1264. Section 514 reassures U.S. authors that Congress will continue to protect their copyrights against inadvertent loss.

2. *Section 514 Protects Domestic Creative Industries Against Overseas Piracy.*

Section 514 also “promote[s] the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, by protecting U.S. authors against the costly piracy of their works overseas. History has shown that participation in the Berne Convention is essential to the economic interests of U.S. creative industries. In its Report on the Berne Convention Implementation Act, for example, the Senate Judiciary Committee cited a finding “that U.S. companies [had] lost between \$43 billion and \$61 billion during 1986 because of inadequate legal protection for United States intellectual property, including copyrights,” overseas. S. Rep. No. 100-352, at 2 (1988). As the Committee saw, “[a]dherence by the United States to the Berne Convention is a significant opportunity to reduce the impact of copyright piracy on our world trade position.” *Id.* at 2.

Berne compliance is no less essential to our economic interests today.<sup>8</sup> By fulfilling the United States’s obligations under Article 18, rendered mandatory by the TRIPS Agreement, Congress meant to ensure that U.S. works would receive Article 18’s benefits abroad. The House Ways and Means Committee explained that the implementation of the Uruguay Round’s intellectual property provisions would “dramatically improve protection and enforcement of U.S. intellectual property rights abroad.” H.R. Rep. No. 103-826, pt. 1, at 16 (1994). Congressman Howard Berman, who had chaired the portion of the House Judiciary Committee’s hearing concerning Section 514, stated on the House floor: “The reason for our adopting [Section 514] is simple: If the United States passes a law that protects previously produced foreign works, then

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<sup>8</sup> When Congress was considering the Uruguay Round Agreements Act, it heard testimony that in the former Soviet Union, “the Baltics, Poland, Turkey, South Korea, Taiwan, Saudi Arabia, and the Gulf States,” U.S. creative industries had lost “over \$2 billion due to piracy” in 1993, “a not insignificant portion of which [was] due to [these countries’] failure to ‘restore’ protection for [U.S.] copyrights.” *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary*, 103d Cong. 244 (1994) [hereinafter “Joint Hearings”] (statement of Eric Smith, Executive Director and General Counsel, International Intellectual Property Alliance).

we will have every right to expect certain foreign countries to pass laws protecting previously produced U.S. works.” 140 Cong. Rec. 29,612 (1994). That, in turn, increases the incentive for U.S. authors to create new works and disseminate those works abroad. These sorts of benefits to domestic authors are well within the purpose of the Progress Clause.

Even setting aside those direct benefits, Congress could rationally have adopted Section 514 “as a bargaining chip,” *Luck’s Music*, 407 F.3d at 1264, to secure other benefits of the TRIPS Agreement—namely the mandate of “high levels of substantive IP protection” across the World Trade Organization. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 Yale L.J. 804, 824 (2008). International agreements are, in essence, contracts among nations. *See, e.g.*, Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 Yale L.J. 824 (2007). Like all contracts, they involve bargained-for consideration. Congress could have viewed compliance with Article 18 as consideration for an overall increase in global protection for the United States’s intellectual assets. One cannot separate Section 514 from the value of the overall bargain. Indeed, *Eldred* approved the Copyright Term Extension Act on a similar basis: it “enhanced the United States’s position in negotiating with European Union countries for benefits for American authors,” regardless of whether it served the interests of domestic authors *on its own*. *Luck’s Music*, 407 F.3d at 1264 (citing *Eldred*, 537 U.S. at 205-06). The United States’s compliance with its Berne obligations promotes domestic authorship in the long run.

As *Eldred* explained, this Court may not “second-guess congressional determinations and policy judgments” as to the exercise of the Progress Clause power. 537 U.S. at 208. Congress was not bound “to articulate its reasons for enacting” Section 514; indeed, its actual reasons are “irrelevant for constitutional purposes.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315

(1993). This Court could uphold Section 514 even if Congress had acted only on the basis of “speculation unsupported by evidence or empirical data,” so long as that “speculation” was “rational.” *Id.* But such deference is unnecessary here, where Congress has explained—and where *Eldred* has already recognized—the significant benefits that accrue to domestic authors when the United States fulfills its international obligations. Section 514, like the statute at issue in *Eldred*, “reflects judgments of a kind Congress typically makes.” 537 U.S. at 205. When Congress has chosen a policy that in its view best “promote[s] the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, this Court should not disturb Congress’s judgment.

## **II. SECTION 514 IS CONSISTENT WITH THE FIRST AMENDMENT.**

In *Eldred*, this Court answered the question of what limits the First Amendment imposes on copyright. So long as congressional enactments do not alter the “traditional contours of copyright protection”—the idea/expression dichotomy and the fair use doctrine—they do not implicate the First Amendment. 537 U.S. at 221. Because the copyrights restored by Section 514 are of precisely the same type as afforded to domestic authors, Section 514 is consistent with the First Amendment. The Tenth Circuit erred by creating a novel First Amendment theory based on reliance interests, not on the constitutionally protected interest of free expression.

Nevertheless, the Tenth Circuit correctly upheld Section 514 as a valid content-neutral regulation under the standard of *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997). Congress enacted Section 514 to benefit U.S. authors, who were suffering billions of dollars in losses to international piracy. On the basis of substantial expert testimony, Congress reasonably determined that only a reciprocal agreement, in which our restoration of copyright to foreign authors could ensure international restoration of copyright for our authors, could control this piracy. Petitioners’ objections do not comport with a critical element of *Turner* analysis: courts may not substitute their policy judgments for the “predictive judgments of the Congress.”

*Id.* at 195 (quoting *Turner Broadcasting System, Inc. v. FCC (Turner I)*, 512 U.S. 622, 665 (1994)). Courts owe deference to Congress’s determination of the appropriate balance between authors’ rights and reliance protections in an international copyright regime.

