

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854

LAWRENCE GOLAN, et. al.

Plaintiffs,

v.

JOHN ASHCROFT, in his official
capacity as Attorney General of the
United States

Defendant.

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Preliminary Statement

This memorandum defends the constitutionality of two recent amendments to the copyright law, the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. 105-298, Title I, 112 Stat. 2827 (1998), and §514 of the Uruguay Round Agreements Act (URAA), Pub. L. 103-465, 108 Stat. 4976 (1994). Both statutes enhance the copyright protection afforded to artistic works—the CTEA lengthens the duration of the copyright term by 20 years, and the URAA enlarges the scope of what the copyright law covers.

Plaintiffs are an assortment of people and corporations that, according to the Complaint, depend on works within the public domain for their livelihood or avocation. Some plaintiffs

allege that they are musicians whose orchestras, for financial reasons, mainly perform works from the public domain. Other plaintiffs allege that they record and sell albums of public-domain music. Still others allege that they distribute footage of movies, films, and television shows that are no longer protected by copyright.

Plaintiffs complain that both the CTEA and the URAA exceed the Constitution's bounds. The central tenet of the Complaint is that the public is best served by a shorter term of copyright protection, and one that protects less works rather than more. But this is a policy concern, better suited to a policy forum. To convince the Court to focus on this question, rather than the law, Plaintiffs import into their constitutional analysis policy questions, such as whether the statutes were wise or fair. Plaintiffs' policy positions were put before Congress and rejected. That debate should not be reopened. It is the courts' duty to apply and enforce settled law, not to revise that law to accord with individual notions of sound policy.

Plaintiffs' suit should be dismissed because so long as the Constitution delegates to Congress the power to pass a statute, and the statute does not trample on other parts of the Constitution, that statute is acceptable. The Constitution enabled Congress to pass both acts. Nothing elsewhere in the Constitution proscribes the acts. The Complaint, therefore, does not state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This brief first addresses the CTEA and then moves to the URAA.

Argument

I. The CTEA Is Constitutional.

The CTEA harmonizes the duration of the copyright term in the United States with that of

the European Union by adopting a basic copyright term equal to the life of the author plus 70 years. See CTEA §102(b), 112 Stat. 2827. The United States previously granted copyrights for the author's life plus 50 years. The CTEA adopts a fixed term of 95 years after publication or 120 years after creation, whichever is shorter, if the life of the author cannot be ascertained (i.e., anonymous and pseudonymous works) and for "works made for hire" by corporate entities. See CTEA §102(b)(3), 112 Stat. 2827. Like every previous act amending the duration of copyright protection, the CTEA extends the term of subsisting, as well as newly acquired, copyrights.

Plaintiffs' complaint should be dismissed because the CTEA in no way offends the Constitution: it falls squarely within the tradition of every copyright amendment before it—a tradition that the Supreme Court regards as authoritative; it is within the power delegated to Congress by the Copyright Clause of the Constitution; and it does not run afoul of any other constitutional provision. The Court of Appeals for the District of Columbia Circuit recently upheld the constitutionality of the CTEA over objections similar to Plaintiffs'. *Eldred v. Reno*, 239 F.3d 372 (2001), rehearing en banc denied 255 F.3d 849 (2001).

A. Rejecting the CTEA Would Disavow a National Tradition That the Supreme Court Regards as Authoritative.

The elements of the CTEA to which Plaintiffs object are identical to provisions of the United States' first copyright legislation, enacted in 1790. To reject the CTEA, therefore, would require the Court to reject the 1790 Act as well. Such a conclusion flies in the face of the deference with which the Supreme Court treats the legislation passed by the first Congress.

The Supreme Court treats legislative practice, established by the first Congress and

continued unchallenged over long periods of time, with great deference. Many members of that Congress participated in the convention that drafted the Constitution, giving them unique insight into the text's meaning. Statutes enacted at that time, therefore, bear a heavy presumption of constitutionality, because the framers would have been unlikely to overstep the bounds that they themselves created. Specifically with regard to the original copyright law, passed in 1790, the Court found the actions of the first Congress nearly conclusive:

The construction placed upon the Constitution ... by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

If a century of copyright tradition was “almost conclusive” in *Burrow-Giles*, more than two centuries of tradition must be accorded conclusive deference here. The CTEA's provisions have extensive lineage in Congress's previous copyright enactments, dating back to the initial copyright act passed by the first Congress. Specifically, every time Congress has extended the copyright term it has applied that extension to subsisting copyrights. Congress has also consistently looked to the term provided in Europe to inform its decisions on how long protection in the United States should be.

Never has an extension of the copyright term for new works not been accompanied by a parallel extension of the term of subsisting copyrights. Congress passed the first copyright act in 1790. Act of May 31, 1790, 1 Stat. 124. Since that time, “as the technology available to authors for creating and preserving their writings has changed, the governing statute has changed with

it.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 460 (1984) (Blackmun, J., dissenting). There have been five major revisions to the copyright law, including the CTEA. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of July 8, 1870, §§85-111, 16 Stat. 198; Act of Mar. 4, 1909, 35 Stat. 1075; Copyright Revision Act of 1976, 90 Stat. 2541. Four of these revisions extended the term of copyright protection. Each extension also applied to subsisting copyrights, to keep protection for existing copyright holders as similar as possible to the protection for new works. The CTEA’s term extension goes no further than this centuries-long tradition.

