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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 FOR THE MOTION PICTURE ASSOCIATION OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets.

MPAA members depend upon copyright to protect their works. Were this Court to accept Golan's novel constitutional arguments, it would undermine U.S. efforts to secure overseas copyright protection for U.S. works and directly affect U.S. copyrights on numerous foreign works owned or licensed by MPAA members and their affiliates.

The MPAA has an interest in ensuring that the United States honors its obligations under Article 18 of the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (Berne Convention), and Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, 33 I.L.M. 1197. Failure to

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

honor those obligations could potentially subject U.S. copyright holders to retaliatory measures in other countries, to the detriment of the affected industries, the people they employ, and the broader U.S. economy.

PRELIMINARY STATEMENT

Section 514 of the Uruguay Round Agreements Act (URAA), 17 U.S.C. § 104A, brings the United States into compliance with its international obligations under Article 18 of the Berne Convention and Article 9 of TRIPS, strengthens the hand of trade negotiators seeking additional protection for U.S. works overseas, encourages investment in the creation and dissemination of creative works, and rectifies inequities created by U.S. copyright law. The provision reflects the considered judgment of the political branches regarding how best to integrate the United States' copyright system into the framework of the Berne Convention and TRIPS, while reinforcing the United States' position as a proponent of strong copyright protection throughout the world.

Golan and his amici attack Section 514 by trumpeting the value of the public domain. This case, however, is not about works in the broader public domain, such as "the Bible" (ISP Br. 15), "Shakespeare's plays" (*id.*), "fairy tales" (Dechenery Br. 4), "*Robin Hood*" (*id.* at 7), "*Alice's Adventures in Wonderland*" (*id.* at 8), "Gilbert and Sullivan's operettas" (*id.* at 18), "'The Star Spangled Banner'" (Google Br. 22), "'Keats' poems'" (*id.* at 23), "Little Red Riding Hood" (ALA Br. 14), or any work that has fallen into the public domain due to the expiration of its full copyright term. It is solely about a narrowly-defined class of foreign works that *prematurely* fell into the public domain due to rigid copyright formalities, the happenstance that the author lived in a

country without copyright relations with the United States, or the lack of subject matter protection for sound recordings fixed before 1972. The restored copyrights on these works do not last for a single day beyond the term they would have enjoyed but for those impediments—all of which are antithetical to the Berne Convention and TRIPS.

As with any copyright, a restored copyright protects only the author's particular expression of an idea, not the underlying idea itself. In addition, "fair use" of a work is permitted, and the statutory protections for teaching and libraries, as well as various compulsory licenses granted by statute, continue to apply. These limits are further supplemented by new provisions specific to restored copyrights. For example, any reliance party may continue to exploit a work indefinitely unless and until the copyright holder provides notice of intent to enforce its restored copyright—as has been done for only a small percentage of restored works. Even then, the reliance party has one year from the date of notice to dispose of existing copies or otherwise exploit the work, and any reliance party that has created a derivative work may continue to use it, subject only to the requirement of reasonably compensating the original author for future uses.

Taken together, these provisions strike a careful balance between the United States' obligations and objectives and the interests of reliance parties. The approach that Golan and his amici propose would not only undermine the credibility of the United States in international negotiations and expose it to the risk of trade sanctions, it would mark an unprecedented and unwarranted departure from this Court's long-standing deference to the political branches' balancing of the interests served by the Copyright Clause and transform is-

sues of copyright policy properly left to the political branches into constitutional questions under the First Amendment.

SUMMARY OF ARGUMENT

1a. Copyright laws such as Section 514 are not subject to heightened First Amendment scrutiny. As this Court explained in *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), copyright promotes the creation and dissemination of speech and contains built-in First Amendment accommodations. First, copyright distinguishes between ideas and expression, limiting protection to the latter. Second, the fair use defense permits copying of an author's expression for certain purposes. These limits are more than sufficient to protect First Amendment concerns.

Section 514 does not alter these limits on copyright protection or create liability for any acts prior to restoration. It merely restores protection during whatever unexpired portion of the copyright term would have remained if the work had not prematurely fallen into the public domain or been denied protection. Section 514 thus does not alter the "traditional contours" of copyright protection within the meaning of *Eldred*.

The Tenth Circuit erred when it transformed the phrase "traditional contours" into a general test that, in effect, requires heightened scrutiny of significant changes to copyright laws. Congress regularly adjusts copyright law in response to evolving circumstances and new understandings of how best to encourage authors and to promote free expression. Applying heightened First Amendment scrutiny every time Congress does so would improperly transform questions of policy traditionally left to Congress in the exercise of its au-

thority under the Copyright Clause into constitutional questions to be decided by the courts.

The argument that removing works from the public domain is different from other changes ignores the reasons *why* those works fell into the public domain in the first place and the larger context of copyright restoration. It is hardly a radical departure to say that where copyright protection was denied for reasons antithetical to the Berne Convention and TRIPS, that denial will not be given continued effect during whatever copyright term remains.

Indeed, Section 514 is not the first law to remove works from the public domain. Most notably, the first federal copyright law, the Copyright Act of 1790, extended copyright protection to previously unprotected works. Just as that legislation eased the transition to a national copyright system, Section 514 eases the transition to the international copyright regime established by the Berne Convention and TRIPS.

b. Even if Section 514 were subject to heightened scrutiny, it should be sustained. The United States' interest in adhering to the Berne Convention and TRIPS is beyond dispute. Although the United States availed itself of a transitional provision to delay implementing its Berne obligations, this became untenable after the United States signed TRIPS. Unlike Berne, TRIPS has a strong enforcement mechanism that allows countries to initiate World Trade Organization proceedings and, ultimately, to impose trade sanctions. In fact, upon joining the WTO, the United States used this mechanism to pressure Japan to honor its restoration obligations. As a result, Japan amended its law to restore protection for certain sound recordings.