**A. Copyright Restoration Does Not Trigger First Amendment Scrutiny.**

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), this Court recognized the fundamental compatibility of copyright protection and the First Amendment, noting that “the Framers intended copyright itself to be the engine of free expression.” *Id.* at 558. Yet the First Amendment also imposes restrictions on copyright, lest the limited monopoly of copyright protection undermine the very freedom of expression it was meant to promote. These “accommodations” are “built[] in[to]” copyright law through the idea/expression dichotomy and the fair use doctrine. *Eldred*, 537 U.S. at 219.

In *Eldred*, this Court confronted the same constitutional issue presented here. In enacting the Copyright Term Extension Act, Congress retroactively extended copyright by twenty years. Because this extension delayed access to certain copyrighted works, some who desired earlier access to those works brought suit, alleging a “constitutional interest in the public domain.” Brief for Petitioners at 36, *Eldred*, 537 U.S. 186 (No. 01-618). This Court rejected that claim, declaring that so long as “Congress ha[d] not altered the traditional contours of copyright protection, further First Amendment scrutiny [was] unnecessary.” 537 U.S. at 221. Like the Copyright Term Extension Act, Section 514 does not alter the idea/expression dichotomy or the fair use doctrine. Section 514 is therefore consistent with the First Amendment.

The Tenth Circuit attempted to sidestep *Eldred* and *Harper & Row* by casting petitioners’ reliance on the public domain as an additional First Amendment limitation on copyright. Its entitlement theory of the First Amendment is not only novel and doctrinally unfounded; it would upend this Court’s jurisprudence of constitutional rights.

1. *Section 514 Respects the First Amendment.*

Eight years ago, this Court clarified what *Harper & Row* had held almost twenty years prior: that “copyright law contains built-in First Amendment accommodations.” *Eldred*, 537 U.S. at 219. First Amendment protections need not be imposed on copyright law; they exist within copyright law. The idea/expression dichotomy gives the public full access to the facts and ideas associated with an act of expression, thus ensuring a robust marketplace of ideas. In addition, the fair use doctrine gives the public full access to even copyrighted expression for purposes that lie at the heart of the First Amendment: criticism and education. *Id.* at 220-21. Yet *Eldred* did not rest on this point alone. It further observed that reproducing other authors’ original expression was not core First Amendment speech. *Id.* Given the combined weight of these factors—“built-in First Amendment accommodations,” *id.* at 219, and a weak case for any constitutional harm—the *Eldred* Court dismissed the First Amendment challenge. Nowhere in its discussion of the First Amendment issue did the Court even raise the questions of copyright duration or the scope of the public domain. If such questions merit constitutional scrutiny at all, it is under the Progress Clause, not the First Amendment.

a. Section 514 Respects the Idea/Expression Dichotomy and the Fair Use Doctrine.

Restored copyright protection under Section 514 includes the “built-in First Amendment accommodations,” *id.*, of the idea/expression dichotomy and the fair use doctrine. The first of these accommodations gives the public full access to any “any idea, procedure, process, system, method of operation, concept, principles, or discovery” embedded in a protected work. 17 U.S.C. § 102(b). Copyright protects “only . . . the expression of [an] idea—not the idea itself.” *Mazer*, 347 U.S. at 217; *see also Harper & Row*, 471 U.S. at 556 (“No author may copyright his ideas or the facts he narrates.”). This dichotomy has been fundamental to copyright doctrine since *Baker*

*v. Selden*, 101 U.S. 99 (1879), and it serves essential First Amendment interests. By limiting copyright protection to an author’s expression, the dichotomy “encourages others to build freely upon the ideas and information conveyed by a work.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991). “[T]he democratic dialogue—a self-governing people’s participation in the marketplace of ideas—is adequately served if the public has access to an author’s ideas, and such loss to the dialogue as results from inaccessibility to an author’s ‘expression’ is counterbalanced by the greater public interest in the copyright system.” 4 *Nimmer on Copyright* § 19E.03[A][2]. Recognizing that the idea/expression dichotomy incorporates First Amendment values, “[c]ourts have rejected First Amendment challenges to the federal copyright law on the ground that no restraint (has been) placed on the use of an idea or concept.” *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (internal citations omitted). The “‘idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 556).

Whereas the idea/expression dichotomy limits the scope of what copyright protects, the fair use doctrine allows the public to access even protected expression “for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research.” 17 U.S.C. § 107. These purposes—criticism and education—go to the heart of the First Amendment. When journalists and scholars borrow copyrighted material, they inform us all; when artists do so, they create “new expression, meaning, [and] message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Copyright law did not always recognize fair use. *See Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907). The doctrine emerged “to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed

to foster.” *Campbell*, 510 U.S. at 577 (internal citations omitted); see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (“[N]o author could create a new work if he were first required to repeat the research of every author who had gone before him.”). It is instructive that in *Harper & Row*, this Court construed a First Amendment defense to copyright infringement as a claim to “expand fair use.” 471 U.S. at 557. The Court presumed that copyright law was to accommodate First Amendment’s interests *through* the fair use doctrine.

Indeed, *Harper & Row* suggests that the combination of the fair use doctrine and the idea/expression dichotomy fully incorporates the First Amendment’s protections in the domain of copyright. In declining to extend the fair use doctrine, the *Harper & Row* Court relied on the sufficiency of “the First Amendment protections *already embodied* in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.” *Id.* at 560 (emphasis added). These protections are, in short, coextensive with what the First Amendment requires.

