

LAWRENCE GOLAN v. ERIC H. HOLDER, JR., ATTORNEY GENERAL

132 S.Ct. 873 (2012)

Supreme Court of the United States.

Decided January 18, 2012.

- 5 GINSBURG, delivered the opinion of the Court.
- 6 The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention or Berne), which took effect in 1886, is the principal accord governing international copyright relations. Latecomer to the international copyright regime launched by Berne, the United States joined the Convention in 1989. To perfect U. S. implementation of Berne, and as part of our response to the Uruguay Round of multilateral trade negotiations, Congress, in 1994, gave works enjoying copyright protection abroad the same full term of protection available to U. S. works. Congress did so in §514 of the Uruguay Round Agreements Act (URAA), which grants copyright protection to preexisting works of Berne member countries, protected in their country of origin, but lacking protection in the United States for any of three reasons: The United States did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had failed to comply with U. S. statutory formalities (formalities Congress no longer requires as prerequisites to copyright protection).
- 7 The URAA accords no protection to a foreign work after its full copyright term has expired, causing it to fall into the public domain, whether under the laws of the country of origin or of this country. Works encompassed by §514 are granted the protection they would have enjoyed had the United States maintained copyright relations with the author's country or removed formalities incompatible with Berne. Foreign authors, however, gain no credit for the protection they lacked in years prior to §514's enactment. They therefore enjoy fewer total years of exclusivity than do their U. S. counterparts. As a consequence of the barriers to U. S. copyright protection prior to the enactment of §514, foreign works "restored" to protection by the measure had entered the public domain in this country. To cushion the impact of their placement in protected status, Congress included in §514 ameliorating accommodations for parties who had exploited affected works before the URAA was enacted.
- 8 Petitioners include orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works §514 removed from the public domain. They maintain that the Constitution's Copyright and Patent Clause, Art. I, §8, cl. 8, and First Amendment both decree the invalidity of §514. Under those prescriptions of our highest law, petitioners assert, a work that has entered the public domain, for whatever reason, must forever remain there.
- 9 In accord with the judgment of the Tenth Circuit, we conclude that §514 does not transgress constitutional limitations on Congress' authority. Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.

I

A

- 12 Members of the Berne Union agree to treat authors from other member countries as well as they treat their own. Berne Convention, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, Art. 1, 5(1), 828 U. N. T. S. 221, 225, 231-233. Nationals of a member country, as well as any author who publishes in one of Berne's 164 member states, thus enjoy copyright protection in nations across the globe. Art. 2(6), 3. Each country, moreover, must afford at least the minimum level of protection specified by Berne. The copyright term must span the author's lifetime, plus at least 50 additional years, whether or not the author has complied with a member state's legal formalities. Art. 5(2), 7(1). And, as relevant here, a work must be protected abroad unless its copyright term has expired in either the country where protection is claimed or the country of origin. Art. 18(1)-(2).[...]
- 13 A different system of transnational copyright protection long prevailed in this country. Until 1891, foreign works were categorically excluded from Copyright Act protection. Throughout most of the 20th century, the only eligible foreign authors were those whose countries granted reciprocal rights to U. S. authors and whose works were printed in the United States.[...] [2] For domestic and foreign authors alike, protection hinged on compliance with notice, registration, and renewal formalities.
- 14 The United States became party to Berne's multilateral, formality-free copyright regime in 1989. Initially, Congress adopted a "minimalist approach" to compliance with the Convention. [...] The Berne Convention Implementation Act of 1988 (BCIA), 102 Stat. 2853, made "only those changes to American copyright law that [were] clearly required under the treaty's provisions,"[...]. Despite Berne's instruction that member countries—including "new accessions to the Union"—protect foreign works under copyright in the country of origin, Art. 18(1) and (4), [...] the BCIA accorded no protection for "any work that is in the public domain in the United States," §12, 102 Stat. 2860. Protection of future foreign works, the BCIA indicated, satisfied Article 18. [...]
- 15 The minimalist approach essayed by the United States did not sit well with other Berne members.[...]
- 16 Berne, however, did not provide a potent enforcement mechanism. The Convention contemplates dispute resolution before the International Court of Justice. Art. 33(1). But it specifies no sanctions for noncompliance and allows parties, at any time, to declare themselves "not . . . bound" by the Convention's dispute resolution provision. [...] Unsurprisingly, no enforcement actions were launched before 1994. [...]
- 17 The landscape changed in 1994. The Uruguay round of multilateral trade negotiations produced the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[...] The United States joined both. TRIPS mandates, on pain of WTO enforcement, implementation of Berne's first 21 articles. TRIPS, Art. 9.1, 33 I. L. M. 1197, 1201 (requiring adherence to all but the "moral rights" provisions of Article 6*bis*). The WTO gave teeth to the Convention's requirements: Noncompliance with a WTO ruling could subject member countries to

