No. 10-545

In The
Supreme Court of the United States

LAWRENCE GOLAN, et al.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Intellectual Property Owners Association (IPO), established in 1972, is a trade association for owners of patents, trademarks, copyrights, and trade secrets. With over 200 member companies and 12,000 individuals active in IPO's various committees, publications, and educational efforts, IPO is the only association in the United States that serves all intellectual property owners in all industries and across all fields of technology. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.

IPO has no interest in any party to this litigation nor does IPO have a stake in the outcome of this case *per se*, other than its interest in seeking a correct and consistent interpretation and administration of the law on behalf of its members. IPO respectfully submits this *amicus* brief in support of Respondents.

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[1] 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners have styled their argument as a contest between the alleged private benefits created by Section 514 of the Uruguay Round Agreement Act and the alleged corresponding harm to the public. Pet'rs Br. 45-51. Specifically, they argue that Section 514—which allows foreign copyright owners to revive lapsed U.S. copyrights, just as they are able to revive lapsed copyrights in other countries—creates private economic advantages while at the same time disadvantaging the public. Pet'rs Br. 49.

This purported distinction relies on the false premise that what is helpful to foreign copyright owners must be detrimental to the American public generally. The American public, however, benefits when the United States complies with its treaty obligations. In the global e-commerce economy, the free flow of goods and ideas depends on mutual and reciprocal respect for the rights and interests of all entities that create and disseminate works, thereby enhancing the "Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. Section 514 protects a vital national interest by extending protections to foreign copyright owners that the United States has, by treaty, promised to provide, in large part to ensure that American copyright owners receive reciprocal rights abroad. Repudiating Section 514 might yield short-term advantages for some, namely those who have begun to exploit lapsed works and

who must then stop doing so or pay royalties when the copyright is restored under Section 514's provisions. But failing to uphold the U.S. treaty obligations embodied in Section 514 threatens to undermine the long-term public interest in several profound ways.

If Section 514 were struck down: (1) the United States would face costly World Trade Organization (WTO) challenges for violations of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); (2) the WTO could (as it has before) approve cross-retaliation measures that target U.S. intellectual property interests, thereby threatening U.S. economic interests that go far beyond copyright matters; and (3) the American public would suffer because the U.S. government would lack an effective tool for persuading other nations to extend and enforce intellectual property rights. Under any standard of review, including the "intermediate standard" proposed by Petitioners, these serious consequences outweigh any short-term benefits to those that may wish to subordinate America's international treaty obligations to their private pecuniary interests.

ARGUMENT

I. TRIPS and the Berne Convention Require the United States to Provide Copyright Protection for Works that Are Protected in the Country of Origin Unless the Term of Protection Has Expired

The United States joined the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1989. Sept. 9, 1886 S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (last revised July 24, 1971). Article 18 of the Berne Convention requires member countries to protect works that have not fallen into the public domain in their country of origin due to expiration of the term of copyright and whose copyright term has not expired in the country where protection is claimed. Examples would include works in the public domain in the United States due to lack of national eligibility, failure to comply with statutory formalities, or lack of subject matter jurisdiction. For some works, the Berne Convention thus required the United States to provide retroactive copyright protection for works that had fallen into the public domain in the United States for reasons other than expiration of their copyright term. When implementing the Berne Convention, however, the United States declined to extend copyright protection to works already in the public domain in the United States. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 12, 102 Stat. 2853, 2860 (1988). There was little impact to the United States' refusal to comply with the retroactive copyright

protections required by Article 18 of the Berne Convention because the Berne Convention lacked an effective enforcement mechanism for noncompliance. *See* 4 Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 18.05[A][2] (2011).