Copyright restoration is not only something the United States must do to comply with its treaty obligations, but something it has a strong interest in doing to secure protection for U.S. works overseas and to improve trade protection across a broad spectrum of goods and services. If the United States had tried to minimize its obligations under the Berne Convention and TRIPS, other countries would have followed suit not just on copyright restoration, but on other obligations. As the largest creator and exporter of copyrighted works, the United States has an interest in signaling to the rest of the world that such a begrudging, incomplete approach to implementing intellectual property obligations is unacceptable.

Section 514 benefits U.S. authors by helping to secure reciprocal protection for their works overseas. When U.S. negotiators sought foreign protection for U.S. works, they were told it would not be provided unless the United States protected foreign works in the same manner. For example, Russia resisted providing protection for U.S. works created before the United States and the Soviet Union established copyright relations in 1973. But after the United States adopted Section 514, Russia restored the copyrights on U.S. works.

Section 514 also advances the United States' interest in encouraging the creation and dissemination of creative works. Authors creating new works today can be confident that because the United States indisputably discharged its obligations under the Berne Convention, it can press other countries to fulfill both the letter and the spirit of their obligations not only to restore copyright but to enact other key provisions that encourage the creation and protection of creative works. Section 514 also signals that as additional nations join the Berne Convention or the WTO, they will be re-

quired to restore copyright on eligible works. The provision additionally encourages investment in the preservation, restoration, and distribution of existing works. Further, revenue from foreign protection for existing works provides an important source of support to finance the production of new works.

Section 514 also advances the interest in relieving authors from the inequitable effects of strict copyright formalities and other restrictions that arbitrarily caused them to lose copyright protection before those restrictions were relaxed. Golan and his amici praise Dmitri Shostakovich and others, but never stop to consider the fundamental unfairness of depriving them and their heirs of compensation for the use of their works in the United States.

Section 514 does not burden substantially more speech than necessary to achieve these important objectives. Section 514 leaves in place the idea/expression dichotomy and the fair use defense, as well as other statutory exceptions that limit copyright. It also creates new exceptions specific to restored copyrights. Unless and until a copyright holder provides formal notice of intent to enforce its copyright, reliance parties may exploit a work indefinitely. Even where notice is provided, reliance parties may continue distributing or performing the work for a year, and creators of derivative works cannot be enjoined from exploiting their derivative works as long as they ultimately pay reasonable compensation for the continued use. These protections are more than sufficient to accommodate reliance parties' interests.

2. Section 514 is entirely consistent with the "limited Times" provision of the Copyright Clause because it restores copyrights only for whatever unexpired por-

tion of the copyright term remains. Section 514 also "promote[s] the Progress of Science and useful Arts," an issue that, if judicially cognizable, is reviewed at most under the rational basis test. For the same reasons that Section 514 survives intermediate scrutiny, it easily satisfies this highly deferential standard of review.

ARGUMENT

I. SECTION 514 OF THE URAA DOES NOT VIOLATE THE FIRST AMENDMENT

A. Section 514 Is Not Subject To Heightened First Amendment Scrutiny

Section 514 is, like other copyright laws, "compatible with free speech principles" and subject only to rational basis review. *Eldred* v. *Ashcroft*, 537 U.S. 186, 219 (2003). As explained in *Eldred*, the "Copyright Clause and First Amendment were adopted close in time," and the "'Framers intended copyright itself to be the engine of free expression.'" *Id.* (quoting *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985)). "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors," *Harper & Row*, 471 U.S. at 546, and by providing this reward, "to promote the creation and publication of free expression," *Eldred*, 537 U.S. at 219 (emphasis omitted).

Copyright law also "contains built-in First Amendment accommodations." *Eldred*, 537 U.S. at 219. First, copyright "distinguishes between ideas and expression" and limits protection to particular expressions while permitting the free communication of "every idea, theory, and fact in a copyrighted work." *Id.*; *see also* 17 U.S.C. § 102(b). This "'idea/expression

dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 556). It thus "encourages others to build freely upon the ideas and information conveyed by a work." *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991). Indeed, the idea/expression dichotomy is so protective of speech interests that "[c]ourts have rejected First Amendment challenges to the federal copyright law on the ground that no restraint [has been] placed on the use of an idea or concept." *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (internal quotation marks omitted).

Second, the "fair use" defense, codified at 17 U.S.C. § 107, "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances." *Eldred*, 537 U.S. at 219. Fair use thereby creates "breathing space within the confines of copyright." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

These traditional limits on copyright protection are more than sufficient to ensure that copyright "does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221. Copyright thus "bears less heavily" on First Amendment interests, and although it is not "'categorically immune from challenges under the First Amendment,'" "First Amendment scrutiny is unnecessary" where "Congress has not altered the traditional contours of copyright protection." *Id.*

Section 514 provides no basis for making an exception to this general rule. Section 514 merely grants foreign works that prematurely fell into the public domain copyright protection during whatever remains of their copyright term. It does not create liability for any acts prior to restoration or alter copyright's built-in protections for speech or the additional statutory exceptions codified at 17 U.S.C. §§ 108-122. In fact, Section 514 creates new exceptions that provide restored works narrower protection than other works. Section 514 thus does not "alter[] the traditional contours of copyright protection," 537 U.S. at 221, within the meaning of *Eldred*.

