No. 10-545

In The
Supreme Court of the United States

LAWRENCE GOLAN, et al.,

Petitioners,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE INTERNATIONAL PUBLISHERS ASSOCIATION, INTERNATIONAL FEDERATION OF SCHOLARLY PUBLISHERS, INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL & MEDICAL PUBLISHERS, BÖRSENVEREIN DES DEUTSCHEN BUCHHANDELS E.V., INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, AND COPYRIGHT CLEARANCE CENTER, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

GLORIA C. PHARES
Counsel of Record
MIRIAM GEDWISER
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
gcphares@pbwt.com

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* "Foreign Publishers" and their members and affiliates represent organizations from Berne countries all over the world, which are the treaty partners of the United States in the Berne Convention for the Protection of Literary and Artistic Works.[2] They are dedicated to implementing laws and public polices important to authors and to publishing worldwide. In particular, they are interested in ensuring the fulfillment of the Berne principle that each member of the Berne Union will offer the protection of its own copyright laws to the authors and other copyright owners of other Union members whose works are still in copyright in their countries of origin.

The International Publishers Association (IPA) is the international industry federation representing all aspects of book and journal publishing. Established in 1896, IPA actively fights against censorship and promotes copyright, literacy, and freedom to publish on behalf of its member associations and publishers in

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[1] No counsel for a party to this action authored any part of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. The Court has docketed letters from each party (Apr. 19 and May 20, 2011) consenting to the filing of *amicus curiae* briefs, and the parties were notified on July 18, 2011, of the Foreign Publishers' intent to file this brief.

[2] Berne Convention for the Protection of Literary and Artistic Works, concluded July 24, 1971 (Paris), S. Treaty Doc. No. 27, 99th Cong., 2d Sess., 1161 U.N.T.S. 3 (1986) ("Berne Convention" or "Berne").

more than 55 countries. The International Federation of Scholarly Publishers is an association of non-profit scholarly publishers. Among its aims are fostering not-for-profit scholarly publishing worldwide and ensuring that copyright and freedom to publish are strongly defended. The International Association of Scientific, Technical & Medical Publishers, founded in 1969 and based in the Netherlands, comprises approximately 100 scientific, technical, medical, and scholarly publishers, collectively responsible for more than 60% of the global annual output of scientific and technical research articles, over half the active research journals, and tens of thousands of print and electronic books, reference works, and databases. Börsenverein des Deutschen Buchhandels e.V., founded in Leipzig in 1825, is the sole organization representing all levels of the book trade in Germany; its publishers generate 90% of all publishing turnover in Germany.

The 131 worldwide members of the International Federation of Reproduction Rights Organisations, based in Brussels, work to foster the lawful use of copyrighted text and images, to complement creators' and other rightsholders' own activities, and to eliminate unauthorized copying, through collective management of rights. Copyright Clearance Center, Inc., a U.S. entity with a subsidiary in the Netherlands, is concerned that the Berne principles be implemented for both foreign and domestic copyright holders through the mechanism of collective copyright management of text-works.

SUMMARY OF ARGUMENT

The Foreign Publishers believe that it is important to the international copyright relations of the 164 Berne countries, including the U.S., that the decision of the court of appeals be affirmed. At a time when copyrighted works move around the world in a matter of minutes, it is critical that the nations of the world operate under reasonably uniform and cooperative copyright regimes. For most of its history, the U.S. stood outside the international copyright community, and its signing of the Berne convention, almost 200 years after the 1790 Copyright Act, reflects the maturation of a great nation and its desire at last to cooperate with the world community to foster the benefits of copyright, including a vibrant public domain.

When the U.S. joined Berne in 1988, its authors and other rightsholders obtained the benefits of membership – copyright protection of all their works – in the 77-member Berne Union. Effective January 1, 1996, the U.S. finally completed the bargain under Berne by restoring to U.S. copyright those foreign works still in copyright in their Berne countries of origin – even those whose copyrights had lapsed because of failure to comply with U.S. formalities – for whatever term of copyright, if any, remained to those works. That result was effected by §514 of the Uruguay Round Agreements Act (URAA), which is at the center of this case.

In restoring those copyrights, the U.S. followed the same procedures that it had followed before when circumstances, especially circumstances affecting international relations, warranted restoration. In addition to private legislation during the 19th century, the U.S. has five times in the 20th century enacted legislation to restore copyrights: the Trading with the Enemy Act, two wartime acts, the North American Free Trade Agreement, and the URAA's §514 (codified at 17 U.S.C. §104A). All the acts provided for reliance parties, but §514 also provided additional protections for reliance parties who had created derivative works embodying some level of their own expression.

These repeated congressional acts demonstrate that Congress has always behaved as though the right of restoration is within its powers, although the relatively infrequent exercise of those powers reflects Congress' understanding that they should be invoked only when there are exceptional public policy reasons for acting. In addition, any possible impact that restoration might have on protected speech rights is overcome by fair use and the copyright doctrine that copyright does not protect ideas. Even if intermediate scrutiny were required, Congress' careful balance of the competing interests reflects a tailored and narrow solution.

It is important that one of the largest producers and consumers of copyrighted materials be a fully functioning member of Berne. Section 514 is critical to that effectiveness because it extends the benefits of U.S. copyright to the foreign members of Berne. For

the U.S. to be a member of Berne without restoration legislation, a path that Petitioners advocate, would be a continuation of the nearly 200 years in which the U.S. was either openly hostile or not very hospitable to foreign copyright owners and would cloud the promise of its entry into Berne.

To avoid that outcome, the Foreign Publishers urge this Court to affirm the decision of the court of appeals.

ARGUMENT

I. WHY HISTORY MATTERS.

The Foreign Publishers represent authors and other rightsholders from nations that are treaty partners of the U.S. in the Berne Convention, the major international copyright convention. The U.S. signed Berne in 1988, almost 200 years after the U.S. enacted its first copyright law. As a result, the 77 members of the Berne Union extended copyright protection in their countries on the basis of "national treatment" to *all* works that were in copyright in the United States, not only "new works," as Petitioner contends, Pet. Br. 7.[3]

[3] "National treatment" refers to the obligation of each treaty partner to extend the copyright protection accorded authors in its own country to the works of authors in the countries of the other treaty partners that have not fallen into the public domain

(Continued on following page)

The Berne members had every right to expect that after receiving the benefits of membership, the U.S. would reciprocate. But the United States did not immediately embrace its treaty obligations; only after a dismaying delay (and the threat of sanctions) did it finally enact legislation, the Uruguay Round Agreement Act (URAA),[4] which restored to the remainder of their U.S. copyright terms (if any) millions of foreign works lost under U.S. law for failing to comply with the intricacies of formalities under the 1909 Copyright Act.

