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Following an International Copyright Regime at a Large National Cost: Is It Worth It?

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FOLLOWING AN INTERNATIONAL COPYRIGHT REGIME AT A LARGE NATIONAL COST: IS IT WORTH IT?

VAISHALI KHATRI*

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ABSTRACT

The main question at issue is which view of copyright law the United States should adhere to. Founders of American copyright law based our Constitution on utilitarian principles that promote the spread of knowledge and information to the general public. It has always been held that innovation and creativity were of core importance in an efficiently functioning democracy. With the passing of Section 514, the United States digressed from its national roots in order to comply with an international regime of copyright law. This decision in *Golan* takes steps to afford private economic benefit to a few copyright holders at the expense of the public at large: a notion against constitutional principles. Congress and the Supreme Court have rationalized American compliance with international law at the great cost of impeding education and culture, discouraging business and investment, and creating a grey cloud over the public domain and copyright industry. Prior to this decision, the United States has never succumbed to the pressures of international adherence at national expense, and we should not start now. Again, if it is unfair for the neighborhood to lose out on Granny’s fruit baskets, it is equally unfair on the American public to lose access to works in the public domain.

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I. INTRODUCTION

To depict the impact of following an international copyright regime on the American public, imagine the following story about Granny. Granny is an elderly woman whose joy in life, for the last thirty years, comes from religiously gardening, planting, and maintaining her vegetable and flower beds. Not only does she upkeep her own home and lawn, but additionally, Granny preserves the adjoining property to her land on which stand a few fruit trees and some open space where her grandchildren come to play. Over thirty years ago, when Granny first moved to the neighborhood, she noticed the weeds and vines growing over an old unused shack on her neighboring property. She visualized creating a spacious area where she could grow fruits and vegetables, picnic with her family, and put a swinging tire in for her grandchildren to enjoy during their yearly summer vacations to her house. Granny is well aware of the limits on her property line, but the adjoining land has been vacant for as long as she can remember, and she takes pleasure in preserving the fruit trees, gardens, and lawn. The neighbors all believe this property belongs to Granny, as she maintains the trees, collects the fruit each harvest, and creates baskets to give to the families in the neighborhood. Over the years, Granny believes that she became owner of the land through adverse possession, as nobody has ever condemned her public use of the land.¹ Now imagine how Granny would feel if one day somebody decided to claim they owned the land, and they could legally start charging her for the use of the trees and the fruit. Granny is no longer allowed on the property without permission from a random stranger claiming he owns the land. If Granny wishes to continue to share the fruit with the neighborhood, as she has been freely doing for over thirty years, she will be charged a fee determined by this unknown party. Considering that Granny has been fairly and innocently utilizing the abandoned land for the benefit of the neighborhood community, does this situation seem fair? Most likely not.

Essentially, this is an analogous property law illustration of the effect of the Supreme Court's recent copyright law decision in *Golan v. Holder*.² The United States of America was founded on a principle of separation of power between the three branches of government.³ With respect to copyright law, in an effort to comply with an international regime, Congress has taken it upon itself to take works out of the American public domain and "restore" the authors' rights in the original works. Not only did Congress pass such legislation, but the Supreme Court affirmed in *Golan* the constitutionality of this statute.⁴ Petitioners are analogous to "Granny" depicted in the aforementioned scenario, and the impact of

¹ JESSE DUKMINIER, GILBERT LAW SUMMARIES: PROPERTY 24 (Elizabeth L. Snyder et al. eds., 2002). Adverse possession is a concept in property law: a process by which a premise can change ownership without compensation, if the user of a certain piece of property establishes the requisite elements and no claim is brought. The elements of adverse possession include: (1) actual possession, (2) open and notorious use, (3) exclusivity, (4) hostile or adverse use, and (5) continuous use. *Id.* at 24–30.

² *Golan v. Holder*, 132 S. Ct. 873 (2012).

³ "[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power [between the branches] will reduce the risk of tyranny and abuse" *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

⁴ *Golan*, 132 S. Ct. at 874.

the legislation on the American public parallels that of the neighborhood community. As illustrated above, had such measures been taken “with respect to well-established property rights, the problem would be obvious. This statute analogously restricts, and thereby diminishes, Americans’ preexisting freedom to use formerly public domain material in their expressive activities.”⁵ However, the Supreme Court and Congress did just that by affirming the Tenth Circuit’s decision.⁶ This case note is a criticism of the Supreme Court’s recent decision regarding copyright law in *Golan*. Part II of the case note illustrates the legislative background, which frames the Supreme Court’s decision in the case. Part III details the facts, procedure, and background presented to the Court. Next, Part IV gives Justice Ginsberg’s reasoning on Supreme Court affirmation of the Tenth Circuit decision, which is followed with Justice Breyer’s dissent. The subsequent sections, Parts V and VI, specify aspects of contention and criticism with the majority opinion, and outline the damaging impact of the decision on the American public.

II. LEGISLATIVE BACKGROUND

In order to comprehend the Supreme Court’s decision in *Golan*, it is necessary to understand the string of legislation, which creates the backdrop of the Court’s reasoning.⁷ The Court’s analysis of the impact of each subsequently passed legislative act in relation to the Copyright and Patent Clause of the Constitution sheds light on the argument at issue.⁸ In regard to copyright, this clause in the Constitution provides that “Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings and Discoveries.”⁹

The primary accord governing international copyright law, effectuated in 1886,¹⁰ is the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention” or “Berne”).¹¹ The Berne Convention was devised to create an international regime of copyright law, in which the 164 member countries agree

⁵ *Id.* at 906 (Breyer, J., dissenting).

⁶ *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), *aff’d*, 132 S. Ct. 873 (2012).

⁷ See Sonny Bono Copyright Term Protection Act (“CTEA”), 17 U.S.C. §§ 301–04 (2012); Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”); Uruguay Round Agreement Act (“URAA”) § 514, 108 Stat. 4809 (codified 17 U.S.C. §§ 104, 109 (2000)). Title 17 of the United States Code governs copyright law in America, where these agreements have been codified. See *Harmonizing Copyright’s Internationalization with Domestic Constitutional Constraints*, 121 HARV. L. REV. 1798 (2008) (discussing the emerging international framework of copyright law through various pieces of legislation and treaties).

⁸ U.S. CONST. art. I, § 8, cl. 8.

⁹ *Id.*

¹⁰ Berne Convention, art. 18, Sept. 9, 1886, 828 U.N.T.S. 221 (entered into force July 24, 1971). The 1886 treaty has been subsequently modified: Berlin, 1908; Rome, 1928; Brussels, 1948; Stockholm, 1967; and Paris, 1971, and amended in 1979. HOUSE REPORT OF THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H.R. REP. NO. 100–609 (1988).

¹¹ Prior to the Berne Convention, national copyright laws typically only applied for works created within each country. *Harmonizing Copyright’s Internationalization with Domestic Constitutional Constraints*, *supra* note 7. For example, if a work was published in Germany, the German citizen would be protected by copyright in Germany, however, the work could be copied or sold by anyone in the United Kingdom. Similarly, if an original work was produced in France, it could be protected in France, but not in another country.

to comply with two major principals: (1) minimum rights and (2) national treatment or reciprocity.¹² The minimum rights principle requires all member countries to grant a basic level of protection recognized under this Convention.¹³ The national treatment refers to the principle that member countries provide the same protections to authors in other member countries as they provide to their own authors.¹⁴ Interestingly, the United States did not become a signatory to the Berne Convention until 1988, over a century later.¹⁵

The core issue in *Golan v. Holder* revolves around Article 18 of the Berne Convention, which “requires countries to protect the works of other member states unless the works’ copyright term has expired in either the country where protection is claimed or the country of origin.”¹⁶ Consequently, Article 18 requires that when a country joins the Berne Convention, it must provide copyright protection to pre-existing foreign works, even if such works were previously a part of the public domain.¹⁷ In 1988, the United States joined the Berne Convention despite Article 18; however, America *did not* provide protection for any foreign works lodged in the U.S. public domain.¹⁸

Although Congress decided to join the Berne Convention, they took a

¹² See Berne Convention, *supra* note 10, at arts. 2–19.

¹³ Berne Convention, *supra* note 10, at art. 5 (Article 5 classifies the Rights Guaranteed. Subsections (1) and (2) identify rights “Outside the country of origin”; subsection (3) identifies rights “In the country of origin”; subsection (4) defines “Country of origin”).

¹⁴ *Id.*

¹⁵ The United States had an entirely different system of transnational copyright protection from its European counterparts, where foreign works were excluded from protection under the Copyright Act. *Golan*, 132 S. Ct. 873, 879 (2012). Copyright protection in the United States was largely based on authors’ (both domestic and foreign) “compliance with notice, registration, and renewal formalities.” *Id.* Joining would have required distinct changes to U.S. copyright laws: “As Congress considered joining the Berne Convention, a major subject of its deliberations was whether Berne required the United States to grant protection to any foreign works in the public domain of the United States, and whether the Constitution permitted Congress to do so.” Brief for Petitioners at 5, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2423674 at *5.

¹⁶ Berne Convention, art. 18: Works Existing on Convention’s Entry into Force, reads:

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

Berne Convention, *supra* note 10, at art. 18.