tariffs or cross-sector retaliation. [...] The specter of WTO enforcement proceedings bolstered the credibility of our trading partners' threats to challenge the United States for inadequate compliance with Article 18. [...]

- 18 Congress' response to the Uruguay agreements put to rest any questions concerning U. S. compliance with Article 18. Section 514 of the URAA[...] extended copyright to works that garnered protection in their countries of origin,[...] but had no right to exclusivity in the United States for any of three reasons: lack of copyright relations between the country of origin and the United States at the time of publication; lack of subject-matter protection for sound recordings fixed before 1972; and failure to comply with U. S. statutory formalities (*e.g.*, failure to provide notice of copyright status, or to register and renew a copyright).[...][11]
- 19 Works that have fallen into the public domain after the expiration of a full copyright term—either in the United States or the country of origin—receive no further protection under §514. *Ibid.*[12] Copyrights "restored"[13] under URAA §514 "subsist for the remainder of the term of copyright that the work would have otherwise been granted. . . if the work never entered the public domain." §104A(a)(1)(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. Their total term, therefore, falls short of that available to similarly situated U. S. works.
- 20 The URAA's disturbance of the public domain hardly escaped Congress' attention. Section 514 imposed no liability for any use of foreign works occurring before restoration. In addition, anyone remained free to copy and use restored works for one year following §514's enactment. See 17 U. S. C. §104A(h)(2)(A). Concerns about §514's compatibility with the Fifth Amendment's Takings Clause led Congress to include additional protections for "reliance parties"—those who had, before the URAA's enactment, used or acquired a foreign work then in the public domain. See §104A(h)(3)-(4).[14] Reliance parties may continue to exploit a restored work until the owner of the restored copyright gives notice of intent to enforce— either by filing with the U. S. Copyright Office within two years of restoration, or by actually notifying the reliance party. §104A(c), (d)(2)(A)(i), and (B)(i). After that, reliance parties may continue to exploit existing copies for a grace period of one year. §104A(d)(2)(A)(ii), and (B)(ii). Finally, anyone who, before the URAA's enactment, created a "derivative work" based on a restored work may indefinitely exploit the derivation upon payment to the copyright holder of "reasonable compensation," to be set by a district judge if the parties cannot agree. §104A(d)(3).

B

- 22 In 2001, petitioners filed this lawsuit challenging §514. They maintain that Congress, when it passed the URAA, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations.[...] The District Court granted the Attorney General's motion for summary judgment. [...]

- 23 The Court of Appeals for the Tenth Circuit affirmed in part. [...] The public domain, it agreed, was not a "threshold that Congress" was powerless to "traverse in both directions." [...] But §514, as the Court of Appeals read our decision in *Eldred v. Ashcroft*, 537 U. S. 186 (2003), required further First Amendment inspection[...]. [...] The case was remanded with an instruction to the District Court to address the First Amendment claim in light of the Tenth Circuit's opinion.
- 24 On remand, the District Court's starting premise was uncontested: Section 514 does not regulate speech on the basis of its content; therefore the law would be upheld if "narrowly tailored to serve a significant government interest." [...] Summary judgment was due petitioners, the court concluded, because §514's constriction of the public domain was not justified by any of the asserted federal interests: compliance with Berne, securing greater protection for U. S. authors abroad, or remediation of the inequitable treatment suffered by foreign authors whose works lacked protection in the United States. [...]
- 25 The Tenth Circuit reversed. [...]
- 26 We granted certiorari to consider petitioners' challenge to §514 under both the Copyright Clause and the First Amendment, [...] and now affirm.