Congress also has consistently looked to European copyright terms to inform its own legislation. It modeled the first federal copyright act after the Statute of Anne, enacted in England in 1710. The Statute of Anne allowed an initial term of 14 years, with the possibility for a renewal term of 14 years if the author survived the first term. See 8 Anne, ch. 19 (1710). The 1790 Act provided an identical term. See Act of May 31, 1790, §1, 1 Stat. 124. In 1829, a Committee of the House of Representatives sent notes “to the ministers of the principal European nations, requesting information from each of them respecting the state of copy-rights in the nations they represented.” Noah Webster, *Collection of Papers on Political, Literary and Moral Subjects* 177-78 (1843). The response to the queries showed that the United States lagged “far behind the States of Europe in securing the fruits of intellectual labor, and in encouraging men of letters.” *House Report*, 7 Register of Debates in Congress App. CXIX (1830). So in 1831 Congress amended the copyright law to increase the initial term of protection from 14 to 28 years, making the total potential life of a copyright 42 years. The House Committee’s Report explained that the decision to extend the term was intended “to place authors in this country more

nearly on an equality with authors in other countries.” *Id.* The Committee Report for the 1909 Act followed suit, also investigating the state of European law. The Report detailed laws passed by Germany, England, and France, as well as the outcome of international conferences on copyright from Berne and Berlin. See S. Rep. 1108 at 5-6 (1909). The CTEA continues Congress’s longstanding resolve to keep abreast of international copyright law and respond accordingly.

B. The CTEA Is Fully Consistent with the Copyright Clause.

The Copyright Clause of the Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”. U.S. Const. art. I, §8, cl. 8. Plaintiffs argue that the CTEA exceeds that bound; that its term is not “limited”; that it does not “promote the Progress of Science and useful Arts”; and that it violates the originality requirement implicit in the Clause. These contentions, while inventive, depart too far from precedent to have any merit.

1. The CTEA Establishes a Copyright Term of Limited Duration.

The term set by the CTEA, equal to the life of the author plus 70 years, meets the requirement that the copyright term be limited. Webster’s Dictionary defines “limited” as “confined within limits: restricted in extent, number, or duration”. *Webster’s Third New International Dictionary* 1312 (1993). By that definition, or any other, the CTEA’s term is a limited period. It ends. It is “restricted in ... duration”. See also *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). That should be the end of Plaintiffs’ challenge, for *Pennock v.*

Dialogue, 27 U.S. 1, 16-17 (1829), teaches that, so long as the period is limited, the length of such a period shall be subject to the discretion of Congress. Plaintiffs insist, however, that linguistic definitions (and, it seems, Supreme Court precedent) are unavailing, for basic logic indicates that at some point many limited steps amount to a big, unlimited one.¹ But this case does not concern whether *every* finite term is within Congress’s power under the Copyright Clause. Courts respond only to cases or controversies. And the only controversy before the Court is whether the specific term established by the CTEA—the life of the author plus another 70 years—is limited or unlimited. The theoretical question whether a finite term could ever exceed a limited time is one for a different forum.

History proves that the framers used “limited” in the dictionary sense, and not in the novel way that Plaintiffs encourage. Before the Constitution was adopted, a quarrel developed over whether works of art should be protected in perpetuity or for a more limited duration. One side, led by Noah Webster, argued that authors should have just as much right to their product as farmers and mechanics have to theirs—a perpetual right. See Noah Webster, *Collection of*

¹Plaintiffs litter throughout the Complaint references to Congress’s 11 extensions in the past 40 years, or 9 extensions from 1962 to 1974. See, e.g., Compl. ¶¶ 2, 24, 95. This is irrelevant to whether the term of the author’s life plus 70 years is a “limited Time[]”. It is also misleading. Plaintiffs arrive at this exaggerated figure by counting the numerous interim extensions of the copyright term during the 1960s and 1970s after Congress had already decided to extend the copyright term to 75 years for already existing works. As with all provisions of the 1976 Act, which were worked out over a long period of time, the term extension was not enacted the moment it was agreed upon. Rather, Congress waited to enact it along with the rest of the omnibus copyright revision. Meanwhile, to avoid having works fall into the public domain because their second 28-year term was about to expire, and in recognition of the fact that it was already decided that the copyright term for those works would be extended by 19 years, Congress passed a series of holding actions to bridge the time to the 1976 Act.

Papers on Political, Literary and Moral Subjects 175 (1843). Webster traversed the states trying to convince state legislatures to pass copyright protection. See *id.* at 174. The Continental Congress sided with Webster and, lacking the power under the Articles of Confederation to legislate on intellectual property, passed a resolution encouraging the states to enact copyright protection. XXIV *Journals of the Continental Congress 1774-1789* 326-27 (1922). Though the resolution recommended a term of at least 14 years, noticeably absent was any suggested ceiling on the copyright term. The Continental Congress apparently did not object to the issuance of perpetual copyright terms. See Edward C. Walterscheid, *Defining The Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315, 348 (2000).

The Constitution ended the debate by restricting copyrights to a “limited” time; there would be no ownership in fee simple of intellectual property. But the debate itself illuminates the context for the framers’ use of the term “limited Times”. The definition of “limited” must be read in the context of the discourse over finite versus perpetual copyrights. “Limited” is the opposite of unlimited and nothing more. Plaintiffs’ suggestion that it denotes a more stringent measure has nothing to recommend it. It finds no support in the dictionary, Supreme Court precedent, or history.

The CTEA’s term of life of the author plus 70 years does not even approach ownership in perpetuity. It is, therefore, within the Copyright Clause’s durational boundary.

2. The CTEA Does Not Disturb the Copyright Clause’s Prefatory Phrase—“To promote the Progress of Science and useful Arts”.

Once the Court determines that the CTEA establishes a “limited” copyright term, its job is

done. The prefatory phrase of the Copyright Clause—“To promote the Progress of Science and useful Arts”—does not limit Congress’s power. Rather, Congress alone must determine what best promotes artistic progress. And even if the Court were to ensure the promotion of artistic progress, it would look to the copyright law as a whole, not individual statutes. Finally, and regardless of all else, the CTEA does “promote the Progress of Science and useful Arts”.

a. The Copyright Clause’s Prefatory Phrase Does Not Limit Congress’s Power.

