

No. 10-545

In the Supreme Court of the United States

LAWRENCE GOLAN, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Section 514 of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4976, implements international copyright agreements and fulfills international copyright objectives by restoring protection to certain foreign works that had fallen into the public domain for reasons other than expiration of the full copyright term. Section 514 operates prospectively only, and it provides substantial accommodations to parties who had exploited the affected works before the URAA was enacted. The questions presented are as follows:

1. Whether Section 514 of the URAA is a permissible exercise of congressional authority under the Copyright Clause of the Constitution.
2. Whether Section 514 of the URAA violates the First Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 609 F.3d 1076. The opinion of the district court (Pet. App. 43-69) is reported at 611 F. Supp. 2d 1165. A prior opinion of the court of appeals (Pet. App. 70-109) is reported at 501 F.3d 1179. A prior opinion of the district court (Pet. App. 110-152) is unreported but is available at 2005 WL 914754. A prior order of the district court (Pet. App. 153-165) is reported at 310 F. Supp. 2d 1215.

JURISDICTION

The judgment of the court of appeals was entered 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, and

the petition was filed on that date. The petition for a writ of certiorari was granted on March 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL, INTERNATIONAL-AGREEMENT, AND
STATUTORY PROVISIONS INVOLVED**

Pertinent constitutional, international-agreement, and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

1. “There is no such thing as an ‘international copyright’ that will automatically protect an author’s writings throughout the world.” U.S. Copyright Office, *Circular 38a, International Copyright Relations of the United States* 1 (Nov. 2010). If the United States has not established copyright relations with a foreign country, residents of that country are generally free to copy and redistribute American works at will. Similarly, a work first published in a foreign country that does not have copyright relations with the United States ordinarily is not entitled to copyright protection here. To protect the works of domestic authors abroad, the United States therefore must enter into international agreements.

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention or Berne), Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), “has been the major multilateral agreement governing international copyright relations” “[f]or more than 100 years.” S. Rep. No. 352, 100th Cong., 2d Sess. 2 (1988) (*Berne Senate Report*). Currently, 164 countries are parties to the Berne Convention. See World Intellectual Prop. Org. (WIPO), *Contracting Parties*:

Berne Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 (*WIPO List*). The Berne Convention generally requires each party to afford foreign copyright holders the same protections it affords its own nationals, and the Convention establishes a required minimum level of copyright protection in member countries. One such protection is set forth in Article 18 (App., *infra*, 1a-2a), which requires parties to restore copyright protection to certain unprotected foreign works whose copyright terms have not yet expired in their country of origin.

The United States joined the Berne Convention in 1989. See *WIPO List*. By adhering to Berne, the United States immediately ensured protection for United States copyright holders in 24 new countries, and “secure[d] the highest available level of multilateral copyright protection for U.S. artists, authors and other creators.” *Berne Senate Report* 2-3.

To implement the treaty, Congress initially passed the Berne Convention Implementation Act of 1988 (BCIA), Pub. L. No. 100-568, 102 Stat. 2853. The BCIA adopted a “minimalist approach” to implementation and made “only those changes to American copyright law that [we]re clearly required under the treaty’s provisions.” H.R. Rep. No. 609, 100th Cong., 2d Sess. 7 (1988) (*Berne House Report*); accord *id.* at 20. Recognizing that Article 18 raised “difficult questions” that called for “legislative caution,” Congress postponed full consideration of that provision until it could undertake “a more thorough examination.” *Id.* at 51-52; see S. Rep. No. 412, 103d Cong., 2d Sess. 225 (1994) (*URAA Report*).

In the ensuing years, the United States and 123 other countries concluded the Uruguay Round of multilateral trade negotiations, which included the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹ The TRIPS Agreement required parties to, *inter alia*, comply with Article 18 of the Berne Convention and therefore to restore copyrights in certain foreign works. TRIPS, *supra* note 1, Art. 9.1; see *id.* Art. 14.6 (extending Berne's Article 18 protections to sound recordings). And TRIPS provided an effective means by which a WTO member could challenge any other WTO member's implementation of Berne, through the dispute settlement procedures of the then-newly established WTO. 7 William F. Patry, *Patry on Copyright* § 23:56, at 23-123, 23-124 (Mar. 2010) (Patry); J.A. 97-99. A finding of noncompliance through that process could lead to the imposition of trade sanctions. *Ibid.*

In the context of considering implementation of TRIPS, Congress and the Executive Branch revisited implementation of Article 18. Congress learned that other countries believed the United States to be out of compliance with Article 18, and that the United States could face the prospect of a WTO dispute settlement proceeding. *E.g.*, *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before Subcomms. of the House & Senate Comms. on the Judiciary*, 103d Cong., 2d Sess. 131, 147, 241, 247-248 (1994) (*Joint Hearing*). Witnesses also testified that nonexistent or ineffective copyright protections for the works of American authors abroad had

¹ Marrakesh Agreement Establishing the World Trade Organization, done Apr. 15, 1994, Annex 1C, H. Doc. No. 316, 103d Cong., 2d Sess. 1621 (1994), 1869 U.N.T.S. 299.

led to considerable losses in foreign trade, and that the United States' failure to restore copyright protection to certain foreign works was hindering diplomatic efforts to secure copyright protections for American authors abroad. *E.g., id.* at 120, 131, 136-137, 189, 241, 247, 253, 256, 291.

On December 8, 1994, Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809. Section 514 of the URAA (17 U.S.C. 104A and 17 U.S.C. 109(a) (2006 & Supp. III 2009)) implements Article 18 of Berne by restoring the remainder of the copyright term that certain foreign works would have enjoyed but for (i) lack of national eligibility (*i.e.*, if the foreign work was first published in a country, and authored by a foreign national of a country, that did not previously have copyright relations with the United States), (ii) absence of subject-matter protection for sound recordings fixed before federal law afforded copyright protection to such recordings, or (iii) failure to comply with statutory formalities (*e.g.*, fixing a copyright notice or filing a timely renewal application). 17 U.S.C. 104A(a)(1)(B) and (h)(6)(C).² The URAA did not afford copyright protection to foreign works that were in the public domain in the country of origin or the United States because the full copyright term had expired. 17 U.S.C. 104A(h)(6)(B) and (C).³ Under Section

² The United States has abolished such formalities as a condition of copyright protection for both domestic and foreign copyright holders. *E.g.*, Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 102(a)(2)(A), 106 Stat. 264 (providing for automatic renewal of copyright term); BCIA § 7, 102 Stat. 2857 (eliminating requirement that copyright notice be affixed to work).

³ Because Section 514 provides for restoration of copyright where foreign works passed into the public domain due to "failure of renewal,"

514, restored copyrights “subsist for the remainder of the term of copyright that the work would have otherwise been granted * * * if the work never entered the public domain.” 17 U.S.C. 104A(a)(1)(B).

Section 514 is prospective only and has no effect on the legality of conduct that occurred before the URAA was enacted. Rather, the effect of restoring copyright to a particular foreign work is to make available various statutory remedies (see 17 U.S.C. 501-513 (2006 & Supp. III 2009)) for acts of infringement that occur “on or after the date of restoration.” 17 U.S.C. 104A(d)(1) and (2). Section 514 also permitted all persons to make additional copies of, and otherwise use, the affected works for an additional year after enactment of the URAA. See 17 U.S.C. 104A(h)(2)(A); 61 Fed. Reg. 19,372 (1996) (date of copyright restoration was January 1, 1996).

Section 514 also provides various accommodations for “reliance parties” (17 U.S.C. 104A(h)(4)) who had exploited the affected foreign works before the URAA was enacted. Such persons can continue to exploit the restored works unless and until the foreign copyright holder gives notice of an intent to enforce, either by filing a notice with the Copyright Office within two years of restoration, or by notifying the reliance party directly. 17 U.S.C. 104A(c), (d)(2)(A)(i) and (B)(i). Even after receiving notice, a reliance party may continue to exploit any existing copies of the restored work for another year. 17 U.S.C. 104A(d)(2)(A)(ii) and (B)(ii). A person who has created a “derivative work,” based on a

17 U.S.C. 104A(h)(6)(C)(i), it encompasses some works that received a period of copyright protection in the United States. Cf. note 2, *supra* (explaining that United States law now provides for automatic renewal of copyrights). The primary impact of the restoration provisions, however, is on foreign works that never received U.S. copyright protection.

work subject to a restored copyright, can continue to exploit that work indefinitely if he pays reasonable compensation to the copyright owner. 17 U.S.C. 104A(d)(3). If the parties cannot agree on reasonable compensation, a district court may set a reasonable rate that takes into account any “contributions of expression of * * * the reliance party to the derivative work.” 17 U.S.C. 104A(d)(3)(B).

2. Petitioners seek to use, copy, or sell, in ways that normally would constitute infringement, works whose copyrights were restored under Section 514. They brought this action alleging, *inter alia*, that the URAA exceeds Congress’s powers under the Copyright Clause and that it violates the First Amendment.⁴

a. The district court granted the government’s motion for summary judgment. Pet. App. 110-152. The court rejected petitioners’ contention that the Copyright Clause categorically precludes Congress from restoring copyrights “to works that have passed into the public domain.” *Id.* at 116, 143. The court further determined that, in enacting Section 514, Congress was “attempting to promote protection of American authors by ensuring

⁴ Petitioners also alleged that the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause and the First Amendment. Proceedings were stayed after this Court granted certiorari to review a similar challenge to the CTEA in *Eldred v. Ashcroft* (No. 01-618). Pet. App. 154. The Court ultimately rejected that challenge. See 537 U.S. 186 (2003). The district court subsequently granted the government’s motion to dismiss petitioners’ CTEA claims (Pet. App. 153-165), the court of appeals affirmed (*id.* at 79-81), and petitioners do not pursue those challenges here (Pet. 7 n.2). Petitioners also alleged that Section 514 violates their substantive due process rights. The district court granted summary judgment in favor of the government on that claim (Pet. App. 148-152), and petitioners did not challenge that ruling on appeal.

compliance with the Berne Convention within our own borders,” and that Congress’s effort to achieve that “constitutionally-permissible end” survived rational-basis scrutiny. *Id.* at 147. The district court rejected petitioners’ First Amendment challenge, relying on “the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns.” *Id.* at 147-148.

b. The court of appeals affirmed in part and reversed in part. The court agreed that Section 514 of the URAA does not exceed Congress’s authority under the Copyright Clause, but it vacated the district court’s First Amendment ruling and remanded for further proceedings. Pet. App. 70-109.