The Foreign Publishers do not dismiss Petitioners' concerns about the importance of the public domain, but they see that concern in the context of a longer history of the U.S. position in the world copyright

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in those countries because of the expiration of the term of copyright there. Berne Convention, *see supra* n.2, Art. 2(6).

[4] Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994). Title V of the URAA relates to Intellectual Property, and Sections 511-14, pertaining to copyrights, are codified at 17 U.S.C. §104A. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) concluded with the World Trade Agreement, establishing the World Trade Organization (WTO). Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S., 33 I.L.M. 1144 (1994). Annex IC to the WTO Agreement is the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). Articles 9-14 of TRIPs address copyright and related rights; Article 9 specifically requires members to comply with Articles 1-21 of the Berne Convention (1971), excluding its Article 6*bis*. The URAA implements and expressly "approves" TRIPs (and the other subsidiary agreements). URAA, title I, subtitle A, §101(a), (d)(15). Article 64 of TRIPs provides that specified articles of GATT 1994 will govern disputes under TRIPs.

community and also a broader view of the public benefits (not only the public domain) that should influence a country's international copyright policies. As the Foreign Publishers see it, the U.S.'s joining the Berne Union presented the means for achieving more uniform international copyright relations with many nations and was the culmination of several distinct phases of U.S. copyright policy (not all very high-minded) that changed with the growth of the country.

The URAA, which Petitioners seek to dismantle, implemented the U.S. obligations to its foreign treaty partners while also taking account of the interests of reliance parties, especially those who had created derivative works. For reasons discussed below, the Foreign Publishers do not believe that law and history support Petitioners' arguments. Moreover, the Foreign Publishers believe this Court's deliberations may be assisted by seeing the development of the United States' role in the international copyright community from the vantage point of the U.S.'s foreign treaty partners.

A. The United States Had No International Copyright Relations for 100 Years.

Petitioners' repeated references to the 200 years of U.S. copyright law, Pet. Br. 3, are inaccurate in the context of protection of works of foreign origin. The stark facts, as described in the 1959 Copyright Law

Revision Study on the Protection of Works of Foreign Origin, are that

> Under our first federal statute, adopted in 1790, the published works of U.S. citizens and residents only were eligible for protection. This situation remained unchanged for a hundred years. * * * The United States did not participate in the creation of the Berne Union [in 1886] and has never become a member of it. Nor did the United States, during the first century of federal copyright legislation, make any bilateral arrangements with any foreign country for reciprocal copyright protection.[5]

There is no evidence, and Petitioners cite none, that the Congress' 100 years' rejection of copyright protection for any works but those of U.S. authors had anything to do with its concern for the protection of the public domain. The evidence, both statutory and in practice, is that Congress intended to limit copyright protection to U.S. citizens and residents as a means of protecting domestic interests at the expense of foreign authors and their publishers.

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[5] Arpad Bogsch, Study No. 32 Protection of Works of Foreign Origin, prepared for the Subcomm. on Patents, Trademarks and Copyrights of the Sen. Judiciary Comm., 86th Cong., 2d Sess., pursuant to S. Res. 240 (1959). The revision studies were the beginning of the long process that resulted in the 1976 Copyright Act, 17 U.S.C. §101 *et seq.* ("1976 Act").

This conclusion is supported by the language of the first Copyright Act.[6] Sections 5-6 of that Act expressly permitted the works of *foreign* authors to be imported, sold, published and republished in the United States without payment of royalties and deprived non-resident foreign authors of a cause of action for unauthorized publication of manuscripts.

As a result of these provisions, U.S. publishers and printers businesses acted as do the publishers and printers (and digitizers) of many developing nations whose piracy the U.S. currently attempts to stop. They published, without permission and without paying royalties, the works of foreign (usually British) authors sought by the large population of American readers. This brought hardship not only upon foreign authors and publishers,[7] but American authors too. Rather than publishing American authors, which required paying royalties, American publishers preferred publishing cheap editions of British authors to whom they paid nothing.[8] American authors who sought to

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[6] 1st Cong. ch. 15, 1 Stat. 24 (1790).

[7] English authors found some relief from this practice in the United States because the larger, more respectable, publishers observed something known as "trade courtesy." S. Rep. No. 622, 50th Cong., 1st Sess. (1888) ("Chace Act Report"), Part 2 (reprinting S. Rep. No. 1188, 49th Cong., 1st Sess. 16-17 (1886) (testimony of publisher Henry Holt)); Samuel Ricketson, *The Birth of the Berne Union*, 11 Colum.-VLA J.L. & Arts 9, 13-14 (1986) ("Ricketson").

[8] Chace Act Report, Part 1 at 6 (statement of E. C. Stedman, of the American Copyright League, describing Washington Irving's 1840 letter to the *Knickerbocher* illustrating the problem).

publish in England were often met with low terms because English publishers used their losses in the United States as an excuse either for not publishing American authors or for publishing them on less favorable terms.[9] It was because of this record that Senator Jonathan Chace characterized the United States as "the Barbary coast of literature," and "the buccaneers of books."[10]

In the first of many 19th century efforts to introduce legislation protecting foreign authors, Henry Clay in 1837 presented the Senate with a petition from British authors, complaining that American publishers were printing their works (sometimes abridged without authority) without paying royalties, in support of a bill to extend copyright protection to foreign authors.[11] The draft legislation was reported unfavorably because

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[9] At times during the late 18th and 19th centuries it was understood, based on various English cases (some of which were later overturned) that a foreigner who went to or resided in Britain and first published a work there could obtain copyright and sue for infringement. Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* 33-39 (1968). Once copyright was obtained, American authors then claimed copyright protection (and royalties) in foreign countries with which Britain had copyright relations. *See* Chace Act Report, Part 2 at 24-25 (testimony of S.L. Clemens).