II

- 28 We first address petitioners' argument that Congress lacked authority, under the Copyright Clause, to enact §514. The Constitution states that "Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." Art. I, §8, cl. 8. Petitioners find in this grant of authority an impenetrable barrier to the extension of copyright protection to authors whose writings, for whatever reason, are in the public domain. We see no such barrier in the text of the Copyright Clause, historical practice, or our precedents.

A

- 30 The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain. [...] Petitioners' contrary argument relies primarily on the Constitution's confinement of a copyright's lifespan to a "limited Tim[e]." "Removing works from the public domain," they contend, "violates the `limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires." [...]
- 31 Our decision in *Eldred* is largely dispositive of petitioners' limited-time argument. There we addressed the question whether Congress violated the Copyright Clause when it extended, by 20 years, the terms of existing copyrights. [...] Ruling that Congress acted within constitutional bounds, we declined to infer from the text of the Copyright Clause "the command that a time prescription, once set, becomes forever `fixed' or `inalterable.'" [...] "The word `limited,'" we observed, "does not convey a meaning so constricted." [...] Rather, the term is best understood to mean "confine[d] within certain bounds," "restrain[ed]," or "circumscribed." [...] The construction petitioners tender closely resembles the definition rejected in *Eldred* and is similarly infirm.[...]

- 33 The difference, petitioners say, is that the limited time had already passed for works in the public domain. What was that limited term for foreign works once excluded from U. S. copyright protection? Exactly "zero," petitioners respond.[...] We find scant sense in this argument, for surely a "limited time" of exclusivity must begin before it may end.[...]
- 34 Carried to its logical conclusion, petitioners persist, the Government's position would allow Congress to institute a second "limited" term after the first expires, a third after that, and so on. Thus, as long as Congress legislated in installments, perpetual copyright terms would be achievable. As in *Eldred*, the hypothetical legislative misbehavior petitioners posit is far afield from the case before us. [...] In aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored foreign authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights.

B

- 36 Historical practice corroborates our reading of the Copyright Clause to permit full U. S. compliance with Berne. Undoubtedly, federal copyright legislation generally has not affected works in the public domain. Section 514's disturbance of that domain, petitioners argue, distinguishes their suit from *Eldred*'s. In adopting the CTEA, petitioners note, Congress acted in accord with "an unbroken congressional practice" of granting pre-expiration term extensions[...]. No comparable practice, they maintain, supports §514.
- 37 On occasion, however, Congress has seen fit to protect works once freely available. Notably, the Copyright Act of 1790 granted protection to many works previously in the public domain. Act of May 31, 1790 (1790 Act), §1, 1 Stat. 124 (covering "any map, chart, book, or books already printed within these United States"). Before the Act launched a uniform national system, three States provided no statutory copyright protection at all.[...] Of those that did afford some protection, seven failed to protect maps;^[18] eight did not cover previously published books;^[19] and all ten denied protection to works that failed to comply with formalities.^[20] The First Congress, it thus appears, did not view the public domain as inviolate. [...]
- 38 Subsequent actions confirm that Congress has not understood the Copyright Clause to preclude protection for existing works. Several private bills restored the copyrights of works that previously had been in the public domain. [...] These bills were unchallenged in court.
- 39 Analogous patent statutes, however, were upheld in litigation.[...]
- 41 Congress has also passed generally applicable legislation granting patents and copyrights to inventions and works that had lost protection. [...]
- 42 Pointing to dictum in *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1 (1966), petitioners would have us look past this history. In *Graham*, we stated that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." [...] But as we explained in *Eldred*, this passage did not speak to the constitutional limits on

Congress' copyright and patent authority. Rather, it "addressed an invention's very eligibility for patent protection." [...]