Relying in part on *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the court of appeals rejected petitioners’ contention that extending “copyright protection to works in the public domain” is categorically foreclosed by the Copyright Clause. Pet. App. 82-83. The court further held that implementation of “the Berne Convention, which secures copyright protections for American works abroad, is [not] so irrational or so unrelated to the aims of the Copyright Clause that it exceeds the reach of congressional power.” *Id.* at 85.

The court of appeals read *Eldred* as suggesting that Congress’s exercise of its Copyright Clause power is subject to First Amendment review “if it ‘altered the traditional contours of copyright protection.’” Pet. App. 86-87 (quoting *Eldred*, 537 U.S. at 221). The court held that one of those “traditional contours” is “the bedrock principle of copyright law that works in the public domain remain there,” and that Section 514 “alters the traditional contours of copyright protection by deviating from this principle.” *Id.* at 87. The court concluded that

once the affected works entered the public domain, petitioners acquired “vested First Amendment interests in the expressions,” and that First Amendment scrutiny was required to determine whether Section 514 impermissibly interferes with those interests. *Id.* at 102. The court of appeals therefore remanded for further proceedings. *Id.* at 107-109.

c. After further discovery in the district court, the parties filed cross-motions for summary judgment. The court granted petitioners’ motion and denied the government’s motion, holding that Section 514 violates petitioners’ First Amendment rights. Pet. App. 43-69. The court concluded that none of the federal interests identified by the government—*i.e.*, (1) ensuring compliance with international obligations, (2) protecting the interests of American authors abroad, and (3) correcting historical inequalities facing foreign authors—provides a constitutionally sufficient justification for Section 514. See *id.* at 56-68.

d. The court of appeals reversed. Pet. App. 1-42. The court agreed that Section 514 is content-neutral and therefore subject to intermediate scrutiny. *Id.* at 11. Because it concluded that the government has “a substantial interest in protecting American copyright holders’ interests abroad, and Section 514 is narrowly tailored to advance that interest,” the court did not reach the validity of the government’s other two asserted interests. *Id.* at 12-13 & n.6.

The court of appeals held “that the government’s interest in securing protections abroad for American copyright holders” is an important interest unrelated to the suppression of free expression. Pet. App. 13. The court recognized that Congress’s predictive judgments are entitled to “substantial deference,” and that such

deference is especially warranted where, as here, the judgment involves other Branches' assessment of foreign affairs. *Id.* at 16-18 (citation omitted). In sustaining Congress's judgment that Section 514 would alleviate significant ongoing harms to American authors, *id.* at 19-29, the court relied on, *inter alia*, "testimony from a number of witnesses that the United States' position on the scope of copyright restoration—which necessarily includes the enforcement against reliance parties—was critical to the United States' ability to obtain similar protections for American copyright holders," *id.* at 24.

The court of appeals also concluded that Section 514 is narrowly tailored to serve the government's interest, and that the burdens imposed on "reliance parties" are exactly "congruent" to the benefits afforded American copyright holders. Pet. App. 30-31. The court declined to decide precisely what level of protection for reliance parties the Berne Convention requires or permits. *Id.* at 32. The court explained that, even assuming Section 514 provides greater protection for foreign authors than the Berne Convention requires, the legislation might induce other nations to provide comparable protections to American authors, thereby serving a substantial interest of the United States. *Ibid.*

SUMMARY OF ARGUMENT

I. Section 514 is a valid exercise of Congress's Copyright Clause authority.

A. Section 514 is consistent with the text of the Copyright Clause, and particularly with the Clause's requirement that copyrights be issued for "limited Times." A copyright restored under Section 514 expires on the same day it would have expired if the work had received copyright protection when it was first pub-

lished. Because petitioners do not dispute that the generally applicable periods of protection afforded by the Copyright Act are “limited” as applied to U.S. works, those periods are necessarily “limited” as applied to restored copyrights as well.

B. Section 514 also accords with historical practice. The first federal copyright statute, enacted by the First Congress in 1790, granted copyright protection to a substantial range of pre-existing works that had previously been open to public exploitation. On a number of occasions, subsequent Congresses likewise restored copyright and patent protection to works and inventions that had entered the public domain, and the relevant patent laws were uniformly sustained when challenged in court. To be sure, when Congress has expanded the scope of federal copyright protection, its more common practice has been to limit those expansions to works that were not yet in the public domain. But that does not cast doubt on Congress’s constitutional power to extend copyright protection to public-domain works, particularly given the frequency of Congress’s departures from the general rule and the consistent judicial rejection of challenges to analogous patent statutes.

C. Section 514 is subject to, and easily survives, judicial review under the deferential “rational basis” standard. Although petitioners assert a “federal right” to copy and use works of authorship that are in the public domain, this Court’s decisions make clear that the contours of that right (and the contours of the public domain) are defined by the copyright statutes that Congress has enacted. Ensuring compliance with international obligations, securing greater protections for American authors abroad, and remedying past inequali-

ties are legitimate governmental objectives, and Section 514 is a rational means of achieving them.

II. Section 514 is consistent with the First Amendment.

A. The court of appeals erred in holding that Section 514 alters the “traditional contours of copyright protection” and is therefore subject to heightened scrutiny. In *Eldred*, this Court discussed the various features of traditional copyright law that ensured its consistency with the First Amendment. Those features include the “idea/expression dichotomy,” the “fair use” defense, and the fact that traditional copyright protections restrict only the unauthorized exploitation of other people’s expression. So long as Congress legislates in a manner consistent with those traditional features of copyright law, the First Amendment inquiry is essentially at an end.

Section 514 does not alter the traditional balance between protected and prohibited conduct that is built into the Copyright Act. The idea/expression dichotomy and the “fair use” defense apply fully to exploitation of restored works subject to Section 514. The determination whether particular conduct infringes a restored copyright likewise is governed by the generally applicable Copyright Act provisions that define infringement, not by any rule specific to the URAA. The restrictions imposed on petitioners are atypical only in the sense that they apply to works of authorship that petitioners were once free to exploit. But that aspect of the statutory scheme violates no independent First Amendment norm. If particular restrictions on expressive activity are otherwise consistent with the First Amendment, a person who has previously engaged in the now-

proscribed conduct has no “vested” right to continue to do so.

B. Even if Section 514 were subject to heightened (*i.e.*, intermediate) judicial scrutiny under the First Amendment, it would satisfy such review. Petitioners contend that the United States could have complied with its obligations under the Berne Convention while according greater rights to “reliance parties” who had previously exploited the restored works. Congress could appropriately seek to ensure, however, both that the United States was in actual compliance with Berne and that its compliance was not disputed by other member nations. Congress could also appropriately conclude that placing temporal limits on the rights of reliance parties would induce other nations to do likewise, thereby benefitting American authors abroad. Finally, Congress could appropriately seek to redress the prior inequalities of treatment between U.S. and foreign authors that had necessitated copyright restoration.

ARGUMENT

I. SECTION 514 IS A VALID EXERCISE OF CONGRESS’S POWER UNDER THE COPYRIGHT CLAUSE

The Copyright Clause empowers Congress to “promote the Progress of Science * * * , by securing for limited Times to Authors * * * the exclusive Right to their respective Writings.” U.S. Const. Art. I, § 8, Cl. 8. That provision places various constraints on Congress’s authority to define the terms and recipients of copyright protection. The authority to grant copyrights “for limited Times” does not include the power to grant *perpetual* copyrights. The authority to grant copyrights to “Authors” does not encompass the power to use copyrights as a form of patronage by granting them to per-

sons having no nexus to the relevant work’s creation. And the authority to vest authors with exclusive rights in their own “Writings” does not include the power to grant exclusive rights in the *ideas* the author has expressed. Section 514 is fully consistent with each of those limitations.

Petitioners ask this Court to read into the Copyright Clause an additional, atextual limitation, under which works that enter the public domain in this country for any reason become categorically ineligible for copyright protection under United States law. Petitioners’ argument is inconsistent with the constitutional text, congressional practices dating back to the First Congress, and this Court’s decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

A. The Text Of The Copyright Clause Does Not Preclude Congress From Granting Copyright Protection To Works That Have Entered The Public Domain In The United States

1. Petitioners contend (Br. 21-23) that Section 514, by restoring copyright protection to works that had previously entered the public domain in the United States, exceeds Congress’s Copyright Clause authority to grant copyrights for “limited Times.” That argument is inconsistent with the constitutional text and with this Court’s decision in *Eldred*.

As the Court explained in *Eldred*, the term “limited” in the Copyright Clause is best understood to mean “‘confine[d] within certain bounds,’ ‘restrain[ed],’ or ‘circumscribe[d],’” rather than “forever ‘fixed’ or ‘inalterable.’” 537 U.S. at 199 (brackets in original; citation omitted). Under Section 514, the term of a restored copyright is “limited” in the relevant respect. Section

514 provides that “[a]ny 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.” 17 U.S.C. 104A(a)(1)(B). A copyright restored under Section 514 thus expires on the same day it would have expired if the work had received copyright protection in the United States when it was first published—*i.e.*, if the author had been nationally eligible for protection at the time the work was created, the subject matter had been eligible for copyright protection at that time, and the author had complied with any then-applicable formalities imposed by United States law. A foreign author whose U.S. copyright is restored by the URAA therefore will have a *shorter* term of copyright protection. Because petitioners do not dispute that the terms of protection afforded by the Copyright Act are “limited” as applied to U.S. works, those terms are necessarily “limited” as applied to restored copyrights as well.