[10] Chace Act Report, Part 1 at 2 (Senator Chace).

[11] Senate Journal 192, 24th Cong., 2d Sess. (1837). The petition was also presented before the House shortly afterward, House of Representatives Journal 400, 24th Cong., 2d Sess. (1837), along with a petition of prominent American authors and journalists.

of a "floodgate" of negative memorials that "deluged" both houses of Congress on behalf of U.S. publishers and book manufacturers, especially the typesetters, the same result that greeted several later efforts before and after the Civil War.[12]

The issue later attracted a new advocate in Senator Jonathan Chace of Rhode Island, who held hearings in 1886 before the Senate Judiciary Committee, but again legislation was rejected because of concerns that protection of foreign authors would harm U.S. book manufacturers and typesetters. Senator Chace renewed his efforts in 1887, but this time supported by academicians and the typographical unions, won over by the addition to the legislation of a provision that a work by a foreign author must be typeset in the United States to secure protection. The International Copyright Act, a bilateral treaty with England, known as the "Chace Act," was finally achieved in 1891,[13] 101 years after the 1790 Copyright Act, at the cost of imposing on foreign authors the burdens of the so-called manufacturing clause, *see infra* n.19.

The Chace Act extended the provisions of U.S. copyright laws to citizens of foreign nations, but only if those nations granted U.S. authors the benefit of

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[12] James J. Barnes, *Authors, Publishers and Politicians, The Quest for an Anglo-American Copyright Agreement 1815-1854*, 61-67, 216-62 (1974).

[13] 51st Cong., ch. 565, 26 Stat. 1106 §13 (1891).

their copyright laws on substantially the same basis as they did to their own citizens or if those nations were party to an international agreement that provided for copyright reciprocity and would permit the United States to become a party if it chose.

While the hearings accompanying the Chace Act Report are full of the nuts and bolts of the likely effect of the legislation on royalties, trade, and the cost of books, and explanations for why American typographers and printers wanted books to be printed in America, Senator Chace's opening statement shows that he believed that the cause of international copyright was motivated by more serious considerations – fairness, morality, and the common decency that befits a country that has matured and seeks the respect of the community of nations. As he said:[14]

> There is abundant evidence of an awakening sense on the part of the American people to the wrong that we are doing to ourselves as a people in postponing the just recognition of the rights of foreign authors and doing violence to that proper sense of international comity which ought to govern the actions of so enlightened a nation.
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[14] Chace Act Report, Part 1 at 1-2; Senator Chace was not alone in evaluating American sentiment in favor of international copyright protection. *See*, *e.g.*, 2 Anthony Trollope, *Autobiography* 151 [Chapter XVII] (1883) ("But the argument [against international copyright], as far as I have been able to judge, comes not from the people, but from the bookselling leviathans."); G.H. Putnam, *Memoirs of a Publisher 1865-1915* 381 (1915).

> This is a simple question of our moral obligation as a nation to recognize the property rights of foreign authors. * * * All the other nations of the earth accept the same principle. The difference between our position and that of all other nations is that they not only protect the individual who is a foreigner in his common-law rights to property, but they protect also his property under copyright. In this respect we are, to our disgrace, behind all the other nations.

B. The U.S. Missed the Early Opportunity for Membership in Berne.

The principal impetus among European countries for a multilateral convention on copyright seems to have been the desire to replace their intricate network of bilateral agreements with an agreement based on the principle of national treatment and uniform substantive terms such as scope of protection, rights, duration of term of copyright, and formalities. To achieve that, representatives of the countries met several times, culminating in 1886 when 12 countries were represented, with Japan and the United States observing. Within 12 years, Japan, Sweden, Norway, the Netherlands, and Austria-Hungary had also signed Berne.[15]

Invited to the 1883 conference, the U.S. made no commitment to attend, responding that "while it

[15] Ricketson, *supra* n.7, at 29-30.

accepted, in principle, the proposition . . . in favor of international protection, it saw immense practical obstacles to achieving this, particularly the threat posed to local manufacturing interests involved in the production of copyright works."[16] At that time, the U.S. had not yet even enacted the Chace Act. At the final Berne conference in 1886, the head of the U.S. delegation stated that although the U.S. was not ready to join, it did not wish to be understood to oppose the Convention, and it "desires to reserve without prejudice the privilege of future accession to the Convention, should it become expedient and practicable to do so. . . ."[17] It would be another 100 years before changes in U.S. law permitted the United States to join.

C. Congress Enacts the 1909 Copyright Act, a Further Barrier to Berne.

As the new century began, America's businesses were prospering and beginning to realize the benefits of trade and business with the rest of the world. Congress passed a new Copyright Act in 1909, which applied to an author who was a citizen or subject of a foreign country if that foreign country met either of the conditions for a foreign author to qualify for protection under the Chace Act or if the foreign author

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[16] *Id*. at 23.

[17] *Id.* at 29-30.

was domiciled in the United States at the time of first publication of his work.[18]

The structure of the 1909 Act disqualified the United States from becoming a member of Berne. Publication with notice, registration and renewal of copyrights, deposit of works with the Copyright Office, and, for English-language works, compliance with the manufacturing clause[19] were all incompatible with the Berne Convention's basic tenet of extending copyright protection to members without conditions. Complying with these formalities was difficult enough for U.S. authors; the hardship was compounded for foreign authors.

As U.S. copyright-based businesses became engaged in more international activities, the United States also began to enter into an increasing number of bilateral agreements with other countries as the European countries had done in the middle of the 19th century before settling on the Berne Convention solution.[20] In 1952, attempting to ensure protection

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[18] Pub. L. No. 60-349, 35 Stat. 1075 (1909) ("1909 Act").

[19] *Id*. §15; the (detested) clause required that English-language works of foreign origin be printed from type set within the limits of the U.S., or from plates made within the limits of the U.S., and the printing of the text and binding of the books to be performed within the limits of the U.S., a requirement that was expensive and imposed considerable hardship on foreign authors and their publishers.