Section 514 respects these protections. Restored copyrights, like all copyrights, “subsist[] in accordance with” the various limitations of copyright protection, 17 U.S.C. § 102(a), including the idea/expression dichotomy, *id.* § 102(b), and the fair use doctrine, *id.* § 107. Artists are free to borrow the ideas of Stravinsky, such as his use of polytones or serial techniques, see Joseph Straus, *A Principle of Voice Leading in the Music of Stravinsky*, 4 Music Theory Spectrum 106 (1982), even if they cannot reproduce his work directly. Indeed, “every idea, theory, and fact” in restored works remains fully “available for public exploitation.” *Eldred*, 537 U.S. at 219. And under the fair use doctrine, artists have some “breathing space” to borrow even Stravinsky’s expression for “transformative” purposes. *Campbell*, 510 U.S. at 579. “To the extent” that

petitioners’ “assertions raise First Amendment concerns,” as in *Harper & Row*, “copyright’s built-in free speech safeguards are generally adequate to address them.” *Eldred*, 537 U.S. at 221.

b. Section 514 Does Not Govern Expression That Lies at the Core of the First Amendment.

Section 514 raises minimal constitutional concern because the speech that it regulates is not central to the freedom of expression. “The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” *Eldred*, 537 U.S. at 221. Lawrence Golan and the Symphony of the Canyons seek not to create musical expressions of their own but to perform the expressions of foreign artists. Their goal is to engage in pure duplication, not “transformati[on],” *Campbell*, 510 U.S. at 579. This is a weak interest under the First Amendment.

Weaker still are the First Amendment claims of the commercial plaintiffs. The estate of Richard Kapp, S.A. Publishing, Ron Hall, and John McDonough all assert the right to reproduce recordings for profit. It is beyond contention that these plaintiffs are not creating new expression. They seek only to sell expressive content to others. Even if some of those others might transform the works into new expressive content, that cannot sustain the claims at issue here. With each degree of separation, the First Amendment interest becomes weaker, to the point of evaporation. *Cf. Whalen v. Roe*, 429 U.S. 589, 600 (1977) (rejecting a constitutional right to medical privacy as too distant from the privacy rights already recognized under the Constitution). If a business venture itself constitutes protected expression, then any record store in the country could bring a First Amendment claim when its taxes were raised. The commercial plaintiffs seek redress for harms that lie far from the core of the First Amendment.

c. Section 514 Does Not Trigger First Amendment Scrutiny by Delaying Public Access to Restored Works.

*Eldred* is also notable for what it did *not* mention as relevant to the First Amendment analysis: the timing of a copyrighted work’s entry into the public domain. Because the copyright term extension at issue in *Eldred* applied retroactively to “published works with existing copyrights,” 537 U.S. at 193, it necessarily delayed these works’ entry into the public domain. Yet the *Eldred* Court made no mention of this issue in dismissing the First Amendment claim. *Id.* The implication is clear: questions of copyright’s duration do not implicate the First Amendment. Section 514, like the Copyright Term Extension Act, simply effects a temporal readjustment. It restores copyright protection to certain works for a limited time, delaying their eventual entry into the public domain. As in *Eldred*, this delay does not raise First Amendment concerns.

Insofar as copyright duration raises constitutional questions, they pertain to the Progress Clause, not the First Amendment. As Justice O’Connor observed during the *Eldred* argument:

[I]f you say that the Copyright Clause is not violated, I don’t think there are examples where this Court has then resorted to First Amendment analysis to invalidate the same act. . . . [T]his would be quite a new proposition. . . . And I think there are not examples that I can think of where we have said, well, we’ll analyze it under the Copyright Clause, but if that fails we’ll turn to the First Amendment.

Transcript of Oral Argument at 17-18, *Eldred*, 537 U.S. 186 (No. 01-618). Because the Framers included both the Progress Clause and the First Amendment in the Constitution, these provisions must speak to distinct issues. For “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). If petitioners cannot show that copyright restoration violates the Progress Clause, then they cannot resuscitate that claim under the First Amendment.

2. *Petitioners' Argument Lacks Support in Precedent or the Constitution.*

Petitioners could argue—in line with the Tenth Circuit—that once works pass into the public domain, “the First Amendment protects” their “right to unrestrained artistic use of these works.” *Golan II*, 501 F.3d at 1193. The Tenth Circuit presented this argument in two ways. First, it read *Eldred*’s language of “traditional contours” to extend beyond the idea/expression dichotomy and the fair use doctrine. *Id.* at 1189. Having surveyed historical practice to find a “time-honored tradition of allowing works in the public domain to stay there,” *id.* at 1192, the court converted this “tradition” into a “bedrock principle of copyright law,” *id.* at 1187. By breaking with this tradition, the court reasoned, Section 514 triggered First Amendment scrutiny.

Second, without support from *Eldred*, the Tenth Circuit found that petitioners had enjoyed a First Amendment right to exploit restored works when these works were in the public domain. *Id.* at 1193. Because petitioners had acted in “reliance on” this right, *id.* at 1193, the court found that they “had vested First Amendment interests in the expressions.” *Id.* at 1194. Because Section 514 infringed those interests, the court concluded, it was “subject to First Amendment scrutiny.” *Id.* at 1194.

The Tenth Circuit’s reasoning is flawed in three ways. First, it misreads *Eldred*. The Tenth Circuit’s crucial premise is that the term “traditional contours,” as invoked by *Eldred*, “seems to refer to something broader than copyright’s built-in free speech accommodations.” *Id.* at 1189 (emphasis added). Yet a textual, structural, and functional reading of *Eldred* suggests that “traditional contours” refers exclusively to the idea/expression dichotomy and the fair use doctrine. Second, the suggestion that any change to the copyright system breaks from its “traditional contours” lacks legal foundation and threatens Congress’s broad authority under the Progress Clause. It undermines the Framers’ intent for Congress, not the courts, to structure the nation’s copyright system. Third, by invoking reliance interests, the Tenth Circuit proposes an

entitlement-based theory of the First Amendment. Such a theory has no basis in the case law and would upend the analysis of constitutional rights.

a. By “Traditional Contours,” Eldred Meant Only the Idea/Expression Dichotomy and the Fair Use Doctrine.