Petitioners’ contrary argument is premised on an understanding of the word “limited” that this Court considered and rejected in *Eldred*. Petitioners contend that “[r]emoving works from the public domain violates the ‘limited [T]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at anytime.” Br. 22. This Court in *Eldred*, however, expressly refused to “read[] into the text of the Copyright Clause the command that a time prescription, once set, becomes forever ‘fixed’ or ‘inalterable.’” 537 U.S. at 199. The Court held instead that a period of exclusivity can be “limited” within the meaning of the Copyright Clause even though it has been extended beyond the original term of copyright protection. See *ibid.* To be

sure, the statutory extensions at issue in *Eldred* applied only to works that were already protected by U.S. copyrights when the extensions were enacted. Petitioners have identified no plausible definition of the word “limited,” however, that would encompass that situation but not the one at issue here.⁵

2. Petitioners also suggest (Br. 23-24) that Section 514 is inconsistent with the Copyright Clause’s preamble, which indicates that the goal of copyright protection is “To promote the Progress of Science.” Petitioners identify no decision, however, in which any court has interpreted the preamble as an independent limitation on the powers of Congress. Rather, “the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.” *Eldred*, 537 U.S. at 222; see *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (Congress “may * * * implement the stated purpose of the Framers by selecting the [patent-law] policy which in its judgment best effectuates the constitutional aim.”).

Petitioners contend (Br. 24) that Section 514 does not further the objective identified in the Copyright

⁵ As petitioners observe, the Solicitor General stated at oral argument in *Eldred* that a “bright line” exists between works of authorship that have entered the public domain and those that have not. Br. 20. The thrust of the Solicitor General’s statement, however, was that Congress, in enacting the copyright extensions at issue in *Eldred*, could rationally distinguish between a work whose copyright had very recently expired and a work whose copyright was on the verge of expiring, even if the works had been created only days apart. See Tr. of Oral Argument at 44, *Eldred*, *supra* (No. 01-618). The Solicitor General did not suggest, much less concede, that the Copyright Clause categorically forbids the extension of copyright protection to works that have entered the public in the United States. See *id.* at 28-29.

Clause’s preamble because Section 514 applies only to works that had already been created when the URAA was enacted. That argument, however, is simply a variant of the “quid pro quo” theory that this Court rejected in *Eldred*. See 537 U.S. at 214-217; *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1263-1264 (D.C. Cir. 2005) (describing similar argument as “the core argument advanced against the [CTEA] in *Eldred*,” and noting that “[i]n all of [its] variations the argument lost”). As this Court recognized, “if the only way to promote the progress of science were to provide incentives to create new works,” then “the United States could not ‘play a leadership role’ in the give-and-take evolution of the international copyright system.” 537 U.S. at 206 (quoting 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, 332 (2002) (Perlmutter)). In today’s global economy, and in light of current (and emerging) technologies that render geographic borders largely obsolete with respect to the protection of intellectual property, the promotion of “progress” is tied directly to “active participation” in that international system. Perlmutter 324; see *id.* at 330-335.

B. Historical Practice Confirms That The Copyright Clause Authorizes Congress To Restore Copyrights To Works In The Public Domain

“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 (citing *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Beginning with the first federal copyright statute in 1790, Congress has frequently extended copyright protection

to works that, for one reason or another, were in the public domain. Congress has similarly restored patent protection to inventions in the public domain, and its exercise of that authority has been upheld by Chief Justice Marshall, Justice Story, and Justice Bushrod Washington. That historical practice reinforces the most natural reading of the Copyright Clause’s text.

1. *The First Congress granted copyright protection to works that were previously unprotected*

“[E]arly congressional practice * * * provides ‘contemporaneous and weighty evidence of the Constitution’s meaning.’” *Alden v. Maine*, 527 U.S. 706, 743-744 (1999) (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). As this Court has observed in the copyright context, “[t]he construction placed upon the Constitution by the first [copyright] act of 1790 * * * by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

The first federal copyright statute, enacted by the First Congress in 1790, granted copyright protection to “any map, chart, book or books already printed within these United States.” Act of May 31, 1790 (1790 Act), ch. 15, § 1, 1 Stat. 124; see *Eldred*, 537 U.S. at 194. At that time, many of the “map[s],” “chart[s],” and “books” “already printed” had no copyright protection. The unmistakable effect of the 1790 Act thus was to grant copyright protection to works that had previously been in the “public domain.” See *Luck’s Music Library*, 407 F.3d at 1265; Pet. App. 135.

a. Before passage of the 1790 Act, copyright was a matter of state law. Three States provided no statutory

copyright protection at all.⁶ Of the ten States with operative copyright statutes, seven provided no protection for “maps” or “charts.”⁷ Consistent with the recommendation of the Continental Congress, eight States provided no protection for books already printed at the time of enactment.⁸ And each of the ten States with operative statutes required authors to abide by certain formalities as a condition of eligibility for copyright protection.⁹

⁶ Delaware never enacted a copyright statute, and the copyright statutes in Maryland and Pennsylvania provided that they would not go into effect until all States had enacted similar copyright legislation. See Md. Copyright Act of 1783, § VI; Pa. Copyright Act of 1784, § VII. See generally Library of Cong., *Copyright Office Bull. No. 3, Copyright Enactments of the United States* 11-31 (2d ed. rev. 1906) (reprinting state statutes). Because Delaware never enacted copyright legislation, the copyright laws of Maryland and Pennsylvania never went into effect. See Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* 123-124 (1967).

⁷ See Mass. Copyright Act of 1783, para. 3; N.J. Copyright Act of 1783, § 1; N.H. Copyright Act of 1783, para. 2; R.I. Copyright Act of 1783, para. 2; S.C. Copyright Act of 1784, para. 1; Va. Copyright Act of 1785, § I; N.Y. Copyright Act of 1786, § I.

⁸ See Resolution of May 2, 1783, 24 J. Cont’l Cong. 326 (Guillard Hunt ed., 1922) (encouraging States “to secure [copyright protection] to the authors or publishers of any new books not hitherto printed”); Conn. Copyright Act of 1783, para. 2; N.J. Copyright Act of 1783, § 1; N.C. Copyright Act of 1785, § I; Ga. Copyright Act of 1786, § I. In Massachusetts, New Hampshire, Rhode Island, and South Carolina, previously printed works were eligible for copyright protection, but an author could enforce his copyright only with respect to works that were “not yet printed” (Mass. Copyright Act of 1783, paras. 3-4; N.H. Copyright Act of 1783, paras. 2-3; R.I. Copyright Act of 1783, paras. 2-3), or those that were “hereafter published” (S.C. Copyright Act of 1784, paras. 1, 3).

⁹ Connecticut, New Jersey, South Carolina, Virginia, North Carolina, Georgia, and New York had registration requirements. See Conn. Copyright Act of 1783, para. 3; N.J. Copyright Act of 1783, § 1; S.C.

Thus, when the first federal copyright law was enacted in 1790, state copyright statutes permitted members of the public to freely and lawfully exploit: (i) all “books,” “charts,” and “maps” in Delaware, Maryland, and Pennsylvania; (ii) all “maps” and “charts” in Massachusetts, New Jersey, New Hampshire, Rhode Island, South Carolina, Virginia, and New York; (iii) all “books” printed before 1783 in Connecticut, Massachusetts, New Jersey, New Hampshire, and Rhode Island, before 1784 in South Carolina, before 1785 in North Carolina, and before 1786 in Georgia; and (iv) any “books,” “maps,” or “charts” whose authors had failed to comply with applicable formalities.

All of these works would be in the “public domain” *unless* common law provided additional copyright protections. It did so with respect to unpublished works. But, as this Court recognized in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), that protection expired upon first publication. As the Court held, “a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world,” *id.* at 657, “does not exist at common law,” *id.* at 663.¹⁰

Copyright Act of 1784, para. 3; Va. Copyright Act of 1785, § II; N.C. Copyright Act of 1785, § I; Ga. Copyright Act of 1786, § I; N.Y. Copyright Act of 1786, § I. Massachusetts and North Carolina had deposit requirements. Mass. Copyright Act of 1783, para. 4; N.C. Copyright Act of 1785, § I. And Massachusetts, New Hampshire, and Rhode Island imposed a notice requirement of printing the author’s name with the work, thereby prohibiting copyright on pseudonymous works. Mass. Copyright Act of 1783, paras. 3-4; N.H. Copyright Act of 1783, paras. 2-3; R.I. Copyright Act of 1783, paras. 2-3.

¹⁰ This Court has consistently reiterated that understanding. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 214-215 (1954) (“[S]tatute creates the copyright. It did not exist at common law even though he had a property right in his unpublished work.”) (footnote omitted); *Caliga v. Inter*

Against this backdrop, the First Congress conferred federal copyright protection upon all “books,” “maps,” and “charts” “already printed.” The effect of that enactment was to remove a number of existing works from the public domain. The First Congress’s implicit determination that it possessed constitutional authority to take that step is “entitled to very great weight.” *Burrow-Giles Lithographic Co.*, 111 U.S. at 57.

b. Petitioners do not dispute that state statutes left a number of works unprotected (and, thus, freely exploitable) before the 1790 Act. Nor do they contend that all of the States recognized a common-law copyright in published works. See 05-1259 Pet. C.A. Reply Br. 16 (conceding most States were “hostile” to post-publication common-law copyright). Petitioners argue instead that “[t]he Founders recognized copyrights existed at common law” (Br. 31); that New York recognized a perpetual common-law copyright in published works, and that “the scope of common law protection for published works” was otherwise “hotly contested” (*id.* at 32); and that, before 1790, there was “no public domain of the United States” (*id.* at 31). None of those arguments can obscure the fact that the First Congress took the very step petitioners contend is constitutionally impermissible—*i.e.*, that it granted copyright protection to works that were previously open to public exploitation.