In 1994, the United States signed several trade agreements as part of the Uruguay Round (1986-1994) of the General Agreement on Tariffs and Trade (GATT). To comply with TRIPS and the other agreements that came out of the Uruguay Round, Congress enacted the Uruguay Round Agreement Act (URAA) in 1994. Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994) (amending 17 U.S.C. §§ 104A & 109). Section 514 of the URAA addressed the requirement that the United States, as a member of the Uruguay Round, comply with Article 9 of TRIPS, which in turn requires compliance with Articles 1-21 of the Berne Convention, with the exception of Article 6bis related to moral rights. *Id.*; TRIPS, art. 9.

Section 514 of the URAA "restored" copyrights in foreign works that are protected in their country of origin but fell into the public domain in the United States. 17 U.S.C. § 104A(h)(6)(C). Section 514 only restores copyrights for foreign holders when: (1) the work remains protected under the laws of the country in which the work was originally created or published, and (2) the work is within the copyright term the work would have enjoyed if the work was originally created or published in the United States.

17 U.S.C. § 104A(a)(1)(B) and (h)(6)(B). Restoration does not extend the term of protection—a restored copyright expires on the same day as if the work had been protected from the time of its initial creation or publication.

Unlike the Berne Convention, the TRIPS Agreement includes an effective enforcement mechanism. *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. 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. 136-37 (1994) (*Joint Hearing*) (statement of Ira S. Shapiro, General Counsel, Office of the U.S. Trade Representative) ("[T]he [Berne] Convention does not provide a meaningful dispute resolution process....The WTO Agreement, however, includes effective dispute settlement procedures that apply to the TRIPs agreement. It is likely that the other WTO members would challenge the current U.S. implementation of Berne Article 18 under those procedures.").

While working to comply with its obligations under TRIPS and the Berne Convention with passage of the URAA, Congress also recognized that other parties may have relied on the lapse of copyright protection for certain works before copyright protection for these works was restored.

To address this concern, Section 514 of the URAA provides protections for these reliance parties who exploited restored foreign works prior to the restoration of their copyrights. 17 U.S.C. § 104A (d)(2)-(4). The details of the protections afforded to reliance parties have been extensively briefed by the parties and are therefore not repeated here. *See* Pet'rs Br. 9; Resp'ts Br. 6-7, 41-42.

Taking into account both U.S. treaty obligations and the interests of reliance parties, Section 514 is a measured and balanced approach to complying with U.S. obligations under TRIPS. This balance between the rights of the foreign author and the U.S. reliance party represents an equitable compromise, allowing the United States to comply with TRIPS and further U.S. interests on a wide variety of trade issues, while at the same time protecting parties such as Petitioners.

II. Section 514 of the URAA Serves an Important Governmental Purpose to Protect the Interests of the United States and the American Public Abroad

Section 514 of the URAA was enacted in response to past, and in anticipation of future, concerns regarding the protection of U.S. works abroad. As the Tenth Circuit recognized, "Congress had substantial evidence from which it could reasonably conclude that the ongoing harms to American authors were real and not merely conjectural. Around the globe, American works were

being exploited...without providing compensation." *Golan v. Holder*, 609 F.3d 1076, 1086 (10th Cir. 2010) (*Golan IV*). In particular, as both the Tenth Circuit and Petitioners recognized, prior to the enactment of the URAA, "[s]ome...countries, such as Thailand and Russia, [had] refused to protect U.S. works in the public domain in their territory citing the U.S. interpretation of Berne Article 18 as justification." *Id.* at 1086-87 (quoting *Joint Hearing* at 137 (statement of Ira Shapiro)). *See also* Pet'rs Br. 7.

The threats to U.S. interests abroad due to U.S. noncompliance with the TRIPS Agreement and the Berne Convention are no less important now. Since the URAA was enacted, the WTO has demonstrated effective enforcement against TRIPS violations, just as was anticipated at the time of enactment of the URAA. As discussed below, the WTO has allowed countries to take retaliatory measures against the United States for violating other WTO agreements. Additionally, the United States risks retaliatory and/or reciprocal treatment by other countries if it fails to provide retroactive copyright protection for works that fell into the public domain other than through the expiration of their copyright terms, as required by TRIPS and Article 18 of the Berne Convention.