¹⁷ *Id.*

¹⁸ *Golan*, 132 S. Ct. at 874. “A different system of transnational copyright protection long prevailed in this country. Throughout most of the 20th century, the only foreign authors eligible for Copyright Act protection were those whose countries granted reciprocal rights to American authors and whose works were printed in the United States.” *Id.* Violations of the Berne Convention were not enforced at this time. *Id.*

“minimalist approach”¹⁹ and adopted the Berne Convention Implementation Act (“BCIA”), which did not grant any protections to foreign works already in the American public domain.²⁰ Thus, the United States was compliant with the Berne Convention even *without* the restoration of foreign works already in the public domain.²¹

The United States’ non-compliance with the Berne Convention was dismantled in 1994, by the creation of the World Trade Organization (“WTO”) and Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”), a result of the multilateral trade negotiations at the Uruguay Rounds.²² TRIPs extended protection, in compliance with Article 18, to all works of foreign origin whose term of protection had not expired abroad, regardless of their status in the public domain in the United States.²³

In response, Congress enacted Section 514 of the Uruguay Round Agreement Act (“URAA”), which “gave works enjoying copyright protection abroad the same full term of protection available to U.S. works.”²⁴ URAA Section 514 grants copyright protection to pre-existing works of Berne member countries, protected in their country of origin, but lacking protection in the United States for any of three reasons: (1) the United States did not protect works from the country of origin at the time of publication; (2) the author failed to comply with U.S. statutory formalities; or (3) the United States did not protect sound recordings fixed before 1972.²⁵ This legislation does not “restore” copyrights in foreign works that entered into the public domain through expiration of term of protection.²⁶ Although Section 514 provides some protection for “reliance

¹⁹ *Id.* at 879. BCIA “made only those changes to American copyright law that [were] clearly required under the treaty’s provisions.” *Id.*

²⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 (1988).

²¹ Prior to 1994, the Berne Convention lacked teeth of enforceability because it allowed parties to declare that they were not bound by the agreement. Berne Convention, *supra* note 10, at art. 33 (Article 33 governs Disputes. Subsection (1) outlines “Jurisdiction of the International Court of Justice”; subsection (2) identifies “Reservation as to such jurisdiction”; subsection (3) discusses “Withdrawal of reservation”). The Berne Convention did not specify sanctions for noncompliance, which permitted the United States to be a member without conforming to the provisions set forth in Berne without repercussion. *Golan*, 132 S. Ct. at 880–81.

²² *See supra* note 7. TRIPs was the result of multilateral trade negotiations at the Uruguay Rounds, which set forth the minimum standards governing intellectual property regulation and enforceable by the WTO through dispute resolution. *Golan*, 132 S. Ct. at 881. TRIPs “mandated implementation of Berne’s first 21 articles.” *Id.*

²³ “The WTO gave teeth to the Convention’s requirements: Noncompliance with a WTO ruling could subject member countries to tariffs or cross-sector retaliation.” *Golan*, 132 S. Ct. at 881.

²⁴ *Id.* at 878.

²⁵ Uruguay Round Agreement Act (“URAA”) § 514, 108 Stat. 4809 (codified 17 U.S.C. §§ 104, 109 (2000)).

²⁶ The Berne Convention allows a copyright holder to receive protection for at least 50 years after the death of the author. Berne Convention, *supra* note 10, at art. 7 (Article 7 governs the “Term of Protection”). Therefore, if a work entered into the public domain due to expiration of this term, it will not receive the right to restoration governed by Section 514. *See* 17 U.S.C. § 104A(h)(6)(B).

Prospectively, restoration places foreign works on an equal footing with their U.S. counterparts; assuming a foreign and domestic author died the same day, their works will enter the public domain simultaneously. Restored works, however, receive no compensatory time for the period of exclusivity they would have enjoyed before §514’s enactment, had they been protected at the outset in the United States.

parties,”²⁷ (such as the plaintiffs in the case) the constitutionality of this legislation is the core issue of *Golan v. Holder*.

III. FACTS AND PROCEDURAL BACKGROUND

The Petitioners in *Golan v. Holder* are a “broad range of artisans and businesses” comprised of orchestra conductors, educators, performers, publishers, and many others of the like, who have built their livelihoods upon the use of works in the public domain.²⁸ They perform, distribute, sell, and exploit the publicly available works.²⁹ The central issue underlying this case is the constitutionality of restoring copyright in a category of works produced by “foreign authors who lost those rights to the public domain for any reason other than the expiration of a copyright term.”³⁰ Congress’s enactment of URAA Section 514 was to the detriment of petitioners—they were no longer able to freely enjoy the use of works, which prior to this statutory enactment, were not protected by U.S. copyright law.³¹ In September 2001, petitioners brought suit against the government challenging the constitutionality of Section 514 and the Copyright Term Extension Act (“CTEA”)³² under the Copyright Clause and the First Amendment.³³

The district court granted summary judgment for the government, holding that there was “no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns.”³⁴ The district court followed the presumption of statutes to be constitutional, and acknowledged “it is generally for Congress, not the courts, to decide how best to pursue the Constitution’s objectives.”³⁵ Petitioners appealed to the Tenth Circuit Court of Appeals.

Golan, 132 S. Ct. at 882.

²⁷ A “reliance party” is defined as a person who:

(A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts;

(B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of that work; or

(C) as the result of the sale or other disposition of a derivative work covered under subsection (d)(3), or significant assets of a person described in subparagraph (A) or (B), is a successor, assignee, or licensee of that person.

17. U.S.C. § 104A(h)(4)(A)–(C).

²⁸ *Golan v. Holder*, 611 F. Supp. 2d 1165, 1167 (D. Colo. 2009), *rev’d*, 609 F.3d 1076 (10th Cir. 2010), *aff’d*, 132 S. Ct. 873 (2012).

²⁹ *Id.*

³⁰ *See Golan v. Holder*, 609 F.3d 1076, 1080 (10th Cir. 2010), *aff’d*, 132 S. Ct. 873 (2012).

³¹ *Id.*

³² *See supra* note 7. “Also known as the Sonny Bono Copyright Term Extension Act, the CTEA increased the duration of existing and future copyrights from life-plus-50-years to life-plus-70-years.” *Golan v. Gonzales (Gonzales)*, 501 F.3d 1179, 1181–82 (10th Cir. 2007).

³³ *See Golan*, 611 F. Supp. 2d at 1168.

³⁴ *Id.*

³⁵ *Golan v. Gonzales*, No. Civ.01–B–1854(BNB), 2005 WL 914754 *2 (D.Colo. Apr. 20, 2005).

The appellate court affirmed in part and remanded in part.³⁶ The Tenth Circuit foreclosed petitioners' challenge to the CTEA based on the Supreme Court's decision in *Eldred v. Ashcroft*.³⁷ However, the appellate court recognized the need for legislation to fit within the express confines of the Constitution and concluded petitioners had "shown sufficient free expression interests in works removed from the public domain to require First Amendment scrutiny of [Section] 514."³⁸

Consequently, the case was remanded back to the district court to address this First Amendment issue in regards to Section 514.³⁹ On remand, the district court granted petitioners' motion for summary judgment determining that "to the extent Section 514 suppresses the rights of reliance parties to use works they exploited while the works were in the public domain," was unconstitutional.⁴⁰ This time, the government filed a timely appeal.⁴¹ On appeal, the Tenth Circuit held "the government ha[d] demonstrated a substantial interest in protecting American copyright holders' interests abroad, and Section 514 is narrowly tailored to advance that interest," and consequently reversed the lower court's decision.⁴² In 2011, the Supreme Court granted certiorari to contemplate petitioners' challenge, under both the Copyright Clause and the First Amendment, of Section 514.⁴³ The Supreme Court decided the case and Justice Ginsburg's opinion was given on January 18, 2012.

IV. OPINION ANALYSIS

A. Justice Ginsburg's Majority Opinion

The Supreme Court granted certiorari to consider the petitioners' challenge that URAA Section 514 was unconstitutional under both the Copyright Clause and the First Amendment.⁴⁴ Justice Ginsburg was joined by a 6-2 majority⁴⁵ affirming

³⁶ See *Golan*, 609 F.3d at 1076.

³⁷ *Id.*; see generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (petitioners sought a determination that the CTEA fails constitutional review under both the Copyright Clause's 'limited Times' prescription and the First Amendment's free speech guarantee. Supreme Court held the CTEA did not exceed Congress's power under the Copyright Clause, and furthermore, the legislation was not in violation of the First Amendment).

³⁸ *Gonzales*, 501 F.3d at 1187.

³⁹ "We then remanded the case to the district court to assess whether [Section] 514 is content-based or content-neutral and to apply the appropriate level of constitutional scrutiny," *Golan*, 609 F.3d at 1082 (internal quotations omitted). The parties filed cross-motions for summary judgment. *Id.*

⁴⁰ *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009), *rev'd*, 609 F.3d 1076 (10th Cir. 2010) *aff'd*, 132 S. Ct. 873 (2012).

⁴¹ Government argued URAA § 514 did not violate the First Amendment. *Golan II*, 609 F.3d at 1082. Plaintiffs cross appealed claiming the lower court failed to enjoin the Attorney General from enforcing the statute. *Id.*

⁴² *Id.* at 1083. In the appeal the government argued that Section 514 advanced three interests: (1) compliance with international treaties and agreements, (2) legal protection of American copyright holders' interests abroad, and (3) to remedy foreign authors past inequities. *Id.* The Tenth Circuit rejected arguments one and three, but found the government expressed an important government interest in two. *Id.*

⁴³ *Id.* at 1076.

⁴⁴ *Golan v. Holder*, 132 S. Ct. 873 (2012).