Ocean Newspaper Co., 215 U.S. 182, 188 (1909) (“At common-law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common-law right was lost.”); *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 362 (1908) (“In this country the right of an author to multiply copies of books, maps, etc., after publication, is the creation of the Federal statutes.”).

First, petitioners' generalized observation that "[t]he Founders recognized copyrights existed at common law" (Br. 31) elides the fact that the common-law right was limited to unpublished works. See *Wheaton*, 33 U.S. at 657, 660-661. Contrary to petitioners' contention (Br. 32 n.5), the Court's holding in *Wheaton* was not limited to Pennsylvania law. Rather, the *Wheaton* Court relied primarily on (i) the word "secure" in the 1790 Act, which it read as an indication that Congress was "creat[ing]" a new right, rather than "sanctioning an existing right"; and (ii) the unsettled nature of English common law at the time the colony of Pennsylvania was settled. 33 U.S. at 660-661. The first rationale is not specific to Pennsylvania, and the second equally applies to the other colonies (which were all settled at a time when English common law remained obscure).

Second, petitioners rely on *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005), to argue that "New York common law provided perpetual common law protection for published works." Br. 32. Even if that were an accurate description of the *Capitol Records* court's holding, it says nothing about the status of common-law protection in the 12 other States.¹¹ Petitioners' contention that the existence of *post-publication* common-law copyright in those other States was "hotly contested" (*ibid.*) is based solely on the disagreement between the majority and dissenting Justices in *Wheaton* itself.

Finally, petitioners argue that the 1790 Act could not have removed works from the "public domain of the

¹¹ Petitioners appear to overstate the holding of *Capitol Records*, which was limited to sound recordings. Indeed, the court recognized a critical distinction between sound recordings and literary works. 830 N.E.2d at 262-264.

United States” because, before 1790, “there was no federal copyright law, and no public domain of the United States by definition.” Br. 31. That argument lacks merit. In asserting that the works at issue in this case were within the “public domain of the United States” before Section 514 was enacted, petitioners do not and cannot contend that any federal statute affirmatively authorized the public to exploit those works. Rather, petitioners simply mean that no provision of federal law protected the works from public exploitation. Because the term “public domain” refers to the *absence* of copyright protection, it makes no sense to say that the “public domain of the United States” did not exist until the first federal copyright law was enacted. The clear practical effect of the 1790 Act was to confer federal copyright protection upon many works that were previously subject to unrestricted exploitation by the public. Enactment of a law having that effect reflects Congress’s implicit understanding that its powers under the Copyright Clause extended to works in the public domain.

2. Subsequent Congresses also restored copyright and patent protection to works and inventions in the public domain

On several subsequent occasions, Congress restored copyright and patent protection to works and inventions that had previously entered the public domain. See *Eldred*, 537 U.S. at 201 (“Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry.”). Petitioners’ understanding of the Copyright Clause as categorically prohibiting such restoration is inconsistent with that historical practice.

a. In 1808, Congress passed the first special act restoring patent protection to an invention in the public domain. Oliver Evans's patent for milling powder had expired on January 7, 1805. P.J. Federico, *The Patent Trials of Oliver Evans*, 27 J. Pat. Off. Soc'y 586, 597 (1945) (Federico). Three years later, Congress passed a private bill reissuing Evans a new patent for a full term. Act of Jan. 21, 1808, ch. 13, 6 Stat. 70. That bill was signed by then-President Thomas Jefferson (the first administrator of the patent system, and perhaps the Founder with the narrowest view of the copyright and patent powers), and the patent was issued by Secretary of State James Madison (who had drafted the Constitution's "limited Times" language). See Federico 606; *Eldred*, 537 U.S. at 202 n.8. During the three-year interval between expiration of the original patent and issuance of the new, "no patent was in force and no restrictions, legal or moral, existed to the general use of the milling machinery without license." Federico 607.

On many other occasions in the 19th century, Congress similarly restored individual patents, each time removing inventions from the public domain. *E.g.*, Act of June 30, 1834, ch. 213, 6 Stat. 589; Act of Mar. 3, 1843, ch. 131, 6 Stat. 895; Act of May 30, 1862, ch. 88, 12 Stat. 904; Act of June 11, 1878, ch. 187, 20 Stat. 542. During roughly the same period, Congress also enacted several private bills restoring copyright protection to individual works that had fallen into the public domain (often because the author had failed to comply with statutory formalities). *E.g.*, Act of Feb. 19, 1849 (Corson Act), ch. 57, 9 Stat. 763; Act of June 23, 1874 (Helmuth Act), ch. 534, 18 Stat. 618; Act of Feb. 17, 1898 (Jones Act), ch. 29, 30 Stat. 1396. Congress sometimes granted special protections to persons who had used the belatedly

copyrighted works while they were in the public domain, see Corson Act § 1, 9 Stat. 763, but other private bills contained no such accommodations, see Helmuth Act, 18 Stat. 618; Jones Act, 30 Stat. 1396.

Although the copyright bills were never challenged in court, the patent bills were. As this Court recognized in *Eldred*, 537 U.S. at 202, those laws were uniformly upheld by Chief Justice Marshall, by Justice Story, and by this Court in a unanimous opinion written by Justice Bushrod Washington (a member of the 1787 Virginia House of Delegates that ratified the Constitution). See *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4564) (Marshall, Circuit Justice), *aff'd*, 13 U.S. (9 Cranch) 199 (1815); *Blanchard v. Sprague*, 3 F. Cas. 648 (C.C.D. Mass. 1839) (No. 1518) (Story, Circuit Justice); *Jordan v. Dobson*, 13 F. Cas. 1092 (C.C.E.D. Pa. 1870) (No. 7519) (Strong, Circuit Justice); *The Fire-Extinguisher Case*, 21 F. 40 (C.C.D. Md. 1884). In *Evans*, this Court described the question before it as “whether, after the expiration of the original patent granted to [Evans], a general right to use his discovery was not so vested in the public as to require and justify a construction” of the private bill that would permit the continued use of machinery “erected subsequent to the expiration of the original patent and previous to the passage of the [private bill].” *Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 202 (1815) (Washington, J.). The Court unanimously held that the private bill did not permit continued use of the machinery. *Id.* at 203 (concluding that Congress chose not to further extend the protections and that “this Court would transgress the limits of judicial power” if it were to do so).

Justice Story reached the same conclusion while sitting as circuit justice in a later case. He rejected the

argument that renewal of a patent was unconstitutional because “it operates retrospectively to give a patent for an invention, which, though made by the patentee, was in public use and enjoyed by the community at the time of the passage of the act.” *Blanchard*, 3 F. Cas. at 650. Justice Story explained that he “never ha[d] entertained any doubt of the constitutional authority of congress to make such a grant.” *Ibid.*

b. In addition to the private bills described above, Congress has also enacted several generally applicable laws restoring copyright or patent protection to works or inventions in the public domain.

In 1832, Congress provided for a “new patent to be granted” to an inventor whose original patent was “invalid or inoperative” for failure to comply with statutory formalities “by inadvertence, accident, or mistake.” Act of July 3, 1832, ch. 162, § 3, 4 Stat. 559. While recognizing that many of the relevant inventions had previously been subject to free exploitation by the public, Congress specifically directed that “no public use or privilege of the invention so patented * * * shall, in any manner, prejudice [the inventor’s] right of recovery for any use or violation of his invention after the grant of such new patent.” *Ibid.* And in 1893, Congress provided that authors who had failed to comply timely with the deposit requirement would still “be entitled to all the rights and privileges” of the Copyright Act, so long as they had satisfied that requirement by March 1, 1893. Act of Mar. 3, 1893, ch. 215, 27 Stat. 743.

In 1919 and 1941, Congress authorized the President to grant protection to foreign works that had fallen into the public domain during World War I and World War II. See Act of Dec. 18, 1919 (1919 Act), ch. 11, 41 Stat. 368; Act of Sept. 25, 1941 (1941 Act), ch. 421,

55 Stat. 732. Six presidents, including Woodrow Wilson, Warren Harding, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, and Lyndon Johnson, issued proclamations pursuant to those Acts and thereby removed works from the public domain. In 1944, for example, President Roosevelt excused noncompliance with copyright formalities for British works published abroad on or after September 3, 1939, and he permitted the authors or proprietors of such works to comply with the terms of the Copyright Act *nunc pro tunc* and thereby receive restored protection. See Proclamation No. 2608, 3 C.F.R. 19 (1943-1948); see also Proclamation No. 3792, 3 C.F.R. 132 (1966-1970) (restoring copyright protection to German works subject to copyright or renewal between September 3, 1939, and May 5, 1956, upon compliance with formalities within one year of proclamation).¹² Reflecting Congress’s recognition that certain members of the public had used the restored works while they were in the public domain, the 1919 Act did not “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 this Act.” 1919 Act, 41 Stat. 369. The 1941 Act provided only that such parties were not liable for uses prior to the proclamation and that they could continue to exploit the works for one year. 1941 Act, 55 Stat. 732; H.R. Rep. No. 619, 77th

¹² See also Proclamation of Apr. 10, 1920, 41 Stat. 1790 (Great Britain); Proclamations of May 25, 1922, 42 Stat. 2271 (Germany), 2273 (Austria), 2274 (New Zealand); Proclamations of June 3, 1922, 42 Stat. 2276 (Italy), 2277 (Hungary); Proclamation No. 2722, 3 C.F.R. 107 (1943-1948) (France); Proclamation No. 2729, 3 C.F.R. 113 (1943-1948) (New Zealand); Proclamation No. 2868, 3 C.F.R. 45 (1949-1953) (Australia); Proclamation No. 2953, 3 C.F.R. 137 (1949-1953) (Finland); Proclamation No. 3353, 3 C.F.R. 79 (1959-1963) (Austria).