- 43 Installing a federal copyright system and ameliorating the interruptions of global war, it is true, presented Congress with extraordinary situations. Yet the TRIPS accord, leading the United States to comply in full measure with Berne, was also a signal event. [...] Given the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly. [...]

C

- 45 Petitioners' ultimate argument as to the Copyright and Patent Clause concerns its initial words. Congress is empowered to "promote the Progress of Science and useful Arts" by enacting systems of copyright and patent protection. U. S. Const., Art. I, §8, cl. 8. Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts. [...]
- 46 The "Progress of Science," petitioners acknowledge, refers broadly to "the creation and spread of knowledge and learning." [...] They nevertheless argue that federal legislation cannot serve the Clause's aim unless the legislation "spur[s] the creation of . . . new works." [...] Because §514 deals solely with works already created, petitioners urge, it "provides no plausible incentive to create new works" and is therefore invalid. Reply Brief 4.[...]
- 47 The creation of at least one new work, however, is not the sole way Congress may promote knowledge and learning. In *Eldred*, we rejected an argument nearly identical to the one petitioners rehearse. The *Eldred* petitioners urged that the "CTEA's extension of existing copyrights categorically fails to 'promote the Progress of Science,' . . . because it does not stimulate the creation of new works." [...] In response to this argument, we held that the Copyright Clause does not demand that each copyright provision, examined discretely, operate to induce new works. Rather, we explained, the Clause "empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." [...] And those permissible ends, we held, extended beyond the creation of new works. [...]
- 48 Even were we writing on a clean slate, petitioners' argument would be unavailing. Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to "incentives for creation." [...] Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science. [...] Until 1976, in fact, Congress made "federal copyright contingent on publication[,] [thereby] providing incentives not primarily for creation," but for dissemination. [...] Our decisions correspondingly recognize that "copyright supplies the economic incentive to create *and disseminate* ideas." [...]
- 49 Considered against this backdrop, §514 falls comfortably within Congress' authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne "promotes the diffusion of knowledge," [...] A well-functioning international

copyright system would likely encourage the dissemination of existing and future works. [...] Full compliance with Berne, Congress had reason to believe, would expand the foreign markets available to U. S. authors and invigorate protection against piracy of U. S. works abroad [...], thereby benefitting copyrightintensive industries stateside and inducing greater investment in the creative process.

- 50 The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold, however, that it is not the sole means Congress may use "[t]o promote the Progress of Science." [...] Congress determined that exemplary adherence to Berne would serve the objectives of the Copyright Clause. We have no warrant to reject the rational judgment Congress made.

III

A

- 53 We next explain why the First Amendment does not inhibit the restoration authorized by §514. To do so, we first recapitulate the relevant part of our pathmarking decision in *Eldred*. [...]

- 58 Given the "speech-protective purposes and safeguards" embraced by copyright law, see *id.*, at 219, we concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case.[...] We reach the same conclusion here.[31] Section 514 leaves undisturbed the "idea/expression" distinction and the "fair use" defense. Moreover, Congress adopted measures to ease the transition from a national scheme to an international copyright regime: It deferred the date from which enforcement runs, and it cushioned the impact of restoration on "reliance parties" who exploited foreign works denied protection before §514 took effect. [...]

B

- 60 Petitioners attempt to distinguish their challenge from the one turned away in *Eldred*. First Amendment interests of a higher order are at stake here, petitioners say, because they—unlike their counterparts in *Eldred*—enjoyed "vested rights" in works that had already entered the public domain. The limited rights they retain under copyright law's "built-in safeguards" are, in their view, no substitute for the unlimited use they enjoyed before §514's enactment. Nor, petitioners urge, does §514's "unprecedented" foray into the public domain possess the historical pedigree that supported the term extension at issue in *Eldred*. [...]