The Tenth Circuit erred when it transformed the phrase "traditional contours" into a general test that subjects changes to "the ordinary procedure of copyright protection" and "historical practice" to heightened First Amendment scrutiny. *Golan* v. *Gonzales*, 501 F.3d 1179, 1189 (10th Cir. 2007). *Eldred* did not establish a new test requiring that deviations from historical practice be closely scrutinized. It simply noted that the idea/expression dichotomy and fair use defenses—which the Court described earlier in the opinion as "traditional First Amendment safeguards," *id*. at 220—provide more than adequate protection for First Amendment activity.

Congress regularly adjusts copyright law in response to evolving circumstances and new understandings of how best to encourage authors and promote free expression. These adjustments often alter not only procedural or administrative aspects of copyright protection, but also the scope and nature of protection. For example, Congress broke new ground when it extended copyright protection to foreign works in 1891, Act of Mar. 3, 1891, ch. 565, § 13, 26 Stat. 1106, 1110; to

dramatic works in 1856, Act of Aug. 18, 1856, ch. 169, 11 Stat. 138; to photographs and photographic negatives in 1865, Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540; to motion pictures in 1912, Act of Aug. 24, 1912, Pub. L. No. 62-303, 37 Stat. 488; to fixed sound recordings in 1972, Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391; and to architectural works in 1990, Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. VII, 104 Stat. 5089, 5133 (1990). Congress altered fundamental procedural rules when, for example, it relaxed the requirements of publication with notice, registration, and timely renewal in 1976, *compare* Act of Mar. 4, 1909, ch. 320, §§ 9, 10, 23, 35 Stat. 1075, 1077-1078, 1080, *with* Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 102, 302(a), 304, 408(a), 90 Stat. 2541, 2544-2545, 2572, 2573-2576, 2580, and fully eliminated the copyright notice requirement in 1989, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-2859. Congress even changed the nature of the rights granted in certain works when it accorded certain visual artists "moral rights" adapted from the European tradition. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089, 5128-5133.

Applying heightened First Amendment scrutiny every time Congress amends the copyright law would ensnare the courts in countless challenges to copyright legislation. The result would be to improperly transform questions of policy traditionally left to Congress under the Copyright Clause into constitutional questions decided by the courts. Nothing in the First Amendment requires such a remarkable expansion of judicial involvement in copyright policy.

Attempts to argue that Section 514 is different from other amendments because it restores works that

were in the public domain ignores the reasons *why* those works fell into the public domain in the first place. Copyright embodies a statutory bargain between authors and the public, under which authors receive "a special reward" "to motivate the[ir] creative activity" while the public receives "access to the products of their genius *after* the limited period of exclusive control *has expired*." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added). Section 514 merely ensures that for works prematurely cast into the public domain, the author is not unfairly deprived of the benefit of his or her labors during whatever time remains before the normal copyright term expires. This may prevent certain members of the public from continuing to reap a windfall, at the expense of the author, during the period that copyright protection was denied. *See infra* p. 28. But it is hardly a radical departure to say that where copyright protection was denied for reasons antithetical to the Berne Convention and TRIPS, that denial will not be given continued effect.

Indeed, Section 514 is not the first law to remove works from the public domain to ease the transition to an integrated copyright system or to correct for circumstances that unfairly caused authors to lose protection. *See* U.S. Br. 17-28. Most notably, the Copyright Act of 1790 granted copyright protection to "any map, chart, book or books *already printed* within the[] United States" at the time of the statute's enactment. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (emphasis added). The statute thus extended copyright protection to previously unprotected work. This legislation "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument," and which was the Con-

gress that drafted the First Amendment, "is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *see also Myers* v. *United States*, 272 U.S. 52, 136 (1926).

Golan and his amici contend that the 1790 Act did not create new rights in published works, but merely recognized and circumscribed copyrights already in existence. This interpretation assumes that every work published at the time was already protected under state law. Yet not all states had copyright statutes in force in 1790. Delaware, for example, did not provide any statutory protection for printed works at the time. Maryland and Pennsylvania had enacted copyright statutes, but provided that those laws "would take effect only when all states had enacted such statutes," a condition that had not been met. Walterscheid, *Understanding the Copyright Act of 1790*, 53 J. Copyright Soc'y U.S.A. 313, 341 n.138 (2006). Accordingly, statutory copyright protection was unavailable in at least three states prior to 1790 when the first federal copyright law granted such protection to otherwise unprotected works. Landau, *Fitting United States Copyright Law into the International Scheme*, 23 Ga. St. U. L. Rev. 847, 875 (2007) ("[A]t the time of the Copyright Act of 1790, Delaware, Maryland, and Pennsylvania did not have any scheme of protection for authors' works.").

This leaves Golan to rely entirely on the supposition that common-law copyright existed throughout the United States at the time. As Golan's own amici admit, however, "there are no American cases before 1790 recognizing a common-law right in published works." Gomez-Arostegui Br. 4. In fact, this Court definitively held nearly two hundred years ago in *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834), that common-law copy-

right did *not* exist throughout the United States at the time of the Founding. *See also* Patterson & Joyce, *Copyright in 1791*, 52 Emory L.J. 909, 928, 931 (2003).

