

No. 10-545

IN THE
Supreme Court of the United States

LAWRENCE GOLAN ET AL.,

Petitioners,

v.

ERIC H. HOLDER, JR. ET AL.,

Respondents.

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

**BRIEF OF *AMICUS CURIAE*
AMERICAN INTELLECTUAL PROPERTY
LAW ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

The American Intellectual Property Law Association (“AIPLA”) is a national association of approximately 16,000 members whose interests lie in copyright, patent, trademark, trade secret, and other areas of intellectual property law. The AIPLA’s members include attorneys in private practice and attorneys employed by corporations, universities, and government, and represent both owners and users of intellectual property. Unlike many other areas of practice in which separate and distinct plaintiffs’ and defendants’ bars exist, most, if not all, intellectual property attorneys represent both intellectual property owners and alleged infringers. The AIPLA has no stake in the parties to this litigation or the result of this case, other than its interest in seeking the correct interpretation of the law affecting intellectual property.²

¹ In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel. After reasonable investigation, AIPLA believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter; (ii) no representative of any party to this litigation participated in the authorship of this brief, and (iii) no one other than AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

² In accordance with Supreme Court Rule 37.3(a), the parties to this litigation have consented to the filing of this brief by filing blanket consents with the Court.

SUMMARY OF ARGUMENT

Article I, section 8, clause 8 of the Constitution (the “Copyright Clause”) grants to Congress the power 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.” Section 514 of the Uruguay Round Agreements Act (“URAA”), which accords copyright protection to various foreign works that were previously in the public domain in the United States so long as the term of protection for those works would not have otherwise already expired, is a proper exercise of this Article I power and does not violate the First Amendment.

Since the first Copyright Act of 1790, Congress has repeatedly extended and expanded copyright protection pursuant to its powers under the Copyright Clause. Copyright restoration under section 514 of the URAA is consistent with this history, is a valid exercise of Congress’s power, and does not infringe the protections of the First Amendment. These First Amendment protections—namely, the fair use doctrine and the idea-expression dichotomy, which this Court has labeled as the “traditional contours” of copyright law—are left in place after the enactment of section 514, and the Court should thus conduct a deferential review of the statute. Even were the Court to apply a more rigorous review, the government has several substantial interests that justify enactment of section 514: compliance with international treaties, protection of the rights of U.S. copyright holders abroad, and protection of foreign holders of copyrights in the U.S.

Reversal of the decision below would also encroach on the powers accorded Congress under the Copyright

Clause. Regulation of copyright protection is a matter best suited for Congress, not the courts, and Congress—which is in the best position to weigh the advantages and disadvantages of any particular copyright statute—has exercised those powers to great collective effect. As the Court recognized in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), since 1790, Congress has enacted many changes to the Copyright Act that have enhanced the rights of all holders of extant copyrights, and significant investments have been made based on these enactments. Reversal in this case would be destabilizing and injurious to intellectual property owners, to international agreements and Congress’s efforts to comply with them, and to the U.S. economy.

ARGUMENT

I. THE TENTH CIRCUIT CORRECTLY FOUND THAT SECTION 514 DOES NOT VIOLATE THE FIRST AMENDMENT

The Tenth Circuit held in this case that Congress infringed no First Amendment rights in enacting the copyright restoration provisions of section 514 of the URAA, as codified at 17 U.S.C. § 104A. This decision was correct because copyright law and the First Amendment rationally coexist, and because section 514 does not alter the traditional contours of copyright law and is fully consistent with other congressional enactments. In addition, although only deferential review is necessary, section 514 does not offend the First Amendment even if intermediate scrutiny is applied because the statute addresses a substantial governmental interest and is narrowly tailored.

A. Copyright Law and the First Amendment Fully and Rationally Coexist

Copyright law has built-in mechanisms to protect the First Amendment, and where these mechanisms are left intact, the First Amendment is not burdened. The Court acknowledged this fundamental principle in Justice Ginsberg’s opinion in *Eldred*, observing that where “Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” 537 U.S. at 221. Those “traditional contours”—the doctrines of fair use and the idea/expression dichotomy—are the Copyright Act’s built-in mechanisms to protect the First Amendment. They have consistently been found to provide ample respect for free speech, while allowing for Congress to act on its power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Art. I, Sec. 8, cl. 8.