As an initial matter, the phrase “To promote the Progress of Science and useful Arts” places no restriction on the power of Congress. See *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128, 130 (8th Cir. 1985); *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981). Rather, it introduces and explains the power granted to Congress. That is the most natural way to understand the introductory phrase alongside the remainder of the Copyright Clause. Plaintiffs read the phrase with an addition: “*Only* to promote the Progress of Science and useful Arts”. They conclude that the prefatory phrase is a substantive limit on Congress’s power. But the Constitution uses no such limiting word.

b. The Constitution Commits the Determination of What Best Promotes the “Progress of Science and useful Arts” to Congress Alone.

In any event, the decision on how best to effectuate copyright protection is committed by the Constitution to Congress alone. The Supreme Court has been clear: “[I]t is *Congress* that has been assigned the task of defining the scope of the limited monopoly that should be granted to

authors or to inventors in order to give the public appropriate access to their work product.”

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (emphasis added). See also *Pennock v. Dialogue*, 27 U.S. 1, 17 (1829) (“[T]he period shall be subject to the discretion of congress.”). And the courts are especially deferential to Congress “when major technological innovations alter the market for copyrighted materials.” *Sony Corp.* at 431. (Technological change was a major impetus behind the CTEA. See *infra*, pp. 13-16.) Plaintiffs ask this Court to do precisely what the Supreme Court has forbidden—to resolve a policy debate on the economics of optimal copyright duration. This is the wrong forum and the wrong time. “[I]t is not [the Court’s] role to alter the delicate balance Congress has labored to achieve.” *Stewart v. Abend*, 495 U.S. 207, 230 (1990). See also *Satellite Broadcasting and Communications Assn. v. FCC*, No. 01-1151, slip op. 59-61 (11th Cir. Dec. 7, 2001); *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 839 (10th Cir. 1993). Congress already held a policy debate, and the CTEA was its outcome. All of the arguments that Plaintiffs advance here were voiced strenuously in Congress. See, e.g., *Senate CTEA Report*, S. Rep. 104-315 at 29-36 (1996) (Views of Sen. Brown). They were the minority view. *Pennock*, *Sony Corp.*, and *Stewart* prohibit the Court from reopening the debate.

Committing to Congress’s sole discretion the power to set the copyright term makes sense. Copyright law must balance the rights of authors with the rights of the public. On one hand, strong copyright protection is necessary to provide incentives for authors to create new works. See *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Without that protection, infringers could

freely sell copies of any work, and at a cheaper price than the author, who must recoup not only the price of reproducing the work for distribution, but also the amount invested in creating the work in the first instance. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal. Stud. 325, 326-29 (1989). Infringers would typically corner the market, making it impossible for authors to recover their costs. As a result, authors would be unlikely to choose to create new works in the first place. On the other hand, the purpose of enticing authors to create is ultimately to benefit the public. If works do not eventually fall into the public domain, the public receives less benefit, and the purpose of copyright protection is defeated. It is a precarious balance: too little protection and authors will not create; too much protection and the public cannot make use of it. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

Identifying the optimal length of protection, so that authors have enough incentive to create and yet works still fall into the public domain, appears impossible—especially since the optimal point likely changes as technology develops. The framers could not identify the proper duration, and instead delegated to Congress the power to set the term. Economists today still bicker over the best solution. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283, 308-11 (1996) (detailing different economic approaches to copyright law). That Plaintiffs too disagree with Congress's assessment, then, is no wonder—especially given where their financial stake lies. But the Supreme Court has settled this debate about authority. It forbade the courts from giving a delicate policy decision constitutional significance.

c. **If Anything, Copyright Law as a Whole, Not Individual Amendments, Must “promote the Progress of Science and useful Arts”.**

Even if Plaintiffs’ promote-the-progress argument were legally cognizable, it would fail. Plaintiffs take the Copyright Clause’s supposed restriction—that the limited term provided by Congress must “promote the Progress of Science and useful Arts”—and somehow conclude that every statute affecting the copyright term must itself promote artistic progress. That assumption tramples roughshod over the Constitution’s text.

Plaintiffs isolate out one part of the Copyright Clause: “To promote the Progress of Science and useful Arts”. They ignore what follows it: “by securing for limited Times to Authors ... the exclusive Right to their respective Writings and Discoveries”. Yet the second phrase is crucial, for it explains *what* must promote artistic progress—the “exclusive Right” provided to authors, not every statute making changes to that right.

Analyzing the CTEA in a vacuum, as if it alone provides the “exclusive Right”, is wrong; copyright law in its entirety secures such protection, which the CTEA merely amended. Were the Court to review Congress’s legislation to ensure that it promotes artistic progress, then, it must review the copyright law as a whole (including, of course, the CTEA) to make that determination. Plaintiffs’ complaint makes no allegation that the copyright law in its present form does not promote artistic progress and, indeed, Plaintiffs cannot in good faith make any such claim. The period of exclusive use is essential to allowing authors an opportunity to recover their expenses. Without it few new works would be produced and little artistic progress could be achieved.

d. **Regardless, the CTEA Promotes the “Progress of Science and useful Arts”.**

At all events, the CTEA does promote artistic development, in at least three ways. First, the CTEA harmonizes the length of the United States’ copyright term with the European Union’s, which fosters international cooperation in the protection of intellectual property; second, the term extension ensures greater income to American copyright holders, which stimulates new works; and third, the CTEA assures prospective authors that Congress will safeguard their investments. These reasons, at a minimum, make clear that any disagreement with Congress is of a policy, not constitutional, nature.