[20] *See* U.S. Copyright Office, Circular 38A, International Copyright Relations of the United States, available at http://www.copyright.gov/circs/circ38a.pdf (Nov. 2010).

for their authors in the United States, the European trading partners of the United States (all members of the Berne Convention) devised a convention, the Universal Copyright Convention (UCC), intended to permit them to belong to a multilateral convention with the United States.[21] Members agreed to treat the works of foreign authors as they treated their own. Article III(1) provided that any Contracting State which, under its domestic law, required any formalities – describing those required by the U.S. 1909 Act – must regard those requirements as satisfied with respect to works protected under the UCC. In other words, if foreign authors from UCC countries published their works with a copyright notice, the U.S. agreed to respect their copyrights, even if they did not comply with the initial U.S. formalities.[22] But authors still were required to renew copyrights at peril of losing copyright, a requirement that continued until 1992 (long after enactment of the 1976 Copyright Act), when renewal was made automatic for works copyrighted between January 1, 1964, and December 31, 1977.[23]

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[21] Universal Copyright Convention, 216 U.N.T.S. 133 (1952).

[22] To prevent Berne-member nations from abandoning that treaty in favor of the UCC, the UCC provides that if a member withdraws from Berne, it loses UCC protection. If a nation is a member of both conventions, Berne supersedes the UCC.

[23] Copyright Renewal Act of 1992, title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264.

D. Congress Restored Foreign Copyrights Under the 1909 Act.[24]

When there have been compelling circumstances, Congress has restored copyrights that had lapsed or were likely to lapse. In 1917 it passed the Trading with the Enemy Act, providing that an enemy or an ally of an enemy, who was unable during war to take actions relating to prosecuting U.S. patents, copyrights, and trademarks during prescribed periods would be granted an extension, so long as the applicant's nation extended the same privileges to U.S. citizens.[25]

During both World Wars, recognizing that wartime activities had made it impossible for copyright owners to comply with various formalities of the 1909 Act,[26] the United States enacted laws providing that any foreign work protectable under the 1909 Act that was first produced or published abroad during wartime would be protected by the Act so long as the foreign copyright proprietor complied with the requisite formalities of the Act within specified times.[27]

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[24] In addition to the legislation described in this section, Congress also enacted several private bills in the 19th century relating to lapsed copyrights. *See infra* Part III.A.1.

[25] Trading with the Enemy Act, Pub. L. No. 65-91 §§10(a), (b) and (c), 40 Stat. 411, 420 (1917).

[26] H.R. Rep. No. 66-79, 66th Cong., 1st Sess. 2 (1919); S. Rep. No. 66-326, 66th Cong., 2d Sess. 2-3 (1919) ("WWI Senate Report"); H.R. Rep. No. 77-619, 77th Cong, 1st Sess. 1-2 (1941); S. Rep. No. 77-571, 77th Cong., 1st Sess. 1 (1941).

[27] Act to amend sections 8 and 21 of the Copyright Act, Pub. L. No. 66-102. §§8 and 21, 41 Stat. 368, 369 (1919) ("WWI Act");

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It is noteworthy that in both cases, the legislation ensured that no liability would attach to any person or entity that had used the lapsed works during the period when the copyrights had lapsed.[28]

That early historical record, especially during the period in which the U.S. has maintained international copyright relations, makes plain that Congress always acted with the understanding that it was empowered under appropriate circumstances to restore copyrights to foreign works that had lapsed because of their failure to comply with U.S. copyright formalities.

E. With the 1976 Copyright Act, the United States Began the Final Trek Toward Full International Copyright.

Only a few years after the United States ratified the UCC, the Copyright Office began an effort to reexamine the copyright law with a view to its general revision. After 15 years of extensive studies, hearings with representatives from all parts of the copyright community, and reports, Congress passed the 1976 Act, effective January 1, 1978.[29] It had been drafted so as to make U.S. law more, although not yet entirely, compatible with Berne.

Act to amend section 8 of the Copyright Act, Pub. L. No. 77-258, 55 Stat. 732 (1941) ("WWII Act").

[28] *Id*.

[29] Pub. L. No. 94-553, §101, 90 Stat. 2541 (1976).

While it did not extend protection to all works regardless of nationality, it expanded the universe of protected foreign authors beyond those protected under the 1909 Act. But other changes went a long way to deleting many of the 1909 Act formalities. The term of copyright of new works and unpublished works was measured by the life of the author plus a term of years (deleting the renewal registration requirements);[30] registration became permissive, although it was still required as a condition for suit.[31] Publication with notice continued, but a cure provision for omitted notices was added that mitigated somewhat the absolute loss of copyright that would have resulted under the 1909 Act.[32] The manufacturing clause continued, but expired by its own terms in 1986, and was formally repealed in 2010.[33]

Interest in the Berne Convention revived in 1984, after the United States withdrew from UNESCO, which administers the UCC. In 1988, the U.S. joined

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[30] The term of copyright for 1909 Act works, if renewed, was extended to a period of 75 years and further extended to 95 years by the Sonny Bono Copyright Term Extension Act, title I of Pub. L. No. 105-298, 112 Stat. 2827 (1998).

[31] 1976 Act, §§302, 408(a), 411, 90 Stat. 2541, 2572-73, 2580, 2583.

[32] *Id.* §§401-405, 411, 90 Stat. 2541, 2576-78, 2583.

[33] *Id.* §601, 90 Stat. 2541, 2588-89; Pub. L. No. 97-215, 96 Stat. 178 (1982); Pub. L. No. 111-295 §4(a), 124 Stat. 3180 (2010).

Berne.[34] The significant changes for purposes of conforming to Berne were the elimination of notice as a condition to securing copyright and registration as a condition to filing infringement suits by copyright owners of non-U.S. works.[35]

But to the disappointment of the international community, while removing the last of the formalities in the 1976 Act, the United States did not then address its affirmative obligation under Berne's Article 18,[36] to restore works that had lost copyright because of formalities, but were still in copyright in their countries of origin. The URAA, which Petitioners challenge, was the piece of legislation that addressed that major treaty obligation.

In light of the 15-year effort leading to the 1976 Copyright Act, it was clear that the United States was positioning its laws with the ultimate objective of joining Berne. As Representative Kastenmeier observed, "It can safely be stated that Congress drafted and passed the 1976 Act with a 'weather eye' on Berne."[37] In other words, well before the U.S. signing of Berne, it was foreseeable that one day the U.S.