A. The Precedent Set by the WTO with Respect to the U.S. Fairness in Music Licensing Act Suggests that Similar Action Will Be Taken if Section 514 of the URAA Is Struck Down

In 1999, the European Communities and their member states (the EC) brought a WTO action against the United States over the Fairness in Music Licensing Act (FMLA), Pub. L. No. 105-298, 112 Stat. 2830 (1998). *See* World Trade Organization, Panel Report, *United States-Section 110(5) of the US Copyright Act*, ¶¶ 1.1, 2.1, WT/DS160/R (June 15, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (Panel Report). The FMLA, codified in Section 110(5) of the U.S. Copyright Act, provides an exemption for small businesses, relieving them of the requirement to pay royalties to copyright holders for public performances of radio or satellite transmissions. *See* 17 U.S.C. § 110(5).

The EC believed that Section 110(5) was incompatible with Article 9.1 of the TRIPS Agreement because it "cause[d] prejudice to the legitimate rights of copyright owners," specifically, the exclusive right of authorizing public performance of works and any communication to the public of the performance of their works. *See* Panel Report, ¶¶ 3.1, 6.17-6.19. The WTO ultimately agreed and recommended that the United States bring subparagraph (B) of Section 110(5) of the Copyright Act into conformity with its obligations under TRIPS.

Id. at 7.1, 7.2; *see also* 17 U.S.C. § 110(5)(B). As a result, the United States agreed to make a taxpayer-funded, lump-sum payment of $3.3 million to a fund set up to assist members of performing rights societies in the EC while working to resolve the dispute. *See* World Trade Organization, Notification of a Mutually Satisfactory Temporary Agreement, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2003), *available at* http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114303.pdf. Years later, the United States continues to search for a permanent resolution to the problem. *See* World Trade Organization, Status Report by the United States, Addendum, *United States-Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.78 (June 7, 2011), *available at* http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_147988.pdf.

Just as with the URAA, while lawmakers were drafting the FMLA, intellectual property experts warned Congress that passing what became the FMLA amendment would invite WTO challenges to Section 110(5). *Music Licensing in Restaurants and Retail and Other Establishments*, *Hearings on H.R. 789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997). These experts included Marybeth Peters, then-Register of Copyrights, who testified: "Allowing virtually every business to play music to its customers through loudspeakers or

audiovisual devices would invite a difficult case against the United States for violating our TRIPS obligations." *Id.* at 32. Bruce A. Lehman, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, also told lawmakers he was "seriously concerned" that the nation's trading partners would accuse the United States of violating its international commitment to TRIPS. *Id.* at 44.

Given this precedent of the WTO imposing penalties for failing to comply with TRIPS in the past, the United States will likely face challenges if Section 514 of the URAA is overturned. WTO members are certain to bring claims before the WTO for U.S. noncompliance with Article 18(1) of the Berne Convention if Section 514 of the URAA is struck down, and the United States falls out of compliance with the requirements of Article 18 of the Berne Convention. *See Golan IV*, 609 F.3d at 1089 (noting that past conduct may be the best evidence in making predictive judgments). Moreover, given the fact that no final resolution of the FMLA dispute was ever reached, countries are likely to insist on far greater penalties than those imposed in the FMLA dispute with the EC.

B. The WTO Has Demonstrated Its Willingness to Allow Foreign Countries to Use Cross-Retaliation Measures that Target Intellectual Property Interests, Harming the U.S. Public

The WTO has also authorized countries to retaliate against American intellectual property interests to force U.S. compliance with other international trade laws. The WTO's willingness to take such a dramatic step—even when the underlying dispute is completely unrelated to intellectual property—underscores the threat of serious intellectual property-related sanctions against the United States when its compliance with TRIPS is, in fact, at issue.[2]

The WTO first authorized cross-retaliation against a Member's intellectual property in 2000, siding with Ecuador in its dispute with the EC over trading practices that discriminated against Ecuadorian bananas. *See* World Trade Organization, Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU (Mar. 24, 2000) (permitting Ecuador to suspend certain intellectual

