Reviving Fallen Copyrights: A Constitutional Analysis of Section 514 of the Uruguay Round Agreements Act of 1994

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ARTICLE

REVIVING FALLEN COPYRIGHTS: A CONSTITUTIONAL ANALYSIS OF SECTION 514 OF THE URUGUAY ROUND AGREEMENTS ACT OF 1994+

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I. INTRODUCTION

After the year 2052, the duration of all copyrights will be set forth by the Copyright Act of 1976,¹ and the Copyright Act of 1909² will fade into history. Until then, however, we must deal with the differing copyright durations of both Acts and the differences in the way renewal terms are handled. Under the 1909 Act, an author received an original copyright term and a separate renewal term.³ To secure the renewal term, the author or his/her successors had to reregister the copyright with the Copyright Office.⁴ In contrast, the 1976 Act provides for a single copyright term with no need to renew, and it extends the copyright term for works created under the 1909 Act.⁵ However, the 1976 Act does not address the fate of works copyrighted under the 1909 Act which lost their copyrights due to the copyright holders’ failure to meet various notice and registration

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4. See infra Part II.B.

requirements or their failure to renew the copyright for the renewal term.6 Those works fell into the public domain and anyone could use them without the need to secure the permission of the author.7 Prominent examples of such works are J.R.R. Tolkien’s Lord of the Rings trilogy8 and director Frank Capra’s film It’s a Wonderful Life.9

In 1994, Congress addressed this issue.10 As part of comprehensive legislation to implement the Uruguay Round of General Agreement on Tariffs and Trade (GATT),11 Congress enacted section 514 of the Uruguay Round Agreements Act of 1994. The section restored the copyrights of foreign, but not American, works that fell into the public domain due to failure to meet the formalities required by the 1909 and 1976 Acts.12

Part II of this Article briefly discusses the history and rationale of United States copyright law. This section also sets forth the copyright durations under the various Copyright Acts from 1791 to 1976, along with the 1976 Act provisions for extending the copyright life of pre-1976 works. Part II also states the provisions of section 514.

Part III analyzes the constitutionality of section 514. The Constitution’s grant of power to Congress to establish copyrights contains an inherent limitation on the duration of copyrights.13 The question of whether reviving fallen copyrights constitutes a taking under the Fifth Amendment is also discussed.14 Finally, Part IV considers whether section 514 sufficiently balances the equities between the copyright owners and the public.

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6. See infra notes 27-29 and accompanying text.
7. Jessica Litman, The Public Domain, 39 EMORY L.J. 965, 975 (1990). The existence of the public domain is, of course, the flip side of the fact that copyrights exist for a limited time. Litman suggests that the public domain should be viewed not as the collection of unprotected works, but rather as a method of protecting the “raw material” that makes authorship possible. Id. at 967-68. Litman also demonstrates the utility of the public domain in solving “fuzzy and overlapping property rights,” id. at 1012, and in easing the burden on copyright plaintiffs in proving the originality of works, id. at 1018.
8. Id. at 976 n.68.
10. Congress earlier lessened the consequences of failure to comply with formalities and later discarded the requirement. See infra notes 42-43 and accompanying text.
11. The Uruguay Round of General Agreement on Tariffs and Trade (“GATT”), completed on December 15, 1993, has considerably advanced international intellectual property protection.
13. U.S. CONST. art. I, § 8, cl. 8 states that “Congress shall have 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 . . . ”
II. A BRIEF SURVEY OF COPYRIGHT LAW

Congress passed Copyright Acts in 1790, 1909, and 1976, along with a number of amendments to those Acts in other years. Congress' authority to confer copyrights stems from the Constitution, which authorizes the legislature "[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 . . ."\(^{15}\)

A. Rationale for Copyright Protection

Although physically intangible, a copyright is regarded as a property right.\(^ {16}\) The owner of a copyright can control reproduction of and, to some degree, the exhibition of the protected work.\(^ {17}\) In effect, the copyright holder has a limited monopoly on the copyrighted work.\(^ {18}\)

The primary justification for granting a limited monopoly is an economic one.\(^ {19}\) Creating works of fiction, music, and art does not occur in a financial vacuum, but imposes concrete costs on the creator. For example, some costs include "time and effort plus the cost to the publisher of soliciting and editing the manuscript and setting it in type."\(^ {20}\) Economists refer to such costs as "fixed," meaning that they do not vary with regard to the number of goods created.\(^ {21}\) Other costs vary with the number of copies of the creative work being produced, such as "printing,

16. Litman, supra note 7, at 971 & nn.27–36.
18. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) (discussing "[t]he monopoly privileges that Congress may authorize"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (discussing "[t]he limited scope of the copyright holder's statutory monopoly"); Zechariah Chafee, Jr., Reflections on the Law of Copyright: I, 45 COLUM. L. REV. 503, 506 (1945) ("We should start by reminding ourselves that copyright is a monopoly.").
19. Sony, 464 U.S. at 429 (noting that copyright law "is intended to motivate the creative activity of authors and inventors by the provision of a special reward"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."); American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992) ("The copyright law celebrates the profit motive, recognizing the incentive to profit from the exploitation of copyrights will rebound to the public benefit by resulting in the proliferation of knowledge."); THE FEDERALIST No. 43, at 309 (James Madison) (Benjamin Wright ed., 1961) ("The public good fully coincides in both [copyright and patent] cases with the claims of individuals.").
binding, and distributing individual copies." Such costs are termed "variable" or "marginal." A rational actor will not produce a creative work unless he can at least recoup his fixed and marginal costs. To do so, he will have to charge a price for the work that exceeds the marginal cost of production so that fixed costs are taken into account. Absent copyright protection, however, a second person could duplicate the creative work and sell it at the marginal cost of production. The price of the duplicate, therefore, will be less than the original because the second person will not have incurred the fixed cost of creating the work.

Thus, a major reason that copyright protection exists is to ensure that authors will continue to create works without fear that their ability to exploit the value of the work will be destroyed by imitators who have lower average costs. One factor to be considered in judging the constitutionality of any copyright legislation is, therefore, the balance between the incentive for authors to create works and the resulting harm from the limited monopoly granted to the authors.