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[34] Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[35] *Id.* §§7(a), (b), 102 Stat. at 2857-58.

[36] S. Treaty Doc. No. 99-27 20, 1161 U.N.T.S. 3, 41.

[37] Berne Convention Implementation Act of 1987, Hearings on H.R. 1623 before the H.R. Comm., Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, 100 Cong., 1st and 2d Sess. (1987 and 1988), Serial No. 50 ("Berne Hearings") at 1030.

would have to confront its obligations under Berne's Article 18 and restore copyright to works still in copyright in their Berne countries, but in the public domain in the U.S. It surely behooved anyone intending to build a business based on those foreign works, especially after the U.S. actually signed Berne, as did several of the Petitioners, *see* Pet. Br. 11, to consider the likely possibility that the U.S. would restore the copyrights of foreign works for the remainder, if any, of their copyright terms.

II. THE UNITED STATES FAILED TO COMPLY WITH ALL ITS OBLIGATIONS WHEN IT JOINED THE BERNE CONVENTION.

Barring a constitutional impediment, which the Foreign Publishers contend is not present in this case (*see* Parts III and IV), the Berne Convention as implemented by URAA is a binding obligation of the United States. If the U.S. ignores that obligation, it breaches the treaty.

The mutual pact at the center of the Berne Convention is each treaty-partner's promise of national treatment (*see supra* n.3). Article 18(1) of Berne states that "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."[38]

[38] *See supra* n.36.

On March 1, 1989, the effective date of the Berne Convention for the United States, U.S. authors obtained the copyright protection in the 77-member Berne Union.[39] But the United States did not reciprocate.

Congress' "minimalist" approach to conforming the 1976 Act to Berne[40] eliminated only the conditions to obtaining and maintaining copyright disallowed by the Convention. Congress was emboldened to defer hard questions about Berne implementation by its awareness that Berne was widely understood to be "toothless," *i.e.*, unenforceable.[41] Indeed, Ambassador Clayton Yeutter, the U.S. Trade Representative, pointed out that Berne "does not have the kind of challenge mechanism that we have in the GATT where there are panel findings."[42] Because "a country that felt that our standards were inadequate and did not meet the minimums" would likely not avail itself of the cumbersome International Court of Justice procedures Berne allowed, the U.S. had "quite a bit of

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[39] Today, 164 countries have signed the Berne Convention.

[40] Berne Hearings 179 (Under Secretary of State Allen Wallis).

[41] Report of Dr. Mihály Ficsor ("Ficsor Report"), J.A. 90-93, 95 (¶¶20-23 & n.9).

[42] Berne Hearings 180.

flexibility" in determining what precisely Berne required.[43]

With the advent of TRIPs and the WTO, however, the risk of GATT-like enforcement caused Congress to take its Berne obligations more seriously.[44] As the Senate Judiciary Committee candidly acknowledged, "While the United States declared its compliance with the Berne Convention in 1989, it never addressed or enacted legislation to implement Article 18 of the Convention."[45] In 1994, faced with the realistic threat of sanctions if it did not comply with Berne, Congress finally addressed its Article 18 obligations and enacted Section 514 of the URAA,[46] which became §104A of the 1976 Act, effective January 1, 1996.[47]

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[43] *Id.*; *see also id.* at 199-200 (Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

[44] *See* Ficsor Report, J.A. 94-98 (¶¶24-28).

[45] S. Rep. 103-412, Uruguay Round Agreements Act Joint Report of the Comm. on Finance, et al. of the U.S. Senate to Accompany S. 2467 (1994) ("URAA Joint Report") at 225. The U.S. is not alone in taking its Article 18 obligations seriously only on threat of WTO consequences. The Russian Federation, for example, explicitly declined to adopt any restoration when it joined Berne in 1995. Ficsor Report J.A. 149-51 (¶¶86-87). In 2004, however, as Russia prepared to accede to the WTO, it amended its copyright law to provide for restoration. *Id.*, J.A. 155-57 (¶¶96-97).

[46] Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994).

[47] Proclamation 6780 of March 23, 1995, to Implement Certain Provisions of Trade Agreements Resulting from the Uruguay

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In enacting the URAA, Congress carefully balanced several factors: (1) the U.S. had legal and ethical obligations to comply with treaty obligations, especially regarding foreign copyrights;[48] (2) the treaty partners were already protecting all U.S. works in all Berne-member countries, but the U.S. had not enacted legislation implementing Article 18; (3) any legislation must shield reliance parties who had used restored works during the period of their lapsed terms; and (4) any legislation must address the special circumstances of reliance parties who had created derivative works based on restored foreign works, thereby creating their own independently protected copyrights.

As shown below (Part IV.B.3.), URAA §514 carefully addressed all those factors. As the Foreign Publishers believe there is no constitutional barrier to URAA §514, they urge this Court to remove any doubts about the statute's validity and affirm the court of appeals. Plain fairness and respect among treaty partners require no less.

Round of Multilateral Trade Negotiations, and for other Purposes, §5(e), 60 Fed. Reg. 15845, 15846 (1995).

[48] General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions, Joint Hearing before the Subcomm. on Intellectual Property and Judicial Admin. of the H.R. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary on H.R. 4894 and S. 2368, 103d Cong., 2d Sess. (1994), H.R. Comm. on the Judiciary Serial No. 90 and S. Comm. on the Judiciary, Serial No. J-103-77.

III. CONGRESS HAS THE POWER TO RESTORE FOREIGN COPYRIGHTS

A. The History of Copyright Restoration Shows that Congress Understood That It Had the Power to Restore Copyright Protection When Circumstances So Warranted.

"To comprehend the scope of Congress' power under the Copyright Clause, 'a page of history is worth a volume of logic.'" *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). History shows that Congress has repeatedly and consistently recognized and used its powers to restore lapsed copyrights (*i.e.*, copyrights whose protections have expired for technical reasons, not because of the expiration of their terms). Far from being "unique in the history of American copyright law," Pet. Br. at 2, Section 514 follows a congressional tradition of restoring copyright to preexisting works in the service of a uniform and fair national and international copyright regime.