Cong., 1st Sess. 2 (1941) (describing the 1941 Act as providing “adequate[]” protection to the “rights lawfully exercised by American users or publishers of copyrighted works[,] protection of which ha[d] lapsed”).

Although none of these statutes appears to have been challenged in court, this Court addressed a comparable issue in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843). In *McClurg*, the Court held that an 1839 amendment had revived a disputed patent that “would have been void” under prior law. *Id.* at 207, 208-209. The Court explained that the applicable law “depend[s] on the law as it stood at the emanation of the patent, together with such changes as have since been made; for though they may be retrospective in their operation, that is not a sound objection to their validity.” *Id.* at 206. Under the law existing at the time the process was patented (1834-1835), the issued patent “would have been void” because the patentee had allowed his employer briefly to practice the invention before obtaining the patent. *Id.* at 207. The 1839 amendment, however, exempted brief uses by an employer and, accordingly, “relieved” the patentee “from the effects of former laws,” *id.* at 209, rendering the patent “valid, retroactive to the time it issued,” *Eldred*, 537 U.S. at 203.¹³

¹³ In *Eldred*, this Court described *McClurg* as approving “the legislative expansion of existing patents.” 537 U.S. at 202; see *id.* at 203 n.9. But *McClurg* involved an “existing” patent only in the sense that a patent had in fact been issued. At the time of issuance, however, the patent was “void” under the governing law. The effect of the intervening statute therefore was to confer patent rights that had not previously existed, and thus to render unlawful infringing conduct that would previously have been legal, rather than simply to extend the term of patent protection.

c. Petitioners suggest that the 1919 and 1941 Acts were simply responses to the “exigency of wartime,” and that the various private bills reflected the “specific circumstances of the people involved.” Br. 40. But if petitioners’ basic constitutional theory were correct—*i.e.*, if extension of copyright protection to works in the public domain were categorically beyond the scope of Congress’s powers under the Copyright Clause—neither the “exigency of wartime” nor the “specific circumstances” of a particular case would justify the statutes described above. Petitioners also note (Br. 39, 40) that neither the 1919 and 1941 Acts nor the private copyright bills were challenged in court. The private patent bills *were* challenged, however, and they were uniformly upheld. See *Eldred*, 537 U.S. at 202.

Petitioners also rely (Br. 22, 41) on this Court’s statement (in dicta) 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.” *Graham*, 383 U.S. at 6. As this Court recognized in *Eldred*, however, “[t]he controversy in *Graham* involved no patent extension. *Graham* addressed an invention’s very eligibility for patent protection, and spent no words on Congress’ power to enlarge a patent’s duration.” 537 U.S. at 202 n.7; see *Luck’s Music Library*, 407 F.3d at 1266; Pet. App. 83-85.

Read in context, the statement on which petitioners rely is best understood as a corollary to the proposition that Congress may not “enlarge the [intellectual] monopoly without regard to the innovation, advancement or social benefit gained thereby.” *Graham*, 383 U.S. at 6. Just as the Copyright Clause authorizes the issuance of copyrights only to “Authors,” it authorizes the issuance

of patents only to “Inventors,” and it therefore does not empower Congress to grant monopolies on extant inventions (*e.g.*, as a form of patronage) to persons having no nexus to the creation or discovery. *Graham*’s dicta cannot reasonably be read to overrule prior decisions *sub silentio*, particularly when those decisions (unlike *Graham*) spoke directly to this issue. See *Eldred*, 537 U.S. at 202 n.7 (rejecting dissent’s contention that *Graham* “flatly contradicts” cases like *Evans* and *Blanchard*) (citation omitted).¹⁴

Unlike the grant of a patent, moreover, copyright cannot “remove existent *knowledge* from the public domain.” *Graham*, 383 U.S. at 6 (emphasis added). Copyright protects only the author’s particular expression and (unlike a patent) does not bar others from exploiting the underlying idea or knowledge. See *Eldred*, 537 U.S. at 217 (The Constitution provides more lenient standards for exercises of the copyright power because a

¹⁴ Read in the broad manner that petitioners advocate, the *Graham* dicta would contradict important principles of patent law. Issuance of a patent often has the effect of preventing persons other than the patentee from continuing to engage in conduct that was previously lawful. Cf., *e.g.*, *RCA v. Radio Eng’g Labs., Inc.*, 293 U.S. 1, 3 (1934) (explaining that each of four competing claimants, “acting independently, had made the same or nearly the same discovery at times not widely separate,” but that “[t]he prize of an exclusive patent falls to the one who had the fortune to be first”). Under the Patent Act in its current form, moreover, an inventor is not entitled to a patent if his invention was “in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.” 35 U.S.C. 102(b). The evident import of that provision is that prior public use or sale does *not* categorically bar issuance of a patent if that use or sale occurred *less* than one year before the patent application was filed. The Patent Act thus significantly restricts, but does not eliminate, the inventor’s right to seek a patent after his invention has entered the public domain.

“copyright gives the holder no monopoly on any knowledge” and the reader “may make full use of any fact or idea she acquires from her reading.”); *Mazer*, 347 U.S. at 217 (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”). Indeed, the only mention of the copyright component of the Clause in *Graham* was a footnote stating that it is “not relevant here.” 383 U.S. at 5 n.1. Language “extract[ed]” from a patent decision that is “not trained on” the restoration of patent protection provides no support for petitioners’ categorical rule. *Eldred*, 537 U.S. at 217.

d. Petitioners observe (Br. 19, 37 & n.6) that, when Congress has lengthened the general period of copyright protection conferred by federal law, it has typically made the extensions applicable only to works whose copyrights had not yet expired. They also identify (Br. 34-36) several occasions on which Congress chose not to extend newly enacted protections to works that had already entered the public domain when the new protections were adopted. Petitioners are correct that, when Congress has expanded the scope of copyright protection, either by lengthening the term of protection or by making additional categories of works copyrightable, its more common practice has been to limit those expansions to works that were not yet in the public domain. But the fact that Congress has, more often than not, limited the scope of such enactments does not mean that it was constitutionally required to do so. That is particularly clear given the frequency with which Congress has departed from the general rule, and the uniformly favorable judicial rulings that have ensued when analogous departures in the patent context were challenged in court.

e. Petitioners cite various decisions of this Court for the “unremarkable” proposition (Pet. App. 118) that the public has a “federal right to ‘copy and use’” works that are in the public domain. See Br. 16, 21-22, 45, 47 (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003)). Those decisions do not suggest, however, that the “federal right” is a *constitutional* right or a restriction on the power of Congress. Rather, the Court has described the relevant “federal policy” as one “of allowing free access to copy *whatever the federal patent and copyright laws leave in the public domain*,” *Compro Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (emphasis added)—a formulation that, by its terms, makes the right to copy contingent on the scope of federal patent and copyright statutes.

In enforcing that “federal policy,” this Court has held to be preempted state laws that conferred patent-like protection on inventions that were not patentable under federal law. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (invalidating state law granting protections to inventions in the public domain because it “clash[ed] with the balance struck by Congress in our patent laws”); *Compro Corp.*, 376 U.S. at 237-238 (similar holding). The Court has also applied a rule of construction under which ambiguous provisions of other federal statutes will not be construed to confer copyright-like protection on materials that are unprotected by the Copyright Act. See *Dastar Corp.*, 539 U.S. at 34 (rejecting proposed interpretation of Lanham Act that would have “create[d] a species of mutant copyright law” whose terms were inconsistent with more specific copyright provisions). The thrust of those decisions, however, is that courts in applying other laws should respect the various balances struck by Congress in its

patent and copyright statutes. Petitioners' effort to invoke those rulings as a constitutional limitation on congressional power turns the decisions on their head.

C. Section 514 Is A Rational Exercise Of Congress's Copyright Clause Authority

On the question whether Section 514 “is a rational exercise of the legislative authority conferred by the Copyright Clause,” this Court “defer[s] substantially to Congress.” *Eldred*, 537 U.S. at 204; see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors * * * in order to give the public appropriate access to their work product.”). As the only two courts of appeals to consider the issue have held (Pet. App. 85; *Luck's Music Library*, 407 F.3d at 1264-1266), Section 514 easily satisfies that deferential standard. Ensuring compliance with international obligations, securing greater protections for American authors abroad, and remedying past inequalities are legitimate (indeed, important) governmental objectives, and Section 514 is a rational means of achieving them. See Part II.B, *infra*. And the policy determinations (including the various balances between competing interests) reflected in Section 514 are precisely the sorts of “judgments * * * Congress typically makes, judgments [the Court] cannot dismiss as outside the Legislature's domain.” *Eldred*, 537 U.S. at 205. As in *Eldred*, this Court should again decline “to second-guess congressional determinations and policy judgments of this order.” *Id.* at 208.¹⁵

¹⁵ If the Court concludes that Congress exceeded its authority under the Copyright Clause, but that Section 514 does not violate the First

II. SECTION 514 IS CONSISTENT WITH THE FIRST AMENDMENT

As this Court reaffirmed in *Eldred*, “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” 537 U.S. at 212. The “[j]udicial deference” reflected in the familiar “rational basis” standard “is ‘but a corollary to the grant to Congress of any Article I power.’” *Id.* at 213, 218 (quoting *Graham*, 383 U.S. at 6). The Copyright Clause differs from other Article I provisions, however, in that the very purpose of copyright protection is to limit the manner in which expressive works may be used. The imposition of some restrictions on expressive activity is therefore the intended and inherent effect of *every* grant of copyright. If the existence of those restrictions were treated as a ground for heightened judicial scrutiny under the First Amendment, the principle of deference to Copyright Clause legislation would effectively be negated.