A plain reading of *Eldred* confirms that the “traditional contours” of copyright protection are exclusively the two described in that opinion: the idea/expression dichotomy and the fair use doctrine. When interpreting language in its prior precedents, this Court looks to its “own prior use of [a] word.” *Rapanos v. United States*, 547 U.S. 715, 748 (2006). *Eldred* used the word “traditional,” just one page before “traditional contours,” explicitly to refer to the idea/expression dichotomy and the fair use doctrine as “*traditional* First Amendment safeguards.” 531 U.S. at 220 (emphasis added). The word “traditional” appears at no other point in the *Eldred* opinion. As a simple matter of textual interpretation, therefore, “traditional contours” refers exclusively to the idea/expression dichotomy and the fair use doctrine. Both the Ninth Circuit and the D.C. District Court have read *Eldred*’s use of “traditional contours” in precisely this way. *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007); *Luck’s Music*, 321 F. Supp. 2d at 119 (“Congress has not altered the traditional contours of copyright protection by enacting Section 514. Section 514 does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine.” (citation omitted)). Only the Tenth Circuit misread the opinion.

The structure of the *Eldred* opinion further supports this reading of “traditional contours.” “[T]he analytical structure of [an] opinion” is “integral” to its meaning. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (2007). Part III of the *Eldred* opinion, which addresses the First Amendment, does not mention the public domain even once. 537 U.S. at 218-21. Only Part II, the Progress Clause analysis, refers to the public domain. *See, e.g., id.* at 213. The absence of any “public domain” discussion in the part of the *Eldred* opinion dealing

with the First Amendment would be odd, if the *Eldred* Court truly intended for the timing of entry into the public domain to serve as a “traditional contour” of the First Amendment. The only elements of copyright law that the Court discussed in its First Amendment analysis were the idea/expression dichotomy and the fair use doctrine. These alone are *Eldred*’s “traditional contours,” the alteration of which triggers First Amendment scrutiny.

Finally, as Section II.A.1 argued, the idea/expression dichotomy and the fair use doctrine are coextensive with the protections required by the First Amendment. “The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.” *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (describing Madison’s view of the First Amendment as protecting the “censorial power . . . in the people over the Government”). The only rationale for expanding “traditional contours” beyond the idea/expression dichotomy and the fair use doctrine would be that these doctrines did not prevent the government from using the copyright power to censor expression. However, it is difficult to imagine how that might be. Even if copyright protects a given work, its ideas are available for unlimited duplication, and the expression itself is available for reporting, criticism, comment, and teaching. That leaves no room for censorship. Because the idea/expression dichotomy and the fair use doctrine are coextensive with the First Amendment’s protections in the copyright context, there is no functional basis for adding “traditional contours” beyond those already recognized in *Eldred*.

b. “Traditional Contours” Cannot Refer to Congress’s Historical Exercise of its Progress Clause Power.

The Tenth Circuit’s use of history to inform its interpretation of “traditional contours” is misguided.<sup>9</sup> As an initial matter, the Tenth Circuit gets the historical record precisely backwards. The 1790 Copyright Act, the 1832 Patent Act, the 1919 and 1941 Acts, and the 1997 amendment all defeat the notion of a consistent historical practice against restoring copyright protection. Although the Tenth Circuit considers these examples to be “few,” *Golan II*, 501 F.3d at 1191, simple counting is insensitive to historical context. Circumstances rarely require Congress to restore copyrights. *Cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“For most of our history the question did not present itself.”). Evidence that Congress has repeatedly restored copyrights—even if the instances of its doing so are few—defeats the idea that non-restoration is a “time-honored tradition,” *Golan II*, 501 F.3d at 1192.

Restricting copyright law to its historical form would limit Congress’s ability to structure copyright as necessary to “promote the Progress of Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8. Under the Tenth Circuit’s approach, every deviation from past copyright practice would trigger First Amendment scrutiny. That would open the door to a constitutional challenge of virtually any copyright statute that Congress has ever enacted. For instance, the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, broke with two centuries of federal practice by providing copyright on the act of creation, rather than publication. 1 *Nimmer on Copyright* § 2.02. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853,

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<sup>9</sup> The Tenth Circuit also makes what it frames as a functional argument that Section 514 “alter[s] the ordinary copyright sequence,” in which works move “from 1) creation; 2) to copyright; 3) to public domain.” *Golan II*, 501 F.3d at 1189. Insofar as the argument invokes this sequence because it is “ordinary,” it amounts to a historical claim. Even if the argument does not fail for that reason, it is flawed in another sense: far from altering the ordinary sequence, Section 514 restores it. The foreign works at issue here *never* received copyright protection in the United States. They proceeded immediately from creation to the public domain, bypassing the copyright phase altogether. Section 514 rectifies this error by restoring these works to the copyright phase, in which they belong. These works will all enter the public domain, after their copyright term expires.

eliminated various formalities. 2 *Nimmer on Copyright* § 7.01. According to the Tenth Circuit, either could be subject to First Amendment challenge. Such invasive judicial oversight would be inconsistent with the Progress Clause: implicit in Congress’s power to design “a system that promote[s] the Progress of Science,” *Eldred*, 537 U.S. at 212 (internal quotation marks omitted), is the power to modify that system. As the example of *Boogie Chillen* shows, Congress must have the flexibility to respond to new developments, technological and legal, in ways that fulfill the constitutional purpose of the Progress Clause. The Tenth Circuit would bind Congress with the dead hand of the past.

c. The Tenth Circuit Proposes a Flawed Entitlement Theory of the First Amendment.

The Tenth Circuit’s reliance theory lacks any foundation. The argument posits that, although petitioners would have had no First Amendment right to use the foreign works at issue had they been copyrighted in the first place, petitioners *acquired* such a right once the works entered the public domain. What the Tenth Circuit describes is not a right; it is an entitlement—a privilege to which an individual has no inherent claim, only an interest in continued access that arises once the privilege has been provided. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Yet the Tenth Circuit provided no citation to support its entitlement theory of the First Amendment, nor is the government able to find any case supporting that logic.