Nor is an expansion of copyright protection incompatible with the First Amendment’s goals. As this Court recognized in *Eldred*, “copyright’s purpose is to *promote* the creation and publication of free expression.” 537 U.S. at 219 (emphasis in original). Put another way, as the “engine” of free expression, copyright law provides incentives to authors to share their work with society. *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)). The proximity of the enactment dates for the first Copyright Act (1790) and the First Amendment (1791) at least suggests that the Founding Fathers were aware of the interlocking relationship of these protections.

The fair use doctrine and the idea/expression dichotomy, in particular, ensure that copyright law does not conflict with the First Amendment. This Court has recognized the centrality of these doctrines, explaining that the idea/expression dichotomy, and, by extension, fair use, “strikes a definitional balance between the First Amendment and the Copyright Act.” *Harper & Row*, 471 U.S. at 556 (internal quotation marks and citation omitted).³

B. Section 514 Does Not Alter the Traditional Contours of Copyright Law

Section 514 of the URAA granted, or “restored,” copyright protection for some foreign works that had fallen into the public domain in the U.S., allowing these works protection under the Copyright Act to nearly the same extent as a work by a U.S. author who had complied with all formalities of the Copyright Act. Section 514, however, contains important limitations. First, copyright restoration is not available for any work that is in the public domain of its source country through the expiration of its term of protection. *See* 17 U.S.C. § 104A(h)(6)(B). In addition, restoration is not available for works whose U.S. copyright would have already expired, since the length of restored U.S. protection extends only until the end of the U.S. term had the work never entered the public domain in the U.S. *See id.* § 104A(a)(1)(B). Other limitations include:

³ The Court in *Harper & Row* concluded that the “balance” it articulated meant that abuse of the fair use doctrine—in that case, the bad-faith use of a stolen manuscript—would not be tolerated. Although the fair use defense failed in *Harper & Row*, the Court was careful to explain and affirm the doctrine’s centrality to the concept of copyright law.

the requirement that if copyright owners wish to pursue enforcement against “reliance” parties, they must file a notice of intent to enforce their restored copyrights within 24 months of restoration or, alternatively, they must serve actual notice of such intent directly on reliance parties, *id.* §§ 104A(c), 104A(d)(2)(A)(i); and the right of reliance parties—that is, parties that have engaged in acts covered by section 106 of the Copyright Act prior to the restoration of the foreign work at issue—to continue to engage in those acts for 12 months following notice. *Id.* § 104A(d)(2)(A)(ii).

Even setting aside the foregoing significant limitations, section 514 leaves entirely untouched the protective doctrines of fair use and the idea/expression dichotomy. *Eldred* made two foundational observations: (i) absent alteration of the “traditional contours” of copyright law, no First Amendment scrutiny is necessary; and (ii) changing the scope of copyright protection does not alter these “traditional contours” because it leaves in place fair use and the idea/expression dichotomy. These observations show that the very purpose of protecting the “traditional contours” of copyright law is to safeguard First Amendment values. Section 514 does not violate this purpose. Surely if the fair use doctrine and the idea/expression dichotomy were unimpeded in *Eldred*, then they too are unimpeded here, where section 514 expands copyright protection in an even more limited fashion than the term extension at issue in *Eldred*.

A mere increase in copyright protection does not, *ipso facto*, alter the traditional contours of copyright law and thereby detract from First Amendment rights. The First Amendment is intended to protect the right to free speech, but it is not intended to make the copying

of someone else's speech free. This Court recognized as much in *Eldred*, stating that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches." 537 U.S. at 221. The Court followed that observation with the further statement that "copyright's built-in free speech safeguards" generally are adequate to address First Amendment concerns. *Id.* Here, section 514's removal of certain works from the public domain does not subject the statute to constitutional invalidation. Contrary to the assertion by the Petitioners, Courts generally do not consider the public domain to be essential for the "creation of knowledge and its spread." Brief for the Petitioners ("Pr. Brief") 24. Rather, the opposite proposition is correct: it is copyright protection that is largely responsible for the "creation of knowledge and its spread." *Id.*

The judiciary has acknowledged repeatedly the strong relationship between reward and the "Progress of Science." The economic philosophy behind copyright law "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Quoting a district court opinion, the Court in *Eldred* noted that copyright law celebrates the profit motive by recognizing that the profit incentive underlying copyright protection "will redound to the public benefit by resulting in the proliferation of knowledge." *Eldred*, 537 U.S. at 212 n.18 (quoting *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)); *see also Harper & Row*, 471 U.S. at 558 ("the Framers intended copyright itself to be the engine of free expression"); *Twentieth Century Music v. Aiken*,