One of Congress’s principal objectives in enacting the CTEA was to harmonize the copyright term in the United States with the term in the European Union, which mandates that member countries protect artistic works for the author’s life plus 70 years. See Council Directive 93/98, art. 1, 1993 O.J. (L 290) 9. Harmonization is particularly important now because, with the advent of the internet, national borders have increasingly less meaning in copyright law. At the push of a button, works can be shared with others over great distances instantly. In many cases, infringers can “post” files on websites, allowing anyone with a computer anywhere in the world to download the files. Lack of protection in one country, therefore, has ramifications worldwide, and the protection of intellectual property necessarily must be a cooperative global effort. As the Report of the Senate Judiciary Committee reflects:

The Committee recognizes the increasingly global nature of the market for U.S. copyrighted works. Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of

U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability.

Senate CTEA Report, S. Rep. No. 104-315 at 8 (1996). The Register of Copyrights echoed the Committee's sentiments, noting in particular how important it is that the United States, as a leading exporter of intellectual property, be at the forefront of the effort to protect copyrights globally. See *id.* at 8 (quoting the testimony of Marybeth Peters).

By matching the term in the United States with that of its European neighbors, the CTEA unifies the terms of the international community's major copyright protectors. This uniformity of copyright terms makes cooperation among them simpler. Better cooperation is necessary for effective protection, especially given the ease with which new technology enables infringement. And better protection directly stimulates new works, which is the core purpose of copyright protection. See *Goldstein v. California*, 412 U.S. 546, 555 (1973); *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975). Thus, the CTEA is plainly adapted to further the objectives of the Copyright Clause. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Another objective of the CTEA is to promote the development of new art by securing for American authors the increased resources that result from longer copyright terms. The Rule of the Shorter Term, adopted by the European Union, "permits countries with longer terms to limit protection of foreign works to the shorter term of protection granted in the country of origin." *Senate CTEA Report* at 9. Prior to the CTEA then, the European Union did not provide American authors with its standard term of the life of the author plus 70 years. Rather, the Rule of the

Shorter Term allowed it to protect American works for the shorter duration provided by the United States. Failing to provide a term equal to the European Union's thus deprived American authors of the benefits of 20 years of international copyright protection that they might otherwise have. *Id.* at 7.

The CTEA, by extending the United States' copyright term, allows American authors to take advantage of the full term provided by the European Union and the monetary benefits that accompany that term. Intellectual property is the United States' second largest export, accounting for roughly \$40 billion in foreign sales in 1994 alone, with a "huge percentage of [those exports going] to nations of the European Union." *Id.* at 9. The 20 years' extra protection as a result of the CTEA will earn significant returns for American authors, which they will likely reinvest in new art. See 140 Cong. Rec. E2263 (Oct. 6, 1994) (statement of Rep. Hughes); 140 Cong. Rec. S15473 (Dec. 20, 1994) (statement of Sen. Packwood). This spur toward new creative activity is the core purpose of copyright protection.

A final objective of the CTEA was to respond to recent technological advances that undermined previous copyright protections. Since the last time Congress revisited the length of the copyright term, the prevalence of video-recording devices, compact-disc burners, high-quality photocopying, and the internet—all of which gained commercial prevalence after 1976—have made an infringer's task easier. See Richard A. Posner, *Economic Analysis of Law* 48 (5th ed. 1998). As infringement becomes easier, the potential for authors to lose out on the benefits of their creations becomes more serious, and the value of copyright protection goes down. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal

Stud. 325, 363 (1989). One way of correcting for the declining value of a copyright is to lengthen its term. The longer a copyright exists, the longer an author may exploit his work, and the better chance he has to recoup his expenses.

By lengthening the copyright term, the CTEA rectifies the damage done to copyright protection by new infringing technologies. But it does more than that. The Act assuages the fears of any prospective authors who may worry that future technological advances will undermine their investment in new works. By responding to the current wave of technology, the CTEA demonstrates to authors that if the next wave of technology endangers copyright protection, Congress will respond to stabilize its worth. In that way, extending the term of subsisting copyrights directly encourages the creation of new works and is central to Congress's copyright mission.

Congress passed the CTEA with forethought and the intent to promote artistic progress. Plaintiffs may (and obviously do) disagree with Congress's analysis, but that misses the point. Enactment and amendment of the copyright law is the job of the political branches alone; Plaintiffs' policy disagreements, therefore, have no legal significance.

3. The Originality Requirement Is Irrelevant to Extensions of Subsisting Copyrights.

Plaintiffs next argue that the CTEA violates the constitutional requirement that works be original in order to qualify for protection, as first articulated in the *Trade-Mark Cases*, 100 U.S. 82 (1880), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). "The retroactive extension of the term of copyright to existing works", Plaintiffs reason, "violates this originality

requirement because, at the time the CTEA extended the term of copyright, the existing works added not even a modicum of creative thought or selection.” Compl. ¶ 98.

But Plaintiffs misread *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991), which held that to “qualify for copyright protection, a work must be original to the author.” Here the question before the Court is not whether the works “qualify” for copyright protection, for they are already copyrighted, but only whether an act of Congress may extend the term of subsisting protection. Originality is wholly beside the point. See *Eldred v. Reno*, 239 F.3d 372, 376-77 (D.C. Cir. 2001). As articulated in *Feist*, originality “means *only* that the work was independently created by the author ... and that it possesses at least some minimal degree of creativity.” 499 U.S. at 345 (emphasis added). Every work affected by the CTEA meets this test, and Plaintiffs do not allege otherwise.

C. The CTEA Does Not Run Afoul of Any Other Constitutional Provisions.

Once the Court finds that the Constitution grants to Congress the power to enact the CTEA, all the Defendant must show is that the statute does not trample on other parts of the Constitution. With that showing the statute must be upheld. Plaintiffs contend that the CTEA violates the first and fifth amendments. But both arguments misunderstand critical precedent, which leads them astray and into irrelevance.