B. Duration of Copyright

The first Copyright Act, passed by Congress in 1790, granted a fourteen-year copyright term to authors. The author could renew his copyright for a second fourteen-year term, assuming that he lived past the first copyright term. In 1831, Congress amended the Act so that the first term of copyright protection lasted twenty-eight years, with a subsequent fourteen-year renewal period.

23. VARIAN, supra note 21, at 35.
24. For example, suppose that the author spends $10,000 writing a novel and that the marginal cost of publishing the novel is $1 per book. If the author expects to sell 10,000 copies, he will have to charge at least $2 per book. Of that $2, $1 covers the cost of publishing, and the other $1 represents the fraction of the fixed cost to be spread among all the books.
25. Landes & Posner, supra note 20, at 328. But see Stephen G. Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970) (arguing that copyright law is unnecessary because the "lag time" involved in copying a work provides the creator with sufficient time to recoup his or her efforts). Several scholars have responded to Justice Breyer’s article. See Landes & Posner, supra note 20, at 330–33; and Barry W. Tyerman, The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer, 18 UCLA L. REV. 1100 (1971).
26. Indeed, this delicate balance results from the tension between the Copyright Clause and the First Amendment.
27. Copyright Act of 1790, 1 Stat. 124 (repealed 1909).
28. Id.
29. Id.
The 1909 Act updated copyright law to meet the needs of the early twentieth century. The Act extended the renewal period to twenty-eight years, enabling authors to protect their works for a maximum of fifty-six years. To secure the renewal extension, the copyright holder had to apply to the Copyright Office and register the renewal within one year of the expiration of the first term of the copyright. If the holder failed to do so, the copyright expired after the initial term, throwing the work into the public domain.

By the 1960s, however, Congress concluded that copyright law required further changes. The primary goal, pressed by authors and other creators, was to increase the duration of copyright to a term of the author's life plus fifty years. As life expectancies increased, authors began outliving their copyrights, which meant their later works had to compete with earlier works in the public domain. As communications technology improved, the commercial life of works were proportionally lengthened, leading to a perceived need for longer terms of copyright protection. A second problem that needed to be addressed was the inconsistency between the 1909 Act and foreign copyright laws. Because the 1909 Act's term was shorter than the copyright terms of other countries, many American works were receiving longer copyright protection in foreign countries than they were receiving in the United States. This dichotomy fueled tensions between the United States and other countries, leading to threats of retaliatory action against the United States.

Another major problem that needed attention was the 1909 Act's notice requirement, which carried harsh consequences if the copyright holder did not fully comply with it. Some errors were fatal to the copyright: omission of the copyright notice, post-dating the copyright

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31. Id.
32. Id.
34. Id.
35. Id.
36. By the 20th century, most other countries had copyright terms based on the life of the author plus a number of years. Of these, over half had a term of the author's life plus 50 years. James J. Guinan, Jr., Duration of Copyright, STUDIES ON COPYRIGHT 473, 477 (1963).
38. 17 U.S.C. § 21 (1976). If the owner had tried to comply with the notice provision, but accidentally omitted notice from a few copies, the copyright would not be lost, although the copyright owner would not be able to recover against innocent infringers. Id. But see Wildman v. New York Times Co., 42 F. Supp. 412, 415 (S.D.N.Y. 1941) (not applying the exception where the omission stemmed from a mistake in law); Sieff v. Continental Auto Supply, Inc., 39
more than a year in the future, and misplacement of the copyright notice. Responding to these unnecessarily strict requirements, Congress drastically altered the mechanics of copyright law in the 1976 Act. First, for works created after January 1, 1978, the 1976 Act granted a copyright term of the author's life plus fifty years. Second, the statute retained the notice requirement, but lessened the consequences for omissions or errors. For example, failure to affix a copyright notice on a work did not place a work into the public domain if the author registered the work with the Copyright Office within five years of publication. The significance of affixing a notice was that it would prevent an infringer from claiming a defense of innocent infringement. However, infringers who could prove that they had relied upon the lack of notice incurred no liability for any infringement. To give maximum protection, Congress finally discarded the notice requirement as part of the Berne Convention Implementation Act of 1988. Affixing the copyright notice became optional, not mandatory.

C. The Berne Convention

The Berne Convention, which dates back to 1886, is a multilateral copyright agreement applying to the more than seventy-five signatory countries. The agreement was developed in response to the problems European countries faced when creative works crossed national boundaries.

F. Supp. 683, 688 (D. Minn. 1941) (not applying the exception where the omission resulted from "neglect or oversight").

40. The 1909 Act specified the location for the copyright notice, such as "upon the title page or upon the first page of text of each separate number or under the title heading" for periodicals. J.A. Richards, Inc. v. New York Post, Inc., 23 F. Supp. 619, 620 (S.D.N.Y. 1938). Failure to follow the notice placement requirements accurately often led to the loss of copyright. See, e.g., id. (placing copyright notice on back page of a 28-page pamphlet led to loss of copyright).
43. Id. § 401(d).
44. Id. § 405(b).
46. 17 U.S.C. § 401(a) (1994) ("[A] notice of copyright as provided by this section may be placed on publicly distributed copies.") (emphasis added).
without corresponding copyright protection in foreign countries. An English work under protection in England, for example, could be shipped to France, where it received no protection. In fact, such copying of foreign works was not only condoned, but was also considered "beneficial" and "honorable." The Berne Convention was created to prevent this sort of international piracy through a reciprocal, universal approach to copyright.

The United States signed the Berne Convention in 1986 and then executed the treaty through the Berne Convention Implementation Act of 1988. However, because Congress declared that the Berne Convention was "not self-executing," the United States was obligated to follow the Convention's dictates "only pursuant to appropriate domestic law."

As a result, the remaining vestiges of the 1909 Act conflicted with sections of the Berne Convention. The Convention grants a copyright term of the author's lifetime plus fifty years. The agreement also applies retroactively to all works that have not fallen into the public domain through expiration of the term of protection in the country where protection is being asserted. Thus, if the original work is in the public domain because it received the full fifty-six years of copyright protection under the 1909 Act, the Convention will not renew protection. If, however, the work is in the public domain because the author failed to comply with notice and registration formalities, the Convention will protect the work.

