

No. 10-545

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IN THE  
**Supreme Court of the United States**

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LAWRENCE GOLAN, *et al.*,  
*Petitioners,*

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,  
*Respondents.*

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

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**BRIEF OF THE AMERICAN BAR ASSOCIATION  
AS *AMICUS CURIAE* IN SUPPORT  
OF RESPONDENTS**

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## QUESTIONS PRESENTED

Section 514 of the Uruguay Round Agreements Act of 1994 granted copyright protection to millions of works that the Copyright Act had placed in the public domain of the United States, where they had remained for years as the common property of all Americans and free to use without restriction. The questions presented here are:

1. Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the public domain?
2. Does Section 514 violate the First Amendment of the United States Constitution?

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**INTEREST OF THE AMICUS CURIAE<sup>1</sup>**

*Amicus curiae* American Bar Association (“ABA”) respectfully submits this brief in support of respondents, Eric Holder, Jr., *et al.* Pursuant to policy adopted by the ABA, which sets forth the view of a broad cross-section of its members, the ABA urges this Court to affirm the judgment of the Tenth Circuit, but to do so applying a deferential standard of review.

The ABA is the leading national voluntary bar organization of the legal profession, having nearly 400,000 members. Its members come from each of the fifty states, the District of Columbia, and the U.S. Territories. Membership includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields.<sup>2</sup>

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<sup>1</sup> Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. The parties have filed letters with the Clerk of the Court providing blanket consent to the filing of *amicus* briefs.

<sup>2</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Particularly relevant to this case, the ABA's Section of Intellectual Property Law ("IPL Section") is the world's largest organization of intellectual property professionals, with approximately 25,000 members, including partners, associates, and law students. Attorneys in the IPL Section represent diverse interests, including copyright owners, users of works of authorship, large and small corporations, libraries, universities, and individual authors.

The ABA policy addressed in this case originated in the IPL Section's Copyright Task Force, which is composed of the chairs of all the IPL Section's copyright committees as well as attorneys with copyright expertise. The Task Force was created to monitor judicial developments and to develop policy on matters of special importance. Before its presentation to the ABA's House of Delegates, the report and resolution that gave rise to the applicable ABA policy was approved both initially by the Task Force and subsequently by the IPL Section Council.<sup>3</sup> In the House of Delegates, the IPL Section's resolution was cosponsored by the Section of International Law and the Section of Antitrust Law.

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<sup>3</sup> The ABA's House of Delegates ("HOD") is the ABA's policy-making body. The HOD is composed of more than 550 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Only recommendations adopted by the HOD become ABA policy. *See* ABA General Information, *available at* <http://www.abanet.org/leadership/delegates.html>.

The following Resolution was adopted as ABA policy by its House of Delegates at the 2010 Annual Meeting after discussion and analysis. It provides:

RESOLVED, that the American Bar Association supports the principle that under the Copyright Clause of the Constitution of the United States (Article I, Section 8, clause 8), Congress has the power to implement U.S. obligations under international copyright treaties by restoring copyrights in certain works of foreign origin that have gone into the public domain.

FURTHER RESOLVED, that the Association favors the position that Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994), including the transitional protection it provides for prior users of restored works, does not violate, and is fully in accordance with, the Copyright Clause and the First Amendment of the Constitution of the United States.

This brief sets forth the analysis on which the ABA's policy is based.

## SUMMARY OF ARGUMENT

It is important for the United States to comply with the international treaties that this country has ratified, and to do so in a way that does not encourage other countries to disregard their obligations under those treaties. Compliance in a manner that subjects this country to substantial international criticism undermines the effects of existing treaties and the government's ability to negotiate new ones. Congress made a judgment that Section 514 was the appropriate way to comply with the Berne Convention and the TRIPS Agreement,<sup>4</sup> and would result in important protections abroad for U.S. authors.<sup>5</sup> Congress had the power under the Constitution to enact Section 514. The provisions of that Section, and of the copyright law generally, adequately protect Petitioners' First Amendment interests.