Unable to refute that the First Congress extended copyright protection to works in the public domain, Golan attempts some slight of hand by redefining the public domain to exclude the example that disproves his case. Specifically, Golan argues (at 33) that "Congress *created* the public domain of the United States" when it enacted the first copyright statute in 1790 and thereafter began a tradition of not removing works from that public domain. (Emphasis added.) But by recasting the public domain as a statutory creation, Golan undercuts his argument that it is an inviolable constitutional requirement.

Further, the fact that the Copyright Act of 1790 was transitional legislation is exactly the point. Just as the First Congress "provided protection to previously published works in order … to ease the transition from the uncertain and largely ineffective protection provided under the state copyright acts to a single federal copyright" (Gomez-Arostegui Br. 29), Section 514 eases the transition from a national copyright regime to the international copyright regime of the Berne Convention and TRIPS. There is more than one way to establish a historical tradition, and the strong parallels between the first Copyright Act and Section 514 demonstrate that, even if Congress does not remove works from the public domain every day, transitional measures such as Section 514 do not necessarily mark a break with tradition.

B. Even Under Intermediate Scrutiny, Section 514 Is Clearly Constitutional

Even if Section 514 were subject to heightened scrutiny, it should be sustained because, as the Court of Appeals concluded, it advances important governmental interests without burdening substantially more speech than necessary.

1. The United States has an important interest in complying with the Berne Convention

The United States' interest in adhering to the Berne Convention and TRIPS is beyond dispute. Those agreements provide the general framework for the United States' copyright relations with the 164 members of the Berne Convention and the 153 members of the WTO. To receive the substantial benefits of that membership, both on copyright and trade issues, a country must adhere to Berne and TRIPS.

a. A central principle of the Berne Convention is that "[t]he enjoyment and the exercise" of rights granted to foreign works "shall not be subject to any formality." Art. 5(2), 1161 U.N.T.S. at 35. The United States, however, was "slow to fully adapt its copyright laws to international norms." Landau, 23 Ga. St. U. L. Rev. at 847. It did not provide any copyright protection to foreign works until 1891. *Id.* at 847 n.3. It then waited over 100 years before adhering to the Berne Convention. During much of that time, the United States continued to apply strict copyright formalities. At various times copyright protection could be lost or denied for failure to affix a copyright notice to publicly distributed copies of a work, failure to deposit copies with the Library of Congress, failure to manufacture the work in the United States, or failure to make a

timely original or renewal registration. *See, e.g.*, Act of Mar. 4, 1909, ch. 320, §§ 9, 10, 15, 23, 35 Stat. 1075, 1077-1080; Act of Mar. 3, 1891, ch. 565, §§ 2-3, 26 Stat. 1106, 1107. As a result, many works entered the public domain long before their full copyright terms would have expired or never secured federal protection.

Another important principle of the Berne Convention is that as new countries adhere to it, their existing works will be protected in other Berne countries as long as their copyright terms have not expired. Article 18 requires extension of copyright protection to "all works" that "have not yet fallen into the public domain … through the expiry of the term of protection" either in their country of origin or in the country in which protection is claimed. Art. 18(1)-(2), 1161 U.N.T.S. at 41.

As the hundredth anniversary of the Berne Convention came and went, a concerted effort was made to align the U.S. copyright system with international norms. The U.S. Trade Representative warned that the United States had become a "'second class citizen' in the copyright world." *The Berne Convention: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 93 (1988) (statement of Clayton Yeutter) (*Senate Berne Hearing*). He noted that trading partners "repeatedly asked the difficult question of why the United States was pushing so hard for strong copyright protection … when we did not adhere to the Berne Convention." *Id.* at 96.

Members of Congress agreed that "100 years on the sidelines" was "long enough." 132 Cong. Rec. 27,695 (1986) (statement of Sen. Mathias). In 1988, Congress passed the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853. The 1988

Act, however, failed to implement the copyright restoration commitments in Article 18 of the Berne Convention, based in part on the transitional provisions of Article 18(3). It was only in 1994, when Congress enacted Section 514 of the URAA, that it finally came into compliance with Article 18.

b. Golan argues (at 17) that when "the United States joined Berne in 1988," "Congress specifically found that Article 18 permitted the United States to do so without removing any works from its public domain." The Berne Convention Implementation Act, however, embodied a "minimalist approach" to implementing the Berne Convention. H.R. Rep. No. 100-609, at 7 (1988). Far from rejecting the requirement to restore copyright protection for eligible works, Congress simply decided that "retroactivity can be addressed after adherence to Berne," *id.* at 52, and tabled the issue.

The decision to push the limits of Article 18(3) by delaying full implementation was largely driven by the Berne Convention's lack of an effective enforcement mechanism between member states. The General Counsel of the Office of the U.S. Trade Representative later explained: "Many Berne union members disagreed with our interpretation of [A]rticle 18 at the time. But the Berne Convention did not provide a meaningful dispute resolution process, and frankly, they could do very little more than raise their concerns with us." *See General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. of 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. 131 (1994) (statement of Ira Shapiro) (*URAA Hearing*). Another observer noted: "No machinery existed under

Berne to compel United States compliance or punish its non-compliance. Congress was, therefore, free to adopt a minimalist approach and evade Article 18." Karp, *Final Report, Berne Article 18 Study on Retroactive United States Copyright Protection for Berne and Other Works*, 20 Colum.-VLA J.L. & Arts 157, 172 (1996).

This failure to implement Article 18 quickly became untenable after the United States signed the TRIPS Agreement in 1994. Article 9 of TRIPS requires signatories to comply with Article 18 of the Berne Convention, 33 I.L.M. at 1201, and because TRIPS is enforceable through the World Trade Organization, countries that believe the United States has failed to honor its obligations can request WTO permission to impose trade sanctions.