Until the enactment of section 514 of the Uruguay Round Agreements Act, the United States was not in full compliance with the Berne Convention. Congress, in its enabling legislation, stated that "Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States." Thus, foreign works whose United States copyright protection lapsed for failure to meet various formalities remained in the United States public domain, even though the Berne Convention called for them to be protected.

48. Id. at 18.
49. Id. at 19, 23, and 40.
51. Id. § 2.
52. Berne Convention for Protection of Literary & Artistic Works, Sept. 9, 1886 (Paris Text, 1971), art. 7(1).
53. Id. at art. 18(2).
54. RICKETSON, supra note 47, at 671.
D. Section 514 of the Uruguay Round Agreements Act

Section 514 restores the copyrights on foreign works that have fallen into the public domain in the United States through failure to meet formalities or failure to renew, but not through expiration of the original term of protection. To be eligible for copyright restoration, the work must not be in the public domain in the source country. The source country must be "a nation, other than the United States, that . . . adheres to the Berne Convention . . .".

Works that have had their copyrights restored receive protection for the term that they would have received had they not fallen into the public domain due to failure to meet formalities. For example, a public-domain work created in 1920 would not have its copyright restored because it fell into the public domain through expiration of the original fifty-six year copyright in 1976. However, a work created in 1940 that fell into the public domain because of a failure to properly register for the renewal term would have its copyright restored. That restored term would last until 2015, seventy-five years after its creation, which is the maximum term established under the 1909 Act as it was subsequently modified by the 1976 Act.

Section 514 does take into account "reliance" parties: people who rely on the public-domain status of the works. Reliance parties have a year following the restoration of the copyright during which they may continue exploiting the work without incurring liability. After that year, they are subject to liability conditioned upon receipt of "a notice of intent to enforce a restored copyright."

57. The Act defines a source country as:
   (A) a nation other than the United States;
   . . .
   (C) in the case of a published work—
      (i) the eligible country in which the work is first published; or
      (ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.
58. Id. § 104A(h)(3).
59. Id. § 104A(a)(1)(B).
60. Id. § 104A(h)(4)(A).
Section 514 also has a special provision for derivative works created before the enactment of the Uruguay Round Agreements Act and on reliance of the public-domain status of works with restored copyrights. Owners of such derivative works "may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation." If the parties cannot agree on the amount of compensation, a United States district court will assess the amount.

III. IS SECTION 514 CONSTITUTIONAL?

A. Congressional Power to Enact Section 514

Congress did not state the basis for its power in enacting section 514; however, it did not have to do so for the statute to be constitutionally valid. Section 514 most likely falls within Congress' power under the Copyright Clause, which authorizes the legislature "[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." Because Congress had the power to grant the copyright, it

63. Id. § 104A(d)(3)(A)(ii).
64. Id. § 104A(d)(3)(B). The determination by the district court:
shall reflect any harm to the actual or potential market for or value of the restored work from the reliance party's continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.


66. U.S. Const. art. I, § 8, cl. 8. Alternatively, section 514 might fall within Congress' power under the Commerce Clause to regulate interstate commerce. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.09 (1992). U.S. Const. art. I, § 8, cl. 3 grants Congress the power "[t]o regulate Commerce . . . among the several States." Until 1995, the Court reviewed challenges to federal statutes as being beyond Congress' commerce power with a very lenient standard generally called the "rational basis" test. The Court upheld exercises of the commerce power so long as there was a rational basis for Congress to conclude that the regulated activity substantially affected interstate commerce. Preseault v. ICC, 494 U.S. 1, 17 (1990); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Wickard v. Filburn, 317 U.S. 111, 125–29 (1942); United States v. Darby, 312 U.S. 100, 119–21 (1941). Under this lenient standard, Congress could almost certainly revive copyrights, because it could conclude rationally that the presence or absence of copyrights for creative works substantially affects interstate commerce. In particular, failure to adhere to the
should have the power to revive it. After all, revival of a fallen copyright may be considered another grant of copyright protection to certain works in the public domain.

One potential bar to this congressional power is the holding in the seminal case of *Graham v. John Deere Co.* The Court noted "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." At first glance, the dispositive difference between *Graham* and section 514 appears to be that the former concerns patents and the latter copyrights. However, *Graham* is not so easily distinguished. The Patent Clause (which is also the Copyright Clause) is also a grant of power "limited to the promotion of advances in the 'useful arts.'" As a result, Congress' power to grant patents is valid only where it is used to advance "the stated constitutional purpose." The Copyright Clause similarly limits Congress' power to grant the copyright to the advancement of the arts.

Where *Graham* may be distinguished from section 514 is that it prohibits Congress from removing "knowledge" from the public domain. A copyright cannot remove knowledge from the public domain, but only the expression of that knowledge. The so-called "Idea/Expression Dichotomy," as codified at 17 U.S.C. § 102, keeps copyright protection requirements of the Berne Convention could result in economic sanctions against the United States.

However, the status of the rational basis test has been cast into doubt by United States v. Lopez, 115 S. Ct. 1624 (1995). In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1000 feet of a school, exceeded the scope of the Commerce Clause. *Id.* at 1634. In doing so, the Court made no reference to the rational basis test. The Court seemed to restrict the commerce power to regulating economic activity, rather than accept a number of inferential chains connecting the regulated activity to interstate commerce. *Id.* at 1630 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."). Thus, Congress' ability to revive copyrights under the Commerce Clause is in doubt.

Moreover, Congress' commerce power is still constrained by other constitutional guarantees, particularly the First Amendment. To the extent that the Court's copyright decisions may be based implicitly on a balancing of Congress' interest in protecting copyrights against the public's First Amendment rights in expressing itself, the Commerce Clause may also be subject to such a balancing.

68. *Id.* at 6.
69. *Id.* at 5.
70. *Id.* at 6.
from extending to ideas and facts.\textsuperscript{72} The expression of ideas or facts can be copyrighted, but not the ideas and facts themselves. The scope of patent protection, however, is much broader than that of copyright. Although ideas cannot be patented, a process or product can be.\textsuperscript{73}

At this point, a metaphysical distinction between knowledge, ideas, and facts, and expression is in order. Copyrights protect only expression, and thus, for copyright purposes, there is no distinction between knowledge and ideas and facts.\textsuperscript{74} For example, one might copyright a description of a gene-splicing process to create disease-resistant tomatoes, but another person would be free to use that description and write her own description of the gene-splicing process.\textsuperscript{75} Thus, the copyright covers neither the idea of gene-splicing to create disease-resistant tomatoes, nor the knowledge of how to go about doing so.