The plain language of the Copyright Clause does not limit Congress's power to grant copyrights only to those works that are not in the public domain. Moreover, the historical record shows that Congress – including the First Congress, which passed the Copyright Act of 1790 – has repeatedly extended copyright protection to works in the public domain. Congress has done so on a substantial number of

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<sup>4</sup> Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), April 15, 1994, 33 I.L.M. 1199.

<sup>5</sup> Section 514 was passed as part of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994) (“URAA”), codified as amended at 17 U.S.C. Sections 104A, 109.

occasions and in a variety of different circumstances. This history is evidence of the consistent view of Congress that it has the power to restore copyright protection to works that have fallen into the public domain should it desire to do so. *See* Section A, below.

Nor does Congress's exercise of its copyright power in Section 514 violate the First Amendment. The ABA believes that, when evaluating Section 514, deferential review – and not intermediate scrutiny – is the appropriate standard of review. Congress did not alter the traditional contours of copyright protection with Section 514; instead, it left in place the two First Amendment accommodations built into copyright law: (1) the “idea/expression dichotomy” and (2) the doctrine of “fair use.” As such, under this Court's holding in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the ABA believes that deferential review of Section 514 is appropriate. A higher level of review is not required merely because some of the Petitioners may have relied on the public domain nature of certain restored works by performing those works before their copyright protection was restored. *See* Section B.1, below. However, even if this Court applies intermediate scrutiny, Section 514 would be constitutional because Section 514 serves important, interrelated government interests – the most critical of which is to ensure that the United States is in compliance with its treaty obligations – and because the means chosen by Congress to further those interests were narrowly tailored to meet that objective. *See* Section B.2, below.

## ARGUMENT

### A. The Copyright Clause Gives Congress the Power to Restore Copyrights

The Copyright Clause of the United States Constitution provides that: “The Congress shall have 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 . . .” U.S. CONST. art. I, § 8.

The plain language of the Copyright Clause does not limit Congress’s power to grant copyrights only to works that are outside the public domain. Petitioners rely on the phrase “for limited times” in support of the proposition that such a meaning should be read into the Copyright Clause. However, it is undisputed that under Section 514 a restored work will receive copyright protection for a limited time since the end point of such protection cannot extend beyond the date on which copyright protection would have expired had the work been protected all along.

The historical record shows that Congress – including the First Congress – has repeatedly extended copyright protection to works in the public domain. This Court in *Eldred v. Ashcroft*, 537 U.S. 186, 196 n.3 (2003), after analyzing the historical record surrounding the enactment in 1790 of the first federal copyright statute, concluded that: “the First Congress clearly did confer copyright

protection on works that had already been created.”<sup>6</sup> In 1790, at least some of these works were in the public domain. *See Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 113-14 (D.D.C. 2004), *aff’d on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 338 n.284 (2004) (“Nachbar”) (“Of the general copyright laws passed by the States during the years of the Articles of Confederation, the laws of two of the States (Maryland and Pennsylvania) never even came into effect; they included reciprocity clauses that were never fulfilled because one State, Delaware, never enacted a general copyright law . . .”).

Indeed, the 1790 Act provided federal copyright protection to works that previously were unprotected and in the public domain in at least three important ways. First, several states had no operative copyright statutes and therefore no copyright protection at all.<sup>7</sup> Nachbar at 338 n. 284. Second, seven out of the ten states that did have operative copyright statutes did not protect “maps”

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<sup>6</sup> The Copyright Act of 1790 states: “That from and after the passing of this act, the author and authors of any map, chart, book or books *already printed* in these United States, being a citizen or citizens thereof . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years.” Copyright Act of 1790, ch. 15, 1 Stat. 124, § 1 (emphasis added).

<sup>7</sup> This Court has held that no common law post-publication copyright existed before the first Copyright Act. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834).



or “charts,” which the 1790 Act did protect. Resp. Br. at 19 n. 7. Third, the 1790 Act extended federal copyright protection even to works previously unprotected for failure to comply with the requisite formalities of state law. Resp. Br. at 19 n. 9. The parallel between the 1790 Act and Section 514 is striking: both provided copyright protection to previously unprotected works as part of an effort to create a more encompassing system of copyright protection.