⁴⁵ Justice Breyer filed the dissent, with whom Justice Alito joins. Justice Kagan took no part in the

the Tenth Circuit's finding of Congress's legislation to be "narrowly tailored to fit the important government aim of protecting U.S. copyright holders' interests abroad," and therefore within constitutional bounds.⁴⁶ The opinion first addresses Section 514 in light of the Copyright Clause and the First Amendment, respectively.⁴⁷

In regards to the Copyright Clause, petitioners' argument focuses on the "limited Times" language of the Constitution, which they contend is violated by the ability to "remov[e] works from the public domain."⁴⁸ However, the Supreme Court looks to their precedent set forth in *Eldred* to find the contrary.⁴⁹ Justice Ginsburg declines to accept a constricted meaning of the word "limited," but rather defines the term to mean "confine[d] within certain bounds, restrain[ed]," or "circumscribed."⁵⁰ Accordingly, she analogizes Section 514 to the CTEA and does not find the copyright lifespan to be unlimited, and thus, is within the constitutional limits as found in *Eldred*.⁵¹

Furthermore, in regards to the Copyright Clause, petitioners argue that historically federal copyright legislation has not affected works in the public domain, thus distinguishing this case from *Eldred*.⁵² However, Justice Ginsburg cites the Copyright Act of 1790 to illustrate that "the First Congress . . . did not view the public domain as inviolate."⁵³ Furthermore, Ginsburg references subsequent unchallenged private bills that effectively restored copyrights of works previously in the public domain.⁵⁴ The Supreme Court respects the separation of power between the government branches, as they do not question Congress's

consideration or decision of this case. *Id.* at 877.

⁴⁶ *See id.* at 875.

⁴⁷ *Id.* at 878–82.

⁴⁸ Brief for the Petitioners, *supra* note 15, at 22. Petitioners' believe the constitution is violated "by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires." *Id.*

⁴⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 192 (2002). Similarly, in *Eldred*, petitioners challenged the constitutionality of the CTEA, which lengthened the term of the copyright by 20 years. *Id.* However, the Supreme Court upheld the legislation, inferring a less restrictive meaning of the term "limited." *Id.*

⁵⁰ *Golan*, 132 S. Ct. at 884 (internal quotation marks omitted).

⁵¹ Justice Ginsburg refutes petitioners' argument that the limited time passed for works in the public domain, explaining "the copyrights of restored foreign works typically last for fewer years than those of their domestic counterparts." *Id.* Petitioners go one step further in concluding that with Congress's legislation "perpetual copyright terms would be achievable." *Id.* However, the Supreme Court again looks to *Eldred* to counter, explaining, "the hypothetical legislative misbehavior petitioners posit is far afield from the case before us. . . . Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyright." *Id.*

⁵² *Id.*

⁵³ *Id.* at 886. The Copyright Act of 1790 granted protection to maps, charts, books, or books already printed, thus in the public domain, of the United States. *Id.*

⁵⁴ *Id.* at 886–87. *See* Corson Act (1849); Helmuth Act (1874); Jones Act (1898); *see also* McClurg v. Kingsland, 42 U.S. (1 How.) 202 (1843) (upholding Congress's restoration of an invention to protected status); *Evans v. Jordan*, 13 U.S. (9 Cranch) 199 (1815) (upholding Congress's passage of a private built restoring patent protection). In this discussion the Supreme Court includes Acts passed by Congress in 1919 and 1941, which authorized the "President to issue proclamations granting protection to foreign works that had fallen into the public domain during World Wars I and II." *Golan*, 132 S. Ct. at 887. *But see* *Graham v. John Deer Co.*, 383 U.S. 1, 37 (1966) (denying the authorization of issuance of patents whose effects remove existent knowledge or restrict free access to materials already in the public domain).

political choice to embrace Berne unstintingly.⁵⁵ Accordingly, the Court finds that United States compliance with Berne's international copyright regime is a "signal event" justifying the restoration of works in the public domain.⁵⁶

Lastly, in regards to the Confrontation Clause, petitioners argue that Section 514 does not "spur the creation of . . . new works,"⁵⁷ hence the federal legislation does not "promote the Progress of Science and useful Arts."⁵⁸ Yet the Supreme Court finds this argument invalid stating, "the creation of at least one new work . . . is not the sole way Congress may promote knowledge and learning."⁵⁹ The Court reasons the *dissemination* of works as an equivalent means to promote science and the spread of knowledge, as the creation of new works.⁶⁰ An efficient international copyright system should encourage the spread of current and future works, thus Congress believes full compliance with the Berne Convention would expand the foreign market and stimulate the protection of privacy of U.S. works abroad.⁶¹ The Court does not refute petitioners' argument for the need to incentivize creation of new works in order to advance and spread knowledge and learning. However, the majority concedes that creation is not the sole way Congress may use to "promote the Progress of Science," taking a more flexible approach that aligns with the standards of the Berne Convention.⁶²

Next, the Supreme Court tackles petitioners' argument that Section 514's restoration offends First Amendment concerns of the guarantee of freedom of expression. Again, the Court analogizes this case to *Eldred*, observing "that the Framers regarded copyright protection not simply as a limit on the manner in which expressive works may be used . . . [but] also saw copyright as an 'engine of free expression.'"⁶³ The Court believes "copyright supplies the economic incentive to create and disseminate ideas," and that copyright jurisprudence accommodates the First Amendment.⁶⁴ Ginsburg explains that the fair use defense⁶⁵ and idea/expression dichotomy⁶⁶ are inherent in copyright protection,

⁵⁵ *Golan*, 132 S. Ct. at 887.

⁵⁶ *Id.*

⁵⁷ Brief for Petitioners, *supra* note 15, at 24.

⁵⁸ *Golan*, 132 S. Ct. at 887–88. "Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts." U.S. CONST. art. I § 8, cl. 8.

⁵⁹ *Golan*, 132 S. Ct. at 888. The Supreme Court again quotes its decision in *Eldred*, "rejecting the notion that 'the only way to promote the progress of science [is] to provide incentives to create new works.'" *Id.* (citation omitted); see *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2003).

⁶⁰ *Golan*, 132 S. Ct. at 888; see *Harper & Row, Publishers, Inc. v. Nation Enterpr.*, 471 U.S. 539, 558 (1985) ("[C]opyright supplies the economic incentive to create and disseminate ideas.").

⁶¹ *Golan*, 132 S. Ct. at 888.

⁶² *Id.* at 888–89.

⁶³ *Id.* at 890 (quoting *Harper & Row Publishers, Inc.*, 471 U.S. at 558).

⁶⁴ *Id.* The Supreme Court describes various accepted aspects of copyright protection including, the fair use defense, idea/expression dichotomy, and speech protective purposes as the "traditional contours" of copyright protection which accommodate for First Amendment concerns. *Id.*

⁶⁵ In regards to fair use, which is codified at 17 U.S.C. §107, Ginsburg explains:

The fair use of copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." This limitation on exclusivity "allows the public to use not only facts and ideas contained in copyrighted work, but also [the author's] expression itself in certain circumstances.

which balances the First Amendment and the Copyright Act.⁶⁷ Through Section 514, Congress adopts a measure to simplify the United States' transition to follow an international copyright regime. Because Section 514 does not disturb the fair use and idea/expression aspects of copyright law, the "speech protective purposes and safeguards" are met.⁶⁸ Encompassed in Section 514, Congress "deferred the date from which enforcement runs, and it cushioned the impact of restoration on 'reliance parties' who exploited foreign works [previously] denied protection," thus accounting for First Amendment concerns.⁶⁹

Although petitioners believe the First Amendment safeguards inherent in copyright law infringe upon the "vested rights" they enjoyed in works that had already entered the public domain, the Supreme Court rejects this notion.⁷⁰ Again, the Supreme Court capitalizes upon historical records to demonstrate that nothing in "our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain."⁷¹ Petitioners misinterpret having "vested rights" in foreign works they believe they acquired when they were able to utilize an unimpeded exploitation of such works.⁷² However, the Supreme Court clarifies petitioners' misconception of their "vested rights": "[a]nyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once protected works."⁷³ Through Section 514, Congress does not "impose a blanket prohibition on public access," because users can exploit the works through fair use or by paying a royalty for the desired exploitation of the author's expression.⁷⁴ This legislation fully implements the standards of the Berne Convention, which mandates both foreign and domestic works be governed by the same legal regime.⁷⁵

The Supreme Court, along with Congress, believes "Section 514 continue[s] the trend toward a harmonized copyright regime by placing foreign works in the position they would have occupied if the current regime had been in effect when

Golan, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219).

⁶⁶ In regards to the idea/expression dichotomy, codified at 17 U.S.C. §102(b), Ginsburg writes:

In no case does copyright protec[t] . . . any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . described, explained, illustrated, or embodied in [the copyrighted] work." "Due to this [idea/expression] distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication"; the author's expression alone gains copyright protection.

Golan, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219), *see Harper & Row Publishers, Inc.*, 471 U.S. at 556.

⁶⁷ *Golan*, 132 S. Ct. at 890–91.

⁶⁸ *Id.* at 891.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 892.

⁷³ *Id.* "Copyright in a work protected . . . vests initially in the author . . ." 17 U.S.C. § 201(a) (2006). "Once the term of protection ends, the works do not revert in any rightholder. Instead, the works simply lapse into the public domain." *Golan*, 132 S. Ct. at 892.