1. Private bills

During the 19th century, Congress passed several bills restoring specific copyrights, reflecting Congress' consistent understanding that it had the power to extend copyright protection to previously unprotected,

preexisting works.[49] For example, the 1849 "Act for the Relief of Levi H. Corson" restored the copyright of an almanac author who had mistakenly deposited his work in the wrong district, an error that, without congressional reprieve, would have immediately resulted in loss of copyright.[50] Because the copyright had lapsed, Congress attached two caveats to the restoration – the rights of people who had already printed or otherwise used the almanac were unaffected and Corson was required to "give public notice" before enforcing his restored copyright.[51] This early act already evidenced two of the key concerns of later restorations: fairness to authors who lose protection by failing to comply with technical formalities, and fairness for parties who have already used the work while it was unprotected.

That Congress did not frequently exercise its restoration power during the 19th century does not reflect a perceived lack of power. Congress simply did not confront situations that, in its estimation, called for more than isolated copyright restoration.

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[49] Act of Feb. 19, 1849, ch. 57, 9 Stat. 763; Act of Jan. 25, 1859, ch. 16, 11 Stat. 557; Act of May 24, 1866, ch. 99, 14 Stat. 587; Act of June 23, 1874, ch. 534, 18 Stat. 618.

[50] Act of Feb. 19, 1849, ch. 57, 9 Stat. 763.

[51] *Id.*

2. World War I restoration act

Congress exercised its restoration power on a broad scale in 1919, when World War I made compliance with 1909 Act formalities impossible for many foreign authors whose copyrights had lapsed. Congress responded with the WWI Act.[52]

Register Thorvard Solberg explained that "American authors have failed to secure copyright in Great Britain for their works published during the war, and British authors have lost protection for their works in the United States."[53] The Register urged Congress to restore the lost works through "an arrangement for the reciprocal, *retrospective protection* of works by American and British authors published during the war"[54] pointing out that Congress "has already enacted for the authors of Germany and Austria [under the 1917 Trading with the Enemy Act[55]] what this bill proposes to do for the authors of England, France, Belgium, and Italy."[56]

Congress responded by extending copyright protection to those works that had already lost protection under U.S. law. There was no suggestion in the congressional reports or during the floor debates that restoration was outside of Congress' constitutional

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[52] *See supra* n.27.

[53] WWI Senate Report, *see supra* n.26, at 3.

[54] *Id.* (emphasis added).

[55] *See supra* n.25.

[56] WWI Senate Report, *supra* n.26, at 3.

authority. Instead, faced with the "urgent need" for the measure,[57] and the desire to "assist in the promotion of cordial and friendly relations with the various foreign governments concerned,"[58] Congress believed that restoration of the lapsed copyrights was a legitimate response.

3. World War II restoration act

Congress acted again during World War II to protect "authors, copyright owners, or proprietors" of foreign works.[59] Authors who "may have been temporarily unable to comply" with U.S. copyright formalities could receive an "extension," allowing them to gain protection even after the original window for protection had closed.[60]

The 1941 legislation explicitly accounted for the rights of users who had acted before restoration.[61] Those users could be subject to "no liability . . . for lawful uses made or acts done prior to the effective date" of restoration or for one year thereafter for "any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or

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[57] *Id.*

[58] *Id.* at 2 (letter of Frank L. Polk, Acting Secretary of State).

[59] *See* WWII Act, *supra* n.27.

[60] *Id.*

[61] *Id.* Congress had made a similar allowance in the WWI Act, *supra* n.27.

contractual obligation."[62] Unlike URAA's §514 provisions for reliance parties, however, the relief was limited to those who had expended financial resources or entered into contracts, and no extra protection was extended to the creators of derivative works.

These acts cannot be dismissed with a simple reference to the "exigency of wartime." Pet. Br. at 40. Petitioners offer no evidence that, at the time, Congress considered its restoration activities to raise constitutional problems. Rather "Congress' recognition that . . . it would be inappropriate to deny protection to authors," *id.*, during wartime reflects a principled, not an unprincipled, compromise. Congress understood that the Constitution empowered it to restore copyrights in the face of exigent international circumstances and the chance to "assist in the promotion of cordial and friendly relations" among nations.[63]

4. NAFTA and URAA

Twice in the last 20 years, Congress has again found copyright restoration warranted. First, Congress moved to amend the 1976 Act to implement the North American Free Trade Agreement (NAFTA),[64] restoring copyrights for Mexican and Canadian motion pictures.[65] Like the URAA that superseded NAFTA

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[62] WWII Act, *supra* n.27.

[63] WWI Senate Report, *supra* n.26, at 2 (Polk letter).

[64] 32 I.L.M. 289 (1993).

[65] Pub. L. No. 103-182 §334(a), 107 Stat. 2057, 2115 (1993).

the next year, NAFTA protected reliance parties by making notice a prerequisite of restoration[66] and providing a one-year wind-down period.[67] Unlike the URAA, NAFTA made no special provisions for those who had created derivative works.

Second, Congress enacted the URAA. With the URAA, as with the wartime acts, Congress confronted several objectives, including reducing past unfairness to foreign authors, ensuring protection for U.S. authors in many nations, "assist[ing] in the promotion of cordial and friendly"[68] international relations, promoting strong, uniform international copyright norms, and ensuring that those objectives were enacted with minimal impact on reliance parties.[69] Like the 1919 and 1941 wartime acts, NAFTA, and the early private acts, the URAA provided a wind-down for reliance parties who had used restored material during the period of lapsed copyright.[70] The URAA went further, however, in exempting derivative works from the one-year limit, instead allowing them to "continue to exploit that derivative work for the duration of the

[66] *Id.* §334(b).

[67] *Id.* §334(c).

[68] *See supra* n.26.

[69] *See generally supra* n.48.

[70] 17 U.S.C. §104A(d)(2). The WWII Act, NAFTA, and the URAA specified a one-year period.

restored copyright" so long as they pay "reasonable compensation."[71]

Thus, the "page[s] of history," record many exercises of Congress' restoration power, even at the expense of public interests. The URAA is simply the most recent in a line of restoration statutes, all falling within Congress' powers under the Constitution.