Subsequent Congresses continued to extend copyright protection to works already in the public domain on several occasions. In particular, Congress has enacted two statutes that allowed the President to restore copyrights through proclamations, which allowed the President to restore copyrights to foreign authors for works published within specific time periods even though they were already in the public domain. *See* Act of Dec. 18, 1919 Pub. L. No. 66-102, 41 Stat. 368 (“1919 Amendment”) and Emergency Copyright Act of 1941, Pub. L. No. 77-258, 55 Stat. 732 (“Emergency Copyright Act”).

The 1919 Amendment provided retroactive copyright protection for war-time works from Austria, Denmark, Germany, Great Britain, Hungary, Italy and New Zealand. Presidents Wilson and Harding issued proclamations that restored copyrights to British and German works published during World War I in 1920 and 1922 respectively. *See* Proclamations of Woodrow Wilson, 41 Stat. 1790 (1920) and Proclamations of Warren Harding, 42

Stat. 2271-278 (1922). Similarly, under the Emergency Copyright Act, proclamations were issued that restored copyright protection to works in the public domain. *See, e.g.*, Proclamation No. 2608, 3 C.F.R. § 2608 (1944) (restoring copyright to United Kingdom of Great Britain and Northern Ireland authors); Proclamation No. 2722, 3 C.F.R. § 2722 (1947) (France); Proclamation No. 2729, 2 C.F.R. § 2729 (1947) (New Zealand); Proclamation No. 2863, 3 C.F.R. § 2683 (1949) (Australia); Proclamation No. 2953, 3 C.F.R. § 2953 (1951) (Finland); Proclamation No. 2958, 3 C.F.R. § 2958 (1951) (Italy); Proclamation No. 2963, 3 C.F.R. § 2963 (1952) (Denmark); Proclamation No. 3792, 3 C.F.R. § 3792 (1967) (Germany).<sup>8</sup>

Furthermore, in 1993, the North American Free Trade Agreement Implementation Act<sup>9</sup> restored copyright protection for Canadian and Mexican motion pictures created between January 1, 1978 and February 28, 1989 that had been in the public domain because of a failure to provide the required copyright notice. *See* Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 18.5 (rev. 3d ed. Supp. 2011).

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<sup>8</sup> Petitioners dismiss these acts of Congress as reflecting Congress's recognition that it would be inappropriate to deny protection to authors who were "temporarily unable to comply with" formalities because of wartime events. Pet'rs' Br. at 40. Similar reasoning would, of course, apply to Section 514's restoration of copyright protection to those works that had fallen into the public domain because the United States and the work's home country did not have copyright relations.

<sup>9</sup> Pub. L. No. 103-182, 107 Stat. 2057 (1993).

In *Eldred v. Ashcroft*, 537 U.S. at 212, this Court described the importance of such a historical record in the context of its analysis of the constitutionality of a statute extending the copyright term of existing works. Such consistent congressional practice is entitled to:

“very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. at 57, 4 S.Ct. 279. Indeed, “[t]his Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced for a long term of years, fixes the construction to be given [the Constitution’s] provisions.” *Myers v. United States*, 272 U.S. 52, 175, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

*Eldred v. Ashcroft*, 537 U.S. at 213.

**B. Section 514 Does Not Violate the First Amendment**

**1. Deferential Review – Not Intermediate Scrutiny – is the Appropriate Standard of Review**

This Court’s ruling in *Eldred* provides significant guidance as to the level of scrutiny applicable to Section 514.<sup>10</sup> In that case, this Court held that when “Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” *Eldred v. Ashcroft*, 537 U.S. at 521. As *Eldred* makes clear, the reference to the “traditional contours of copyright protection” describes the two First Amendment accommodations built into copyright law: the “idea/expression dichotomy” (*i.e.*, the principle that federal copyright law “distinguishes between ideas and expression and makes only the latter eligible for copyright protection”) and the doctrine of “fair use.” *Eldred v. Ashcroft*, 537 U.S. at 219-220; *see* 17 U.S.C. §§ 102(b), 107. *See also*