- 61 However spun, these contentions depend on an argument we considered and rejected above, namely, that the Constitution renders the public domain largely untouchable by Congress. Petitioners here attempt to achieve under the banner of the First Amendment what they could not win under the Copyright Clause: On their view of the Copyright Clause, the public domain is inviolable; as they read the First Amendment, the public domain is policed through heightened judicial scrutiny of Congress' means and ends. As we have already shown, [...] the text of the Copyright Clause and the historical record scarcely establish that "once a work enters the public domain," Congress cannot permit

anyone—"not even the creator—[to] copyright it," 501 F. 3d, at 1184. And nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.^[32] Neither this challenge nor that raised in *Eldred*, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author's viewpoint.

- 62 The Tenth Circuit's initial opinion determined that petitioners marshaled a stronger First Amendment challenge than did their predecessors in *Eldred*, who never "possessed unfettered access to any of the works at issue." 501 F. 3d, at 1193. [...] As petitioners put it in this Court, Congress impermissibly revoked their right to exploit foreign works that "belonged to them" once the works were in the public domain.[...]
- 63 To copyright lawyers, the "vested rights" formulation might sound exactly backwards: Rights typically vest at the *outset* of copyright protection, in an author or rightholder. [...] Once the term of protection ends, the works do not revert in any rightholder. Instead, the works simply lapse into the public domain. [...] Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.
- 64 Congress recurrently adjusts copyright law to protect categories of works once outside the law's compass. For example, Congress broke new ground when it extended copyright protection to foreign works in 1891[...]; to photographs and photographic negatives in 1865[...]; to fixed sound recordings in 1972[...]; and to architectural works in 1990[...]. And on several occasions, as recounted above, Congress protected works previously in the public domain, hence freely usable by the public. [...] If Congress could grant protection to these works without hazarding heightened First Amendment scrutiny, then what free speech principle disarms it from protecting works prematurely cast into the public domain for reasons antithetical to the Berne Convention?^[33]
- 65 Section 514, we add, does not impose a blanket prohibition on public access. Petitioners protest that fair use and the idea/expression dichotomy "are plainly inadequate to protect the speech and expression rights that Section 514 took from petitioners, or . . . the public"—that is, "the unrestricted right to perform, copy, teach and distribute the *entire* work, for any reason." [...] "Playing a few bars of a Shostakovich symphony," petitioners observe, "is no substitute for performing the entire work." [...]^[34]
- 66 But Congress has not put petitioners in this bind. The question here, as in *Eldred*, is whether would-be users must pay for their desired use of the author's expression, or else limit their exploitation to "fair use" of that work. Prokofiev's *Peter and the Wolf* could once be performed free of charge; after §514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev's U. S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U. S. concertgoers.
- 67 Before we joined Berne, domestic works and some foreign works were protected under U. S. statutes and bilateral international agreements, while other foreign works were available

at an artificially low (because royalty-free) cost. By fully implementing Berne, Congress ensured that most works, whether foreign or domestic, would be governed by the same legal regime. The phenomenon to which Congress responded is not new: Distortions of the same order occurred with greater frequency—and to the detriment of both foreign and domestic authors—when, before 1891, foreign works were excluded entirely from U. S. copyright protection. See Kampelman, *The United States and International Copyright*, 41 *Am. J. Int'l L.* 406, 413 (1947) ("American readers were less inclined to read the novels of Cooper or Hawthorne for a dollar when they could buy a novel of Scott or Dickens for a quarter."). Section 514 continued 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 those works were created and first published. Authors once deprived of protection are spared the continuing effects of that initial deprivation; §514 gives them nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires.[35]