⁷⁴ *Golan*, 132 S. Ct. at 892. The Supreme Court acknowledges that would-be users can no longer utilize the foreign works free of charge. However, the right to perform a musical work can be obtained in the marketplace, which users acquire through monetary compensation to U.S. authors. *Id.*

⁷⁵ *Id.*

those works were created and first published.”⁷⁶ The Supreme Court finds this legislation to be within the confines of the Constitution under the belief that there is a great need for the United States to comply with an international copyright regime.⁷⁷

B. Justice Breyer’s Dissent

Justice Breyer dissents because in his view, the Copyright Clause does not authorize Congress to enact this statute because it does not encourage anyone to produce a single new work.⁷⁸ Breyer understands the “economic philosophy behind the Copyright Clause” to be one which grants copyright holders a limited monopoly via private benefit for the public purpose of eliciting the creation of new works.⁷⁹ As the majority finds historical precedent in governing its viewpoint, Breyer cites the Statute of Anne as the basis for the Framers’ construction of the Constitution.⁸⁰ This statute encouraged “learned Men to compose and write useful Books,” hence encouraged the creation of works, not merely the dissemination as the majority notes.⁸¹

Breyer identifies and contrasts two underlying views of copyright law: the “utilitarian view” generally recognized in the United States, and the “natural rights view” generally followed in continental European copyright law.⁸² The utilitarian view, followed by Founders of the Constitution Thomas Jefferson and James Madison, embraces the notion that the monopoly granted to copyright authors serves as “compensation for a benefit actually gained to the community.”⁸³ The Founders believe this monopoly encourages authors to pursue ideas and create works, which may produce utility to the benefit of the general public.⁸⁴ This view contrasts the “natural rights” view grounded in the notion that “author[s] and inventor[s] have inherent rights to the fruits of their labor.”⁸⁵ The natural rights theory heightens the importance of authors’ rights, as opposed to the importance of social gain, highlighted in the utilitarian view.⁸⁶

This legislation takes works from the public domain, and restores copyright

⁷⁶ *Id.*

⁷⁷ *Id.* at 893–94.

⁷⁸ *Id.* at 899 (Breyer, J., dissenting).

⁷⁹ *Id.* at 900. Breyer analogizes this monopoly as a two-edged sword. *Id.* On one side, it encourages production of new works because absent copyright protection, works could be freely exploited without having to incur the cost of creation; consequently, this would deter authors from producing new works. *Id.* On the other side, copyright protection restricts dissemination due to the economic marketplace and high administrative costs it imposes. *Id.*

⁸⁰ See *supra* text accompanying note 54. The Statute of Anne is Britain’s 18th Century copyright statute. *Golan*, 132 S. Ct. at 900 (Breyer, J., dissenting).

⁸¹ *Id.* at 901 (Breyer, J., dissenting); see also Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1444–50 (2010) (stating that the objective of copyright was to encourage authors to produce new works and thereby improve learning).

⁸² *Golan*, 132 S. Ct. at 901–03 (Breyer, J., dissenting).

⁸³ *Id.* at 901 (citation omitted).

⁸⁴ *Id.* at 901–02; see Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 PAPERS OF THOMAS JEFFERSON 379 (J.Looney ed. 2009).

⁸⁵ *Golan*, 132 S. Ct. at 902 (Breyer, J., dissenting).

⁸⁶ *Id.*

to foreign authors.⁸⁷ The dissent analyzes the two ways in which this legislation restricts the dissemination of such works.⁸⁸ First, consumers that previously used works for free are now charged fees by “restored copyright holders,” and second, the legislation creates administrative costs.⁸⁹ The administrative burden is particularly high in what the dissent identifies as “orphan works”; these are millions of works of minimal commercial value whose copyright owners are nearly impossible to identify.⁹⁰ Since the legislation creates high costs to utilize these works, it essentially prevents use of culturally invaluable material to the public, thus “aggravating the already serious problem of cultural education in the United States.”⁹¹

Justice Breyer concedes “that ordinary protection also comes with dissemination-restricting royalty charges and administrative costs”; however, he deems the costs imposed by this legislation to be especially harmful and inordinately high.⁹² Historically, “Congress has long sought to protect public domain material when revising the copyright law.”⁹³ However with this legislation, Congress’s ability to take works from the public domain “abridges” the American public’s constitutionally inherent right to freedom of speech granted by the First Amendment.⁹⁴ Moreover, Justice Breyer identifies restricting use of previously available material, reversing payment expectations of existing users of

⁸⁷ Uruguay Round Agreement Act (“URAA”) § 514, 108 Stat. 4809 (codified 17 U.S.C. §§ 104, 109 (2000)). See *supra* note 7.

⁸⁸ *Golan*, 132 S. Ct. at 904 (Breyer, J., dissenting).

⁸⁹ *Id.* at 904–05. The dissent identifies administrative costs “as the costs of determining whether a work is the subject of a restored copyright, searching for a restored copyright holder, and negotiating a fee.” *Id.* at 905 (internal quotations omitted).

⁹⁰ *Id.* “According to European Union figures there are 13 million orphan books in the European Union (13% of the total number of books in-copyright there), 225,000 orphan films in European film archives, and 17 million orphan photographs in United Kingdom museums.” *Id.*

⁹¹ *Id.* The dissent exemplifies the problem by stating:

[T]he Los Angeles Public Library has been unable to make its collection of Mexican folk music publicly available because of problems locating copyright owners, that a Jewish cultural organization has abandoned similar efforts to make available Jewish cultural music and other materials, or that film preservers, museums, universities, scholars, database compilers, and others report that the administrative costs associated with trying to locate foreign copyright owners have forced them to curtail their cultural, scholarly, or other work-preserving efforts.

Id. at 905–06.

⁹² *Id.* at 906. Although Justice Breyer believes the majority is correct in its analytical process, the majority stops its inquiry, as they did in *Eldred*, by concluding that copyright law inherently restricts dissemination of works and has associated administrative costs; see *supra* text accompanying notes 64–66. However, the dissent distinguishes the current issue from *Eldred*, because unlike in *Eldred*, in this case “an easily administrable standard is available—a standard that would require works that have already fallen into the public domain to stay there.” *Golan*, 132 S. Ct. at 906 (Breyer, J., dissenting).

⁹³ *Golan*, 132 S. Ct. at 907 (Breyer, J., dissenting); see *Kewanee Oil Co. v. Bicron Corp.* 416 U.S. 470, 484 (1974) (stating trade secret protection is compatible with the policy of keeping works in the public domain there); *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (not allowing Congress to authorize patents that effectively remove existent knowledge from the public domain). *Contra supra* note 54.

⁹⁴ *Golan*, 132 S. Ct. at 905 (Breyer, J., dissenting). This will place an additional burden on American consumers of these works, who will now have to seek answers to questions such as, “Is the work eligible for restoration under the statute? If so, who now holds the copyright—the author? an heir? a publisher? an association? a long-lost cousin? Whom must we contact? What is the address? Suppose no one answers? How do we conduct a negotiation?” *Id.*

these works, and rewarding individuals at the public's expense, as examples of the speech-related harms created by this Act.⁹⁵ For the purposes of this case, the dissent limits its finding to show only the presence of a First Amendment issue.⁹⁶

The core of the dissent's arguments comes from its conclusion that the Act does not provide the public with the incentive to produce new works, which it identifies to be the essence of American copyright law.⁹⁷ Additionally, the argument enumerates a "virtually unbroken string of legislation preventing the withdrawal of works from the public domain," directly contradicting the findings of the majority opinion.⁹⁸ Furthermore, the dissent is at despair with the majority's interpretation that the Copyright Clause does not require the creation of new works, but rather, can promote its motives in other ways.⁹⁹ This Act "for the most part covers works that the author[s] did not expect to protect in America," hence Justice Breyer finds the majority's conclusion to be false.¹⁰⁰

V. CRITIQUE OF THE MAJORITY OPINION

A. *The Foundation of American Copyright Law: Historical Precedent*

In order to evaluate the Supreme Court decision in *Golan*, it is essential to look at *how* the Framers interpreted the Copyright Clause, and *what* they intended to accomplish through American copyright law.¹⁰¹ Modern day copyright law in

⁹⁵ *Id.* at 907–08. It will be difficult for members of society such as artists, musicians, universities, and scholars that previously enjoyed the works in the American public domain to obtain permission to use any lesser known foreign work, with the additional burden of now owing payment to the original authors for works they have long been using. *Id.* at 905.

⁹⁶ "I need not decide whether the harms to that interest show a violation of the First Amendment." *Id.* at 907.

⁹⁷ *Id.* at 908. This directly contradicts the majority's conclusion that the Copyright Clause does not "operate to induce new works." *Id.* at 888 (majority opinion). Therefore, the essence of this debate is whether the Constitution should be interpreted to induce the *creation* of new works, or if the *dissemination* of works (as the majority believes) will suffice as a means of promoting the "Progress of Science." *Id.* at 909 (Breyer, J., dissenting).

⁹⁸ *Id.* at 909. *See, e.g.,* Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2860 (1988); Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075, 1077 (all pieces of legislation that did not extend protection to works in the public domain). The majority opinion references legislation, which retroactively granted protection, as the legislation at issue does. *See supra* note 54. However, the dissent distinguishes this line of legislation because they were granted in special circumstances, such as wartime, natural disasters, and the like. *Golan*, 132 S. Ct. at 909 (Breyer, J., dissenting). Justice Breyer finds it "farfetched" to analogize those laws to the present law. *Id.*

⁹⁹ *Id.* at 909–10 (Breyer, J., dissenting). "The industry experts to whom the majority refer argue that copyright protection of already existing works can help, say, music publishers or film distributors raise prices, produce extra profits, and consequently lead them to publish or distribute works they might otherwise have ignored." *Id.* at 909. However, this is flawed because, as the dissent points out, "simply making the industry richer does not mean the industry . . . will distribute works not previously distributed." *Id.* at 910. This argument by the majority basically states that giving extra monetary reward to authors for already created works will somehow incentivize these authors to create new works. However, this view does not acknowledge "the special economic circumstances that surround the nonrepeatable costs of the initial creation of 'Writing.'" *Id.* at 901. Thus, the dissent reads the Copyright Clause, unlike the majority, to encourage the creation of new works for the progress of society.