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<sup>10</sup> Petitioners argued in the court below that a heightened standard of review for their First Amendment claims was warranted because Section 514 exceeded the “traditional contours of copyright,” citing *Eldred*, 537 U.S. at 521. Despite Respondents’ arguments to the contrary, the Tenth Circuit held that heightened scrutiny was appropriate. *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007). On remand, the parties agreed that Section 514 is content neutral, so the court below applied intermediate scrutiny in assessing the statute’s constitutionality. *Golan v. Holder*, 609 F.3d 1076, 1082 (10th Cir. 2010).

*Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007) (holding that Congress did not transgress constitutional limitations in placing existing and future copyrights in parity, and the two traditional First Amendment safeguards are sufficient to vindicate the speech interests affected); *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 893 (9th Cir. 2005) (Berzon, J., dissenting) (the two built-in First Amendment protections achieve a balance between the free flow of ideas and copyright, and are embedded in the traditional contours of copyright protection); *Satava v. Lowry*, 323 F.3d 805, 807 (9th Cir. 2003) (stating that the contours of copyright include Congress’s carefully drawn expression/idea dichotomy); *accord Luck’s Music Library*, 321 F. Supp. 2d at 118-19 (D.D.C. 2004).

As this Court further explained, “when speakers assert the right to make other people’s speeches . . . , copyright’s built-in free speech safeguards are generally adequate to address” any resulting First Amendment concerns. *Eldred*, 537 U.S. at 221. Thus, as long as Congress preserves the idea/expression dichotomy and the established “fair use” defense, any incidental burden on expression that copyright protection entails raises no First Amendment concern. It is these two free speech safeguards that define the “traditional contours of copyright protection.”

The *Eldred* jurisprudence is consistent with prior case law that has concluded that the Framers of our Constitution intended for copyright protection

to encourage the creation of First Amendment protected speech:

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985); *see also Eldred v. Ashcroft*, 537 U.S. at 219 (partial quotation); *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 495 n.3 (2001) (internal citation omitted) (“Congress’ adjustment of the author/publisher balance is a permissible expression of the ‘economic philosophy behind the [Copyright Clause],’ *i.e.*, ‘the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare.’”).

Section 514 serves precisely these First Amendment goals by protecting the interests of authors who had created works that prior to its enactment were, for a variety of reasons, not protected in the United States. Such core First Amendment concerns are not outweighed by the First Amendment interests of those who do not wish to create their own speech, but only to use, or to continue using, the speech of others. *Eldred*, 537

U.S. at 221 (copyright’s built-in free speech safeguards are generally adequate to protect the rights of speakers who merely assert the right to make other people’s speeches). Section 514 is fully consistent with the idea/expression dichotomy and the doctrine of fair use. Nothing in Section 514 prevents anyone from expressing the ideas found in the copyrighted works in their own words. Nothing in Section 514 prevents anyone from making “fair use” of the copyrighted materials – or availing themselves of other exceptions in the copyright law geared towards educational, scholarly and other uses.<sup>11</sup>

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<sup>11</sup> People routinely teach musical works still under copyright: copyrighted musical compositions are played by student bands, orchestras and soloists and sung by choruses and ensembles. There are several exceptions for public performance in Section 110 of the copyright statute, including for in-classroom use and distance education. *E.g.*, 17 U.S.C. Sections 110(1), 110(2). Even where an exception does not apply, there is a flourishing licensing market that enables use of such works on reasonable terms. Public performance of most copyrighted musical works is licensed in the United States by ASCAP and BMI (and, to a lesser extent, SESAC) for their entire repertoire, and such licenses are often taken on an annual basis by performance venues. But no one can be denied such a license. Those licenses tend to be reasonable, as ASCAP and BMI licenses are overseen by rate courts. ASCAP and BMI also license performance of foreign musical compositions (including restored works) on behalf of their foreign counterparts. *See* Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 7.9 (rev. 3d ed. Supp. 2011). Moreover, Section 115 of the copyright law provides for a statutory license (at a set rate) to make and distribute new sound recordings of restored musical works. Finally, Section 104A(d)(3) assures that reliance parties can continue to use any derivative works (like sound recordings) that they made prior to restoration. Thus, the traditional