- 68 Unlike petitioners, the dissent makes much of the so-called "orphan works" problem. [...] We readily acknowledge the difficulties would-be users of copyrightable materials may face in identifying or locating copyright owners.[...] But as the dissent concedes, [...] this difficulty is hardly peculiar to works restored under §514. It similarly afflicts, for instance, U. S. libraries that attempt to catalogue U. S. books. [...]
- 69 Nor is this a matter appropriate for judicial, as opposed to legislative, resolution. Cf. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677-678 (SDNY 2011) (rejecting proposed "Google Books" class settlement because, *inter alia*, "the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court" (citing *Eldred*, 537 U. S., at 212)). Indeed, the host of policy and logistical questions identified by the dissent speak for themselves. [...] Despite "longstanding efforts," [...] Congress has not yet passed ameliorative orphan-works legislation of the sort enacted by other Berne members[...]. Heretofore, no one has suggested that the orphan-works issue should be addressed through our implementation of Berne, rather than through overarching legislation of the sort proposed in Congress and cited by the dissent. [...] Our unstinting adherence to Berne may add impetus to calls for the enactment of such legislation. But resistance to Berne's prescriptions surely is not a necessary or proper response to the pervasive question, what should Congress do about orphan works.

IV

- 71 Congress determined that U. S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U. S. authors abroad, and remedying unequal treatment of foreign authors. The judgment §514 expresses lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not. The judgment of the Court of Appeals for the Tenth Circuit is therefore *Affirmed*.
- 72 JUSTICE KAGAN took no part in the consideration or decision of this case.

76 JUSTICE BREYER, with whom JUSTICE ALITO joins, dissenting.

77 In order "[t]o promote the Progress of Science" (by which term the Founders meant "learning" or "knowledge"), the Constitution's Copyright Clause grants Congress the power to "secur[e] for limited Times to Authors . . . the exclusive Right to their . . . Writings." Art. I, §8, cl. 8. This "exclusive Right" allows its holder to charge a fee to those who wish to use a copyrighted work, and the ability to charge that fee encourages the production of new material. In this sense, a copyright is, in Macaulay's words, a "tax on readers for the purpose of giving a bounty to writers"—a bounty designed to encourage new production. As the Court said in *Eldred*, "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." [...]

78 The statute before us, however, does not encourage anyone to produce a single new work. By definition, it bestows monetary rewards only on owners of old works— works that have already been created and already are in the American public domain. At the same time, the statute inhibits the dissemination of those works, foreign works published abroad after 1923, of which there are many millions, including films, works of art, innumerable photographs, and, of course, books—books that (in the absence of the statute) would assume their rightful places in computer-accessible databases, spreading knowledge throughout the world. [...] In my view, the Copyright Clause does not authorize Congress to enact this statute. And I consequently dissent.

I

80 The possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection. The Constitution's words, "exclusive Right," "limited Times," "Progress of Science," viewed through the lens of history underscore the legal significance of what the Court in *Eldred* referred to as the "economic philosophy behind the Copyright Clause." [...] That philosophy understands copyright's grants of limited monopoly privileges to authors as private benefits that are conferred for a public reason—to elicit new creation.

81 Yet, as the Founders recognized, monopoly is a two-edged sword. On the one hand, it can encourage production of new works. In the absence of copyright protection, anyone might freely copy the products of an author's creative labor, appropriating the benefits without incurring the nonrepeatable costs of creation, thereby deterring authors from exerting themselves in the first place. On the other hand, copyright tends to restrict the dissemination (and use) of works once produced either because the absence of competition translates directly into higher consumer prices or because the need to secure copying permission sometimes imposes administrative costs that make it difficult for potential users of a copyrighted work to find its owner and strike a bargain. See W. Landes & R. Posner, *The Economic Structure of Intellectual Property Law* 68-70, 213-214 (2003). Consequently, the original British copyright statute, the Constitution's Framers, and our case law all have recognized copyright's resulting and necessary call for balance.