1. Nothing in the CTEA Abridges the Freedom of Speech.

The second count of Plaintiffs’ complaint alleges that the CTEA unconstitutionally restricts speech because “plaintiffs can only publish [covered] works with the permission of the copyright holder.” Compl. ¶ 104. The argument falls short, and not only because its analysis

would force the conclusion that the *entire system* of copyright protection violates the first amendment.

The Supreme Court has already considered and rejected the notion that copyright protection unconstitutionally abridges free speech. The United States copyright law, of which the CTEA is a part, relies on the idea-expression dichotomy, meaning that the law “assures authors the right to their original *expression*, but encourages others to build freely upon the *ideas* and information conveyed by a work.” *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991) (emphasis added). See also 17 U.S.C. §102(b). In considering whether a copyright infringer could use the first amendment as a defense to his infringement (the very same argument Plaintiffs make, although they bring the challenge before they infringe rather than after), the Court held that the idea-expression distinction strikes “a *definitional balance* between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting the author’s expression.” *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (emphasis added). In other words, *by definition* copyright and free speech are separate; the Copyright Act falls on the expression side of the line, while the first amendment protects the idea side. This solution makes sense given that the first amendment’s core concern is the dissemination of ideas. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). It is further reinforced by the fair use doctrine, codified at 17 U.S.C. §107, which allows the use of copyrighted material for, among other things, “criticism, comment, news reporting, teaching ... scholarship, or research”. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) (holding that the fair use doctrine allays first amendment concerns about

copyright protection); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (same); *Eldred*, 239 F.3d at 376 (same); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999) (same).

So long as the CTEA does not change the copyright law’s reliance on this crucial distinction—and it does not—then the Act cannot abridge the freedom of speech. The D.C. Circuit put it succinctly: “The works to which the CTEA applies ... are by definition under copyright; that puts the works on the latter half of the ‘idea/expression dichotomy’ and makes them subject to fair use. This obviates the need for further inquiry.” *Eldred v. Reno*, 239 F.3d 372, 376 (2001).

2. The CTEA’s Application “Retroactively” Does Not Violate Substantive Due Process.

Nor does the CTEA violate the Due Process Clause of the fifth amendment. The Supreme Court held long ago that amendments to intellectual property legislation may affect existing works without violating the Constitution:

Whether these exceptions are well taken or not, must depend on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure....

McClurg v. Kingsland, 42 U.S. 202, 206 (1843). Here Congress wanted to fix suboptimal copyright protection and took rational action to do so. Due process requires nothing more.

Courts adjudicate due process claims under the lenient rational-basis standard. Unless Plaintiffs can “establish that the legislature has acted in an arbitrary and irrational way”, then the

law must be upheld. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955) (holding that the law must have a “rational relation” to a legitimate aim). Retroactive laws are subject to the same rational-basis review as any other statute, with the caveat that the Court must ensure not only that a rational basis exists for the statute, but also that a rational basis exists for the retroactive application of that statute. See *United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery*, 428 U.S. at 17.

Congress’s reasons for passing the CTEA were neither arbitrary nor irrational. The Act enhances copyright protection in order to promote artistic progress—a rational legislative goal. Nor does the CTEA offend the Due Process Clause by acting retroactively. The statute takes the date *in the future* on which a copyright is to expire and extends it 20 years forward. Further, the CTEA affixes no liability to any private party for any past action. It does not, in other words, look at actions already taken by Plaintiffs and make them pay as a result of those actions. That was the main concern in *Sperry Corp.*, *Usery*, and *Pension Benefit Guaranty* (though those statutes were upheld). Nor does the CTEA target any unpopular groups for retribution—often a reason for holding retroactive legislation outside the bounds of due process. See, e.g., *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Quite the opposite, Plaintiffs’ main gripe is that the CTEA disadvantages the entire public domain, which is the common property of *all* citizens.

Still, Plaintiffs proffer an alternate standard, quoting language that disparages retroactivity from the splintered majority in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

But the opinion from *Eastern Enterprises* that binds lower courts as precedent is Justice O'Connor's plurality opinion, because it took the narrowest path to the judgment. See *Marks v. United States*, 430 U.S. 188, 193 (1977). That opinion explicitly refused to consider the due process claim, holding that the takings claim was dispositive. *Eastern Enterprises*, 524 U.S. at 538. Thus, *Eastern Enterprises* is completely irrelevant to this case. It does not affect precedent like *Sperry Corp.*, and *Usery*, the due process decisions that bind this Court. To the extent that Justice O'Connor's opinion discussed due process at all, it confirmed those precedents. See *Eastern Enterprises*, 524 U.S. at 537 ("To succeed [on a due process claim], Eastern would be required to establish that its liability under the Act is 'arbitrary and irrational.'").

Plaintiffs' allegation that the CTEA unsettled their expectations by depriving them of works that would have fallen into the public domain is beside the point—*Usery* rejected the position that unsettled expectations have legal consequence, and it did so in the context of a more onerous statute. The Court held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." 428 U.S. at 16. Plaintiffs throw out terms like "unsettled expectations" in the hope of finding a legal hook that will convince the Court to reopen the legislative debate and look at their policy argument why the CTEA should not have been passed. But the Supreme Court has provided clear guidance to the lower courts: "It is enough to say that the Act approached the problem ... rationally; whether a [different] scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19.

II. The URAA Fully Comports With the Constitution.

Section 514 of the URAA amended existing copyright law to bring the United States into compliance with Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1989), available at <<http://www.wipo.org/treaties/ip/berne/>>. The Act restores copyright protection to original works of foreign origin whose authors at some point in the past failed to comply with the formalities required by the United States—formalities that Congress has since jettisoned. See URAA §514(h)(6)(C)(i), codified at 17 U.S.C. §104A(h)(6)(C)(i). The Act also restores protection to foreign works that were not eligible for protection at the time they were created because the United States did not have reciprocal arrangements with the source country. See URAA §514(h)(6)(C)(iii). A copyright restored by the URAA subsists for the remainder of the period that would have been granted had the work been protected from its inception. See URAA §514(a)(1)(B), codified at 17 U.S.C. §104A(a)(1)(B).