IV. SECTION 514 DOES NOT VIOLATE THE FIRST AMENDMENT

A. Because The URAA Is Within The Traditional Contours Of Copyright Law, It Does Not Warrant Heightened First Amendment Scrutiny.

As *Eldred* explained, "in the Framers' view, copyright's limited monopolies are compatible with free speech principles." 537 U.S. at 219. There is nothing about the URAA, and nothing in *Eldred*, that warrants deviating from that general rule or applying any heightened scrutiny to Section 514. Like the statute in *Eldred*, the URAA "protects authors' original expression from unrestricted exploitation," *id.* at 221, and in so doing places limits on Petitioners' asserted right to appropriate that original expression and "make other people's speeches." *Id*. *Eldred* also held that "[t]o the extent such assertions raise First Amendment concerns, copyright's built-in free speech

[71] *Id.* §104A(d)(3).

safeguards are generally adequate to address them." *Id.* Those built-in safeguards are (1) the fact that copyright protects only expressions, not ideas themselves, and (2) the fair use doctrine, *id.* at 219-220. It was in the context of those two safeguards that the court noted that the statute had "not altered the traditional contours of copyright protection," *id.* at 221. Because the URAA also does not disturb those two traditional safeguards, "further First Amendment scrutiny is unnecessary." *Id.*

Because *Eldred*'s analysis does not advance Petitioners' argument, they twist the "traditional contours" language to require an open-ended analysis of copyright history. Pet. Br. at 42-43 (quoting *Eldred*, 537 U.S. at 221). Petitioners' proposed standard proves too much, because if such general analysis of copyright "traditions" were in fact required by the First Amendment, it should have led to First Amendment scrutiny for many innovations in copyright law in the past centuries.

Petitioners do not explain how, for example, congressional action "expand[ing] the scope" of copyright protection, Pet. Br. at 43, into entirely new areas of human creativity, previously unprotected, such as motion pictures, sound recordings, computer programs, and architectural works,[72] was not an alteration of copyright's "traditional contours" as they describe them. Even accepting Petitioners' overbroad definition of

[72] *Id.* §102(a)(1), (6), (7), (8).

"tradition," their argument fails because, as shown above, restoration of copyrights, and especially foreign copyrights, upon a showing of need is hardly a "dramatic and unprecedented" departure, Pet. Br. at 43, from prior laws. That restoration was (and still is) practiced rarely indicates that it is by its nature an exceptional remedy, not that it is unconstitutionally untraditional.

B. Even If Intermediate Scrutiny Applies, Section 514 Is Constitutional.

Under intermediate scrutiny, "a content-neutral statute 'will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" Pet. App. 12 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)). The URAA passes First Amendment scrutiny because it furthers the important governmental interest of full compliance with Berne and TRIPs in a carefully tailored way that accounts for the expressive interests at stake.

1. Compliance with Berne is a substantial governmental interest.

In 1987, Congress held extensive hearings on joining Berne before ultimately adopting the Berne

Convention Implementation Act.[73] Congress' decision represents its judgment that membership in the Convention is important for U.S. international copyright policy. Adhering to all terms of membership, rather than only those that the U.S. perceives to be in its narrow self-interest, is important to ensure the stability of the international regime Congress endorsed, as well as to avoid adverse political consequences. *See Abbot v. Abbot*, 130 S. Ct. 1983, 1996 (2010) (domestic implementation of international convention must be "in a responsible manner" that serves the purposes of the convention rather than favoring domestic interests, if international law is to serve its "high purpose" of promoting just and fair laws across borders).

Petitioners make the remarkable assertion that restoration under the URAA was unjustified because the United States could reap the benefits of Berne even without complete compliance. Pet. Br. at 52, 53 (The U.S. had already "secur[ed] . . . all the prospective benefits of protection under the Convention"; "U.S. authors were not threatened with the loss of any of [those] benefits" even if the U.S. was not Berne compliant.).

This assertion is dubious in a post-WTO world where noncompliant countries could face the threat of sanctions.[74] More disturbingly, this argument

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[73] Berne Hearings at 1017-18.

[74] Indeed, the U.S. itself brought the first WTO enforcement action under TRIPs, seeking to force Japan to implement the

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advocates a return to the United States' days as a self-interested, rogue player on the international copyright scene. The Court should reject Petitioners' argument for the United States to act as a free-rider, benefiting from Berne without bearing its full costs, and recognize that leadership in the international copyright community demands more than a reductionist "what's in it for me right now" approach.

2. Restoration is necessary to comply with Berne.

The language of Berne, Art. 18(1), "shall apply to all works"[75] is mandatory and applies to all restorable works.[76] Nevertheless, Petitioners assert that because Art. 18(3) allows countries to determine "the conditions of application of this [restoration] principle," the U.S. could have allowed reliance parties "complete and permanent protection" – that is, the right to use restored works unconditionally and forever. Pet. Br. at 56.

This argument ignores the fact that "conditions" are permitted only to determine the precise means

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restoration obligations of Berne Article 18. *See generally*, James E. Hudson, *The TRIPs Agreement in Action: Japan in the Hot Seat*, 5 Currents: Int'l Trade L.J. 11 (1996).

[75] Berne Art. 18(1).

[76] *See* Ficsor Report, J.A. 112 (¶45).

of restoration's "application"; "conditions" that undermine the restoration principle itself are not allowed.[77] Certainly, the "condition" of no restoration at all, which Petitioners advocate, so frustrates the principle of restoration that it amounts to a wholesale abrogation of the principle itself.

Convention history and the international implementation of restoration clarify the types of conditions contemplated and show that those conditions were never understood to be "complete and permanent." The records of several meetings of the Berne Union refer to "temporary" or "transitional" protections for "acquired rights," a term used to describe both existing copies of works and preparations already underway to exploit restored works.[78] Further, as the court of appeals observed, "no country has provided full, permanent exemptions for reliance parties," Pet. App. at 34-35, and Petitioners identify no such country here. Even the United Kingdom's model for accommodating reliance parties, analysis of which dominates Petitioners' expert report,[79] does not provide complete or permanent protection for reliance parties. Instead, U.K. reliance parties may continue exploiting restored works only until bought back by the restored owner,[80] at which point they must cease

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[77] Ficsor Report, J.A. 117 (¶¶54-55).