## 2. Section 514 Is Narrowly Tailored to Meet Important Governmental Objectives

Even if a heightened level of constitutional scrutiny is applied to Section 514, the statute does not violate the First Amendment because it is a content-neutral statute that “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.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

The U.S. government actively sought the TRIPS Agreement because it perceived that TRIPS would provide significant advantages for the United States.<sup>12</sup> International piracy was undermining key U.S. industries that relied on intellectual property; the rapid advance of digital technology threatened to exacerbate this problem in an increasingly global market; and the lack of an effective enforcement mechanism for existing treaties “greatly hampered”

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contours of copyright are fully preserved even with the passage of Section 514, and the incentive to create new material is advanced by restoring copyright protection to those works that have lost protection for reasons such as failure to comply with formalities or national ineligibility.

<sup>12</sup> Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), April 15, 1994, 33 I.L.M. 1199. The goal of the TRIPS Agreement was to incorporate protection for intellectual property within the framework of the principal international trade treaties, relying largely on standards of protection in existing intellectual property treaties.



their effectiveness. Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 23-24 (1994). The agreement was a milestone in international intellectual property protection, providing multilateral protection for intellectual property under a framework that provided for minimum standards *and* a means of enforcement. Daniel Gervais, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* § 1.01 (3d ed. 2008).

TRIPS, however, incorporates the standards of protection in the Berne Convention.<sup>13</sup> While the United States had joined the Berne Convention in 1989, it still had not restored copyrights in foreign works, even though the weight of authority indicated that Berne Article 18 required restoration. *See, e.g.*, Silke von Lewinski, *INTERNATIONAL COPYRIGHT LAW AND POLICY* 183-84 (2008); Sam Ricketson and Jane C. Ginsburg, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* § 6.117 (2d ed. 2006). The United States' position had been roundly criticized by our trading partners. *See, e.g.*, Olivia Regnier, *Who Framed Article 18? The Protection of pre-1989 Works in the USA Under the Berne Convention*, 15 EUR. INTELL. PROP. REV. 400 (1993).

Continued adherence to this position threatened to harm the interests of U.S. authors and

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<sup>13</sup> Berne Convention for the Protection of Literary and Artistic Works art. 18, *adopted on* Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986), 1161 U.N.T.S. 3 (revised at Paris July 24, 1971).

copyright owners. At a time when digital technology was taking off and markets were becoming increasingly international, the U.S. government was negotiating new IP agreements, but countries with which the United States previously had no prior copyright relations wanted to protect only those U.S. works newly created after these agreements took effect, not existing works. *See, e.g., General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property and Judicial Admin. of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 103d Cong., 2d. Sess. 120 (1994) (hereinafter *Joint Hearings on the URAA*) (statement of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).*

There was also concern that, with the ratification of TRIPS, U.S. compliance with the Berne Convention could be successfully challenged in the World Trade Organization. *Joint Hearings on the URAA* at 131 (statement of Ira Shapiro, General Counsel, Office of the United States Trade Representative) (“it is likely that other WTO members would challenge the current implementation of Berne [Article 18] if it is not enlarged.”); Katherine S. Deters, *Retroactivity and Reliance Rights Under Article 18 of the Berne Copyright Convention*, 24 VAND. J. TRANSNAT’L L. 971, 996 (1991) (an international tribunal would

likely find U.S. in violation of its obligations under Berne Article 18).