Because Section 514 is a rational exercise of authority conferred on Congress by the Copyright Clause, and because the restrictions of which petitioners complain are simply inherent and traditional features of copyright protection, “further First Amendment scrutiny is unnecessary.” *Eldred*, 537 U.S. at 221. But even if Section 514 were subject to heightened First Amendment scru-

Amendment (see Part II, *infra*), it should remand for the court of appeals to determine in the first instance whether Section 514 can be upheld as an exercise of one of Congress’s other enumerated powers. The United States preserved this issue below, see Br. in Opp. 17 n.9; 05-1259 Gov’t C.A. Br. 56 n.23, but because the lower courts concluded that Section 514 was a valid exercise of Congress’s Copyright Clause authority, neither court passed on it.

tiny, the provision would be constitutional because it is narrowly tailored to further important governmental interests and does not burden substantially more speech than necessary.

A. Section 514 Does Not Trigger Heightened First Amendment Scrutiny

In *Eldred*, this Court stated that, when “Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” 537 U.S. at 221. On the initial appeal in this case, the Tenth Circuit misread that statement to mandate a freestanding inquiry into whether particular copyright legislation alters any “traditional contour[.]” or “time-honored tradition” of copyright protection. See Pet. App. 79, 87, 98. It also misread the historical record to find that “one of these traditional contours is the principle that once a work enters the public domain, no individual—not even the creator—may copyright it.” *Id.* at 79; see *id.* at 89-98. Petitioners’ First Amendment argument (Br. 42-47) rests on the same two erroneous premises. That reading is inconsistent with *Eldred*, irreconcilable with established First Amendment doctrine, and unworkable in practice.¹⁶

1. In *Eldred*, the Court rejected the “petitioners’ plea for imposition of uncommonly strict scrutiny [*i.e.*, the “heightened judicial review” applicable to “content-neutral regulation”] on a copyright scheme that incorpo-

¹⁶ Petitioners’ reading is also inconsistent with the views of every other court to consider this issue. See *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007), cert. denied, 552 U.S. 1096 (2008); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003), cert. denied, 543 U.S. 816 (2004); *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004), aff’d, 407 F.3d 1262 (D.C. Cir. 2005).

rates its own speech-protective purposes and safeguards.” 537 U.S. at 218-219. The Court explained that “[t]he Copyright Clause and First Amendment were adopted close in time,” and that “[t]his proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.” *Id.* at 219. The Court further observed that “copyright’s purpose is to *promote* the creation and publication of free expression,” *ibid.*, by “suppl[ying] the economic incentive to create and disseminate ideas,” *ibid.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

The Court also explained that copyright law “contains built-in First Amendment accommodations.” *Eldred*, 537 U.S. at 219. The Copyright Act preserves the “idea/expression dichotomy,” which “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.” *Ibid.* (brackets in original) (quoting *Harper & Row*, 471 U.S. at 556); see 17 U.S.C. 102(b) (“In no case does copyright protection * * * extend to any idea * * * [or] concept.”). The Act also provides a “fair use” defense that allows the public to use the copyrighted “expression” (in addition to the facts and ideas contained therein) “in certain circumstances,” *Eldred*, 537 U.S. at 219, and “affords considerable latitude for scholarship and comment,” *id.* at 220 (quoting *Harper & Row*, 471 U.S. at 560); see 17 U.S.C. 107 (fair-use defense). The Court noted as well that “[t]he 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.

After discussing the ways in which the CTEA “supplement[ed] the[] traditional First Amendment safeguards,” *Eldred*, 537 U.S. at 220, the Court concluded:

To the extent [the petitioners’] assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the *traditional contours of copyright protection*, further First Amendment scrutiny is unnecessary.

Id. at 221 (emphasis added; citation omitted). And, in a footnote to the last sentence quoted above, the Court reiterated that “it is appropriate to construe copyright’s internal safeguards to accommodate First Amendment concerns.” *Id.* at 221 n.24.

Read in context, the phrase “traditional contours of copyright protection” is best understood to refer to the principles that have historically defined the boundary between an author’s exclusive rights in his own works and the right of the public to engage in independent expression, including speech about the copyrighted works and discussion of the facts and ideas contained therein. The idea/expression dichotomy and the “fair use” defense—the traditional limits on copyright protection (“built-in First Amendment accommodations”) that the Court identified earlier in its opinion, *Eldred*, 537 U.S. at 219-220—are of particular significance in defining that boundary. Section 514 does nothing to alter the traditional balance between the rights of the copyright holder and those of the public. If petitioners or others

are sued for infringing copyrights that have been restored under Section 514, they may assert a “fair use” defense or rely on the idea/expression dichotomy, and the issues raised by such arguments will be resolved under pre-existing Copyright Act provisions (see 17 U.S.C. 102(b), 107), rather than under any rule specific to the URAA. To determine whether particular conduct infringes a restored copyright, courts likewise must apply the pre-existing Copyright Act provisions (*e.g.*, 17 U.S.C. 106, 501(a)) that address that question. See 17 U.S.C. 104A(d)(1) and (2). And the type of conduct in which petitioners wish to engage (*i.e.*, the unauthorized exploitation for their own purposes of works created by others, Pet. Br. 10-11) is precisely the sort of conduct that copyright law has traditionally prohibited.

2. Contrary to petitioners’ contention (Br. 44), the speech interests asserted in this case are not meaningfully different from those asserted in *Eldred*. The practical effect of both the CTEA and Section 514 is to limit, for finite temporal periods, the use of a defined category of works of authorship that would have been subject to unrestricted public exploitation in the United States if those statutes had not been enacted. And the substantive restrictions on exploitation of copyrighted works were the same in both instances, since those restrictions were imposed by pre-existing Copyright Act provisions rather than by the CTEA and Section 514 themselves.

The fact that the URAA restores copyright in works that had previously entered the public domain does not meaningfully alter the First Amendment calculus. Because Section 514 prohibits only those “act[s] of infringement” that occur “on or after the date” that a copyright is restored, 17 U.S.C. 104A(d)(1) and (2), it does not retroactively impose penalties on conduct that was lawful

when it occurred. And petitioners cite no decision suggesting that, if a particular restriction on expressive activity is otherwise consistent with the First Amendment, a person who has previously engaged in the now-proscribed conduct can assert a “vested” (Br. 45) right to continue doing so.

In some of its applications, Section 514 may diminish the value of investments that petitioners made under the prior legal regime. At least as a general matter, however, that sort of economic effect is insufficient to establish a constitutional violation. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992). And more fundamentally, a constitutional claim premised on alleged disappointment of investment-backed expectations would more naturally be brought under the Due Process or Just Compensation Clause. Petitioners abandoned their due process argument below, see note 4, *supra*; they have not asserted a takings claim; and they identify nothing in this Court’s precedents suggesting that disappointment of investment-backed expectations can raise First Amendment concerns simply because the relevant investments pertain to expressive activities.¹⁷

¹⁷ Different constitutional issues would be posed if Congress enacted copyright legislation that transgressed some independent First Amendment prohibition, *e.g.*, by making copyright protection dependent on the viewpoint of the author. “[T]he government may proscribe libel” based on its libelous character, “but it may not make the further content discrimination of proscribing *only* libel critical of the government.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992). By the same token, the restrictions traditionally associated with copyright law could not constitutionally be imposed on a viewpoint-discriminatory basis. But nothing of that sort is at issue here. For purposes of this case, the salient points are that (a) the restrictions traditionally imposed by copyright law, in and of themselves, cannot properly be treated as a trigger

3. If the court of appeals’ understanding of the “traditional contours of copyright protection” were adopted, a broad range of (past and future) Copyright Act amendments would be subject to heightened First Amendment scrutiny. For example, Congress’s decisions to extend copyright protection to “sound recordings” (Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (17 U.S.C. 102(a)(7))) and “architectural works” (Architectural Works Copyright Protection Act, Pub. L. No. 101-650, Tit. VII, 104 Stat. 5133 (17 U.S.C. 102(a)(8))) reflected departures from prior copyright practice at the time those amendments were enacted. If novelty alone were a sufficient basis for heightened First Amendment review, the rule of deference to Copyright Clause legislation would be substantially undermined.

In any event, petitioners are wrong in asserting that the extension of copyright protection to works that were previously in the public domain reflects a “dramatic and unprecedented” departure from traditional norms. Br. 43. Beginning in 1790, Congress has frequently taken that step, including through restoration of copyright in foreign works. See Part I.B, *supra*; Patry § 24:51, at 24-110 (“[O]ne traditional contour of U.S. copyright *is* restoring certain foreign works that have fallen into the public domain.”).

4. The same two First Amendment “supplements” on which the Court relied in *Eldred*, 537 U.S. at 220, apply here as well. Section 108(h) of Title 17 “allows libraries, archives, and similar institutions to ‘reproduce’ and ‘distribute, display, or perform in facsimile or digital

for heightened First Amendment scrutiny (see pp. 37-38, *supra*); and (b) the application of such restrictions to previously exploitable works does not violate any independent First Amendment norm (see pp. 38-39, *supra*).

form' copies of certain published works 'during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research' if the work is not already being exploited commercially and further copies are unavailable at a reasonable price." *Ibid.* (quoting 17 U.S.C. 108(h)). Section 110(5)(B) likewise continues to "exempt[] small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities." *Ibid.* (citing 17 U.S.C. 110(5)(B)). And Title 17 contains a host of other exclusions from a copyright holder's enforcement rights. See 17 U.S.C. 108-122 (2006 & Supp. III 2009). Particularly significant here (given petitioners' asserted speech interests), Section 110 precludes an infringement action for certain musical performances undertaken for nonprofit, educational, or charitable purposes. See 17 U.S.C. 110.

The URAA provides additional accommodations to potential users of newly copyrighted works. All persons in the United States were allowed to make additional copies of and otherwise use the affected works for an additional year after enactment of the URAA. See p. 6, *supra*. Reliance parties may continue exploiting the restored works unless and until the copyright holder gives notice of his intent to enforce, either by filing a notice with the Copyright Office within two years of restoration, or by directly notifying a particular reliance party. 17 U.S.C. 104A(c), (d)(2)(A)(i) and (B)(i). The two-year period for filing a general notice with the Copyright Office expired on January 1, 1998, and notices for fewer than 50,000 works were received. See U.S. Copyright Office, *Notices of Restored Copyrights*, <http://>

www.copyright.gov/gatt.html.¹⁸ Even after receiving notice, a reliance party may continue to exploit any existing copies of the restored works for an additional year. 17 U.S.C. 104A(d)(2)(A)(ii) and (B)(ii). And Section 514 provides additional protections to persons who have actually used works subject to a restored copyright as a “building block[]” (Pet. Br. 16) to create an original work. 17 U.S.C. 104A(d)(3) (governing derivative works); see pp. 6-7, *supra*.