422 U.S. 151, 156 (1975) (stating that the immediate effect of copyright law is a fair return for the author, but “the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

Accordingly, “as James Madison observed, in copyright, [t]he public good fully coincides ... with the claims of individuals.” *Eldred*, 537 U.S. at 212 n.18 (quoting *The Federalist* No. 43, p. 272 (C. Rossiter ed. 1961)). Petitioners thus miss the mark in arguing that more copyright protection—including protection for works which, in fairness, should have been protected from the beginning—will “inhibit[] the spread of existing works, reduce[] the universe of material available to the public for further creation, [or] threaten[] to destroy the incentive to use even those works that remain unprotected.” Pr. Brief 24. Instead, stronger copyright protection can and will “suppl[y] the economic incentive to create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558.

C. Section 514 Is Entirely Consistent with Other Congressional Enactments

Consistent with the recognition that copyright protection fosters creativity, Congress has expanded such protection in numerous ways, including ways that, under Petitioners’ theory, would limit the use of expressive content. In fact, the boundaries of copyright law—both as to the subject matter of works entitled to protection and the length of that protection—have changed extensively since the first Copyright Act of 1790, with no Constitutional conflicts. *See* Stephen McJohn, *Eldred’s Aftermath*, 10 MICH. TELECOMM. TECH. L REV. 93, 118 (2003). All of these enactments undercut Petitioners’

claim that section 514 amounts to an unprecedented shift of copyright protection to the detriment of users and the public. *See* Pr. Brief 43-44.

As Petitioners' brief explains in detail, the "scope and duration" of copyright have been expanded some 19 times since 1790. Pr. Brief 34-36. From 14 years of protection for published maps, charts and books in 1790, through today's protection for the life of the author plus 70 years for an even greater variety of works, published or not, the law has taken many steps forward to broaden copyright protection. *Eldred*, 537 U.S. at 193-94. In addition, Congress granted a new right altogether with the enactment of the Digital Performance Rights in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 ("DPRA"). That act gave sound recording copyright owners the exclusive right to prevent others from publicly performing their works without authorization or compensation. The right was given not only to creators of new sound recordings, but also to copyright owners for sound recordings created before the effective date of the DPRA. 17 U.S.C. § 106. Congress also has extended the Copyright Act through grants of rights in architectural works, increases in the compulsory license fees for existing works, and limits on the first sale doctrine for computer software and sound recordings. 17 U.S.C. § 120 (1990); *id.* §§ 111(d), 115 (1976); *id.* § 109(b) (1976).

The Copyright Act contains other mechanisms which, under Petitioners' theory, also would raise Constitutional questions. For example, sections 203 and 304 expressly provide for parties who previously granted their copyrights to others to "terminate" those grants, thereby preventing those others from further exercising

the rights and reverting the rights to the transferor. 17 U.S.C. §§ 203, 304(c)-(d). Moreover, section 304(d), which was enacted as part of the Copyright Term Extension Act (“CTEA”), created an entirely new termination right for transferors whose previous termination right had expired. *Id.* § 304(d).⁴

In sum, far from showing what Petitioners call a “two-hundred-year tradition dating back to 1790,” Pr. Brief 39, of expanding only the duration and scope of copyright, history in fact shows a wide array of Congress’s exercises of its power under the Copyright Clause, none of which have been deemed to violate the First Amendment. Section 514 is no different. Because section 514 leaves in place the “traditional contours” of copyright, the statute should not be subject to further scrutiny.

D. Section 514 Addresses a Substantial Governmental Interest and Is Narrowly Tailored

Even were section 514 subject to stricter review here, it still plainly should be upheld. For a law to pass intermediate scrutiny, it must: (i) be a content-neutral restriction of free speech; (ii) serve a substantial government interest that is unrelated to the suppression

⁴ These termination provisions also undermine Petitioners’ suggestion that section 514 is advantaging the “heirs of foreign authors” at the expense of the United States public. Pr. Brief 30. The Copyright Act already recognizes that heirs often have the same rights as the authors from whom they descended; the termination provisions in fact give heirs many of the same termination rights that the authors themselves would have had. 17 U.S.C. §§ 203, 304(c)-(d).

of free speech; and (iii) not burden more speech than necessary to further that government interest. *Universal City Studios v. Corley*, 271 F.3d 429, 454 (2d Cir. 2001); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994). Section 514 handily meets these requirements.