Plaintiffs' claim against the URAA should be dismissed because the Act in no way offends the Constitution: The Copyright Clause delegates to Congress the power to pass the Act. The Act is also proper as an implementation of the Berne Convention, signed pursuant to the treaty power and implemented pursuant to the Necessary and Proper Clause. Finally, the URAA does not violate other constitutional proscriptions.

A. The URAA is Within the Congress's Power Under the Copyright Clause.

Though nothing in the text of the Copyright Clause supports their view, Plaintiffs' main attack against the URAA contends that, by restoring copyright protection to works in the public domain, the Act runs afoul of the Copyright Clause. Plaintiffs also contend that the restoration of

protection neither “promote[s] the Progress of Science and useful Arts” nor satisfies the Copyright Clause’s originality requirement. Not only do these arguments fail, but they are made irrelevant by the power granted to the federal government to sign and implement treaties.

1. **The 1790 Copyright Act Proves that the URAA’s Removal of Works from the Public Domain Is Constitutional.**

Plaintiffs incorrectly brand the URAA’s restoration of works from the public domain as “a sweeping change from prior copyright law”. Compl. ¶ 138. In truth, the URAA has antecedents in the legislation passed by the first Congress. The first copyright act, passed in 1790, granted protection to both new works and works “already printed within these United States” at the time of enactment. Act of May 31, 1790, §1, 1 Stat. 124. (Works already in existence had not been protected in the United States previously because the Articles of Confederation did not grant the Continental Congress power to protect intellectual property.) It is not a remarkable departure from previous copyright law, therefore, to issue copyrights for existing works that had been in the public domain. Precisely the opposite, it was done by the first Congress, which did not view the Copyright Clause as a barrier to such copyright restoration. And the views of the first Congress hold unique influence in the Supreme Court’s jurisprudence. The Court has said so *specifically with respect to the Copyright Act of 1790*:

The construction placed upon the Constitution ... by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884). What the Court found

“almost conclusive” after a century must be conclusive after more than 200 years. The 1790 Act, which restored copyrights to public domain works, was enacted by the first Congress and not disputed since then. It is, therefore, constitutional.

The URAA is factually indistinguishable from the 1790 copyright legislation. Both statutes take works out of the public domain and restore protection to them. (And while some works restored by the 1790 Act had previously been protected by individual states, *all* works restored by the URAA were protected in their source country.) If the 1790 Act was constitutional, then so must the URAA be.

_____ Presumably Plaintiffs’ challenge relies on language in recent Supreme Court opinions indicating that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain”. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). See also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57, 61 (1969). This concept comes originally from *Pennock v. Dialogue*, 27 U.S. 1 (1829). See *Bonito Boats*, 489 U.S. at 129 (making clear the connection between the principle and the *Pennock* decision). While the dicta in these decisions has not always fully expounded the rule, the proper scope of *Pennock* is narrower than the isolated quotation suggests.

Once an author creates a work he has a choice: either seek protection for the creation or donate it to the public domain. If an author chooses protection, he gets a limited term during which he can prevent others from infringing on his property right. At any time during the period the author may give up his rights and allow the public to make free use of the work. If an author

chooses donation, however, that decision is final. “[O]nce gone, [the protected work] cannot afterwards be resumed at [an author’s] pleasure; for, where gifts are once made to the public in this way, they become absolute.” *Pennock*, 27 U.S. at 16.

Pennock’s analysis assumes only these two options: protection or donation. But there is a third possibility. Authors in some foreign countries are not free to make a choice either way; the United States and their home country have no reciprocal agreement for the protection of intellectual property, or the formalities formerly required by the United States effectively deprived authors of the choice because they were unaware of the steps necessary to protect their work. *Pennock* was concerned that authors might donate a work and then renege on that decision. But these foreign authors never made the “voluntary act or acquiescence in the public sale” that constitutes “an abandonment of [their] right.” *Bonito Boats*, 489 U.S. at 149 (quoting *Pennock* at 21-22). They are beyond the scope of the *Pennock* question, which dealt only with one particular problem. While isolated dicta in other cases may seem to go beyond that result, *Pennock* and *Bonito Boats*—the only two cases to offer any analysis—clarify the rule.

The 1790 Act was consistent with the *Pennock* Rule. Prior to 1790, the Articles of Confederation did not grant the United States power to protect intellectual property, and so authors did not have the choice to protect or donate their works. The Act’s restoration of copyright protection for those works was constitutionally proper, therefore, because it only restored a choice that had been denied the authors when they created their works. Nothing in the 1790 Act allowed an author to renege on a donation made to the public domain.

The URAA also rectifies authors’ lack of choice. Section 514(h)(6)(C) of the URAA

expressly limits the Act's application to works which lacked national eligibility or failed to comply with the formalities of United States copyright law. In either case, the authors were prevented from choosing protection or donation. The URAA, therefore, goes no further than the original copyright act of 1790. *Pennock* and *Bonito Boats* do not undermine the permissibility of these two statutes.

2. **Whether the URAA Promotes “the Progress of Science and Useful Arts” Has No Legal Consequence.**

Plaintiffs further argue that restoring copyright protection to works already existing in the public domain does nothing to “promote the Progress of Science and useful Arts”. They conclude that the URAA must be unconstitutional.