The Tenth Circuit instead relies on language from three copyright cases to show that “works in the public domain belong to the public.” *Golan II*, 501 F.3d at 1192; *see id.* at 1192-93 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299-300 (1907); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 603 (2d Cir. 1951)). But none of these cases suggests that the public’s access to works in the public domain is a First Amendment right. Even

if the Progress Clause requires eventual access to copyrighted works, the *First Amendment* has nothing to do with this requirement. As discussed in Section II.A.1.c, questions of copyright timing do not implicate the First Amendment. Petitioners therefore have no First Amendment claim to invoke. They could claim that “[b]y removing works from the public domain, § 514 arguably hampers free expression and undermines the values the public domain is designed to protect.” *Golan II*, 501 F.3d at 1194. However, so long as it respects the idea/expression dichotomy and the fair use doctrine, Section 514 poses no threat to the freedom of expression.<sup>10</sup>

The reliance claim is not just incorrect as a doctrinal matter; it is fundamentally inconsistent with mainstream constitutional analysis. If the government’s decision not to regulate a particular genre of unprotected speech created a vested right to engage in that speech, then there would be no such thing as unprotected speech. If a state has yet to regulate obscenity, for instance, purveyors of obscene materials could assert a First Amendment right on the basis of their reliance in unfettered conduct. Yet that would nullify *Miller v. California*, 413 U.S. 15 (1973). Nor is this problem limited to the First Amendment context. This Court has in numerous cases made clear that not every privilege granted by the government is a constitutional right. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (rejecting a federal constitutional right to education). Yet under petitioners’ theory, reliance on these privileges would itself gain constitutional protection, subverting the line drawn by the Court. To the extent that the Constitution does protect reliance, it does so through the Takings Clause, U.S. Const. amend. V, cl. 4. Indeed, the Tenth Circuit seems to borrow the language of Takings Clause

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<sup>10</sup> The Tenth Circuit argues that the idea/expression dichotomy is insufficient protection because “the threat to free expression lies not in what is copyrighted, but in the fact that the works are being removed from the public domain,” *Golan II*, 501 F.3d at 1194, and that fair use is insufficient because “some access to these works may not be an adequate substitute for the unlimited access enjoyed before the URAA was enacted,” *id.* at 1195. But that rejoinder is circular. Rather than proving a First Amendment right to the public domain, it simply—and incorrectly—assumes such a right.

analysis. *Compare Golan II*, 501 F.3d at 1194 (describing “vested First Amendment interests”), with *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) (explaining how the Fifth Amendment protects “vested property rights”).<sup>11</sup> Whether or not petitioners have a legitimate reliance claim, it is misplaced in the First Amendment context.

### **B. Section 514 Survives Intermediate Scrutiny.**

Neither the parties nor the lower courts have disputed that if Section 514 requires First Amendment scrutiny, then it should be evaluated as a “content-neutral regulation.” *Golan IV*, 609 F.3d at 1076. The test for content-neutrality is twofold: first, whether the law facially discriminates on the basis of content, *Turner Broadcasting System, Inc. v. FCC (Turner I)*, 512 U.S. 622, 642 (1994); and second, whether its purpose was governmental “disagreement with [a] message,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In adopting Section 514, Congress neither classified works on the basis of subject matter nor expressed hostility to any of their messages. As the Tenth Circuit recognized, “Congress primarily enacted Section 514 to comply with the United States’ international obligations and to protect American authors’ rights abroad.” *Golan IV*, 609 F.3d at 1084. Section 514 is “unrelated to the content of speech” and therefore “subject to an intermediate level of scrutiny.” *Turner I*, 512 U.S. at 642.

Under intermediate scrutiny, a content-neutral regulation “will be sustained . . . if it advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997). Intermediate scrutiny is highly deferential. Content-neutral regulations, which include the most anodyne of time, place,

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<sup>11</sup> The legislative history reveals the reliance protection provisions were included to overcome constitutional concerns about the Takings Clause argument. *See, e.g.*, Joint Hearings at 3 (statement of Rep. Hughes) (expressing “constitutional concerns *under the takings clause*”) (emphasis added).

and manner restrictions, *Ward*, 491 U.S. at 792, “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner I*, 512 U.S. at 642. They are therefore subject only to the lowest level of First Amendment scrutiny. *Cf. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”); *id.* at 431 (Stevens, J., concurring) (“[I]n general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions.”).

Intermediate scrutiny dictates that “courts . . . accord substantial deference to the predictive judgments of Congress.” *Turner I*, 512 U.S. at 665. As to the governmental interest prong, this Court’s obligation is simply to “assure that, in formulating its judgments, Congress has drawn reasonable inferences based on *substantial evidence*.” *Turner II*, 520 U.S. at 195 (emphasis added). As to the tailoring prong, courts defer to Congress’s judgment regarding “the remedial measures adopted for” the governmental interest, “lest [they] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.” *Turner II*, 520 U.S. at 196. Under intermediate scrutiny, Section 514 cannot be invalid on the basis that “the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Ward*, 491 U.S. at 800.

The Tenth Circuit properly deferred to Congress in upholding Section 514 under intermediate scrutiny. Congress enacted Section 514 on the basis of substantial evidence suggesting that it would protect U.S. works from international copyright piracy, and Section 514 was not overly broad in advancing that end. *Golan IV*, 609 F.3d at 1083.<sup>12</sup>

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<sup>12</sup> Because the Tenth Circuit did not reach the government’s other asserted interests, *Golan IV*, 609 F.3d at 1083 n.6, if the Court were to disagree with the Tenth Circuit’s analysis, the appropriate course would be to vacate and remand for the Tenth Circuit to assess the remaining interests. *United States v. Cronin*, 466 U.S. 648, 666 (1984).