Section 514 serves at least three principal interests: compliance with international agreements under the treaty power of Congress; ensuring legal protection for U.S. copyright holders abroad; and remedying past harm to foreign copyright holders. Of particular note, the U.S. has a strong interest in harmonizing U.S. law with international schemes of copyright protection, and long-standing precedent allows Congress to legislate where a “national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.” *Missouri v. Holland*, 252 U.S. 416, 435 (1920). Bringing U.S. law on this issue into compliance with international standards is surely an important government interest. Copyright itself is enshrined in the Constitution, and measures to ensure its ongoing viability cannot be seen as a frivolous act by Congress.

Moreover, section 514 specifically limits its burden on speech. It not only requires, among other things, notice of at least one year to reliance parties, as discussed above, but it also expressly provides for licensing of works with restored copyrights, if a derivative work depends on such works. *See* 17 U.S.C. § 104A(d)(2)-(3). In addition, as also discussed above, the provision leaves untouched the fair use doctrine and the idea/expression dichotomy. Section 514 thus does not burden substantially more speech than is necessary to further the significant purposes of

the provision. Quite the opposite is the case: there are important limitations on the restoration right expressly embodied in section 514.

II. CONGRESS HAS BROAD AUTHORITY TO PROMULGATE COPYRIGHT LAWS SUBJECT ONLY TO DEFERENTIAL REVIEW UNDER THE RATIONAL RELATIONSHIP TEST

A. Because the Constitution Expressly Allocates to Congress the Power to Make Laws Regarding Copyrights, Deferential Judicial Review Is Proper

Copyright is a creature of statute, as authorized by the Copyright Clause, and the protection granted is limited to that which Congress has determined to be appropriate. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834) (copyright “does not exist at common law—it originated, if at all, under the acts of congress”); *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 15 (1908) (“[I]t is perfectly well settled that the protection given to copyrights in this country is wholly statutory.”). Congress has the ultimate and sole authority to legislate regarding patents and copyrights. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 142, 168 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *Compeco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

Accordingly, legislation authorized pursuant to the Copyright Clause need only be rational: “[r]ather than subjecting Congress’ legislative choices in the copyright area to heightened judicial scrutiny, we have stressed that ‘it is not our role to alter the delicate balance Congress has

labored to achieve’... Congress’ exercise of its Copyright Clause authority must be rational.” *Eldred*, 537 U.S. at 205 n.10 (quoting *Stewart v. Abend*, 495 U.S. 207, 230 (1990)). Thus, in *Eldred*, the Court rejected the argument that the CTEA failed constitutional review under the Copyright Clause, because the CTEA was a “rational enactment”; the Court held that it is “not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.” *Id.* at 208; *see also Sony Corp. of America 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.”).

The level of review afforded legislation under the Copyright Clause should be no more intrusive than that applied to legislation authorized under other Article I, section 8 clauses. *See U.S. v. Comstock*, 560 U.S. ___, 130 S. Ct. 1949, 1956 (2010) (holding that Necessary and Proper Clause grants Congress legislative authority to enact a particular federal statute where the statute “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power”); *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that because “Congress had a rational basis” for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional “authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States’”) (ellipsis in original).

Petitioners’ purported limitation on Congress’s authority under the Copyright Clause—that Congress

can only exercise its power to promote the judiciary’s determination of “progress” and “public interest”—is inconsistent with Supreme Court precedent holding that congressional action should not be invalidated as long as it has a rational relationship to the implementation of a constitutionally enumerated power. Here, as in *Eldred*, the legislative enactment at issue bears a rational relationship to the promotion of science and the useful arts, and Petitioners’ attempt to impose a heightened “progress” or “public interest” test is misplaced.

B. There Is No “Public Interest” or “Progress” Test for Laws Promulgated Pursuant to the Copyright Clause

This Court has held that copyright supplies the economic incentive to “create and disseminate ideas” for the benefit of the public. *Harper & Row*, 471 U.S. at 558; *Eldred*, 537 U.S. at 219. Accomplishing the goal of promoting public access to creative works requires balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” *Sony*, 464 U.S. at 429; *see also Stewart*, 495 U.S. at 230 (referring to “the delicate balance Congress has labored to achieve”). Any application of copyright law necessarily must reflect this balance. *See Bonito Boats*, 489 U.S. at 146 (the Copyright Clause “reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts’”). The Court has never held, however, that copyright legislation is unconstitutional on the ground that

copyright is “not primarily designed to provide a special private benefit.” *Sony*, 464 U.S. at 429. It should not do so here—especially because such a determination could lead to the result that the Court would independently, and improperly, second-guess Congress on every enacted intellectual property law.