This is not a hypothetical concern. When Japan failed to protect sound recordings made between 1945 and 1971, the United States (with European support) initiated the first-ever WTO proceeding to enforce TRIPS. *Japan—Measures Concerning Sound Recordings*, Case No. WT/DS28 (Feb. 9, 1996). In preparing for the action, the United States asked the World Intellectual Property Organization for its views on the proper interpretation of Article 18. The Director General's response concluded that Article 18(3) was a transitional measure that allowed only a temporary exception for reliance parties. *See* 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, 202-203 (2002). Japan subsequently settled the dispute and provided the copyright restoration for sound recordings required by TRIPS.

Against this backdrop, the assurances of Golan and his amici that the United States could have granted a permanent exemption to reliance parties or even declined to restore any foreign copyrights are cold comfort—particularly to an industry, such as the motion picture industry, that might find itself in the cross-hairs of any effort to impose retaliatory trade sanctions against the United States.[2]

2. The United States has an important interest in strengthening copyright protection for U.S. works in foreign markets

Copyright restoration is not only something the United States must do to satisfy its treaty obligations, but something it has a strong interest in doing to secure protection for U.S. works overseas and to improve trade protection across a broad spectrum of goods and services.

a. Industries that depend on copyright protection, like the motion picture and television industry, form a vital and growing part of the U.S. economy. In 1977, "those American industries that marketed products dependent just on copyright protection contributed $55 billion, or 2.8 percent to the nation's GNP." Dam, *The Growing Importance of International Protection of Intellectual Property*, 21 Int'l Lawyer 627, 628 (1987). By 2007, the value added to GDP from "core copyright industries" whose primary purpose is to create, produce, distribute, or exhibit copyrighted materials had risen to

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[2] The WTO has already found that a different provision of U.S. copyright law violates TRIPS. *See United States—Section 110(5) of the U.S. Copyright Act*, Case No. WT/DS160 (June 15, 2000).

$889.1 billion, or 6.4 percent of GDP. Siwek, *Copyright Industries in the U.S. Economy: The 2003-2007 Report* 10 (2009).

The success of the U.S. copyright industries in foreign markets has long been one of the "few bright spots" "in the gloomy picture of American competition in world trade." 133 Cong. Rec. 14,149 (1987) (statement of Sen. Leahy). In four select copyright industries, foreign sales and exports increased from $36.19 billion in 1991 to $89.26 billion in 2002, reflecting a 9.45 percent average annual growth rate. Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report* 10 (2004) (motion pictures, TV, and video; newspapers, books, and periodicals; software; and recorded music). From 2003 to 2007, foreign sales and exports rose again from $95.23 billion to $125.64 billion. Siwek 2003-2007, at 16. In 2007, these four copyright industries exceeded the foreign sales and exports of many other leading industries, including aircraft, agricultural products, automobiles, and pharmaceuticals. *See id.* at 7.

The overseas revenue generated by the copyright industries helps to reduce the U.S. trade deficit. The U.S. International Trade Commission estimated that in 1982 "the copyright industries earned a trade surplus of over $1.2 billion." 133 Cong. Rec. 36,214 (1987) (statement of Malcolm Baldrige, Secretary of Commerce). By 2007, the motion picture and television industry alone generated a trade surplus of $13.6 billion. MPAA, *The Economic Impact of the Motion Picture & Television Industry on the United States* 7 (2009). International revenue more than doubled between 1992 and 2007 and accounts for nearly half of the motion picture and television industry's total revenue. *Id.* Foreign markets are thus critical to the success of the industry and the incentive to create new works in this country.

b. As the world's largest creator and exporter of copyrighted works, the United States has the most to gain from robust copyright protection. Copyright restoration is only one part of a larger constellation of measures designed to protect the rights of authors and owners.[3] Even assuming Congress could have provided less protection for restored works without facing the risk of trade sanctions, Congress properly concluded that doing so would have weakened the United States' pursuit of its foreign policy objectives by encouraging other countries to read their own obligations under TRIPS, the Berne Convention, and other international agreements narrowly.

For example, Article 1.1 of TRIPS provides that "[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." Article 8 provides that "[m]embers may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition." Article 13 limits "exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." All of

[3] Among other things, TRIPS and Berne prohibit copyright formalities, Berne art. 5, ¶ 2; require that members treat foreign nationals no less favorably than their own nationals ("national treatment"), TRIPS art. 3, ¶ 1; Berne art. 5; entitle member states to most-favored nation treatment, TRIPS art. 4; require copyright protection of cinematographic works, Berne art. 14 bis, computer programs, TRIPS art. 11, and sound recordings, TRIPS art. 14; protect performance rights, Berne arts. 11, 11 bis, 11 ter, and rights in derivative works, Berne arts. 12, 14; and establish a minimum copyright term, TRIPS art. 13; Berne art. 7.

these provisions leave room for interpretation that, if abused, could substantially undermine protection for copyrights, patents, and trademarks.