Now consider what happens when one obtains a patent on the gene-splicing process. The patent does not cover the idea of gene-splicing to create disease-resistant tomatoes because, as noted earlier, patents do not extend to ideas.\textsuperscript{76} However, the patent does protect a particular process of gene-splicing, even from independent discovery.\textsuperscript{77} Thus, the scope of patent protection is much broader than that of copyright, which allows for independent duplication of expression.\textsuperscript{78} Furthermore, there may be a greater number of variations of expression of an idea than there are processes of accomplishing the same idea.\textsuperscript{79} Accordingly, patents are limited to a much shorter term than are copyrights—seventeen years.\textsuperscript{80} It

\textsuperscript{72} Harper \& Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates."); Nash v. CBS, Inc., 899 F.2d 1537, 1541 (7th Cir. 1990) ("[T]he first person to conclude that Dillinger survived does not get dibs on history. If Dillinger survived, that fact is available to all."); NIMMER \& NIMMER, supra note 66, § 2.03[D].


\textsuperscript{74} See H.R. Rep. No. 94-1476, supra note 71.

\textsuperscript{75} See supra note 72 and accompanying text.

\textsuperscript{76} Harper \& Row, Publishers, Inc., 471 U.S. at 556.


\textsuperscript{78} Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("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) . . . .").

\textsuperscript{79} Compare JOSEPH CONRAD, HEART OF DARKNESS (1902), PAUL THEROUX, THE MOSQUITO COAST (1986) and Apocalypse Now (1979) (all of which focus on leaving civilization for an extended journey into a foreign land, culminating in a confrontation with man's ultimate inhumanity). The point of patenting a process is generally that the process is the most efficient way of accomplishing a given goal.

is for this reason that Graham should not be applicable to the revival of copyrights.

The fact that Congress has the authority to enact a given piece of legislation does not end the inquiry. A secondary question of whether the Act can have retroactive effect, and if so, whether it is meant to have such effect. In Landgraf v. USI Film Products,\(^{81}\) the Supreme Court fashioned a set of rules for answering this question.

A statute has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."\(^{82}\) Congress may enact a statute with retroactive effect if it explicitly provides for such application. If it does not, however, the Court will not presume retroactivity unless there is "clear congressional intent favoring such a result."\(^{83}\)

On this point, Congress must have intended for section 514 to have retroactive effect, as the very action of restoring copyrights to public-domain works implies that the Act must have retroactive effect. This interpretation is bolstered by the provision of the Act that creates a limited "safe harbor" for reliance parties; had Congress intended the Act not to have retroactive effect, these reliance parties would have been exempted entirely from the reach of the Act.

**B. The "Limited Times" Requirement**

The Constitution requires that copyrights exist for "limited times."\(^{84}\) Thus, a second problem to be resolved is whether section 514 violates the "limited times" provision. Neither the Supreme Court nor lower federal courts have spoken directly on this issue. What is clear from federal cases is that the "limited times" provision prohibits "perpetual copyright[s]."\(^{85}\)

The underlying reason for the requirement of limited times is the balancing of the interests of the creator against those of the general

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81. 511 U.S. 244 (1994).
82. Id. at 280.
83. Id.
85. Fashion Originators Guild, Inc. v. Federal Trade Comm’n, 114 F.2d 80, 83 (2d Cir. 1940) (Hand, J.), aff’d, 312 U.S. 457 (1941); see also Goldstein v. California, 412 U.S. 546, 560–61 (1973) (implying that had Congress, rather than California, passed a statute with perpetual protection, it would have violated the "limited times" provision); Guinan, supra note 36, at 493 ("It is clear that [perpetual copyright] was not intended as a possibility under the Constitution.").
Thus, the "limited times" provision has been interpreted as protecting the balance of interests by ensuring that a copyright holder's monopoly exists no longer than is necessary to provide authors incentives to create new works. 87

Reviving copyrights should not tilt that balance unreasonably toward the creator because the restored copyrights still result in a shorter copyright period than if the works had been created after 1978. Creative works governed by the 1976 Act are copyrighted for the lifetime of the author plus fifty years. 88 The length of copyright that Congress extends to the revived works is merely the term that would have been initially granted had all formalities and requirements been met. It does not exceed the author’s lifetime plus fifty years, and may be considerably less. Thus, if reviving fallen copyrights tilts the balance too far in favor of creators, it is because the author’s lifetime plus fifty years is too long of a duration for copyright. But if the author’s lifetime plus fifty years is too long, then section 302 of the 1976 Act is unconstitutional. 89

Of course, section 514 provides no additional incentive to the authors of the public-domain works, because at the time the authors created their works, they could not have known that Congress would revive their copyrights. 90 However, this ex post analysis does not doom any statutory attempt to revive copyrights. The 1976 Act, after all, extended copyright terms for many pre-1978 works up to nineteen years beyond which they were entitled to under the 1909 Act. 91 Moreover, Congress has previously acted to mitigate the harshness of the copyright requirements in exceptional circumstances, even though the legislative acts provided no future incentives to potential authors. During World War II, for example,
Congress enacted a statute "to preserve the rights of authors . . . [who] may have been temporarily unable to comply with the conditions and formalities . . . because of the [war]." The statute granted such authors an extension to fulfill the formality requirements if the authors were United States citizens or citizens of countries that provided reciprocal copyright protection for American authors.

These extensions advanced the underlying goals of the Copyright Act no further than does section 514. In neither instance does reviving a fallen copyright provide the author with any additional incentive for creating works because the creation has already occurred. Thus, the lack of additional incentive for authors should not, by itself, doom section 514.

C. The Takings Clause

The most serious constitutional challenge to section 514 is the Takings Clause, which prohibits the taking of "private property . . . for public use, without just compensation." Using its power of eminent domain, the government can force a person to give up private property, so long as the government's purpose in acquiring that property is for public use and the government compensates the owner.