Petitioners analogize to the holding in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), that Congress may not authorize the issuance of patents which would remove existent knowledge from the public domain. *Graham* is distinguishable because it addressed an invention’s very eligibility for protection under the patent law’s unique “nonobviousness” requirement. The Court itself specifically omitted any discussion of copyright as “not relevant” to the case at hand. *Id.* at 5 n.1. That observation alone shuts the door on Petitioners’ analogy. Even if it did not, the Court in *Eldred* addressed *Graham* and held that it is for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives. *Eldred*, 537 U.S. at 212. Moreover, the Court in *Graham* expressly recognized Congress’s authority to execute its powers within its constitutional grant: “Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.” 383 U.S. at 6.

Eldred properly applied the rational review standard to acts of Congress rooted in the Copyright Clause and held that laws promoting conformance with the Berne Convention and ensuring that American authors receive reciprocal copyright protections in foreign countries, as section 514 does, were not unconstitutional. Under

Petitioners’ test, *Eldred* would have been decided differently, and nearly all intellectual property rights—which reflect the balance between the incentive to create and support an extensive industry that relies on copyright protections such as those in section 514, and public access to works—would be subject to judicial “second-guess[ing].” *Eldred*, 537 U.S. at 205, 208. That is not what the Court in *Eldred* did. It instead deferred to Congress’s policy judgments and to its conclusion that the CTEA served the “public purpose” embodied in the preamble to the Copyright Clause.

C. Section 514 Rationally Promotes “Progress” and the “Public Interest”

In *Eldred*, the Supreme Court upheld the CTEA in part because a longer term for copyright protection could “provide greater incentive for ... authors to create and disseminate their work.” 537 U.S. at 206. The Court further held that Congress “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.” *Id.* at 206-07; *see also id.* at 244 (Breyer, J., dissenting) (“The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information.”). For several reasons, section 514 likewise bears a rational relationship to the “promot[ion of] Progress of Science and useful Arts.” Art. I, Sec. 8, cl. 8.

Among other things, Congress rationally decided that section 514 would promote progress by reducing the impact of copyright piracy on the United States’ world trade position. S. Rep. No. 100-352, at 2 (May 19,

1988). In addition, as the Tenth Circuit found, there is substantial evidence that section 514 will cause foreign countries to provide reciprocal copyright protections, and that it is “critical to the United States’ ability to obtain similar protections for American copyright holders.” *Golan v. Holder*, 609 F.3d 1076, 1088 (10th Cir. 2010). Congress has endeavored for decades to enhance the success and productivity of American creators of copyrighted intellectual property through adherence to the Berne Convention and other efforts to obtain strong intellectual property protection for U.S. works abroad. Ensuring that U.S. authors are successfully able to obtain reciprocal foreign copyright protection protects U.S. jobs, contributes to the U.S. economy, and supports U.S. intellectual property as one of the nation’s key exports. Thus, section 514 represents a rational congressional effort to adapt U.S. copyright law as necessary to ensure that an increasing number of Americans are engaged in the “creative activity” of authorship. *Sony*, 464 U.S. at 429.

Congress also reasonably concluded that by refusing to restore copyrights in foreign works in the public domain, the U.S. was not in compliance with its Berne Convention obligations. *See Joint Hearings*, 103d Cong., 2d Sess., 262 (1994), statement of Ira Shapiro, General Counsel, Office of the U.S. Trade Representative (“It is likely that other [WTO] members would challenge the current U.S. implementation of Berne Article 18....”). This Court likewise recognized in *Eldred* that Congress had the right to decide that U.S. copyright laws should match European standards; such conformity entitles American creators to protections in Europe and helps “avoid competitive disadvantages.” 537 U.S. at 206. Section 514 extends this line of thinking by allowing foreign authors

to receive the benefits of U.S. copyright protection in exchange for protection of U.S. works abroad.