The United States has a strong interest in signaling to the rest of the world that a begrudging, incomplete approach to implementing intellectual property obligations is unacceptable. The U.S. Trade Representative has explained that the United States often "asks other countries to take 'politically difficult' steps to improve the protection of intellectual property." *Senate Berne Hearing* 101 (statement of Clayton Yeutter). Indeed, "[d]eveloping countries generally have to engage in greater efforts to bring their laws, judicial processes, and enforcement mechanism into compliance with the TRIPS Agreement." Ilias & Fergusson, *Intellectual Property Rights and International Trade* 19 (2011). For example, "[p]utting 'pirates' out of business in Thailand, China or Mexico places … political and economic strains on those countries." *URAA Hearing* 268 (statement of Jason S. Berman, RIAA). The United States' "leverage" in such negotiations "comes from setting the right example for the rest of the world." *Senate Berne Hearing* 101 (statement of Clayton Yeutter, U.S. Trade Representative). If the United States had tried to transform Article 18(3) into a loophole for avoiding its obligations under the Berne Convention, other countries would have followed suit not just with respect to copyright restoration, but with respect to other obligations that they find politically expedient to disregard.

c. In addition to supporting broader efforts to strengthen intellectual property norms, Section 514 directly benefits U.S. authors by helping to secure reciprocal protection for their works overseas. Because "there are vastly more US works currently unpro-

tected in foreign markets than foreign ones here," copyright restoration operates "dramatically in favor of US industries." *URAA Hearing* 262 (statement of Jason Berman, RIAA). An MPAA representative testified that the motion picture industry's "greatest opportunity for growth is overseas," particularly "in countries that do not now recognize our rights in existing works." *Id.* at 253 (statement of Matt Gerson, MPAA). At stake were "some 30,000 movie titles and many more that number in TV shows" that might otherwise be denied protection. *Id.* Thus, the United States would be the "obvious loser" if it failed to "set the proper example by providing copyright protection to older foreign works." *Id.* at 254.

As of 1994, for example, sound recordings were "unprotected in as many as 70 countries." *URAA Hearing* 262 (statement of Jason Berman, RIAA). Russia and the eleven other members of the Commonwealth of Independent States provided no protection for films, cartoon characters, music, and books created before 1973. *Id.* at 250 (statement of Eric Smith, IIPA). The same was true in South Korea for pre-1987 works. *Id.* at 250-251. And Latvia and Lithuania, upon independence from the Soviet Union, provided no retrospective protection for films. *Id.* at 250. As a result, "billions of dollars" were "lost every year by U.S. authors, producers and publishers" because the United States' trading partners failed "to protect U.S. works which were created prior to the date the U.S. established copyright relations with that country" or which had otherwise "fallen prematurely out of copyright." *Id.* at 246.

The United States had learned from experience that its ability to convince other countries to protect U.S. works depended on the example it set. After the

United States took a minimalist approach to its Berne obligations in 1988, "new adherents to the Convention" began to "rely upon" U.S. "denial of retroactivity as precedent for a similar denial of protection in their own implementing legislation." Deters, *Retroactivity and Reliance Rights Under Article 18 of the Berne Copyright Convention*, 24 Vand. J. Transnat'l L. 971, 997 (1991); *see also URAA Hearing* at 253 (statement of Matt Gerson, MPAA) ("In order for most United States works to gain protection in Russia and the other former Soviet republics, the former Eastern bloc countries, South Korea and elsewhere, the United States must extend copyright protection to older works that were created in those and other foreign countries."); Karp, 20 Colum.-VLA J. L. & Arts at 236 ("Other countries are refusing to give retroactive protection to U.S. works until the United States complies with Article 18[.]").

Officials reported that when U.S. negotiators "urged others to provide protection for our industries' repertoire of existing copyright works," they were "often confronted with the position that such protection will be provided there when we protect their works in the same manner here in the United States." *URAA Hearing* 120 (comments of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks). The General Counsel of the Office of the U.S. Trade Representative testified that "if the largest exporter of copyright material in the world takes the position that we have no or limited obligations" under Berne, it would "have little credibility in convincing our trading partners that they should be protecting" U.S. works. *Id.* at 131 (statement of Ira Shapiro); *see also id.* at 247 (statement of Eric Smith, IIPA) ("[W]hat the United States does in this area will carry great weight in the international community.").

For example, Russia "made clear that it will provide retroactive protection for 'works' only if the U.S. reciprocates with retroactive protection for Russian works." *URAA Hearing* at 249 n.2 (statement of Eric Smith, IIPA). This commitment to follow the United States' lead on copyright restoration was memorialized in a bilateral trade agreement in which Russia pledged to join the Berne Convention and to comply with Article 18's requirement to protect pre-existing works. *See* Exchange of Notes Concerning the Entry into Force of the Agreement on Trade Relations, U.S.-Russ. Fed'n, June 17, 1992, 31 I.L.M. 790; Agreement on Trade Relations, U.S.-U.S.S.R., art. VIII, ¶¶ 2-3, June 1, 1990, 29 I.L.M. 946, 856. Congress's adoption of Section 514 thus set the stage for Russia to reciprocate, which it did by granting full protection to existing U.S. works. *See* U.S. Br. 51 n.23; JA 149-151, 155-157.

3. The United States has an important interest in encouraging the creation of new works

The United States has a substantial interest in encouraging the investment of time, money, and effort needed to create and disseminate creative works. *See Harper & Row*, 471 U.S. at 558. Although many U.S. works for which the United States has sought reciprocal protection in other countries were created before the enactment of Section 514, the law nonetheless encourages the creation of new works and the dissemination of existing or restored works in several ways.

First, as discussed above, Section 514 is only one part of a larger framework of intellectual property protections. Adherence to the Berne Convention initially opened 24 new countries to copyright protection for U.S. works. H.R. Rep. No. 100-609, at 19. Since then,

the Berne Convention has added over 80 members, and more than 10 additional WTO members must comply with its dictates under the TRIPS Agreement. *See* U.S. Copyright Office, Circular 38A, *International Copyright Relations of the United States* 2-10 (2010). Authors creating new works today can be confident that because the United States indisputably discharged its obligations under Article 18 of the Berne Convention, it is in a position to press these countries to fulfill both the letter and the spirit of their international obligations.