[78] *Id.*, J.A. 117-121 (¶¶56-61).

[79] J.A. 193-210.

[80] Ficsor Report, J.A. 149 (¶85).

all exploitation. That reliance parties must be paid when their speech is "suppressed" by the buy-out does not change the fact that restoration does, in fact, allow the restored copyright holder to suppress reliance parties' expression.

Dr. Ficsor's survey of the implementation of restoration[81] in several countries is also instructive. Spain, for example, chose not to apply any "conditions" to restoration and therefore made restored copyright enforceable immediately even against reliance parties.[82] Several other countries, such as France, Hungary, and Italy, provided a fixed amount of time for reliance parties to wind down existing activities.[83] Germany did not set a time limit for reliance-party protection, but protected only concrete "acts of exploitation" of restored works that had already begun, chronologically, before restoration took effect, including derivative works.[84]

In this context, Congress' failure to enact any sort of restoration (even as to non-reliance parties) when it agreed to join Berne in 1988 is hardly evidence that restoration was not required. Rather, Congress took an avowedly "minimalist" approach[85] to implementing

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[81] Dr. Ficsor surveys restoration either under Berne or as required of certain European countries by the EU's "Term Directive." Ficsor Report, J.A. 126-28 (¶68).

[82] *Id.*, J.A. 146-148 (¶¶82-83).

[83] *Id.*, J.A. 152-153 (¶91).

[84] *Id.*, J.A. 133-136 (¶¶71-72).

[85] Berne Hearings 1016 (H.R. Report 100-609).

the Convention and knowingly deferred many difficult questions, including restoration.[86] With the possibility of WTO sanctions looming, Congress eventually did return to restoration and enacted the URAA in 1994.

3. The URAA accommodates the importance of adhering to the Convention without unduly burdening speech.

In enacting URAA §514, Congress placed conditions on restoration that accommodate any pre-existing speech interests: continued protection for derivative works, and a notice requirement and sell-off period for all reliance parties. These accommodations are suitably tailored to accommodate the reliance parties' expressive interests without jeopardizing the U.S.'s Berne compliance.

The reliance parties who may have stronger First Amendment interests are those who have created "derivative works" – original works based on restored works. Unlike other reliance parties, creators of derivative works are asserting a right closer to the "core" of First Amendment-protected speech: not a

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[86] *See id.* at 1029 (minimalist approach did not mean "casting a blind eye towards the long term implications" of Berne membership), *id.* at 1061 ("[A]ny solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial and consumer considerations is possible.").

right to express "other people's speeches," *Eldred*, 537 U.S. at 221, but a right to protect whatever of their own protected speech may be embodied in their independently protectible copyrighted expression. Although those speech elements should be protected within the "traditional contours of copyright," Congress still provided a higher level of protection to owners of derivative works by allowing them to exploit whatever speech is embodied in their new copyrighted expression "for the duration of the restored copyright."[87]

Because, however, derivative works also exercise an exclusive right of the copyright owner of the underlying work, an unqualified right to exploit could create a prohibited unconditional exception to Berne restoration. Congress therefore provided that those using derivative works must pay "reasonable compensation" to the restored rightsholder.[88] That derivative expression comes at an economic price, however, does not change the continued expressive rights preserved for the author of the derivative work.

Congress included additional safeguards for all reliance parties, including those who exploited outright copies of restored works. Restoration does not restrict reliance parties at all until the restored

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[87] 17 U.S.C. §104A(d)(3)(A).

[88] *Id.* §104A(d)(3); *see* 140 Cong. Rec. E2263 (Oct. 8, 1994) (Mr. Hughes) ("Congress recognizes that such continued exploitation [of a derivative work] is still an exploitation of the restored copyright for which payment should be made.").

copyright owner gives notice of intent to enforce the restored copyright.[89] For the first two years, filing a notice of intent to enforce with the Copyright Office could serve as constructive notice to all reliance parties.[90] Thereafter, restored owners must serve notice personally upon reliance parties against whom they would seek enforcement.[91]

This scheme reflects Congress' careful balancing of reliance party interests against the rights of restored owners. Rather than cut off all reliance uses, Congress placed the burden on the restored rightsholders to indicate interest in vindicating their rights under Berne against reliance parties. A reliance party who has not received notice need not cease expressive activities out of fear that the restored owner will eventually appear and demand payment for past activities. Further, by limiting the time for constructive notice, the URAA prodded restored owners to make their intentions known early. As time passes without notice, reliance parties can be more secure in continuing their existing uses without fear that a restored owner will suddenly emerge.

Even when a restored owner gives notice, the reliance party has one year to, for example, sell existing (infringing) copies of a restored work.[92] This "grace

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[89] 17 U.S.C. §§104A(d)(2), (e).

[90] *Id.* §104A(d)(2)(A).

[91] *Id.* §104A(d)(2)(B).

[92] *Id.* §104A(d)(2).

period," which forestalls any abrupt shut-down of existing expressive activities, again reflects Congress' accommodations for reliance parties at the expense of restored owners – even though full Berne compliance, including restoration, had been on the legislative horizon for years by the time that reliance parties like Petitioners began their uses.

Far from being "weak," Pet. Br. at 59, the U.S.'s protections for reliance parties under Article 18 are among the more speech-protective provisions in the world.[93] Specifically, the U.K. model is far less protective of expression than the URAA. Under that model, the restored copyright owner has an absolute right to halt a reliance party's expression at any time, so long as he pays. But economically compensated forcible silencing is still forcible silencing, as far as the *expressive* interests are concerned. To the extent Petitioners prefer the U.K. model, it is perhaps because their actual concern is less with expression than with commercial success.

[93] *See* Ficsor Report, J.A. 126-157, 159-60 (¶¶67-97, 100) (reviewing rules of several nations and concluding that URAA is at least as generous as, and in some ways more generous than, most European rules).

CONCLUSION

The Foreign Publishers urge the Court to affirm the court of appeals' decision.

Respectfully submitted,

GLORIA C. PHARES
Counsel of Record
MIRIAM GEDWISER
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
gcphares@pbwt.com

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