*1. Section 514 Seeks to Protect the Copyrights of U.S. Authors Abroad.*

As commercial markets have become increasingly global, U.S. authors have incurred billions of dollars in losses due to copyright infringement abroad. Without Section 514, which restores copyright protection to foreign authors, foreign countries would not respect the copyrights of U.S. authors. Given the reciprocal nature of this bargain, Section 514 could be no less restrictive while still serving the interests of U.S. authors abroad.

a. Substantial Evidence Before Congress Suggested That Section 514 Would Increase Overseas Copyright Protection for U.S. Works.

Congress had more than an abstract interest in overseas copyright protection for U.S. works; “billions of dollars” were at stake. *See* Joint Hearings at 244 (statement of Eric Smith, Executive Director and General Counsel of the International Intellectual Property Alliance). Even after the United States’s accession to the Berne Convention, international copyright piracy had cost U.S. copyright holders \$7.3 billion between 1989 and 1993. *Id.* at 245. That \$2.0 billion in losses occurred during 1993 alone, *id.*, suggests that the scale of losses was rising. As Section I.B.2 explains, these were the concerns that motivated Congress to adopt Section 514.

This Court has long recognized the government’s important interest in determining its economic policy. *See Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Indeed, with “U.S. copyright industries” representing over five percent of the U.S. gross domestic product, Joint Hearings at 245 (statement of Smith), the Tenth Circuit found it obvious that the government had an important interest in acquiring international copyright protection for U.S. authors. *See Golan IV*, 609 F.3d 1076, 1084 (2010) (“These interests are at least as important or substantial as other interests that the Supreme Court has found to be sufficiently important or substantial to satisfy intermediate scrutiny.” (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789

(1984) (finding the visual assault from too many signs to be an important government interest))). Section 514 was plainly “designed to address a real harm.” *Turner II*, 520 U.S. at 195.

Congress acted on the basis of substantial evidence that copyright restoration would stem the piracy losses. The record included testimony from numerous experts, almost all of whom concluded that U.S. restoration of copyright to foreign works would prompt other countries to restore copyright to our works. Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified as follows:

When we have urged others to provide protection for our industries’ repertoire of existing copyrighted works, we are often confronted with the position that such protection will be provided there when we protect their works in the same manner here in the United States. Clearly, providing for such protection for existing works in our own law will improve our position in future negotiations

Joint Hearings at 120. Ira Shapiro, General Counsel to the Office of the U.S. Trade Representative, testified that “the choices made in our implementation of the TRIPs agreement will set an example for other countries as governments decide on their own implementing legislation as well as influence future disputes over the obligations of the Agreement.” Joint Hearings at 136. Congress drew “reasonable inferences based on substantial evidence,” *Turner II*, 520 U.S. at 195, in enacting Section 514.

b. Given Its Reciprocal Nature, Nothing Short of Section 514 Could Have Advanced the Governmental Interest At Stake.

A substantially narrower version of Section 514 would not have achieved its purpose: to secure U.S. copyrights abroad. Congress heard evidence that the scope and form of the copyright restoration that it provided would define the international regime. Eric Smith testified:

The fact is that what the United States does in this area will carry great weight in the international community. If we interpret Article 18 and the TRIPS provisions to deny protection or significantly limit its scope, our trading partners—just now considering their own implementing legislation—will feel free to simply mirror our views. If the largest exporter of copyrighted material in the world takes the position that we have no, or only limited, obligations, the United States will have

little credibility in convincing particularly the new nations with whom we are just starting copyright relations to give us the expansive protection that we need.

Joint Hearings at 247; *see also id.* at 131 (statement of Shapiro). Indeed, other countries had directly explained their non-enforcement of U.S. copyrights on the basis of our own refusal to restore their authors' copyrights. Smith noted, for example: "The Russian government has made clear that it will provide retroactive protection for [U.S.] 'works' *only if* the U.S. reciprocates with retroactive protection for Russian works." Joint Hearings at 249 n.2 (emphasis added); *see also id.* at 137 (statement of Shapiro) ("Some other countries, such as Thailand and Russia, have refused to protect U.S. works in the public domain in their territory citing the U.S. interpretation of Berne Article 18 as justification."). Congress understood that its decisions as to the scope of Section 514 would shape the parallel provisions adopted by other countries.

Section 514 was thus inherently tailored to its purpose: if it had provided less protection to foreign works in the United States, other countries would have provided less protection to U.S. works abroad. As the Tenth Circuit recognized: "[Section 514's] burdens on speech are therefore directly focused to the harms that the government sought to alleviate. 'This is the essence of narrow tailoring.'" *Golan IV*, 609 F.3d at 1091 (quoting *Ward*, 491 U.S. at 799 n.7). Section 514 did "not burden substantially more speech than [was] necessary," *Turner II*, 520 U.S. at 214 (internal citations omitted), to curtail the problem of international copyright piracy.

## 2. *Petitioners Ignore the Doctrinal Command of Deference.*

Petitioners argued below that Section 514 could have secured the same level of copyright protection for U.S. works overseas, while granting more expansive protections to reliance parties in the United States. But that argument is implausible. The reciprocal nature of the restoration negotiations suggests that expansive reliance protections in Section 514 would have been mimicked by other countries, undermining the government's purpose of promoting overseas

copyright protection for U.S. works. In substance, petitioners are arguing that Congress should have been willing to sacrifice some of the billions of dollars at stake to provide greater domestic reliance protections. But like the duration of copyright protection, that “is not a judgment meet for this Court.” *Eldred*, 537 U.S. at 193 (internal quotation marks omitted). Congress “has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