¹⁰⁰ *Id.* at 909.

¹⁰¹ Cecil C. Kuhne, III, *Forcing the Copyright Genie Back into the Bottle: Public Policy Implications of Copyright Extension Legislation*, 33 SW. U. L. REV. 327, 338 (2004) ("The Framers of the Constitution recognized that a constantly refreshed public domain is essential because it serves as a

the United States should align with its historical roots as determined by our Founding Fathers. The objective of early American copyright statutes “was to encourage authors to produce new works and thereby improve learning.”¹⁰² Through their letters, Thomas Jefferson and James Madison emphasized the “high democratic value of access to knowledge,” while remaining wary of monopolies.¹⁰³ Jefferson and Madison grounded the foundation of the Constitution under a belief that an informed public was essential to a functioning democratic system.¹⁰⁴ This demonstrates the Framers’ intent was to encourage “creativity and innovation via a balanced system of incentives.”¹⁰⁵

The Framers embraced a utilitarian view of copyrights and patents, which provides authors with compensation for the benefits gained by society through the publication of their works.¹⁰⁶ In the utilitarian perspective, monopolies encourage people to pursue ideas that produce utility.¹⁰⁷ This stands at odds with the continental European basis for copyright law, which follows the natural rights theory.¹⁰⁸ According to this dichotomy, copyright law founded in coherence with the utilitarian theory should encourage works to remain in the public domain, in order to benefit the greatest number of people.¹⁰⁹ However, it seems with Section 514, Congress has deviated from the roots of American copyright law in an effort to follow an international regime.

The majority argues that this legislation is an attempt to put foreign copyright holders on the same foot as their American counterparts.¹¹⁰ However, this Court fails to acknowledge that this legislation gives preferential treatment to foreign authors who did not follow certain regulations and statutory formalities.¹¹¹

foundation of new works.”).

¹⁰² Kuhne, *supra* note 101, at 330 (discussing how American copyright law provides incentives for control and opportunities for profit in order to motivate authors and artists to create original works).

¹⁰³ *Golan*, 132 S. Ct. at 901 (Breyer, J., dissenting). In a letter to James Madison, Thomas Jefferson wrote, “the benefit even of limited monopolies is too doubtful to warrant anything other than their suppression.” Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 PAPERS OF THOMAS JEFFERSON 440, 443 (J. Boyd ed., 1956).

¹⁰⁴ See Brief for Public Domain Interests, et al. as Amici Curiae Supporting Petitioners at 22–26, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470829. James Madison wrote, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *THE WRITINGS OF JAMES MADISON* 103 (1910).

¹⁰⁵ Brief of Public Domain, *supra* note 104, at 26; see U.S. CONST, art. I, § 8, cl. 8; see also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (“Congress in 1790 enacted the first federal patent and copyright law, 1 Stat. 109, and ever since that time has fixed the condition upon which patents and copyrights shall be granted. These laws . . . are the supreme law of the land.”); Brief of H. Tomas Gomez-Arostegui & Tyler T. Ochoa as Amici Curiae Supporting Petitioners, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470823 (concluding the historical record does not support the view that the First Congress believed it was removing works from the public domain by enacting the 1790 Act).

¹⁰⁶ See *supra* text accompanying notes 82–84.

¹⁰⁷ *Golan*, 132 S. Ct. at 901 (Breyer, J., dissenting).

¹⁰⁸ “Premised on the idea that an author or inventor has an inherent right to the fruits of his labor.” *Id.* at 902. The natural rights view places a stronger emphasis on the rights of the authors, rather than the advancement of public welfare. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *supra* text accompanying note 76.

¹¹¹ Brief for Creative Common Corp. as Amici Curiae in support of Petitioners at 6, *Golan v.*

American counterparts have made the same mistakes as foreign authors, yet are not afforded any recourse.”¹¹²

The United States was over a century late in signing the Berne Convention, and did not find the need to implement Article 18 until 1994, when Section 514 was adopted.¹¹³ Originally, Article 18 was not implemented because of concerns over the constitutionality of restoring copyrights to works existing in the public domain, thus showcasing Congress’s reservations to comply with an international standard.¹¹⁴ Congress’s decision to adhere to the international system set forth by Berne was to highlight the government’s interest¹¹⁵ in “persuad[ing] foreign countries to allow American holders of preexisting copyrights to charge foreign customers more money for their products.”¹¹⁶ Congress believed retroactivity would be the best way to gain protection of American copyright holders in emerging foreign markets.¹¹⁷ However, this argument places the concerns of a private benefit over the public benefit, which goes against the grain of which our Constitution was founded.¹¹⁸

In cases regarding intellectual property, the Supreme Court has recognized the importance of materials in the public domain. In regards to patent law, the Court has adhered to a utilitarian theory stating, “[t]he efficient operation of the

Holder, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470826.

¹¹² *Id.* American authors are not granted copyright restoration or relief from their failure to follow copyright formalities, unlike foreign authors who benefit from Section 514. See Brief of Justice and Freedom Fund as Amici Curiae Supporting Petitioners at 20, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470825. This essentially, “tak[es] the right to speak from some and giv[es] it to others.” *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

¹¹³ See *supra* text accompanying note 15.

¹¹⁴ See H.R. REP. NO. 100-609, at 51 (1988), quoted in 7 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 24:21 (2008).

¹¹⁵ “But there is no legitimate interest in giving away public speech rights in the hope of creating private economic windfalls. Nor was there any substantial evidence to conclude the government’s give-away would be reciprocated, or to what degree, and to what specific benefit.” Brief for Petitioners, *supra* note 15, at 17.

¹¹⁶ *Golan*, 132 S. Ct. at 910 (Breyer, J., dissenting). “[F]ailure to [comply with Article 18] will . . . undermine the ability of the United States to press other countries to implement the same sort of protection in their implementing legislation currently pending . . . around the globe.” *Id.* (statement of Matt Gerson, Vice President for Congressional Affairs, Motion Picture Assn. of America) (statement of Eric Smith, Executive Director and General Counsel, International Intellectual Property Alliance).

¹¹⁷ *Id.*

While the protection of U.S.-based copyright holders can certainly be a substantial interest, the connection between that interest and Section 514 literally depends upon speculation and conjecture regarding the conduct of other sovereign nations. While the political branches have discretion to make judgments in areas of foreign relations (*Regan v. Wald*, 468 U.S. 222, 242 (1984)), this does not give them carte blanche to set up any given policy as a substantial government interest because of its hoped-for indirect effects on other countries’ actions towards U.S. stakeholders. When a proposed regulation impacts constitutional concerns at a level requiring more than cursory scrutiny, there must be a *definite, direct, and material relationship* between the foreign government’s protection of U.S. interests and the statute that faces constitutional scrutiny.

Brief of Amici Curiae Public Knowledge in Support of Petitioner at 10, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470822 (emphasis added).

¹¹⁸ It is an argument of how to obtain more money from the sales of existing products versus how to promote and protect the creative and innovative process. *Golan*, 132 S. Ct. at 910 (Breyer, J., dissenting).

federal patent system depends upon substantially free trade in publicly known, unpatented design.”¹¹⁹ The Patent Clause in the Constitution reflects the “balance between the need to encourage innovation,” and avoid monopolies.¹²⁰ Congress does not authorize “patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”¹²¹ Moreover, the Supreme Court has previously stated that issuing patents to already publicly held information would “serve no socially useful purpose, but would in fact injure the public by removing existing knowledge from public use.”¹²² Therefore, it follows that American copyright law precedent favors the stimulation of creative works and monopolies, for the purpose of disbursing knowledge for the greatest public gain.¹²³ The Supreme Court in *Golan* has digressed from its historical precedent and has deviated from the “bedrock principle” of American copyright law by restoring copyrights in works already in the public domain.¹²⁴

In light of the global economy, it is understandable that Congress feels pressure to comply with the international system of copyright law set forth in Berne. However, the United States enjoyed the benefits of Berne for years without implementing Article 18.¹²⁵ Compliance with the Berne Convention did not require Congress to enact retroactive protection; it only required *some* level of protection to be given to works of foreign authors that had entered the American public domain.¹²⁶ Congress had the option to take advantage of benefits of Berne through less-restrictive methods of compliance.¹²⁷ Removing works from the

¹¹⁹ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). “Ever since the first U.S. patent statute, the patent system appears to have incorporated a strong vision of the divide between patentable inventions and technology in the public domain.” Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 977–78 (1990).

¹²⁰ *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966).

¹²¹ *Id.* See *Kellog Co. v. Nat’l Biscuit Co.* 305 U.S. 111, 118 (1938) (holding that when a patent falls into the public domain through the disappearance of a monopoly, the public shall be entitled to full enjoyment of that which has become theirs).

¹²² *Bonita*, 489 U.S. at 148. The 1976 Copyright Act states that copyright protection does not extend to “any work that goes into the public domain.” Brief of ACLU as Amicus Curiae Supporting Petitioners at 11, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2578555.

¹²³ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The monopoly created by copyright thus rewards the individual author in order to benefit the public.”) (internal quotations omitted); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (creativity should be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (stating that works once in the public domain should remain there is not a policy incompatible with trade secret protection.); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (stating the main objective of monopolies is to derive benefit to the general public by labors of authors).

¹²⁴ The “bedrock principle” of copyright law: “[W]orks in the public domain remain in the public domain.” Brief for Petitioners, *supra* note 15, at 43.

¹²⁵ See *supra* text accompanying notes 18–21.