[2] When the WTO determines that an international trade violation has occurred, sanctions against the violating country typically correspond with the underlying infraction. But on three occasions described here, the WTO granted member countries permission to cross-retaliate against the violator's intellectual property protections.

property protections from works originating in EC member states), *available at* http://www.worldtrade law.net/reports/226awards/ec-bananas(226)(ecuador).pdf. Similar cross-retaliation was permitted a second time in 2007 when Antigua successfully challenged a U.S. law prohibiting the cross-border supply of online gambling services. *See* World Trade Organization, Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB (Dec. 21, 2007), *available at* www.wto.org/english/tratop_e/dispu_e/285arb_e.doc. Such unrelated cross-retaliations are permitted so that countries with large economies—like the United States and the countries in the European Union—have a greater incentive to comply with the demands of smaller, developing countries. *See, e.g.*, Kate Ackley, *Tiny Antigua Roils U.S. IP*, ROLL CALL: VESTED INTERESTS, Nov. 7, 2007, at 9-10. (explaining that it is difficult for Antigua, a nation of 90,000 people, to make a ripple against the United States with typical trade sanctions). Indeed, after years of inaction by the EC, Ecuador negotiated a settlement for better market access for its bananas once the WTO authorized cross-retaliation. *See* World Trade Organization, Notification of Mutually Agreed Solution, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58 (July 2, 2001), *available at*

http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114885.pdf.[3]

Most recently, a WTO ruling in 2009 permitted Brazil to suspend some of its intellectual property obligations with the U.S. under certain circumstances. *See* World Trade Organization, Decision by the Arbitrator, *United States – Subsidies on Upland Cotton*, WT/DS267/ARB/1 (Aug. 31, 2009), *available at* http://www.wto.org/english/tratop_e/dispu_e/267arb_part1_e.pdf. The decision followed a seven-year dispute between the two countries over American subsidies to U.S. cotton farmers, which Brazil argued violated international trade rules. *Id.* The WTO ruled that Brazil could cross-retaliate against U.S. intellectual property rights if countermeasures involving consumer goods proved insufficient to encourage the United States to eliminate the cotton subsidies. *Id.* ¶¶ 5.201, 5.230.

Because Brazil's economy is considerably larger than that of Ecuador or Antigua, one trade expert called the WTO's ruling on cross-retaliation "the big banana in terms of smaller countries having effective means of retaliation" and predicted that the ruling would "cause the intellectual-property community a few shakes and quivers." Peter Fritsch

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[3] Antigua remains in settlement talks with the United States. Allison L. Whiteman, Note, *Cross Retaliation Under the TRIPS Agreement: An Analysis of Policy Options for Brazil*, 31 N.C. J. INT'L L. & COM. REG. 187, 200-02 (2010).

and John Lyons, *U.S. Loses Ruling on Cotton Payouts*, WALL ST. J., Sept. 1, 2009, at A6. In fact, until the WTO permitted the suspension of intellectual property protections, the United States largely ignored the organization's 2004 ruling that the U.S. cotton subsidies violated international trade rules. *See* Allison L. Whiteman, Note, *Cross Retaliation Under the TRIPS Agreement: An Analysis of Policy Options for Brazil*, 31 N.C. J. INT'L L. & COM. REG. 187, 200-02 (2010). Eager to avoid having Brazil retaliate by, among other things, not enforcing patents for U.S. pharmaceuticals, the United States took the preliminary step of paying $147 million annually to assist Brazilian cotton farmers in 2010. *See, e.g.,* Sewell Chan, *U.S. and Brazil Reach Agreement on Cotton Dispute*, N.Y. TIMES, Apr. 7, 2010, at B2 (stating that Brazil would hold off on retaliation in exchange for various U.S. concessions).

That the United States was willing to make such concessions in a drawn-out trade dispute only after Brazil threatened to retaliate against American intellectual property interests sends an unmistakable message that the WTO's enforcement mechanisms, including allowing cross-retaliation against all types of intellectual property, are successful.