Congress further reasonably concluded that restoration of foreign copyrights would create an incentive to digitally preserve valuable works. Preservation of valuable foreign works plainly promotes progress, and copyright restoration creates an incentive to do so by increasing the amount of time available for an investor to recover its investment and profit from the work. Additionally, restoring copyright protection to foreign works encourages the pursuit of opportunities to further develop, disseminate, and exploit existing works, because many of these opportunities require investment to be realized. For example, because the size of a required investment necessary to develop a preexisting work into a motion picture may be enormous, filmmakers may prefer to license exclusive rights in a protected work rather than using a public domain work, because it reduces the risk that another filmmaker would dilute interest in the motion picture by creating a similar movie. In this way, restoring the copyright to existing foreign works promotes progress by motivating creative activity and is thus a constitutional exercise of legislative power.

Subjecting Congress's patent and copyright policy decisions to the scrutiny Petitioners suggest would in fact burden, rather than promote, progress "of Science and useful Arts" by encouraging attacks in the courts on intellectual property laws as against the "public interest," because they may adversely affect one or another interest group. Specifically, overturning section 514 could call into question not only the authority of Congress to restore copyrights, but also its authority to modify other

potentially unpopular intellectual property laws. Such an outcome would be broadly detrimental. Indeed, owners and licensees of copyrights and other intellectual property rely on Congress’s policymaking ability in pursuing their commercial objectives. In striking down section 514, this Court could cast doubt on that very ability, thereby undermining the expectations of intellectual property owners and licensees currently exploiting their rights in tens of thousands of transactions involving billions of dollars. *Cf. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) (“[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the inventing community.”); *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. ___, 131 S.Ct. 2238, 2252 (2011) (declining to lower standard of proof for patent invalidity defense where Congress had specified applicable standard of proof; observing that “[a]ny re-calibration of the standard of proof remains in [Congress’s] hands”).

D. Petitioners’ “Limited Times” Argument Is an Unduly Narrow Interpretation of the Copyright Clause and Is Without Merit

Petitioners argue that the “limited Times” restriction of the Copyright Clause allows extension but not restoration of copyright protection because an extension of copyright protection still has a “definite outer boundary.” Pr. Brief 22. This “limited Times” argument is premised on an unduly narrow interpretation of the Copyright Clause and is inconsistent with Congress’s historical practice of granting copyright extensions for existing works. By restricting copyright terms to “limited Times,” the Copyright Clause simply prohibits Congress from granting authors a copyright for an unlimited time

period. Section 514 does not violate the “limited Times” provision because the protection accorded by section 514 is clearly limited and definite in length—the foreign works receive the same protection, expiring on the same day, that such works would have received had they originally been eligible for copyright protection under U.S. law. The limited copyright terms of section 514 thus fall precisely within Congress’s authority to grant copyrights for “limited Times.”

Petitioners’ argument that legislation for “restoration” of copyright is “novel” is simply incorrect. *See Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1265 (D.C. Cir. 2005) (tracing various historical provisions for the restoration of copyright for foreign works).⁵ Even

⁵ Various other precedents for retroactive copyright protections include, among others: Act of Dec. 18, 1919, Pub. L. No. 66-10241, 41 Stat. 368 (authorizing restoration of copyrights to foreign authors whose works fell into public domain because World War I prevented them from complying with formalities); Act of Sept. 25, 1941, Pub. L. No. 77-258, 55 Stat. 732 (authorizing restoration of copyrights in foreign works whose authors could not comply with formalities because of World War II); Act of Dec. 15, 1971, Priv. L. No. 92-60, 85 Stat. 649 (private law restoring copyright in certain works of Mary Baker Eddy); Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089 (extending protection to preexisting works of architecture, not constructed before date of enactment, but embodied in unpublished plans as of that date); *id.* (granting moral rights to preexisting works of visual art as to individual copies whose title had not been transferred); Act of Dec. 8, 1993, Pub. L. No. 103-182, 107 Stat. 2204 (implementing North American Free Trade Agreement and providing retroactive protection for Mexican and Canadian motion pictures which had fallen into public domain for failure to comply with copyright notice requirements).

if restoration were indeed a “novel” policy enacted by Congress, Petitioners have not shown why a departure from historical practice would suggest that the copyrights restored pursuant to section 514 should be considered outside the bounds of “limited Times.” Indeed, they are not, instead remaining subject to the copyright terms that Congress has already enacted.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Tenth Circuit, hold that Congress’s enactment of section 514 is a valid exercise of its powers under the Copyright Clause, and reject Petitioners’ argument that section 514 violates the First Amendment.

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