Congress thus faced a landscape in which the considerations supporting copyright restoration had shifted dramatically. Recognizing that TRIPS would incorporate the Berne standards of protection and be enforceable through the WTO, Congress and the Administration had two interrelated goals: ensuring compliance with Berne Article 18, and thereby with TRIPS, and strengthening protection for U.S. copyright owners abroad. These are clearly legitimate governmental objectives, and Section 514 was narrowly tailored to meet them.

Section 514 also protects the interests of reliance parties by providing a significant but limited grace period.<sup>14</sup> The limitation on this grace

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<sup>14</sup> The legislative record indicates that Congress was concerned about copyright restoration and the provisions concerning reliance parties, and scrutinized them carefully. *See, e.g., Joint Hearings on the URAA* at 3 (statement of Chairman Hughes); *id.* at 81-82 (statement of Senator DeConcini). During the legislative process, those provisions were expanded, most notably to preserve the right of derivative works owners to continue to use the underlying works whose copyrights had been restored upon payment of reasonable compensation. *Compare* H.R. 4894, 103d Cong. 2d Sess. (1994) (proposed Section 104A(d)) *with* 17 U.S.C. § 104A(d). Legal scholars indicated that such a change would respond in a significant way to concerns they identified with the draft bills. *Joint Hearings on the URAA* at 209-10 (statement of Shira Perlmutter, Professor, Catholic University School of Law); *id.* at 186 (statement of Eugene Volokh, Acting Professor of Law, University of California at Los Angeles).

period is consistent with the opinions of experts in international law, who concluded that adhering countries may not, consistent with Berne Article 18, allow reliance parties to continue their activities with respect to restored works indefinitely without limitation. *E.g.*, Sam Ricketson and Jane C. Ginsburg, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 6.123 (2d ed. 2006) (the transitional provisions should be “of limited duration” and eventually the work must be “protected in relation to all persons”); Silke von Lewinski, INTERNATIONAL COPYRIGHT LAW AND POLICY § 5.248 at 184 (2008).

The term for which Section 514 protects reliance interests is well within the mainstream views of our trading partners of appropriate protection for reliance interests when copyrights are restored. *See* Report of Dr. Mihály Ficsor at ¶ 100, *Golan v. Gonzales*, No. 01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800 (D. Colo. 2005) (J.A. at 159-60). In some respects, provisions of Section 514 are more protective of reliance parties than the laws of many other countries; for example, it requires notice to reliance parties before restored copyrights can be enforced against them. 17 U.S.C. § 104A(d)(2). This requirement ensures that reliance parties will not be blindsided by right holders who unexpectedly come forward, and that users will continue to be able to use orphan works. Reliance parties have a year after notice to continue use of the works, *id.*, and they can continue throughout the term of the restored copyright to use any derivative works they

previously created (such as sound recordings based on restored musical compositions) under the terms of the statute. 17 U.S.C. § 104A(d)(3).

Congress's objective was to implement Berne and the TRIPS Agreement in a manner that would put U.S. compliance beyond question, so that the United States could obtain the benefits sought from the TRIPS agreement. There was a reasonable basis for Congress to believe that if the United States provided weak and grudging protection for reliance parties with respect to foreign works whose copyrights were restored, so too would other countries with respect to U.S. works, contrary to U.S. economic interests. *See, e.g., Joint Hearings on the URAA* at 136-7 (statement of Ira Shapiro, General Counsel, Office of the United States Trade Representative).

Whether or not in hindsight Congress could have complied with Berne Article 18 with a provision granting broader rights for reliance parties – and it is not at all clear that it could have done so – the United States was facing a new regime under which TRIPS compliance could potentially be assessed by an international tribunal, U.S. non-compliance with Article 18 had received international criticism, and Congress believed compliance with Article 18 by other countries was in the best interests of the United States. U.S. compliance with its international treaty obligations is of great importance. Congress's decision to comply by adopting a law that is squarely within accepted

norms for protection of reliance parties, after hearing from the Administration and from experts, was a quintessential legislative decision entitled to substantial deference.

### CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgment of the court of appeals should be affirmed, and that a deferential standard of review should be applied with respect to Petitioner's claims.

Respectfully submitted,

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August 10, 2011