Even if Section 514 could have provided slightly greater reliance protections without undermining its purpose, a content-neutral regulation “need not be the least restrictive or least intrusive means of” serving the government’s interest. *Ward*, 491 U.S. at 798. Intermediate scrutiny requires only that Congress “not burden *substantially* more speech than necessary to further [its] interests.” *Turner II*, 520 U.S. at 189 (emphasis added). Section 514 provides significant reliance protections, including immunity for infringement prior to restoration, a notice requirement, a one-year grace period, and a license to continue using derivative works with appropriate compensation. 17 U.S.C. § 104A(d). Petitioners argued below that the United Kingdom provides greater reliance protections without sacrificing its authors’ interests. Under the U.K. model, a reliance party may permanently “continue making those uses of the work it had made, or incurred commitments to make, before its copyright is restored,” but owners may “buy out” the reliance party. Irwin Karp, *Final Report, Berne Article 18 Study on Retroactive United States Copyright Protection for Berne and Other Works*, 20 Colum.-VLA J.L. & Arts 157, 180 (1996). But the United Kingdom provides neither a grace period before buyout can occur nor a license to continue using derivative works. *Id.* Section 514’s provisions therefore protect certain expressive and economic interests of reliance parties better than the U.K. model. In the United Kingdom, for instance, the holder of Stravinsky’s copyright could immediately

stop a conductor from performing *The Firebird*; here, the conductor would have twelve months to complete a run of pre-planned concerts. And while the composer of a derivative work based on *Peter and the Wolf* could perform it forever in the United States, with compensation to Prokofiev's copyright holder, the copyright holder could permanently stop the composer from performing the work in the United Kingdom. In short, the U.K. model is both more and less protective of reliance interests. One cannot assert that Section 514 is *substantially* less protective. "At its core, plaintiffs' challenge to Section 514 'reflect[s] little more than disagreement over the level of protection' that reliance parties should receive." *Golan IV*, 609 F.3d at 1094 (quoting *Turner II*, 520 U.S. at 224).

Courts owe deference to Congress's predictive judgment that Section 514's level of reliance protections would serve its purpose. Congress faced conflicting evidence on how much reliance protection would result in a reciprocal copyright regime that secured U.S. copyrights abroad. On the one hand, if Congress provided too many reliance protections, it was likely that other countries would not adequately restore copyright for U.S. authors. Joint Hearings at 247 (statement of Smith). On the other hand, if Congress provided too few reliance protections, other countries might have hauled the United States before the World Trade Organization. *See* Report of Dr. Mihaly Ficsor at 27-28, Dist. Ct. Docket No. 104-C (describing the presumption among Berne parties that countries would provide transitional protections). Congress therefore had to make a prediction—a prediction complicated by the context of international negotiation. This Court should defer to Congress's "findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [it] infringe on traditional legislative authority to make predictive judgments." *Turner II*, 520 U.S. at 196. The need for deference is especially strong in the foreign affairs context, given that the "nuances of the foreign policy of the United States . . .

are much more the province of the Executive Branch and Congress than of this Court.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (internal quotations marks omitted); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) (noting the “classical deference to the political branches in matters of foreign policy”). Section 514 represents Congress’s considered judgment as to the level of domestic reliance protections that would appropriately secure protection for U.S. copyrights overseas. This Court should not interfere with that judgment.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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**APPENDIX**

Title 17, Section 104A of the United States Code provides as follows:

(a) Automatic protection and term.—

(1) Term.—

(A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.

(B) Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

(2) Exception.—Any work in which the copyright was ever owned or administered by the Alien Property Custodian and in which the restored copyright would be owned by a government or instrumentality thereof, is not a restored work.

(b) Ownership of restored copyright.—A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work.

(c) Filing of notice of intent to enforce restored copyright against reliance parties.—On or after the date of restoration, any person who owns a copyright in a restored work or an exclusive right therein may file with the Copyright Office a notice of intent to enforce that person's copyright or exclusive right or may serve such a notice directly on a reliance party. Acceptance of a notice by the Copyright Office is effective as to any reliance parties but shall not create a presumption of the validity of any of the facts stated therein. Service on a reliance party is effective as to that reliance party and any other reliance parties with actual knowledge of such service and of the contents of that notice.

(d) Remedies for infringement of restored copyrights.—

(1) Enforcement of copyright in restored works in the absence of a reliance party.—As against any party who is not a reliance party, the remedies provided in chapter 5 of this title shall be available on or after the date of restoration of a restored copyright with respect to an act of infringement of the restored copyright that is commenced on or after the date of restoration.

(2) Enforcement of copyright in restored works as against reliance parties.—As against a reliance party, except to the extent provided in paragraphs (3) and (4), the remedies provided in chapter 5 of this title shall be available, with respect to an act of infringement of a restored copyright, on or after the date of restoration of the restored copyright if the requirements of either of the following subparagraphs are met:

(A)

(i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) files with the Copyright Office, during the 24-month period beginning on the date of restoration, a notice of intent to enforce the restored copyright; and

(ii)

(I) the act of infringement commenced after the end of the 12-month period beginning on the date of publication of the notice in the Federal Register;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which copyright has been restored under this section are made after publication of the notice of intent in the Federal Register.

(B)

(i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) serves upon a reliance party a notice of intent to enforce a restored copyright; and

(ii)

(I) the act of infringement commenced after the end of the 12-month period beginning on the date the notice of intent is received;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for the infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which copyright has been restored under this section are made after receipt of the notice of intent.

In the event that notice is provided under both subparagraphs (A) and (B), the 12-month period referred to in such subparagraphs shall run from the earlier of publication or service of notice.

## (3) Existing derivative works.—

(A) In the case of a derivative work that is based upon a restored work and is created—

(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the restored work is an eligible country on such date, or

(ii) before the date on which the source country of the restored work becomes an eligible country, if that country is not an eligible country on such date of enactment,

a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.

(B) In the absence of an agreement between the parties, the amount of such compensation shall be determined by an action in United States district court, and shall reflect any harm to the actual or potential market for or value of the restored work from the reliance party's continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.

(4) Commencement of infringement for reliance parties.—For purposes of section 412, in the case of reliance parties, infringement shall be deemed to have commenced before registration when acts which would have constituted infringement had the restored work been subject to copyright were commenced before the date of restoration.