¹²⁶ “Article 18(3) also states that ‘the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.’” *Golan*, 132 S. Ct. at 911 (Breyer, J., dissenting) (quoting 18 U.N.T.S. 251). The plain terms of Berne would have allowed the United States to burden substantially less speech, through the “rule of the shorter term” and “protect[ion] of first sale rights.” Brief for the Petitioners, *supra* note 15, at 59–60. “[T]he scope of that protection is essentially left to the discretion of each member state.” See Brief of Amicus Curiae Professor Daniel J. Gervais in Support of Petitioners at 6, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470824.

¹²⁷ *Golan*, 132 S. Ct. at 911 (Breyer, J., dissenting). For example, the United States obtained concession regarding the issue of moral rights protection under Berne, Article 6 *ibis*, which is of great

public domain goes against constitutional principles, and should have been handled with more caution.¹²⁸

Regardless of the method with which Congress decided to comply with Berne, “no treaty can authorize the government to do what the Constitution otherwise prohibits”; Congress overreached its arms with the enactment of Section 514.¹²⁹ This Court has previously established that the government’s chosen means must not be “substantially broader than necessary.”¹³⁰ As it did in *Eldred*, Congress was free to set the term of copyright as long as it was “limited” while still complying with the Constitution.¹³¹ “[I]f the Progress Clause is to be accorded any substantial meaning,” the Supreme Court should not have allowed Congress to overstep its powers by allowing restoration of works already in the public domain.¹³² The Framers purposely imposed specific limits on Congress’s power in regards to copyright law in order to ensure it would promote, not inhibit, the diffusion of knowledge.¹³³

B. Distinguishing *Eldred*

The Supreme Court falsely relies on the precedent set forth in *Eldred*, where it upheld the constitutionality of CTEA,¹³⁴ because the Court does not acknowledge key distinguishing factors between *Eldred* and the present case. The CTEA, unlike Section 514, only applied to works under (non-expired) copyright protection, it did not remove any works from the public domain.¹³⁵ “Section 514, by contrast, deprives Petitioners, amici and their patrons of access to speech that already belonged to the public.”¹³⁶ At most, the plaintiffs in *Eldred* could show a weak interest in “making other people’s speeches,” but at no point possessed unimpeded access to the works in question.¹³⁷ Conversely, Petitioners in *Golan* freely and rightfully used the “work[s] without restriction, spread its contents, and

importance in European countries. Brief of Gervais, *supra* note 126, at 5–6. “The plain terms of Article 18 would have allowed the United States to negotiate agreements that modified or eliminated Berne’s restoration requirements to accommodate the unique position of the United States relative to any other Berne signatory.” Brief for the Petitioners, *supra* note 15, at 55. Therefore, Congress could have attempted to similarly negotiate terms regarding works of foreign authors already in the public domain, without adopting such extreme measures. *Id.*

¹²⁸ Brief of Gervais, *supra* note 126, at 8.

¹²⁹ Brief for the Petitioners, *supra* note 15, at 51; *see* *Boos v. Barry*, 485 U.S. 312, 324 (1988). “No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” *Id.* at 324 (quoting *Reid v. Covert*, 354 U.S. 1 (1957)); *see also* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

¹³⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). “It would not be contended that [treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States . . .” *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

¹³¹ Brief for Creative Common, *supra* note 111, at 20.

¹³² *Id.*

¹³³ U.S. CONST. art. I § 8, cl. 8.

¹³⁴ Copyright Term Extension Act (CTEA) Pub. L. No. 105–298, § 102(b), (d), 112 Stat. 2827–2828 (1998) (extending the term of existing (non-expired) copyrights for 20 years.). *See Eldred v. Ashcroft*, 537 U.S. 186 (2002).

¹³⁵ CTEA, *supra* note 134.

¹³⁶ Brief Amici Curiae American Library Ass’n, et al., in Support of Petitioners at 28, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10–545), 2011 WL 2533007.

¹³⁷ *Eldred*, 537 U.S. at 221.

use[d] it in the creation of still other works.”¹³⁸ Moreover, the CTEA was generic in nature because it “did not legislate with respect to any particular work.”¹³⁹ It was a subpart of a general statute which extended copyright protection to subsisting and future works.¹⁴⁰ On the other hand, Section 514 restores rights in a select group of works to a particular group of rightsholders, which is not justified by the decision in *Eldred*.¹⁴¹ Such “targeted restoration,” not only “render[s] the public domain perpetually vulnerable,” but is divergent from historical precedent.¹⁴² Therefore, the Supreme Court should have followed the precedent it set forth regarding works in the public domain,¹⁴³ rather than using the *Eldred* reasoning as justification for their decision.

VI. IMPACT

A. Culture, Education, and Scholarship

It is essential to understand the span of works in the public domain that are subject to restoration through Section 514 in order to comprehend the breadth of damage caused by this legislation.¹⁴⁴ The category of works that derive restored protection are those “that are (1) old; (2) of foreign origin; (3) protected under non-U.S. law; and that (4) failed to comply with United States’ copyright ‘formalities.’”¹⁴⁵ These works are in the millions¹⁴⁶ and are representative of a wide array of genres¹⁴⁷ published abroad from 1932 to 1989.¹⁴⁸

The public domain is the truest form of free speech, as it benefits society at large by giving access to a realm of materials that can be freely used.¹⁴⁹ The works in the public domain become cultural building blocks and the “basis for our art, our

¹³⁸ Brief for the Petitioners, *supra* note 15, at 3.

¹³⁹ Brief for the Creative Common, *supra* note 111, at 19.

¹⁴⁰ *Id.* at 18. “The CTEA continued a practice begun with the Act of 1831, extending the term of subsisting copyrights when it extended the term for new copyrights.” *Id.*

¹⁴¹ *Id.* at 19.

¹⁴² *Id.*

¹⁴³ See *supra* text accompanying notes 119–23.

¹⁴⁴ See Berne Convention art. 18, *supra* note 16.

¹⁴⁵ Brief of Google Inc. as Amici Curiae in Support of Petitioners at 15, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2533006.

¹⁴⁶ Since the passage of Section 514 in 1994, over 50,000 registration notices have been filed with U.S. Copyright Office, by foreign authors. See *Notices of Restored Copyrights*, UNITED STATES COPYRIGHT OFFICE (Feb. 7, 2011), <http://www.copyright.gov/gatt.html>. “The works that qualify for copyright restoration probably number in the millions.” Marybeth Peters, Register of Copyrights, U.S. Copyright Office, Library of Cong., *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office* (April 11, 1996), in 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 25, 31 (1996).

¹⁴⁷ The genres of works affected span from musical compositions, cinematographic works, books and writings, paintings and pictures, etc. See Brief of American Library Ass’n, *supra* note 136, at 5–6 (“This encompasses wide swathes of our cultural building blocks, including, for example, all Russian works published before 1973, including works by Vladimir Nabokov, Maxim Gorky, Alexander Solzhenitsyn, and Sergei Prokofiev, paintings by Pablo Picasso, drawings by M.C. Escher, and writings by such authors as George Orwell, J.R.R. Tolkien, and Virginia Woolf.”).

¹⁴⁸ *Golan*, 132 S. Ct at 903 (Breyer, J., dissenting).

¹⁴⁹ See Litman, *supra* note 119, at 966 (discussing how the creations of most new works stem from usage of works already in the public domain).

science, and our self understanding.”¹⁵⁰ Prior to this decision, defining the boundaries of the public domain and intellectual property has been of great importance to the Supreme Court.¹⁵¹ This Court previously iterated the significance of these boundaries in regards to patents by stating, “[a] patent holder should know what he owns, and the public should know what he does not.”¹⁵²

The advent of new technologies makes it increasingly possible for works in the public domain to be disseminated to millions of people in more ways than before.¹⁵³ In today’s world, “the public’s historic legal rights of access to these materials [are] a practical reality.”¹⁵⁴ Cultural institutions, non-profit educational resources, and businesses “seek to serve the global community by collecting and sharing” work in the public domain through digital libraries and encyclopedias, digital repositories, and internet archives.¹⁵⁵ Technology, most importantly the Internet, makes it simple for individuals to utilize “millions of public domain texts, films, and sound recordings with ease,” at a fraction of the cost.¹⁵⁶ Use of these works by the general public, fuels constitutional principles, by promoting creativity in the arts and sciences.¹⁵⁷ In 1941, President Franklin Roosevelt deemed the public domain to be the source of “the great tools of scholarship, the great repositories of culture, and the great symbols of freedom of the mind”; an essential component to the “functioning of a democratic society.”¹⁵⁸

The purpose of copyright law and the public domain is to give the public access to materials to fuel innovation and creativity¹⁵⁹—an unstable public domain

¹⁵⁰ JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 39 (2008). Boyle believes the public domain is comprised of “the raw material from which we make new inventions and create new cultural works.” *Id.* “It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.” *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

¹⁵¹ “Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994).

¹⁵² *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 731 (2002).

¹⁵³ Brief of American Library Ass’n, *supra* note 136. “Thanks to the Internet and other new technologies, Amici are able to preserve and share a vast wealth of information, allowing a virtually unlimited number of patrons worldwide access to digitized books, photographs, music, and other works.” *Id.* at 1.

¹⁵⁴ Brief for Google, *supra* note 144, at 11.

¹⁵⁵ See Brief of American Library Ass’n, *supra* note 136, at 1; Brief for Google, *supra* note 144.

¹⁵⁶ Brief of American Library Ass’n, *supra* note 136, at 9. “[D]igital reproduction and distribution can be far less expensive than older distribution forms, public domain materials can be distributed, reproduced, and recombined on a vast scale.” Brief of Public Domain, *supra* note 104, at 18.