- 82 At the time the Framers wrote the Constitution, they were well aware of Britain's 18th-century copyright statute, the Statute of Anne, 8 Anne, ch. 19 (1710), and they were aware of the legal struggles that produced it. That statute sought in part to control, and to limit, preexisting monopolies that had emerged in the book trade as a result of the Crown's having previously granted special privileges to royal favorites. The Crown, for example, had chartered the Stationers' Company, permitting it to regulate and to censor works on the government's behalf. The Stationers had thereby acquired control over the disposition of copies of published works, from which emerged the Stationers' copyright—a right conferred on company members, not authors, that was deemed to exist in perpetuity. [...]
- 83 To prevent the continuation of the booksellers' monopoly and to encourage authors to write new books, Parliament enacted the Statute of Anne. It bore the title: "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." And it granted authors (not publishers) and their assignees the "sole Right and Liberty of printing" their works for limited periods of time *in order to encourage them "to compose and write useful Books."* 8 Anne, ch. 19, §1 (emphasis added). As one historian has put it, "[t]he central plank of the . . . Act was . . . a cultural *quid pro quo*. To encourage 'learned Men to compose and write useful Books' the state would provide a guaranteed, if temporally limited, right to print and reprint those works." [...] At first, in their attempts to minimize their losses, the booksellers argued that authors had a perpetual common-law copyright in their works deriving from their natural rights as creators. But the House of Lords ultimately held in *Donaldson v. Beckett*, 1 Eng. Rep. 837 (1774), that the Statute of Anne had transformed any such perpetual common-law copyright into a copyright of a limited term designed to serve the public interest. [...]
- 84 Many early colonial copyright statutes, patterned after the Statute of Anne, also stated that copyright's objective was to encourage authors to produce new works and thereby improve learning. [...]
- 85 At least, that was the predominant view expressed to, or by, the Founders. [...] Thomas Jefferson, for example, initially expressed great uncertainty as to whether the Constitution should authorize the grant of copyrights and patents at all, writing that "the benefit even of limited monopolies is too doubtful" to warrant anything other than their "suppression." [...] James Madison also thought that "Monopolies . . . are justly classed among the greatest nu[i]sances in Government." [...] But he argued that "in certain cases" such as copyright, monopolies should "be granted" ("with caution, and guarded with strictness agst abuse") to serve as "*compensation for a benefit actually gained to the community . . . which the owner might otherwise withhold from public use.*" [...] Jefferson eventually came to agree with Madison, supporting a limited conferral of monopoly rights but only "*as an encouragement to men to pursue ideas which may produce utility.*" [...]
- 86 This utilitarian view of copyrights and patents, embraced by Jefferson and Madison, stands in contrast to the "natural rights" view underlying much of continental European copyright law—a view that the English booksellers promoted in an effort to limit their losses following the enactment of the Statute of Anne and that in part motivated the enactment of some of the colonial statutes. [...] Premised on the idea that an author or inventor has an inherent right to the fruits of his labor, it mythically stems from a

legendary 6th-century statement of King Diarmed "to every cow her calf, and accordingly to every book its copy." [...] That view, though perhaps reflected in the Court's opinion, [...] runs contrary to the more utilitarian views that influenced the writing of our own Constitution's Copyright Clause. [...]

- 87 This utilitarian understanding of the Copyright Clause has long been reflected in the Court's case law. In *Mazer*, for example, the Court refers to copyright as embodying the view that "*encouragement of individual effort by personal gain* is the best way to advance public welfare through the talents of authors and inventors." 347 U. S., at 219 (emphasis added). In *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151 (1975), the Court says that underlying copyright is the understanding that "*[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.*" *Id.*, at 156 (emphasis added). And in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), the Court, speaking of both copyrights and patents, points out that the "monopoly privileges that Congress may authorize are . . . [not] primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended *to motivate the creative activity of authors . . . by the provision of a special reward.*" *Id.*, at 429 (emphasis added)[...].
- 88 Congress has expressed similar views in congressional Reports on copyright legislation. [...]
- 94 The upshot is that text, history, and precedent demonstrate that the Copyright Clause places great value on the power of copyright to elicit new production. Congress in particular cases may determine that copyright's ability to do so outweighs any concomitant high prices, administrative costs, and restrictions on dissemination. And when it does so, we must respect its judgment. [...] But does the Clause empower Congress to enact a statute that withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes—all *without providing any additional incentive* for the production of new material? That is the question before us. And, as I have said, I believe the answer is no. Congress in this statute has exceeded what are, under any plausible reading of the Copyright Clause, its permissible limits.[...]