But Plaintiffs ask the wrong question, and their answer is, therefore, meaningless. As discussed with respect to the CTEA, and equally applicable here, Plaintiffs make three critical errors. First, the prefatory phrase of the Copyright Clause is not a substantive limit on Congress's power. See *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128, 130 (8th Cir. 1985); *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981). It merely explains why the power was granted to Congress. Next, Courts do not review the wisdom of intellectual property legislation. The Constitution commits to Congress alone the ability to adjust the scope of copyright protection. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). “[I]t is not [the Court's] role to alter the delicate balance Congress has labored to achieve.” *Stewart v. Abend*, 495 U.S. 207, 230 (1990). See *supra*, pp. 9-11. Finally, the Copyright Clause directs that copyright protection as a

whole, not individual amendments to the law, promote such progress. See *supra*, p. 12. So whether the URAA itself promotes artistic progress is irrelevant.

Regardless, the URAA does promote artistic progress in at least two ways. First, the URAA implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (1989), available at <<http://www.wipo.org/treaties/ip/berne/>>. By complying with the requirements of the Convention, the United States will earn reciprocal protection for American authors and the moral authority with which to pressure foreign countries into providing that protection. Better protection abroad will increase the income received by American authors, which will stimulate new works of art. Second, by refusing to penalize foreign authors for failing to comply with formalities that the United States has long since abandoned, the URAA provides greater security for authors, which makes new works more likely.

A core reason that Congress enacted the URAA was to implement fully the Berne Convention, Article 18(1) of which requires the protection of “all works which ... have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” See *Senate URAA Report*, S. Rep. 103-412 at 225 (1994). By fulfilling its Berne obligations, the United States positions itself to make sure that American authors receive reciprocal treatment from other Berne signatories:

The reason for our adopting this policy is simple: If the United States passes a law that protects previously produced foreign works, then we will have every right to expect certain foreign countries to pass laws protecting previously produced U.S. works.

140 Cong. Rec. H11459 (Nov. 29, 1994) (statement of Rep. Berman). Prior to the URAA it would have been difficult, if not impossible, for the United States to persuade other countries to

implement Berne's protections, which the United States itself refused to provide. Such a request would not have been taken seriously. See David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55-2 Law & Contemp. Probs. 211, 216 (1992). As a result of the URAA, the United States now may credibly urge other countries to protect the rights of American authors. As noted above, American authors earn a great deal from intellectual property exports. Reciprocal restorations will, therefore, produce a significant new income stream from already existing works. This directly stimulates artistic creativity because authors tend to reinvest their earnings in new works of art. See discussion, *supra*, pp. 14-15.

Another core motivation for the URAA was that Congress did not think it fair to penalize foreign authors for not complying in the past with copyright formalities that the authors were unlikely to have been aware of, and which the United States has since cast off. There are two ready examples. First, §304 of the 1976 Copyright Act allowed authors to renew their copyrights *only* by application to the Copyright Office within one year prior to the expiration of the original term. See Pub. L. 94-553, 90 Stat. 2573. The Copyright Amendments Act of 1992, Pub. L. 102-307, 106 Stat. 264, §102(a)(2)(A)(ii), alleviated the necessity of a formal renewal request, vesting the renewal automatically with the copyright holder. A second formality, §401 of the 1976 Act, required that a copyright notice appear on all publicly distributed copies of a protected work. Failure to do so would, in many cases, forfeit protection. This rule was repealed by the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, §7. Neither the Copyright Amendments Act nor the Berne Implementation Act took any step to help authors who

had already lost their copyrights for failure to comply with the formalities that the acts eliminated. This despite the fact that the formalities were much more onerous for foreign authors, who were less likely to be aware of the copyright requirements than were American authors. The URAA finally implements such an overdue measure:

As difficult as it has been for American authors to comply with the strict formalities that were the hallmark of United States copyright law for so many years, it has been even more difficult for foreign authors. Many lost their U.S. copyrights to the requirements of our law. Now that we have essentially eliminated formalities from our copyright system, it is appropriate to restore these copyrights and redress the draconian effects of prior law.

Joint House and Senate Committee Hearings on the URAA, 103rd Cong. 191 (1994) (statement of Shira Perlmutter).

The URAA’s restoration of protection to authors injured by legal formalities promotes artistic progress. It signals to prospective authors that the United States will not use procedural barriers to cheat them out of their right to a limited period of exclusive use of their creation—that the United States respects the rights of authors and will use its power to ensure that their investments are safeguarded. Better security directly promotes the creation of new works.

3. The URAA Protects Only Original Works, as the Copyright Clause Requires.

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), holds that “to qualify for copyright protection, a work must be original to the author.” 499 U.S. at 345. Plaintiffs argue that the URAA runs afoul of that requirement and must be held unconstitutional. Nothing in the URAA, however, indicates anything other than that works must be original to qualify for protection—§514(h)(6) of the Act expressly limits the URAA’s applicability to

“original work[s] of authorship”. Plaintiffs insist that *Feist* requires more. Although not exactly clear, they seem to argue that creativity wears off; that works which once were original become less so with the passage of time. Plaintiffs have misread *Feist* again, which rejects their position. “Original, as the term is used in copyright, means *only* that the work was independently created by the author (as opposed to copied from other works), and that it possess some minimal degree of creativity.” *Feist*, 499 U.S. at 345 (emphasis added). Works eligible under the URAA, by the Act’s own terms, meet *Feist*’s requirements.

B. The URAA is Also Proper Under Congress’s Power to Implement Treaties.

The URAA is also an acceptable exercise of the power of the United States to make and implement treaties. The Constitution grants to the President the power, “by and with the Advice and Consent of the Senate to make treaties, provided two thirds of the Senators present concur”. U.S. Const. art. II, §2, cl. 2. “If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, §8, as a necessary and proper means to execute the powers of the Government.” *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

Section 514 of the URAA implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works. The United States had the power to sign the Berne Convention, and Congress, therefore, had the power to implement it.