B. Section 514 Satisfies Any Potentially Applicable Standard Of First Amendment Review

For the reasons set forth above, Section 514 should be reviewed under the deferential rational-basis standard that generally applies to Copyright Clause legislation. But to the extent any heightened First Amendment scrutiny is appropriate, the parties agree (and the lower courts correctly held) that Section 514 is a content-neutral regulation of speech and, as such, is subject to intermediate scrutiny. See Pet. Br. 47; Pet. App. 11, 51. Under intermediate scrutiny, “[a] content-neutral regulation will be sustained * * * if it advances important governmental interests unrelated to the suppression of free speech and [if it] does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). That inquiry demands considerable deference to Congress’s findings, “lest [the Court] infringe on traditional legislative authority to make predictive judgments.” *Id.* at 196. Such deference is particularly due where, as here, Congress is legislat-

¹⁸ If additional countries join the Berne Convention or the WTO, the two-year time period will run anew for restored works from those countries. See 17 U.S.C. 104A(h)(1) and (2)(B).

ing on matters relating to the Nation’s foreign relations with other sovereigns. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (*HLP*); *Boos v. Barry*, 485 U.S. 312, 320, 329 (1988); *Regan v. Wald*, 468 U.S. 222, 242-243 (1984).

Section 514 furthers at least three important government interests: (1) it ensures compliance with international obligations; (2) it secures greater protections for American authors abroad; and (3) it remedies historical inequalities in the copyright system. For the reasons that follow, those interests are sufficiently weighty, and the means chosen by Congress sufficiently tailored to their achievement, to sustain the legislation even under intermediate scrutiny. *Ipsa facto*, those interests provide the requisite rational basis for upholding Section 514 under the appropriate deferential standard.

1. Section 514 is narrowly tailored to ensure both actual and perceived compliance with international obligations

Petitioners acknowledged that “[p]articipating in and complying with Berne may represent an important [g]overnment interest,” and that “there may have been substantial evidence suggesting the failure to comply with Berne would subject the United States to trade sanctions and other real harms.” Pet. 30-31, 35. They also have not disputed that the Berne Convention requires the restoration of copyright for works in the public domain. See 09-1234 & 09-1261 Pet. C.A. Br. 31 (“There is no dispute the Berne Convention requires the restoration of copyrights.”); Pet. App. 56 (“It is not disputed that the Berne Convention requires the restoration of copyrights to foreign authors.”). They contend (Br. 54-59), however, that Section 514 sweeps too

broadly because the United States could have complied with Berne while fully immunizing reliance parties from all prospective infringement liability. That argument lacks merit.

a. Realization of the full benefits of membership in the Berne Convention depends not simply on our government's own assessment of its treaty obligations, but also on how international partners are likely to perceive the United States' actions. Section 514 minimizes the likelihood that other countries who are parties to TRIPS will bring actions under the WTO dispute settlement mechanism to challenge the United States' implementation of Article 18 of Berne. It also protects the United States against trade sanctions, and it ensures that the United States will maintain its international credibility. Congress and the Executive Branch reasonably concluded that any "restoration" that allowed reliance parties to continue exploiting otherwise restored works unchecked, on a permanent basis, would not adequately achieve those objectives. Cf. *Eldred*, 537 U.S. at 259 (Breyer, J., dissenting) (contrasting the purpose of the CTEA with "an American effort to conform to an important international treaty like the Berne Convention").

b. In 1989, when the United States joined the Berne Convention and first enacted implementing legislation, Congress adopted a "minimalist approach" and determined that the "difficult question[]" of Article 18 compliance required a "more thorough examination."¹⁹ *Berne*

¹⁹ Petitioners emphasize (Br. 6-7, 36, 52) that the United States did not implement Article 18 of the Berne Convention when it joined in 1989, yet still declared that it was in compliance with Berne's mandates. Petitioners also observe (Br. 6) that restoration of copyright to works in the public domain was viewed by some as raising significant constitutional concerns. Subsequent congressional deliberations made clear,

House Report 7, 51-52; *URAA Report 225*; *Joint Hearing* 131, 157. That more thorough examination culminated in the 1994 enactment of the URAA.

The TRIPS Agreement, which requires parties to comply with Article 18 of Berne, was adopted by the United States and its international partners in 1994. See TRIPS, *supra* note 1, Arts. 9.1, 14.6. In the context of considering implementing legislation for TRIPS, Congress learned that some Berne member nations had expressed the view that the United States was not in compliance with Article 18. *E.g.*, *Joint Hearing* 147, 248. Unlike the Berne Convention itself, TRIPS is subject to the WTO's formal and binding dispute resolution proceedings, which can result in (among other things) the imposition of trade sanctions. See p. 4, *supra*. Indeed, the Executive Branch advised Congress that it was "likely that other WTO members would challenge the current U.S. implementation of Berne Article 18." *Joint Hearing* 137 (statement of Ira S. Shapiro, Gen. Counsel, Office of the U.S. Trade Representative (USTR)); accord *id.* at 241, 248 (statement of Eric H. Smith, Exec. Director, Int'l Intellectual Prop. Alliance) ("[T]he risk is great that, if the U.S. does not take legislative action implementing recapture under TRIPS (and Berne), it may be the first country to appear before such a panel as a defendant," "and * * * we may lose that case.").

however, that the "Constitutional * * * considerations" thought to be implicated by restoration of copyrights (*Berne House Report* 52) were primarily grounded in the Just Compensation Clause. See *Joint Hearing* 3, 121, 145-162, 176-186, 187-213, 229-232. Congress addressed those concerns by amending the proposed legislation to incorporate additional protections for the authors of derivative works, see 17 U.S.C. 104A(d)(3), and petitioners have not asserted a takings claim, see p. 39, *supra*.

Against that backdrop, Congress and the Executive Branch revisited implementation of Article 18, and Congress enacted Section 514 of the URAA.

c. Petitioners identify various means by which (in their view) Congress might have implemented the Berne Convention while burdening “substantially less speech” (Br. 54). Those arguments provide no sound basis for invalidating the considered balance that Congress actually struck.

Petitioners assert (Br. 54-56) that under Article 18(3) of the Berne Convention, the United States could have entered into “special conventions” with Berne member nations to avoid restoration altogether. There is no reason to suppose, however, that each of the more than 160 Berne or WTO members would have entered into bilateral or multilateral agreements exempting the United States from the requirements of Article 18, and any effort to negotiate such agreements would have been an extremely arduous diplomatic undertaking. Moreover, agreements along those lines would have directly contravened the government’s other important interests: ensuring adequate protections for U.S. copyrighted works abroad (Part II.B.2, *infra*) and remedying historical inequalities in the copyright system (Part II.B.3, *infra*).

Second, petitioners observe that Article 18(3) of the Berne Convention permits member nations to “determine, each in so far as it is concerned, the conditions of application of this [restoration] principle.” Br. 56 (citation omitted). Petitioners argue that the United States could have invoked that provision as a ground for permitting all “reliance parties” to continue to exploit the restored works unchecked, on a permanent basis. Br. 56-59. Again, such an approach would have directly

conflicted with the United States’ other important interests (see Part II.B.2 and 3, *infra*). More fundamentally, however, Congress reasonably concluded that granting full and permanent immunity to reliance parties would not ensure actual and perceived compliance with Berne. That determination is well supported and is squarely within the political Branches’ special expertise.²⁰

Whatever the precise scope of discretion afforded to Berne member nations by Article 18(3)’s “conditions of application” language, Congress had ample reason to conclude that other member nations would view the grant of a free and permanent license for all reliance parties as insufficient to implement Article 18’s restoration principle.²¹ Whether or not a regime affording ab-

²⁰ Contrary to petitioners’ contention (Br. 57), the United States is aware of no Berne member nation that has affirmatively conferred complete and permanent immunity upon reliance parties. See generally J.A. 126-157 (describing “conditions” imposed by other Berne member nations); Pet. App. 34-35 (“no country has provided full, permanent exemptions for reliance parties”). The United Kingdom’s approach, for example, allows reliance parties to use restored works until the owner buys out the reliance party (J.A. 148-149); it does not allow the reliance party to continue to exploit restored works indefinitely at no cost. As the court of appeals observed, although the “buy back” right (Pet. App. 35 (citation omitted)) is “arguably more protective of reliance parties’ *economic* interests,” it is not “substantially more protective of reliance parties’ *expressive* interests,” *id.* at 37.

²¹ *E.g.*, *Joint Hearing* 157 n.12 (statement of Christopher Schroeder, Counsel to the Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice) (“Nothing short of protecting copyrights in foreign works against *all* other parties can afford such holders the protections required under the Berne Convention” because a “law that allowed reliance parties to continue to exploit the subject works would enable reliance parties to reproduce the subject works with impunity and completely undercut the actual copyright owner, while perhaps making a super-competitive profit.”); Sam Ricketson & Jane C. Ginsburg, *International*

solute and permanent protection to reliance parties could plausibly have been defended in a WTO proceeding, Congress and the Executive Branch understandably did not want the United States to be the defendant in a test case. See *Joint Hearing* 241 (statement of Eric Smith) (WTO proceeding would “be very damaging to the United States and to our reputation as a world leader in the copyright field”).²² More generally, the United States has a substantial interest in avoiding the appearance of an international-law violation, which would damage the Nation’s credibility and undermine its status as a “trusted partner in multilateral endeavors.” *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

Finally, petitioners contend (Br. 59-61) that Section 514 is not narrowly tailored because Congress could have adopted the “rule of the shorter term” or protected “first sale” rights. Because that argument was neither raised nor passed upon below, this Court should not consider it. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). In

Copyright and Neighboring Rights: The Berne Convention and Beyond 343 (2d ed. 2006) (“a situation must eventually be reached when the work is protected in relation to all persons”); J.A. 185 (“[T]here [is] a quite general agreement that such provisions and measures [for reliance parties] should not be applied, in any case, for a period longer than two years from the entry into force of the Convention.”). See generally J.A. 116-121, 180-185.