Second, Section 514 encourages the creation of new works by signaling to U.S. authors that existing and newly joining Berne Convention and WTO members will fully protect their works. For example, if a motion picture were made today based on the critically acclaimed novel *A Thousand Splendid Suns*, as was done with Khaled Hosseini's earlier novel *The Kite Runner*, the creator would know that if and when Afghanistan finally adheres to the Berne Convention, the movie will receive protection in that country even though it was made before Afghanistan and the United States established copyright relations. Similarly, an author working shortly after Congress enacted Section 514, when a substantial number of countries had not yet joined the Berne Convention or the WTO, would have known that the expected rewards of creating a new work would continue to grow as those countries joined, even if they did not join until after the new work was created. *See URAA Hearing* 189 (statement of Professor Shira Perlmutter).

Third, Section 514 encourages the restoration and dissemination of existing works. Films, which are subject to deterioration, are expensive to preserve and restore. Copyright restoration encourages the invest-

ment needed to ensure that classic foreign films are not lost forever and, instead, are made available to a wider audience through restoration and conversion to new media.

Fourth, as explained by the former Register of Copyrights and quoted by this Court in *Eldred*, "copyright for existing works" can "'provide additional income'" that is used to "'finance the production and publication of new works.'" 537 U.S. at 207 n.15. "'Authors would not be able to continue to create … unless they earned income on their finished works.'" *Id.* For example, Noah Webster "'supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary.'" *Id.* Similarly, movie studios depend on the income they earn from their back catalogues, much of it earned overseas, for financial support as they shoulder the substantial risk and expense of creating new films.

4. The United States has an important interest in correcting inequities caused by U.S. copyright law

The United States has an interest in granting authors relief from the inequitable effects of the strict copyright formalities and other restrictions that caused their works to fall prematurely into the public domain. For decades, authors would routinely lose copyright protection for failure to adhere to technical requirements, such as affixing notice to the copyrighted work, formally registering the work, and filing timely renewal applications.

These requirements fell particularly hard on authors unfamiliar with the peculiarities of the U.S. copyright system. *URAA Hearing* 191 (statement of Professor Shira Perlmutter). Indeed, the Copyright Office

took the position that publication *in a foreign country* without the requisite copyright notice permanently deprived a work of copyright protection in the United States. *See* 24 Fed. Reg. 4955, 4956 (June 18, 1959) (codified at 37 C.F.R. § 202.2(a)(3) (1959)) ("Works first published abroad … must bear an adequate copyright notice at the time of their first publication in order to secure copyright under the law of the United States."). Other works fell into the public domain automatically upon publication, regardless of any efforts at compliance, simply because their author lived in a country that did not have copyright relations with the United States at the time. *See* Ricketson, *U.S. Accession to the Berne Convention: An Outsider's Appreciation (Part 2)*, 8 Intell. Prop. J. 87, 109-110 (1993). Others lost protection for failure to file timely registrations or renewals with the Copyright Office.

Section 514 ensures that foreign authors unfairly deprived of their rights do not continue to suffer from the lingering effects of restrictions that are antithetical to the Berne Convention. Golan and his amici argue for a right to continue performing and distributing the symphonies of Dmitri Shostakovich and others without paying any royalties or licensing fees. But they completely ignore the injustice to those authors and their heirs from being deprived of compensation for use of their works in the United States.

5. Section 514 does not burden substantially more speech than necessary to achieve its objectives

Section 514 does "not burden substantially more speech than necessary" to achieve its objectives. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 185 (1997) (*Turner II*). As discussed, Section 514 does not

disturb the idea/expression dichotomy and the fair use defense. Nor does it disturb other exceptions that limit the scope or application of copyright. *See, e.g.*, 17 U.S.C. § 108 (protections for libraries and archives); *id.* § 110 (protections for certain face-to-face teaching activities, religious assemblies, and social functions of nonprofit veterans' and fraternal organizations, etc.); *id.* §§ 111 and 119 (exemptions and statutory licenses for certain secondary transmissions); *id.* § 112 (ephemeral recordings); *id.* § 115 (compulsory license for making and distributing phonorecords); *id.* § 116 (jukebox licenses); *id.* § 117 (copying and adaptation of computer programs); *id.* § 118 (rates and terms for noncommercial broadcasting); *id.* § 121 (materials for the blind and disabled); *id.* § 122 (secondary transmissions by satellite carriers).

Congress also took care to provide significant protections for all users of restored works. Section 514 imposes no remedies for actions occurring before restoration. For reliance parties, Section 514 places the burden on copyright holders to provide notice of intent to enforce their copyrights. 17 U.S.C. § 104A(c). In the absence of notice, reliance parties may exploit a work indefinitely. *Id.* § 104A(d)(2). The contention that Section 514 creates a vast new class of "orphan works" (ALA Br. 22) for which "the difficulty and cost of even locating the relevant 'rightsholder' from whom a license might be negotiated are … often insurmountable" (Google Br. 14), entirely ignores this notice requirement.

Even where notice is provided, reliance parties still receive a one-year grace period *from the date of notice* to continue distributing or performing the work. 17 U.S.C. §104A(d)(2). Creators of derivative works receive even more protection: After the grace period ex-

pires, they cannot be enjoined from exploiting their derivative works for the remainder of the copyright term as long as they ultimately pay "reasonable compensation" to the copyright holder. *Id.* § 104A(d)(3).