To consider whether section 514 acts as a taking, it is important to note that there are two ways to exploit a public-domain work. First, the exploiter simply might make the public-domain work available in a mass market format, without contributing any creative element to the work. Such exploitation is more or less simple copying of the public-domain work. For example, an exploiter might typeset J.R.R. Tolkien's *The Lord of the Rings* and sell copies of the trilogy of novels for profit. Second, the exploiter might use the public-domain work as a springboard for a separate, derivative work. For example, an exploiter might produce a computer game based on Tolkien's trilogy.

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93. Id.
94. Cf. Nimmer & Nimmer, supra note 66, § 1.10[C][1], at 1-84 to 1-86.
95. U.S. CONST. amend. V.
97. Throughout the rest of this Article, the term "exploit" refers to using a public-domain work in some business enterprise. Although the word "exploit" may carry negative connotations, its use here does not reflect any moral judgment.
99. See id. § 106(2) (1994).
1. Private Property

As an initial matter, it is important to characterize the property interest at issue. Section 514 impacts exploiters in two ways: (1) by subjecting them to liability for infringement if they sell, display, or otherwise exploit their stocks of exploited works; and (2) by preventing them from reaping future profits from continued exploitation of the public-domain work. For the purposes of takings law, these interests must be treated differently.

a. Stock Supply of Exploited Works

Under section 514, the government does not physically take the exploiters' stocks of works. Thus, section 514 will only constitute a regulatory taking. A regulatory taking occurs when Congress, or a state body, enacts legislation that diminishes the value of property to a sufficient degree that the property in effect has been taken, even if it nominally remains possessed by the owner. Although the Court has meandered in its attempts to set forth a test for determining when a regulatory taking occurs, its 1992 decision, Lucas v. South Carolina Coastal Council, provides a relatively straightforward approach. Under Lucas, "[w]hen . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of [property] goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."

Of course, the relevant background principles for personal property are different than for real property. In particular, government traditionally has had more control over regulating the former than the latter and may even be able to "render . . . property economically worthless (at least if the

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101. The significance of a physical taking is that it triggers a much different test. In Loretto v. Teletprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court held that any physical invasion, no matter how minute, constituted a per se taking. Id. at 435–40.


103. A comprehensive survey of the topic is beyond the scope of this Article; however, Professor Peterson identifies four separate tests, and notes no satisfactory explanation for why a given test would be used in a given situation. Peterson, supra note 100, at 1316.


property's only economically productive use is sale or manufacture for sale).\textsuperscript{106}

Here, section 514 renders the acquired stocks of exploited works economically worthless. Any attempt to sell or display the works exposes the exploiter to copyright infringement liability. Aside from destroying the stocks, the only viable alternative left is to lock up the works until the revived copyright expires. In \textit{Lucas}, the Court noted that perhaps governments have more latitude to regulate personal property than real property. \textit{Andrus v. Allard}\textsuperscript{107} was the single case cited for this principle.

In \textit{Andrus}, the Court reviewed the Eagle Protection Act and Migratory Bird Treaty Act, which prohibited the commercial transportation of parts from birds legally killed before they came under the Acts' protection.\textsuperscript{108} The Court rejected a claim that the Acts effected takings by denying bird trappers the right to future profits from the sales of already-slain birds.\textsuperscript{109} The Court reasoned that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."\textsuperscript{110}

In reaching this decision, the Court applied \textit{Everard's Breweries v. Day},\textsuperscript{111} and \textit{Jacob Ruppert v. Caffey}.\textsuperscript{112} Both \textit{Everard's} and \textit{Jacob} involved the prohibition of alcohol under the Eighteenth Amendment. In both cases the Court held that the prohibition against the manufacture and sale of alcohol did not constitute a taking even though it left people with acquired stocks of liquor they could not sell.\textsuperscript{113} The Court noted that although the alcohol could not be sold, the owners could still drink their stocks.

A significant difference between the wildlife protection acts in \textit{Andrus} and section 514 is that the former did not deprive the eagle feather owners of all the uses of the regulated property, only those relating to commercial transportation. The Court specifically observed that the bird feather owners were free to display the feathers in their possession.\textsuperscript{114}

\textsuperscript{106} \textit{Lucas}, 505 U.S. at 1027–28.
\textsuperscript{107} 444 U.S. 51 (1979).
\textsuperscript{108} \textit{Id.} at 52–54.
\textsuperscript{109} \textit{Id.} at 66.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} 265 U.S. 545 (1924).
\textsuperscript{112} 251 U.S. 264 (1920).
\textsuperscript{113} \textit{Everard's}, 265 U.S. at 563; \textit{Jacob Ruppert}, 251 U.S. at 303.
\textsuperscript{114} \textit{Andrus}, 444 U.S. at 66.
REVIVING FALLEN COPYRIGHTS

Thus, *Andrus* does not have to be read broadly to support the proposition that a government can render personal property completely worthless without violating the Takings Clause.115

b. Future Profits

Section 514 also prevents exploiters from reaping future profits from continued exploitation of public-domain works. As noted earlier, the Court's decision in *Andrus v. Allard* 116 virtually declares that takings claims based solely on lost profits are fatal. In *Connolly v. Pension Benefit Guaranty Corp.*, 117 the Court solidified its position that lost profits are not a cognizable property interest. *Connolly* involved an amendment to the Employee Retirement Income Security Act of 1974 (ERISA) 118 that created liability for employers who withdrew membership from a multiemployer pension plan. 119 The Court rejected the petitioners' claim that this imposition of liability constituted an uncompensated taking because Congress routinely burdens some parties in a way that benefits others. The Court held that such legislation does not violate the Takings Clause 120 and added: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." 121

With regard to lost profits, therefore, exploiters will be unable to satisfy the *Lucas* threshold test because they have not suffered a complete deprivation of all beneficial uses of the property used to create the exploitations. Specifically, the exploiters can use their materials to exploit other works; all they have lost is the intangible right to exploit particular works. 122 However, the owners of derivative works have a separate claim