²² Indeed, the United States and its European partners initiated a WTO dispute settlement proceeding against Japan for failure to comply with Article 18, as extended to sound recordings through TRIPS Article 14.6. Upon receipt of the “informal views” from WIPO—that Article 18 does require restoration of foreign sound recordings and does not allow permanent reliance-party accommodations (J.A. 104-105, 164-192)—Japan amended its law to provide restored protection (J.A. 105-106).

any event, the “less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of content-neutral regulations on speech.” *Turner II*, 520 U.S. at 217 (internal quotation marks and citation omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (Congress “need not [adopt] the least restrictive or least intrusive means” of achieving the government’s interest). And, once Congress’s basic authority to restore copyrights in public-domain works is established, Congress’s choice of an appropriate *period* of protection is subject only to rational-basis review. See *Eldred*, 537 U.S. at 204-205.

2. Section 514 is narrowly tailored to further the government’s interest in securing greater protections for American authors abroad

Section 514 also furthers the government’s important interest in securing greater protections for American authors abroad. Petitioners do not dispute the court of appeals’ holding that Section 514 is narrowly tailored to serve that interest because “the burdens imposed on the reliance parties are congruent with the benefits Section 514 affords American copyright holders.” Pet. App. 30. Petitioners instead contend that (a) protecting the interests of United States’ copyright holders abroad is not an “important” (or even “legitimate”) governmental purpose (Br. 49), and (b) “Congress had no substantial evidence that Section 514 would actually advance that interest” (Br. 50). Those arguments lack merit.

a. Contrary to petitioners’ contention, securing foreign copyright protection for the works of American authors does not give those authors “windfalls.” Br. 49. Rather, it provides them a (belated) opportunity to receive a reasonable return on their creative investment.

Cf. *Berne Senate Report 2* (reporting industry losses of \$43 to \$61 billion during 1986 due to “inadequate [foreign] legal protection for United States intellectual property”). Similarly, the Russian composers discussed by petitioners (Br. 11, 46, 47) were never compensated for the pre-URAA exploitation of their works within the United States. Allowing petitioners and other reliance parties to continue to freely exploit those restored works indefinitely would perpetuate the “windfall” *they* have enjoyed for decades.

Petitioners also contend that “creating private benefits is not a legitimate objective of copyright regulation.” Br. 49. This Court has repeatedly recognized, however, that “[r]ewarding authors for their creative labor” is “complementary” with “promot[ing] . . . Progress.” *Eldred*, 537 U.S. at 212 n.18 (second set of brackets in original); see *Harper & Row*, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer*, 347 U.S. at 219. And in today’s global economy, copyright will not effectively perform that function if American authors have no prospect of securing effective protections abroad. See Perlmutter 330.

As applied to works created *after* the United States entered the Berne Convention, U.S. protection of foreign authors’ copyrights indisputably furthers First Amendment values, both by creating additional incentives to foreign creative activity (which ultimately benefits American readers and listeners), and by encouraging other nations to provide like incentives to American authors. Petitioners view those incentives as irrelevant to Congress’s decision to restore U.S. copyrights to pre-existing foreign works. But petitioners’ “windfall” argu-

ment is simply a reformulation of the theory—*i.e.*, that extension of additional copyright protection to existing works is illegitimate “because it does not stimulate the creation of new works but merely adds value to works already created”—that was advanced and rejected in *Eldred*, 537 U.S. at 211-212. See *id.* at 212-217; p. 17, *supra*.

b. As the court of appeals’ detailed review of the record (Pet. App. 19-29) makes clear, substantial evidence introduced below demonstrated that the United States’ ability to advocate for stronger intellectual property protections abroad was directly tied to its willingness to provide commensurate protections at home. See *Joint Hearing* 120, 131, 189, 241, 247, 253, 256, 291. Witnesses observed that Russia and Thailand “ha[d] refused to protect U.S. works in the public domain in their territory” and had “cit[ed] the U.S. interpretation of Berne Article 18 as their justification.” *Id.* at 137 (statement of Ira Shapiro); see *id.* at 249 n.2 (statement of Eric Smith) (“The Russian government has made clear that it will provide retroactive protection for ‘works’ only if the U.S. reciprocates with retroactive protection for Russian works.”); *id.* at 189 (statement of Shira Perlmutter, Professor, Catholic Univ. Sch. of Law) (similar testimony). That understanding proved correct. Russia acceded to Berne in 1995 and, after extensive lobbying efforts by a United States delegation, later amended its law to include restoration of copyright for works by American authors. See J.A. 156-157.²³

²³ Law of the Russian Federation on Authors’ Rights and Neighboring Rights, Ved. RF 1993, No. 42, Item 1242, as amended by Federal Law on Amendments to the Law of the Russian Federation on Authors’ Rights and Neighboring Rights, SZ RF 2004, No. 30, Item 3090, Art. 5(1), translated in William E. Butler, *Intellectual Property Law in the*

Foreign governments' insistence on reciprocity was not limited to the mere act of "restoration"; it focused specifically on the scope and extent of any restored copyright protections. For example, Ira Shapiro (then-General Counsel for USTR) explained that "if we interpret article 18 of the TRIP[S] provisions to deny protection *or significantly limit its scope*, our trading partners just now considering their implementing legislation will feel free to simply mirror our views." *Joint Hearing* 131 (emphasis added); *id.* at 247 (statement of Eric Smith) ("[I]f [the United States] takes the position that we have no, *or only limited, obligations*, [we] will have little credibility in convincing * * * the new nations with whom we are just starting copyright relations to give us the expansive protection that we need.") (emphasis added); *id.* at 120 (statement of Bruce A. Lehman, Comm'r of Patents & Trademarks) ("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.") (emphasis added). One witness testified that "the Russians simply said to the United States negotiators * * * that they will interpret their obligations on retroactivity *in exactly the same manner* that the United States interprets its obligations." *Id.* at 291 (statement of Jason S. Berman, Chairman & CEO, Recording Indus. Ass'n of Am.) (emphasis added).

Russian Federation: Basic Legislation 15 (4th rev. ed. 2005); see also GK [Civil Code] Pt. IV, Art. 1256, translated in *Russia and the Republics Legal Materials (Second Series)*, Release No. 21 (William E. Butler ed.).

Although petitioners deride the predictions described above as “guesses about what other countries might do someday” (Br. 50), those predictions accord with common sense. The rationale for international agreements like the Berne Convention is that, by securing to member nations a mutual reciprocity of advantage, such agreements may induce concessions that individual nations would not make unilaterally. To the extent that Article 18 gave member nations discretion as to the precise manner of implementation, it is both reasonable and consistent with the Convention’s core premise to suppose that foreign countries’ discretionary choices will be affected by their observation of the United States’ behavior. In any event, Congress has broad latitude to make such predictive judgments, particularly in the realm of foreign affairs (see p. 43, *supra*), and courts should not substitute their “own evaluation of evidence for a reasonable evaluation by the Legislative Branch,” *HLP*, 130 S. Ct. at 2727 (citation omitted). The evidence in this case fully justifies the conclusion that enactment of Section 514 will lead to greater protection for American authors.

3. *Section 514 is narrowly tailored to further the government’s interest in equitable treatment of foreign authors*

Many foreign authors lost their works to the public domain solely because the United States did not have copyright relations with their countries of origin at the time they created their works. By entering into the Berne Convention, the United States immediately established copyright relations with 24 nations as to which such relations had previously been lacking. Other foreign authors lost their works to the public domain for

failing to comply with certain copyright formalities that had no parallel in their home country and that Congress has since repealed. See note 2, *supra*; *Joint Hearing* 191 (statement of Shira Perlmutter) (“As difficult as it has been for American authors to comply with the strict formalities that were the hallmark of United States copyright law for so many years, it has been even more difficult for foreign authors.”).

Subject to various accommodations for reliance parties and others, Section 514 served to alleviate those prior disparities, and to place foreign authors of existing works in substantially the same position they would have occupied if the current legal regime had been in effect when those works were created and first published. Section 514 thus directly furthers the important government interest in remedying prior inequalities of treatment between American and foreign authors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The First Amendment of the United States Constitution provides:

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.

2. The Copyright Clause (Art. I, § 8, Cl. 8) of the United States Constitution provides:

To 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.

3. Article 18 of the Berne Convention for the Protection of Literary and Artistic Works provides:

(1) This Convention shall apply to all 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.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conven-

tions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

4. Articles 9 and 14 of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights provide in pertinent part:

Article 9

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.

* * * * *

Article 14

* * * * *

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mu-*

tatis mutandis, to the rights of performers and producers of phonograms in phonograms.

5. 17 U.S.C. 102(b) provides:

Subject matter of copyright: In general

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

6. 17 U.S.C. 104A provides:

Copyright in restored works

(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 copy-

right 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 right-holder 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 copy-

right 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 own-

ership 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.

7. 17 U.S.C. 106 provides:

Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

8. 17 U.S.C. 107 provides:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyright work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

9. 17 U.S.C. 108 provides:

Limitations on exclusive rights: Reproduction by libraries and archives

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating

that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

(b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if—

(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

(c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when

it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for pur-

poses of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

10. 17 U.S.C. 109(a) provides:

Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on—

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B),

whichever occurs first.

11. 17 U.S.C. 110 provides in pertinent part:

Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

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(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of

objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

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