If Section 514 of the URAA is overturned and the United States falls out of compliance with TRIPS, the WTO and its member countries have a

strong incentive to retaliate against American intellectual property interests, including valuable patent, trademark, copyright, and other similar rights. Thus, the United States will likely face difficult choices should Section 514 of the URAA be struck down: pay additional monetary penalties or lose important intellectual property protections abroad for U.S. rights-holders. Such penalties affect the entire U.S. public, as tax dollars are used to pay significant sanctions and current rights held by American individuals and companies are substantially compromised abroad.

C. The United States Has Availed Itself of the WTO Dispute Resolution Process with Respect to TRIPS, an Option that Could Be Seriously Undermined if the United States Is Out of Compliance with TRIPS

In 1996, the U.S. brought an action against Japan before the WTO over Japan's failure to comply with Article 14 of TRIPS with respect to Japan's retroactive protection for sound recordings. *See* World Trade Organization, Summary of Dispute, *Japan – Measures Concerning Sound Recordings*, WT/DS28/1, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds28_e.htm (last updated Feb. 24, 2010). This was the first action brought by any country before the WTO with respect to the TRIPS Agreement. James E. Hudson, III, *The TRIPS Agreement in Action: Japan in the Hotseat*, 4 CURRENTS: INT'L TRADE L.J. 11 (1996). The United

States alle ged that Japan's copyright law violated the TRIPS Agreement because it only granted protection to foreign sound recordings that were made on or after 1971. *Id.* The United States took the position that Article 14 of TRIPS required that signatories provide a fifty-year term of protection beginning in 1946, whereas Japan argued that it could decide the base year from which to extend protection. *Id.* At the time, Japanese law protected sound recordings only if they were created in or after 1971. *Id.*

Ultimately, the United States and Japan were able to reach an agreement, resulting in an amendment to Japan's copyright law that protected sound recordings, retroactively, beginning from 1946. *See* World Trade Organization, Notification of Mutually Agreed Solution, *Japan – Measures Concerning Sound Recordings*, WT/DS28/4 (Feb. 5, 1997), *available at* http://www.mofa.go.jp/policy/economy/wto/cases/WTDS28MA.pdf; *see also* U.S. Trade Compliance Center, Press Release, *Japan Resolution of WTO Dispute on Sound Recordings* (Jan. 24, 1997), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005579.asp; Stephen Obenski, *Retroactive Protection and Shame Diplomacy in the US-Japan Sound Recordings Dispute, or, How Japan got Berne-d*, 4 MINN. INTELL. PROP. REV. 183, 208 (2002). Contrary to the Petitioners' position that the governmental interest is "nothing more than a general hope that a

few foreign nations may one day provide reciprocal protection for existing U.S. works in their public domains," Pet'rs Br. 50, the WTO dispute between the United States and Japan demonstrates a real, not speculative, government interest in not hampering the continued enforcement of TRIPS in other countries for the benefit of U.S. copyright holders.

Moreover, since 1996, the United States has brought 14 additional complaints involving TRIPS to the WTO, more than any other country.[4] If Section 514 of the URAA is struck down, and the United States is noncompliant with the retroactive treatment provisions of TRIPS, its position to enforce any TRIPS provisions at the WTO, whether they relate to copyright or to any other type of intellectual property right, will be severely compromised.

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[4] World Trade Organization, Disputes by Agreement, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement.

CONCLUSION

Congress was well within its rights to enact Section 514 of the URAA. The statute is narrowly and appropriately tailored to balance the government's need to comply with the TRIPS agreement and protect the rights of reliance parties. It also serves to further important and substantial government interests, namely to comply with treaty obligations, protect the American public by avoiding costly, taxpayer-funded litigation in the WTO, protect American economic interests against cross-retaliation, and persuade other countries to comply with WTO regulations and decisions. Accordingly, the Court should affirm the judgment below.

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