## (e) Notices of intent to enforce a restored copyright.—

(1) Notices of intent filed with the copyright office.—

(A)

(i) A notice of intent filed with the Copyright Office to enforce a restored copyright shall be signed by the owner of the restored copyright or the owner of an exclusive right therein, who files the notice under subsection (d)(2)(A)(i) (hereafter in this paragraph referred to as the “owner”), or by the owner's agent, shall identify the title of the restored work, and shall include an English translation of the title and any other alternative titles known to the owner by which the restored work may be identified, and an address and telephone number at which the owner may be contacted. If the notice is signed by an agent, the agency relationship must have been constituted in a writing signed

by the owner before the filing of the notice. The Copyright Office may specifically require in regulations other information to be included in the notice, but failure to provide such other information shall not invalidate the notice or be a basis for refusal to list the restored work in the Federal Register.

(ii) If a work in which copyright is restored has no formal title, it shall be described in the notice of intent in detail sufficient to identify it.

(iii) Minor errors or omissions may be corrected by further notice at any time after the notice of intent is filed. Notices of corrections for such minor errors or omissions shall be accepted after the period established in subsection (d)(2)(A)(i). Notices shall be published in the Federal Register pursuant to subparagraph (B).

(B)

(i) The Register of Copyrights shall publish in the Federal Register, commencing not later than 4 months after the date of restoration for a particular nation and every 4 months thereafter for a period of 2 years, lists identifying restored works and the ownership thereof if a notice of intent to enforce a restored copyright has been filed.

(ii) Not less than 1 list containing all notices of intent to enforce shall be maintained in the Public Information Office of the Copyright Office and shall be available for public inspection and copying during regular business hours pursuant to sections 705 and 708.

(C) The Register of Copyrights is authorized to fix reasonable fees based on the costs of receipt, processing, recording, and publication of notices of intent to enforce a restored copyright and corrections thereto.

(D)

(i) Not later than 90 days before the date the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, the Copyright Office shall issue and publish in the Federal Register regulations governing the filing under this subsection of notices of intent to enforce a restored copyright.

(ii) Such regulations shall permit owners of restored copyrights to file simultaneously for registration of the restored copyright.

(2) Notices of intent served on a reliance party.—

(A) Notices of intent to enforce a restored copyright may be served on a reliance party at any time after the date of restoration of the restored copyright.

(B) Notices of intent to enforce a restored copyright served on a reliance party shall be signed by the owner or the owner's agent, shall identify the restored work and the work in which the restored work is used, if any, in detail sufficient to identify them, and shall include an English translation of the title, any other alternative titles known to the owner by which the work may be identified, the use or uses to which the owner objects, and an address and telephone number at which the reliance party may contact the owner. If the notice is signed by an agent, the agency relationship must have been constituted in writing and signed by the owner before service of the notice.

(3) Effect of material false statements.—Any material false statement knowingly made with respect to any restored copyright identified in any notice of intent shall make void all claims and assertions made with respect to such restored copyright.

(f) Immunity from warranty and related liability.—

(1) In general.—Any person who warrants, promises, or guarantees that a work does not violate an exclusive right granted in section 106 shall not be liable for legal, equitable, arbitral, or administrative relief if the warranty, promise, or guarantee is breached by virtue of the restoration of copyright under this section, if such warranty, promise, or guarantee is made before January 1, 1995.

(2) Performances.—No person shall be required to perform any act if such performance is made infringing by virtue of the restoration of copyright under the provisions of this section, if the obligation to perform was undertaken before January 1, 1995.

(g) Proclamation of copyright restoration.—Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States, restored copyright protection on substantially the same basis as provided under this section, the President may by proclamation extend restored protection provided under this section to any work—

(1) of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation; or

(2) which was first published in that nation.

The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under such a proclamation.

(h) Definitions.—For purposes of this section and section 109(a):

(1) The term “date of adherence or proclamation” means the earlier of the date on which a foreign nation which, as of the date the WTO Agreement enters into force with respect to the United States, is not a nation adhering to the Berne Convention or a WTO member country, becomes—

(A) a nation adhering to the Berne Convention;

(B) a WTO member country;

(C) a nation adhering to the WIPO Copyright Treaty;

(D) a nation adhering to the WIPO Performances and Phonograms Treaty; or

(E) subject to a Presidential proclamation under subsection (g).

(2) The “date of restoration” of a restored copyright is—

(A) January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or

(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

(3) The term “eligible country” means a nation, other than the United States, that—

(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

(B) on such date of enactment is, or after such date of enactment becomes, a nation adhering to the Berne Convention;

(C) adheres to the WIPO Copyright Treaty;

(D) adheres to the WIPO Performances and Phonograms Treaty; or

(E) after such date of enactment becomes subject to a proclamation under subsection (g).

(4) The term “reliance party” means any person who—

(A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts

(B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of that work; or

(C) as the result of the sale or other disposition of a derivative work covered under subsection (d)(3), or significant assets of a

person described in subparagraph (A) or (B), is a successor, assignee, or licensee of that person.

(5) The term “restored copyright” means copyright in a restored work under this section.

(6) The term “restored work” means an original work of authorship that—

(A) is protected under subsection (a);

(B) is not in the public domain in its source country through expiration of term of protection;

(C) is in the public domain in the United States due to—

(i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;

(ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

(iii) lack of national eligibility;

(D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country; and

(E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.

(7) The term “rightholder” means the person—

(A) who, with respect to a sound recording, first fixes a sound recording with authorization, or

(B) who has acquired rights from the person described in subparagraph (A) by means of any conveyance or by operation of law.

(8) The “source country” of a restored work is—

(A) a nation other than the United States;

(B) in the case of an unpublished work—

(i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, of which the majority of foreign authors or rightholders are nationals or domiciliaries; or

(ii) if the majority of authors or rightholders are not foreign, the nation other than the United States which has the most significant contacts with the work; and

(C) in the case of a published work—

(i) the eligible country in which the work is first published,  
or

(ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.