115. Moreover, one commentator has observed that "as the government regulates for increasingly stronger public interests, the Court appears to lower its threshold of what constitutes no remaining economically viable use for the purposes of the test." Natasha Zalkin, Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Takings Doctrine Through and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 207, 259–60 (1991).
116. 444 U.S. 51 (1979); see supra notes 107–11 and accompanying text.
120. Id. at 223.
121. Id. (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976)).
122. *Lucas* v. South Carolina Coastal Council, 505 U.S. 1003, 1049 n.11 (1992) (Blackmun, J., dissenting) ("The Court has indicated that proof that a regulation does not deny an owner economic use of his property is sufficient to defeat a facial taking challenge.").
of lost property based on their inability to exploit their copyrighted derivative works. As mentioned earlier, a copyright is a piece of personal property, and may be sold or conveyed as such.\textsuperscript{123}

Conversely, a copyright is intangible and exists only through the force of congressional law. Under one theory, "when the government grants \( A \) a legal right, it normally retains the power to change the law to promote the general welfare, and thus no taking occurs when the government exercises its retained power, even though the change in the law eliminates \( A \)'s right under the prior law."\textsuperscript{124} Unlike property rights stemming from the copyright on derivative works that are based on Congress' retained powers, the effect of section 514 on physical stock is not based on such powers. Physical stocks of exploited works exist independent of Congress' copyright laws and are, in fact, subject to those laws. For that reason, section 514 probably does not effect a taking of the derivative works' copyrights.

2. Public Use

One justification for a taking is that it is for a public purpose.\textsuperscript{125} Because section 514 effects a taking of at least the physical copies of exploitations and the copyrights on derivative works, it must satisfy the "for public use" requirement. There have been both "narrow" and "broad" interpretations of this requirement.\textsuperscript{126} Under the narrow view, public use means "actual use or right to use of the condemned property by the public."\textsuperscript{127} Under the broad view, the public needs only to gain a benefit or advantage for the taking to be deemed a public use.\textsuperscript{128}

The narrow view prohibits Congress from reviving fallen copyrights. By reviving copyrights, Congress regrants an author a limited monopoly consisting of a bundle of rights.\textsuperscript{129} The copyright holder may then exclude the public from the use of the copyrighted work. Consequently, this dynamic runs opposite the narrow view's intention of granting public

\begin{itemize}
\item \textsuperscript{123} 17 U.S.C. § 201(d)(1) (1994).
\item \textsuperscript{124} Peterson, supra note 100, at 1313. There is an inherent circularity in this notion, pointed out by Justice Kennedy: "[P]roperty tends to become what courts say it is." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).
\item \textsuperscript{125} Berger, supra note 96, at 205.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} See supra notes 16–18 and accompanying text.
\end{itemize}
access to the taken property. While this view has some supporters,\textsuperscript{130} it is not the majority opinion.\textsuperscript{131}

The broad view of public use, on the other hand, encompasses the reviving of fallen copyrights, even when the taking transfers a property right from one private party, the copyright exploiter, to another private party, usually the creator of the work. Professor Thomas Ross describes such taking as “private-transferee takings.”\textsuperscript{132} The fact the government gives the acquired property to a private party does not, by itself, invalidate the taking under the public use provision.

a. Doctrinal Analysis

The United States Supreme Court has expressed great deference toward determinations by legislatures concerning public use. In \textit{Berman v. Parker},\textsuperscript{133} the Court held that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”\textsuperscript{134} Thus, the government’s taking constituted public use, although it placed property in the hands of a private agency.\textsuperscript{135}

In \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{136} the Court fine-tuned the test so that a use would be public “where the exercise of the eminent domain power is rationally related to a conceivable public purpose.”\textsuperscript{137} It upheld Hawaii’s taking of land title from lessors and transferring it to

\begin{footnotes}
\footnote{130. In \textit{re} City of Seattle, 638 P.2d 549, 556 (Wash. 1982) (“the fact that the public interest may require it is insufficient if the use is not really public”); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (stating in dictum the constitutional condemnation of a statutory attempt to take property from one person and give to another); RICHARD A. EPSTEIN, TAKINGS 170 (1985).}

\footnote{131. The U.S. Supreme Court, for example, appears to have adopted the broad view. \textit{See} Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954); Berger, \textit{supra} note 96, at 213–14 (discussing the early case of Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916), in which the Court approved as public use a taking to grant a power company land and water rights); \textit{see also} Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (approving a taking of land for a private company on the grounds that it would generate jobs and revenue for the local area).}

\footnote{132. Thomas Ross, \textit{Transferring Land to Private Entities by the Power of Eminent Domain}, 51 GEO. WASH. L. REV. 355, 359 (1983); Berger, \textit{supra} note 96, at 226 (“As a general proposition, however, a private taking is one which benefits one, or a relatively limited number of persons.”).}

\footnote{133. 348 U.S. 26 (1954).}

\footnote{134. \textit{Id.} at 32.}

\footnote{135. \textit{Id.} at 33–34.}

\footnote{136. 467 U.S. 229 (1984).}

\footnote{137. \textit{Id.} at 241.}
\end{footnotes}
lessees because the public would benefit from reducing the concentration of fee simple ownership in the state.

Finally, in *Ruckelshaus v. Monsanto Co.*, the Court held that an Environmental Protection Agency regulation requiring pesticide applicants to disclose data publicly constituted a public use, even where the most direct beneficiaries would be future applicants. *Ruckelshaus* provides the closest analogy to a taking involving property interests in the exploitation of public-domain works because both situations involved intellectual property interests.

Admittedly, the mechanics of the benefits in *Ruckelshaus* and the benefits in this situation run in opposite directions: The former discloses information to the public, while the latter may ultimately restrict the flow of information to the public for a limited time. Nevertheless, *Ruckelshaus* indicates that the Court is receptive to private-transferee takings of intangible property, so long as the taking results in some rational benefit to the public. A Congressional determination that reviving fallen copyrights provides a public benefit will, in almost all probability, satisfy the public use requirement in federal court. If Congress does so, given the Court's deference toward Congress on this issue, section 514 almost certainly qualifies as being for public use.