¹⁵⁷ U.S. CONST. art. I, § 8, cl. 8. The Constitution is founded on the principle to promote creativity for the “Progress of Science.” *Id.*

¹⁵⁸ PATTI CLAYTON BECKER, *BOOKS AND LIBRARIES IN AMERICAN SOCIETY DURING WORLD WAR II: WEAPONS IN THE WAR OF IDEAS* 49 (2005).

¹⁵⁹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” (citation omitted) (quoting U.S. CONST. art. I, § 8, cl. 8)). “The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken* 422 U.S. 151, 156 (1975).

has the exact opposite effect.¹⁶⁰ It is essential the public domain be clearly bound and set apart from the domain of monopoly. Unfortunately, the Supreme Court has created a haze over this line of separation through the enactment of Section 514, the unconstitutional impact of which will halt the spread of culture and education in the United States.¹⁶¹ The parties most “affected by Section 514 are neither copyright holders nor reliance parties, but rather members of the *general public* who regularly rely on (or would benefit from access to) public domain works that are, or could be, made available online for information, educational, and creative purposes.”¹⁶² Works affected by Section 514 are removed from the public domain, which effectively shrinks the pool of information available to the public.¹⁶³ This consequently *diminishes* the public’s right to receive information, and more importantly, the voice of the community.¹⁶⁴

Much of culture and education in the United States stems from the various expressions and interpretations of materials originally in the public domain.¹⁶⁵ For example, “Walt Disney drew from the public domain to create prolific, culture-defining films like *Snow White and the Seven Dwarfs*.”¹⁶⁶ Websites like Wikipedia provide a wealth of information comprised of massive collaborations, millions of articles, and hundreds of languages.¹⁶⁷

The impact of Section 514 on the “Progress of Science and useful Arts,” is vividly illustrated in the music industry.¹⁶⁸ Post implementation of Section 514, many conductors and orchestras were required to pay rental fees on “landmark works of twentieth-century music . . . by Prokofiev, Stravinsky, Shostakovich, and others.”¹⁶⁹ Outside of the few wealthy institutions that could afford to rent the rights to perform these works, the financial burden on smaller local and regional music organizations has been tremendous.¹⁷⁰ This has a “debilitating effect on music scholarship.”¹⁷¹ This legislation has the same crippling effect in film,

¹⁶⁰ Brief for Google, *supra* note 144, at 18; *see* discussion *infra* Part VI.C.

¹⁶¹ *See generally* Briefs as Amici Curiae Supporting Petitioners, 132 S. Ct. 873 (2012).

¹⁶² Brief of American Library Ass’n, *supra* note 136, at 4.

¹⁶³ *Id.*

¹⁶⁴ Brief of American Library Ass’n, *supra* note 136, at 27. “[Section 514] inhibits the spread of existing works, reduces the universe of material available to the public for further creation, and threatens to destroy the incentive to use even those works that remain unprotected. It impedes both the creation of knowledge and its spread.” Brief for the Petitioners, *supra* note 15, at 24.

¹⁶⁵ *See* Litman, *supra* note 119, at 966–67.

¹⁶⁶ Brief for Creative Commons, *supra* note 111, at 6. There were at least three other film adaptations to *Snow White* before Walt Disney created the hit animation film. Brief for Peter Decherney as Amici Curiae in Support of Petitioners at 16, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470832. In many films it is the audience’s familiarity with characters, story lines, plots, and a fan-base that turns movies into major blockbusters. *Id.* This is true for many Disney hits such as *Little Red Riding Hood*, *Alice in Wonderland*, *Aladdin*, and *Jack and the Beanstalk*, all of which, absent works in the public domain, would not have been possible. *Id.* at 17.

¹⁶⁷ Brief for Creative Commons, *supra* note 111, at 7.

¹⁶⁸ *See* Brief of the Conductors Guild and the Music Library Ass’n as Amici Curiae Supporting Petitioners, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470828.

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Id.* A librarian at a music conservatory warns that if the affected works become “too expensive to buy, no one will explore their performance or undertake their recordings. We will curtail intellectual curiosity and diminish our cultural heritage.” *Id.* at 13.

¹⁷¹ *Id.* “All of these developments lessened the ability of music libraries to fulfill their educational and public-service missions.” *Id.* at 6. Many people will be required to “cease activities such as

media, and various other industries—industries that were effectively created by the public domain.¹⁷² Furthermore, this legislation has the potential to hinder society’s use of technological advancements.¹⁷³ The possibility of harms caused to the public through this legislation is endless.

B. *Frivolous First Amendment Safeguard Provisions*

The Supreme Court references the “built in First Amendment accommodations,”¹⁷⁴ of the “fair use defense” and the “idea/expression” dichotomy¹⁷⁵ as speech protective outlets and safeguards, which still allow society to use the works affected by Section 514.¹⁷⁶ However, by no means are these provisions an adequate substitute or appropriate compensation for removing works from the public domain.¹⁷⁷ Neither of these safeguards would allow the public to create derivative interpretations or perform the works in their entirety.¹⁷⁸ It is a stretch for Congress to believe these safeguards, which provide limited access to copyrighted materials, are a justification for withdrawing works in which the general public previously had unfettered access.¹⁷⁹ Many times, it is necessary to replicate the exact expression of the work for its use to be valuable.¹⁸⁰ Moreover, even if the copyright holder does grant permission of use, they are permitted to demand license fees that can fall outside the budget of many creators.¹⁸¹ It is

performing or experimenting with works they have spent decades mastering, unless they obtain the ‘rightsholders’ consent, which may be withheld for any reason, or no reason at all.” Brief for Google, *supra* note 144, at 18–19.

¹⁷² See Brief of Decherney, *supra* note 165 (arguing the public domain facilitated the birth and expansion of the film industry, brought stability to Hollywood, and allowed the founding of cinematic genres).

¹⁷³ See Amicus Brief on Behalf of Project Petrucci, L.L.C., in Support of Petitioners at 27–28, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2578554. This legislation also has the potential of hindering public use of technological advancements. The International Music Score Library Project (“IMSLP”) launched an iPad application allowing users to access sheet music on their mobile devices. *Id.* Instead of orchestra’s paying costly per-performance fees, they could have instantaneous, unlimited, and free access to thousands of IMSLP’s scores via application, thus never paying for sheet music again. *Id.* The potential of the public domain through these types of technological advancements are endless. *Id.*

¹⁷⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2002).

¹⁷⁵ See *supra* text and accompanying notes 65–66. Fair use and idea/expression dichotomy provisions are codified by 17 U.S.C. §§ 107 and 102(b), respectively.

¹⁷⁶ *Golan*, 132 S. Ct. at 890.

¹⁷⁷ “Neither fair use nor the idea/expression dichotomy addresses all the ways in which copyright restrictions can abridge freedom of speech.” Brief for Google, *supra* note 144, at 26.

¹⁷⁸ *Golan v. Gonzalez*, 501 F.3d 1179, 1195 (10th Cir.). The fair use defense is confined to the standard of what types of use a “reasonable copyright owner” may have consented to. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 550 (1939). Similarly, the idea/expression dichotomy only applies to “idea, theory, and fact in . . . copyrighted work[s].” *Eldred*, 537 U.S. at 219. Therefore, both safeguards are extremely limited in their ability to disseminate the restored works in a capacity that would prove useful to anyone other than the rightholder.

¹⁷⁹ “By withdrawing works from the public domain, § 514 leaves scholars, artists, and the public with less access to works than they had before the Act.” *Golan*, 501 F.3d at 1195. The main concern is one of public interest and public necessity. See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH & LEE L. REV. 831 (2010).

¹⁸⁰ “Playing a few bars of a Shostakovich symphony is no substitute for performing the entire work.” Brief for Petitioners, *supra* note 15, at 47.

¹⁸¹ See Brief of the Conductors Guild, *supra* note 167, at 7. For example, one conductor stated his group would no longer perform a number of Igor Stravinsky’s works they previously performed

implausible to think these are adequate measures to alleviate the burden placed on prospective authors and the general public.¹⁸²

The Supreme Court references other measures Congress adopted to ease the transition of parties affected by the loss of access to restored works: “[i]t deferred the date from which enforcement runs, and it cushioned the impact of restoration on ‘reliance parties’ who exploited foreign works denied protection before [Section] 514 took effect.”¹⁸³ Yet again, the Supreme Court’s acceptance of Congress’s attempt to rectify the damage done by the enactment of Section 514 is troubling given the digital age upon us.¹⁸⁴ The one-year grace period afforded is a provision set in place so reliance parties can disseminate copies of the works made before they were put on notice by the Federal Register.¹⁸⁵ In the Internet age, most distribution of works occurs online via downloads and websites. However, after a reliance party is given notice, the statute requires websites to immediately rectify and comply with the provisions of the legislation, or run the risk of facing liability.¹⁸⁶ As a result, most reliance parties, out of fear of facing liability, do not really benefit from the grace period Congress identifies.¹⁸⁷

C. Business and the Copyright Industry

The statute provides that any reliance party that wishes to utilize a restored work can do so by negotiating adequate compensation with the rightsholders, or paying what the district court determines is a reasonable amount.¹⁸⁸ However, with regard to “orphan works,” this seemingly reasonable provision can result in

because the fees to perform, post enactment of Section 514, are at least \$300, which is outside the budget of the ensemble. *Id.* Similarly, a conductor for a university orchestra reported fees to rent certain essential pieces of compositions can exceed \$1,200. *Id.*

¹⁸² “Users and secondary authors cannot simply rely on the existence of fair use; it must be privately litigated based on a different set of facts each time it is invoked.” Brief of Amici Curiae, Information Society Project at Yale Law School Professors and Fellows, in Support of Petitioners at 21, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470834.