These protections are more than sufficient to accommodate reliance parties' interests. Even under intermediate scrutiny, Congress need not select the "least restrictive or least intrusive means" of pursuing its objectives. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989). "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (plurality opinion), and "'courts must accord substantial deference to the predictive judgments of Congress,'" *Turner II*, 520 U.S. at 195. Even greater deference is warranted where those judgments involve foreign policy. *See, e.g.*, *Munaf* v. *Geren*, 553 U.S. 674, 700-703 (2008); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000).

Extensive evidence in the record before Congress showed that broader exceptions for reliance parties would have undercut Congress's objectives, not only with respect to securing reciprocal protection for U.S. works, but also in efforts to convince other countries to comply with both the letter and spirit of all their obligations under TRIPS and the Berne Convention. *See supra* Part I.B.2. The political branches were uniquely equipped to make those judgments, and the careful balance they struck between achieving Section 514's objectives and protecting the interests of reliance parties should not be set aside.

II. SECTION 514 IS A VALID EXERCISE OF CONGRESS'S BROAD AUTHORITY UNDER THE COPYRIGHT CLAUSE

The only two courts of appeals to consider the question have both rejected the argument that Section 514 violates the Copyright Clause. *E.g.*, *Golan*, 501 F.3d at 1186-1187; *Luck's Music Library, Inc.* v. *Gonzales*, 407 F.3d 1262, 1263-1266 (D.C. Cir. 2005). This Court should do the same.

A. The Term Of Restored Copyrights Remains "Limited"

Section 514 is entirely consistent with the "limited Times" provision of the Copyright Clause. Section 514 restores copyrights only for "the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain." 17 U.S.C. § 104A(a)(1)(B). It does not restore the time lost while copyright protection was not in effect. As such, the length of the copyright term restored under Section 514 is no longer than the length of the term for other copyrights, and Section 514 comes nowhere close to establishing "a regime of perpetual copyrights," *Eldred*, 537 U.S. at 209.

Unable to challenge the restored term's length, Golan argues (at 22) that Section 514 "violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected." Yet, this Court has already rejected the argument that under the "limited Times" clause, "a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Eldred*, 537 U.S. at 199. *Eldred* also noted that "the precise duration of a federal copyright has never been fixed at the time of the initial grant" and that today "the baseline copyright term is measured in part by the life of the author." *Id.* at 201 n.6. Golan's argument re-

garding certainty is properly directed to Congress, not enshrined as a constitutional command.

B. Section 514 Promotes The Progress Of Science And The Useful Arts

Golan's argument (at 23-25) that Section 514 does not "promote the Progress of Science and useful Arts" also fails. To the extent this prefatory clause even constitutes a judicially enforceable limit on Congress's authority, *see* U.S. Br. 16, the only question would be whether Section 514 "is a rational exercise of the legislative authority conferred by the Copyright Clause," *Eldred*, 537 U.S. at 204. "On that point," the Court "defer[s] substantially to Congress." *Id.* "Calibrating rational economic incentives … is a task primary for Congress, not the courts," and this Court is "not at liberty to second-guess congressional determinations and policy judgments of this order," even where it considers them "debatable or arguably unwise." *Id.* at 207 n.15, 208. For the same reasons that Section 514 survives intermediate scrutiny, it easily satisfies this highly deferential standard of review.[4]

Golan tries to distance this case from *Eldred* by positing a strong historical tradition against removing works from the public domain. As discussed, however, this argument ignores the parallels between Section 514 and prior restorations, including the First Congress's removal of works from the public domain in 1790.

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[4] Were this Court to find a Copyright Clause violation, it should remand for consideration of whether Section 514 is a valid exercise of one of Congress's other enumerated powers. *See* U.S. Br. 33 n.15.

In addition, *Eldred* noted that "[b]ecause the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs [the Court's] inquiry." 537 U.S. at 201. *Eldred* then cited several cases, some of which involved patents that were legislatively restored after lapsing for a period. *See McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 207 (1843); *Blanchard* v. *Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (Story, J.); *Evans* v. *Jordan*, 8 F. Cas. 872, 874 (C.C.D. Va. 1813) (Marshall, J.), *aff'd*, 13 U.S. (9 Cranch) 199 (1815).[5] Patents are also regularly revived after the late payment of certain fees. For example, if a patent owner fails to make a maintenance fee payment—an act akin to failing to comply with copyright formalities—the patent lapses into the public domain. But if the failure was "unintentional" or "unavoidable," the patent may be restored for whatever time remains on its term. 35 U.S.C. § 41(c)(1); *see also id.* § 151 (restoration of lapsed patents based on "unavoidable" delay in paying issuance fee). Thus, it is possible for the information protected by a utility patent or the design protected by a design patent to enter the public domain for a period before protection is restored. If Golan's argument were accepted, it would strip Congress of authority not only to enact Section 514, but to enact any statute that restores protection of works in the public domain regard-

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[5] Golan argues (at 22) that *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), prohibits the removal of works from the public domain. *Graham*, however, involved the statutory bar against patenting inventions that are obvious. In *Eldred*, this Court distinguished *Graham* and rejected the argument that it had undermined *McClurg*, *Evans*, and *Blanchard*, on which the Court continued to rely. 537 U.S. at 202 n.7.

less of the reason that protection was lost. That is not and cannot be what the Framers intended.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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