In addition, the public will also benefit from adherence to the Berne Convention. By failing to fully comply with the Convention, the United States was vulnerable to sanctions and reciprocal adverse treatment from other member nations whose authors own foreign copyrights to works that are in the United States public domain. The potential sanctions included

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139. *Id.* at 1014–16.
140. Cases involving intangible property interests are, of course, much less frequent than those involving real property. One of the more prominent cases focused on the City of Oakland's attempt to use the power of eminent domain to keep a professional football team from leaving the city. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982). The California Supreme Court rejected the team's argument "that a professional football franchise is not a proper subject for eminent domain," on the grounds that the state constitution left no doubt that a city could take "any property." *Id.* at 76. The court remanded to the appeals court for a determination of whether the city could actually demonstrate that the taking would be for a public use. *Id.* *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 241–42 (5th Cir. 1967) (approving as public use a taking of hunting rights).
141. The Court found that there was a clear public benefit in avoiding the need for costly, duplicative research. *Ruckelshaus*, 467 U.S. at 1014–15.
142. *Id.* at 1014 ("So long as the taking has a conceivable character, 'the means by which it will be attained is . . . for Congress to determine.'") (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).
bilateral or multilateral trade sanctions, or dispute resolution before the International Court of Justice. Realistically, these sanctions were not likely to have been used. Countries may have been loathe to apply trade sanctions simply to vindicate the rights of a few of their own authors. Bringing suit before the International Court of Justice was even more problematic. As of 1987, no country had invoked that provision of the Convention.

Even so, the United States had prudential reasons for complying with the Convention. For one, this country could improve its self-serving image with regard to international copyrights. Former Register of Copyrights Barbara Ringer described the American "role in international copyright [as] marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest." Indeed, the United States' disregard of the Berne Convention seems particularly incongruous, given the country's zealous criticism of other countries with more lenient copyright, trademark, and patent protection.

b. Theoretical Considerations

Many theoretical arguments against the broad interpretation of the Public Use Clause are not applicable to section 514 because these arguments address real property but not intellectual property, which has characteristics of a public good. Professor Ross identifies three significant arguments against private-transferee takings: (1) the potential for improper motivation of Congress; (2) the lack of continuing

143. RICKETSON, supra note 47, at 828–29.
145. RICKETSON, supra note 47, at 829.
146. Id. at 832.
149. A public good is a good that does not exhibit user exclusivity. That is, how much one consumer uses the good does not affect how much others can use it. By contrast, a private good is a good where one person's use of the good negatively affects the ability of others to consume it. For example, if one person eats an apple, no one else is able to eat that apple. Examples of public goods are street lights, national defense, and clean air. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 5, 108–09 (1988).
accountability for the use of the property; and (3) the threat to the institution of private property. 150

First, private-transferee takings can result from improper motivation if the government’s intent is to help or hinder certain individuals by transferring property to or from them. 151 This problem stems from the government’s ability to take specific pieces of property. By reviving an entire class of copyrights, however, Congress cannot pick and choose certain intended beneficiaries and/or victims.

Congress may intentionally benefit certain copyright holders, while others merely benefit as a byproduct. While this situation is problematic, it is still less troublesome than when government targets a specific piece of property. As Justice Jackson declared in Railway Express Agency, Inc. v. New York: 152

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might visited upon them if larger numbers were affected. 153

Second, lack of accountability results from the fact that the government, in transferring taken property to a private party, can no longer ensure that the property is put to public use. 154 Here, the public benefit in reviving copyrights arises not from any particular use of the work by the copyright owner, but from conformity with the Berne Convention. Lack of accountability is not a concern with regard to resurrected copyrights.

Finally, private-transferee takings threaten the institution of private property, which relies on “a property owner’s assurance that he can hold and use his property without invasion or interference.” 155 Professor Ross argues that any sense of security is undermined by the very existence of

150. Ross, supra note 132, at 369–70. There is another problem—that of demoralization of the original owners. Ross argues that demoralization costs are unlikely to be greater for private-transferee takings than for ordinary takings. Id. at 377.

151. Id. at 370–71.


153. Id. at 112–13 (Jackson, J., concurring); see also Ross, supra note 132, at 369 (noting that a government’s ability to take land is more dangerous than its ability to tax because “it may be more difficult to generate a constituency sufficient to block an unwarranted taking than to generate one to defeat an unwarranted tax increase”).

154. Ross, supra note 132, at 375.

155. Id. at 378–79.
eminent domain. Therefore, private-transferee takings do not threaten the institution of private property to any greater degree than do public transfers.\textsuperscript{156} Note, however, that private-transferee takings provide another avenue for takings beyond ordinary takings. Thus, while a property owner might have had no security against the property being taken for use by the government, the owner could have had security against property being taken for use by another private party.

Alternatively, Professor Merrill concludes that eminent domain is appropriately invoked where "barriers to market exchange" make it infeasible for the government to purchase the property right on the open market.\textsuperscript{157} This formulation stems from the Coase Theorem, which states that in the absence of transactional costs, parties will bargain to an efficient result.\textsuperscript{158} That is to say, if there are no barriers to bargaining, the right to use or exclude the use of the public-domain work in question will end up with the party who values it more, whether it be the original creator or the exploiter.\textsuperscript{159}

With copyrights, asymmetric information creates a potentially formidable barrier to bargaining. The asymmetry arises because the exploiters can contact the creator much more easily than the creator or the

\textsuperscript{156} Id.

\textsuperscript{157} Thomas W. Merrill, The Economics of Public Use, 72 CORN. L. REV. 61, 74 (1986). Merrill's point draws heavily from an influential article, Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972), that divides rules protecting entitlements (i.e., rights) into two distinctions: property rules and liability rules. A right protected by a property rule must be purchased from the owner of the right at a price agreed upon by both parties. A right protected by a liability rule, on the other hand, can be taken by another party for an objectively determined price, even if the owner of the right would prefer not to sell at that price. Calabresi & Melamed, supra, at 1092. Eminent domain thus "provides a mechanism that allows government to convert property rules into liability rules." Merrill, supra, at 74.

\textsuperscript{158} COOTER & ULEN, supra note 149, at 5. Professor Coase first formulated the theorem in R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 8 (1960).

\textsuperscript{159} Examples of such barriers include the free rider and hold-out problems. Free riders are individuals who benefit from a public good without paying for their share of the costs of the good. They are able to do so, because of the non-rivalrous character of public goods. National defense, for example, is a public good. Whether or not person A pays for his or her share, the rest of the country cannot exclude person A from the benefits of the defense. COOTER & ULEN, supra note 149, at 108–09.