¹⁸³ *Golan*, 132 S. Ct. at 890.

¹⁸⁴ See Brief for Project Petrucci, *supra* note 172, at 14.

¹⁸⁵ 17 U.S.C. § 104A(d)(2)(A)(ii)(III)–(B)(ii)(III). As against reliance parties, all of 17 U.S.C. § 504’s copyright infringement remedies are available if copies or phonorecords of a restored work are made after either (i) publication in the Federal Register of notice of intent to enforce copyright or (ii) receipt of notice directly from the owner. 17 U.S.C. § 104A(d)(2). Once notice is received, or published in the Federal Register, a reliance party must immediately cease copying and is granted twelve months solely for the purpose of selling off his or her inventory. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Brief for Project Petrucci, *supra* note 172, at 16. This leaves no window for Internet based reliance parties to investigate or verify claims of copyright status before incurring liability. *Id.*

¹⁸⁸ 17 U.S.C. § 104A(d)(3)(A)(ii).

[A] reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party *pays to the owner of the restored copyright reasonable compensation* for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.

(B) In the absence of an agreement between the parties, the amount of *such compensation shall be determined by an action in United States district court*, and shall reflect any harm to the actual or potential market for or value of the restored work from the reliance party’s continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.

17 U.S.C. § 104A(d)(3)(A)(ii)–(B) (emphasis added).

extraordinary administrative costs.¹⁸⁹ The process of determining if the work's copyright has been restored, searching for the author, and negotiating a price, can be a timely, expensive, and many times, an impossible process:¹⁹⁰ a hassle which small businesses will infrequently seek to undertake.¹⁹¹ Due to the foreign nature of the majority of restored works, registration and renewals are lost, and copyright owners, especially if they are not famous, are difficult to identify.¹⁹² These vague parameters of the public domain, "inject[] uncertainty and confusion . . . into the marketplace, preventing ideas, capital, and commerce from flowing efficiently."¹⁹³ This is especially the case for those on "shoestring budgets" that are not willing or able to invest in works that could potentially lead to an act of infringement.¹⁹⁴

Although the statute provides that claims and assertions made against a restored copyright that are materially false will be void, this does not ease the tensions of the fear of litigation for potential businesses and users.¹⁹⁵ Congress did not make any attempts to alleviate the associated administrative costs.¹⁹⁶ Rather, this legislation instilled a fear of copyright-based interference or liability in the public, which deters business and investment.¹⁹⁷

Furthermore, by restoring copyrights, Section 514 restricts the utilization and dissemination of works because the absence of competition directly translates into higher consumer prices.¹⁹⁸ An unencumbered and reliable public domain supports

¹⁸⁹ See *supra* text accompanying note 92.

¹⁹⁰ The 1976 Copyright Act removed the need for formalities in copyright registration. Brief for Project Petrucci, *supra* note 172, at 21.

¹⁹¹ *Golan v. Holder*, 132 S. Ct. 873, 905 (2012) (Breyer, J., dissenting). Counsel for the College Art Association explained to the Copyright Office in a letter, "The vast majority of foreign works were never registered, so registrations and renewals cannot be found to identify the rights owners, particularly if they are not famous In the vast majority of cases, identifying, finding and clearing rights is realistically impossible." Cunard Letter, Brief of Public Domain, *supra* note 104, at 33–34; see *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003) ("figuring out who is in the line of 'origin' will be no simple task"); Brief for Google, *supra* note 143, at 14 ("the difficulty and cost of even locating the relevant 'rightsholder' from whom a license might be negotiated are very often insurmountable").

¹⁹² For example, the University of Michigan and the Institute of Museum and Library Services, estimated the cost to determine copyright status of books in the HathiTrust Digital Library published between 1923–1963, will exceed \$1 million. Brief of American Library Ass'n, *supra* note 136, at 15.

¹⁹³ *Id.* at 18. "Where the owner cannot be found to license a work, the music is not likely to be used due to fear of reprisal." Brief for Project Petrucci, *supra* note 172, at 22.

¹⁹⁴ Brief for Public Domain, *supra* note 104, at 32. "Shoestring budget" refers to parties unable to handle the large licensing fees or potential lawsuits that may arise from use of the restored works. *Id.* Examples of such parties include "documentary filmmakers, independent musicians, educators, non-profits—and those who archive, organize, or distribute large numbers of works . . ." *Id.*

¹⁹⁵ 17 U.S.C. § 104A(e)(3). "Effect of material false statements.—Any material false statement knowingly made with respect to any restored copyright identified in any notice of intent shall make void all claims and assertions made with respect to such restored copyright." Most parties that would actually be affected are small and therefore even the threat of a potential lawsuit will deter use.

¹⁹⁶ "Congress could have alleviated many of the costs that the statute imposes by, for example, creating forms of compulsory licensing, requiring 'restored copyright' holders to provide necessary administrative information as a condition of protection, or insisting upon 'reasonable royalties.'" *Golan*, 132 S. Ct. at 911 (Breyer, J., dissenting).

¹⁹⁷ Brief for Google, *supra* note 144, at 16–17. Individuals "have hewed public domain precisely because these are understood as avoiding complexities, costly historical searches, and legal risk." *Id.* at 17; see BOYLE, *supra* note 148, at 12 (discussing how many libraries will not make available or reproduce materials unless they can be sure the copyright expired. "They cannot afford to take the risk.")

¹⁹⁸ *Golan*, 132 S. Ct. at 900 (Breyer, J., dissenting).

numerous business models and innovative practices because it decreases the transaction costs required to exploit the works.¹⁹⁹ A decrease in transaction costs reduces risk and encourages business. Unfortunately, Section 514 has quite the opposite effect.²⁰⁰

Big business and investors are an integral part of the copyright industry and are essential to the creation of many new works.²⁰¹ Businesses, such as venture capital firms, are much more willing to invest if they can be confident about the boundaries of copyright and the public domain because they negotiate and assess the value of their investments.²⁰² However, weak parameters over the public domain leave open the threat of additional licensing fees and litigation costs for unsolicited use, which daunt business and investment.²⁰³ The uncertainty of the return on investment pushes businesses past their accepted level of risk aversion, and consequently hinders their investment in the copyright industry.²⁰⁴ Additionally, some businesses' livelihoods are directly linked to their ability to exploit works already in the public domain.²⁰⁵ The cloud over the public domain creates a grey area of works that could potentially lead to legal battles that most businesses will attempt to avoid.²⁰⁶

VII. CONCLUSION

The main question at issue is which view of copyright law the United States

¹⁹⁹ Brief of Public Domain, *supra* note 104, at 18–19.

²⁰⁰ The amicus brief discusses risk and liability from a business perspective.

In business terms, risk is liability multiplied by probability. Under our current copyright regime, liability is immense while the probability of liability is uncertain, but ever increasing. While the value of the Public Domain is undeniable, a businessperson less dedicated to the sanctity of the Public Domain would likely have little interest in such an enterprise.

Brief for Project Petrucci, *supra* note 172, at 9–10.

²⁰¹ Brief of Heartland Angels, Inc., as Amici Curiae in Support of Petitioners at 14–15, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2470833. For example, the cost of new motion picture can cost studios in the millions, which would not be possible without outside investment. *Id.* Investors will not invest in the development of movies if they are not confident in an environment where they may be subject to litigation for use of unprotected works. *Id.* at 15. However, without investment money, new works (movies) cannot exist. *Id.*

²⁰² Brief of Heartland Angels, *supra* note 200, at 9–10. Heartland Angels is a private equity organization that seeks out small companies to invest in during early stages of company development. *Id.* at 1. The legislation especially impacts corporations such as Heartland that try to minimize and calculate the risk of their investments. *Id.* at 1–2. Uncertainty in the public domain for corporations like Heartland discourages such firms from investing in the copyright industry. *Id.*

²⁰³ *Id.* at 16. Private equity investment companies typically have a reasonable investment-backed expectation that works will remain in the public domain. *Id.* Section 514 raises licensing costs for target companies, which lower the investing company's return on investment ("ROI"). *Id.* A negative ROI will push a company past its willing level of risk aversion, thus thwarting investment in the creation of new works. *Id.*

²⁰⁴ Brief of Heartland Angels, *supra* note 199.

²⁰⁵ Brief for Google, *supra* note 144, at 4. For example, Google Scholar freely makes legal opinions in the public domain searchable and available. *Id.* The Google Art Project showcases high-resolution images of public domain art famous museums around the world. *Id.* Google has made millions of books available for online reading and download for free. *Id.*

²⁰⁶ "[T]he Public Domain is a laudable and important enterprise, [but] it is not necessarily profitable enough to offset its inherent exposure to copyright liability." Brief of Project Petrucci, *supra* note 172, at 9.

should adhere to. Founders of American copyright law based our Constitution on utilitarian principles that promote the spread of knowledge and information to the general public. It has always been held that innovation and creativity were of core importance in an efficiently functioning democratic society. With the passing of Section 514, the United States digressed from its national roots in order to comply with an international regime of copyright law. This decision in *Golan* takes steps to afford private economic benefit to a few copyright holders at the expense of the public at large: a notion against constitutional principles. Congress and the Supreme Court have rationalized American compliance with international law at the great cost of impeding education and culture, discouraging business and investment, and creating a grey cloud over the public domain and copyright industry. Prior to this decision, the United States has never succumbed to the pressures of international adherence at national expense, and we should not start now. Again, if it is unfair for the neighborhood to lose out on Granny's fruit baskets, it is equally unfair on the American public to lose access to works in the public domain.