[Notes:]

- 140 [2] As noted by the Government's *amici*, the United States excluded foreign works from copyright not to swell the number of unprotected works available to the consuming public, but to favor domestic publishing interests that escaped paying royalties to foreign authors. [...] This free-riding, according to Senator Jonathan Chace, champion of the 1891 Act, made the United States "the Barbary coast of literature" and its people "the buccaneers of books." [...]
- 149 [11] From the first Copyright Act until late in the 20th century, Congress conditioned copyright protection on compliance with certain statutory formalities. The most notable required an author to register her work, renew that registration, and affix to published copies notice of copyrighted status. The formalities drew criticism as a trap for the unwary. [...]

- 150 In 1976, Congress eliminated the registration renewal requirement for future works. Copyright Act of 1976, §302, 408, 90 Stat. 2572, 2580. In 1988, it repealed the mandatory notice prerequisite. BCIA §7, 102 Stat. 2857. And in 1992, Congress made renewal automatic for works still in their first term of protection. Copyright Amendments Act of 1992, 106 Stat. 264-266. The Copyright Act retains, however, incentives for authors to register their works and provide notice of the works' copyrighted status. See, *e.g.*, 17 U. S. C. §405(b) (precluding actual and statutory damages against "innocent infringers" of a work that lacked notice of copyrighted status); §411(a) (requiring registration of U. S. "work[s]," but not foreign works, before an owner may sue for infringement). The revisions successively made accord with Berne Convention Article 5(2), which proscribes application of copyright formalities to foreign authors. Berne, however, affords domestic authors no escape from domestic formalities. See Art. 5(3) (protection within country of origin is a matter of domestic law).
- 151 [12] Title 17 U. S. C. §104A(h)(6)(B) defines a "restored work" to exclude "an original work of authorship" that is "in the public domain in its source country through expiration of [its] term of protection." This provision tracks Berne's denial of protection for any work that has "fallen into the public domain in the country of origin through the expiry of the term of protection." [...]
- 152 [13] Restoration is a misnomer insofar as it implies that all works protected under §104A previously enjoyed protection. Each work in the public domain because of lack of national eligibility or subjectmatter protection, and many that failed to comply with formalities, never enjoyed U. S. copyright protection. [...]
- 153 [14] A reliance party must have used the work in a manner that would constitute infringement had a valid copyright been in effect. See §104A(h)(4)(A). After restoration, the reliance party is limited to her previous uses. A performer of a restored work, for example, cannot, post-restoration, venture to sell copies of the script. [...]
- 172 [33] It was the Fifth Amendment's Takings Clause—not the First Amendment—that Congress apparently perceived to be a potential check on its authority to protect works then freely available to the public. See URAA Joint Hearing 3 (statement of Rep. Hughes); *id.*, at 121 (app. to statement of Lehman, Commerce Dept.); *id.*, at 141 (statement of Shapiro, USTR); *id.*, at 145 (statement of Christopher Schroeder, DOJ). The reliance-party protections supplied by §514, see *supra*, at 10-11, were meant to address such concerns. See URAA Joint Hearing 148-149 (prepared statement of Schroeder).
- 173 [34] Because Shostakovich was a pre-1973 Russian composer, his works were not protected in the United States. See U. S. Copyright Office, Circular No. 38A: The International Copyright Relations of the United States 9, 11, n. 2 (2010) (copyright relations between the Soviet Union and the United States date to 1973).[...]