Missouri v. Holland demonstrates conclusively this point. At issue in that case was the Migratory Bird Treaty Act, which increased protection for wild birds domestically in order to comply with the Migratory Bird Treaty. The Court held that the powers granted to Congress by Article I do not provide the outer boundaries for the Article II power to make international

agreements. So, while admitting that Congress could not enact the legislation using the powers granted to it by Article I of the Constitution, the Court held that the treaty was valid under the treaty power, and its implementing legislation sound under the Necessary and Proper Clause.² What is true for the Migratory Bird Treaty Act is true for the URAA. Article 18 of the Berne Convention is a topic fit for international agreement and does not “contravene any prohibitory words to be found in the Constitution.” 252 U.S. at 433. See also *Reid v. Covert*, 354 U.S. 1, 16-17 (1957). The President, therefore, may sign the Convention and Congress may pass the URAA to implement it.

C. The URAA Does Not Violate Any Other Provisions of the Constitution.

Once the Court finds that either the Copyright Clause or the treaty power (with its Necessary and Proper corollary) delegates to Congress the power to pass the URAA, the Defendant must then demonstrate that the Act does not abridge any other constitutional rights. With that demonstration, the Court must dismiss the action. Because the URAA infringes on neither the first nor fifth amendments, the Act should be upheld.

1. The URAA Does Not Unconstitutionally Restrict Free Speech.

Plaintiffs take the same first amendment stance against the URAA that they did against the CTEA. The defendant incorporates here the discussion *supra*, pp. 17-19. The plaintiffs misunderstand the idea/expression dichotomy, which dooms their argument.

²The URAA is an even stronger case than *Missouri* because Congress can pass this legislation under the Copyright Clause, or even the Foreign Commerce Clause, whereas in *Missouri* Congress could not have passed the Act independent of a treaty.

2. The URAA Does Not Violate the Due Process Clause.

Nor does the URAA offend the Due Process Clause. All laws, whether retroactive or not, must bear only a rational relation to a legitimate legislative purpose. See *United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The URAA undeniably does so and Plaintiffs do not (and cannot in good faith) allege otherwise. See *supra*, pp. 19-20.

Plaintiffs propose an alternate standard, but erroneously cite a takings case to support their proposition that the URAA is subject to a higher standard than *Sperry Corp.* and *Pension Benefit Guaranty* suggest. See *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). *Eastern Enterprises* cannot (and does not purport to) change the Supreme Court's consistently applied standard—all laws must bear only a rational relation to a legitimate legislative purpose.

But Plaintiffs' claim would fail even under their own standard. The Supreme Court has decided that retroactivity is not a reason to reject intellectual property legislation. *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843). Further, the URAA is not retroactive in any significant way. The Act restores copyright protection to works *prospectively only*. Had Congress granted copyright protection backwards in time—so that authors were entitled to royalties for use of their work that had already occurred—it would be a different story. But the URAA protects authors only from infringement after the statute's enactment. And Congress built extra precautions into the Act specifically so as not to upset settled expectations. First, Congress gave people substantial time to prepare. The United States signed the Berne Convention in March 1989. The URAA was not passed until December 1994. The effective date of the Act was not until January

1996. See 60 Fed. Reg. 7793 (Feb. 3, 1995). That is almost seven years notice of this change in law. The advance warning belies any claim of undue surprise.

Congress went further. The URAA protects “reliance parties” from any undue burden that the Act might otherwise cause. A reliance party is typically one who was using a work prior to the enactment of the URAA. See URAA §514(h)(4), codified at 17 U.S.C. §104A(h)(4). (It appears from the Complaint that most of the plaintiffs qualify under this provision.) Reliance parties may continue to use protected material unless and until the owner of the restored copyright files a “Notice of Intent to Enforce,” either with the Copyright Office or with the party himself. Once a Notice has been filed, a reliance party still has one full year with which to continue to use the protected work. This use can include the sale of previously manufactured audio recordings, performance of music, or display of work publicly. See URAA §514(d). The URAA, then, goes out of the way to treat reliance parties fairly and to make sure no citizen is unfairly surprised.

“Derivative works” that were created before the URAA’s enactment receive even greater protection than reliance parties. 17 U.S.C. §101 defines a “derivative work” as “a work based upon one or more preexisting works A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.” Section 514(d)(3)(A), codified at 17 U.S.C. §104A(d)(3)(A), grants to the author of a derivative work a mandatory license from the author of the original work. So long as the derivative author pays “reasonable compensation” to the original author, he may continue to exploit the derivative work for the entire period of original work’s copyright. This is just one more example of the deliberate steps Congress took to ensure that no party was unfairly

surprised by the URAA.

The protections built into the URAA, then, prevent unsettled expectations, contrary to Plaintiffs' claims. Anyone who used a work prior to the URAA is protected as a reliance party, and if they created a derivative work they receive even greater protection. Anyone who does not qualify as a reliance party could not have been using the work prior to the URAA and cannot, therefore, claim an unsettled expectation at the prospective copyright protection provided by the Act. When the full scope of the URAA is evaluated under the correct standard, as articulated by the Supreme Court, it is clear that nothing about the URAA is abusive, and that the Act relates rationally to a legitimate congressional goal.

Conclusion

For the foregoing reasons, Defendant's motion to dismiss should be granted. At their essence, Plaintiffs' arguments amount to one thing—policy reasons that the CTEA and the URAA are undesirable. But the legislative debate is over; Congress considered and passed both measures and the President signed them into law. Especially in the area of intellectual property, where all protection for authors comes at the public's expense, the Constitution commits to the political branches alone the responsibility for shaping the balance of competing interests.

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I certify that, on December 13, 2001, I caused a copy of the foregoing Motion to Dismiss and accompanying Memorandum to be served by first-class mail, postage prepaid, upon counsel at the following addresses:

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