Hold-outs, on the other hand, occur whenever one party must secure a large number of agreements to achieve a result, such as buying a series of lands to build a highway. Each person has an incentive to want to be the last to bargain with the purchaser, because at that point, "[t]he last neighbor to settle ... can extract an excessive amount." Id. at 175.

\textsuperscript{160} Coase, supra note 158, at 6–8.
government can contact all the exploiters. As a result, the government may not be able to purchase the property interest from the exploiters on an open market without incurring transactional costs. In this situation, eminent domain may be appropriate because the government may not be able to engage in voluntary market transactions.

3. Just Compensation

In taking private property for public use, section 514 provides for just compensation for the exploiters. The exact measure of just compensation is complicated because there are multiple ways to calculate the value of the property right to the exploiter. Section 514, however, contains some provisions pertaining to reliance parties that seem to satisfy the just compensation requirement.

Two main values could be used to calculate just compensation: market value and subjective value. Market value is an objective measure, based on "what a willing buyer would pay in cash to a willing seller." Subjective value is the property owner's reservation price, which is the price at which he would be willing to sell his property. Typically, this price is higher than the market value.

The problem with using market value instead of subjective value is that market value systematically underestimates the value that the owner places on the property, and thus potentially moves property from higher valued uses to lower valued uses. The use of subjective value alleviates this problem because the government would never acquire property under eminent domain unless the property value to the public exceeded the

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161. This information asymmetry also arises when copyright owners try to police their copyrights. As a result, copyright holders sometimes grant non-exclusive rights to clearinghouse organizations that then license the right to use the work to the public. The American Society of Composers, Authors and Publishers (ASCAP) is one such organization. ASCAP investigators travel to various locations to monitor public performances of copyrighted works and to ensure that those performances have been licensed. In Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), the Supreme Court acknowledged the difficulty authors face in detecting infringements of their copyrights: "Because a [creative work] can be 'consumed' by many different people at the same time and without the creator's knowledge, the 'owner' has no real way to demand reimbursement for the use of his property except through the copyright laws and an effective way to enforce those legal rights." Id. at 19 n.32.


162. United States v. Miller, 317 U.S. 369, 374 (1943); see also COOTER & ULEN, supra note 149, at 192; EPSTEIN, supra note 130, at 182-83.

163. COOTER & ULEN, supra note 149, at 193; EPSTEIN, supra note 130, at 183.

164. COOTER & ULEN, supra note 149, at 193.
subjective value of the property to the owner. 165 Unfortunately, the use of subjective value is subject to moral hazard: Property owners have an incentive to present an inflated subjective value. 166

In United States v. 564.54 Acres of Land, 167 the U.S. Supreme Court used the market value of the property to determine the value of just compensation. 168 The Court felt a "need for a relatively objective working rule," 169 something that subjective value does not provide. Under this rule, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller," 170 at the time of the taking. In special circumstances, however, a court could apply other standards if the use of market value would be unfair. For example, this approach may be necessary if the property was one traded so infrequently that its market value could not be predicted. 171 The Court concluded that "fair market value does not include the special value of property to the owner arising from its adaptability to his particular use."

The measure of just compensation for section 514 is therefore the fair market value of the property used to exploit the public-domain work. 173 When the property consists of tangible works, such as the actual physical copies of public-domain works or the actual physical copies of the derivative works, the fair market value can be measured by the price at which the goods have been selling. Although section 514 does not provide such compensation, it does allow parties who have relied on the public-domain status of works to continue to exploit the underlying work without liability for one year following the restoration of copyright. 174 This is a form of "in-kind" compensation, or compensation not in the form of money. 175 In this instance, "in-kind" compensation makes sense, because courts will not have to determine the market value of the exploitations since the market itself will do that.

Of course, in some instances, a year may be insufficient time to sell an exploiter's stock of infringing works. However, the Court has not

165. Id.
166. Id.
168. Id. at 511.
169. Id.
170. Id.
171. Id. at 513.
172. Id. at 511.
173. 441 U.S. at 512–13.
expressed sympathy to this claim. In *564.54 Acres of Land*, the Court applied the fair market value test, even though the fair market value of the property taken was considerably less than the cost to the owner of duplicating the conditions of the taken property on a new piece of property. At other times the Court has held that lost future profits do not enter into the takings equation; thus, the fair market value might not include the expected profits.

The one-year limitation seems to be a compromise between the interests of the exploiters and the practical difficulties in policing the restored copyrights. For example, section 514 could have allowed exploiters to sell their acquired stocks without a time limitation. Such an approach, however, immediately creates the problem of how to establish when an infringing work was actually produced, before or after the copyright on the underlying work was restored. Hence, the one-year duration eliminates this problem.

Section 514's lack of explicit compensation for tangible works that infringe restored copyrights is somewhat troubling. Even more problematic is when the property involved is the copyright of a derivative work. The fair market value would appear to be the price at which a willing buyer would pay for an assignment of the duration of the restored copyright on the underlying work. Unlike tangible works, however, this assignment may fall within the class of goods that are traded so infrequently as to make a determination of fair market value difficult or even impossible. For these works, section 514 allows an owner of a derivative work to continue to exploit that derivative work for the duration of the restored copyright, so long as the owner of the derivative work pays reasonable compensation to the owner of the underlying work. In the event parties are unable to agree on reasonable compensation, a district court will assess the amount. Thus, section 514 allows owners of derivative works to reap a reasonable return on their works, which is all the Takings Clause requires.

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177. See supra notes 109–120 and accompanying text.
178. Moreover, there may be a feeling that if physical works cannot be sold off within a year, they are not popular works anyway, and therefore the economic loss to the exploiter is minimal.
181. Id. § 104A(d)(3)(B).
Any equitable action must take into account the effect on the public domain and balance the public interests in receiving access to the work. If reviving copyrights unduly restricts public access to the works with the revived copyrights, Congress would have been better off leaving everything alone. Unfortunately, Congress did not do so. While drafting the 1976 Act, Congress discovered that the prices of creative works are often the same whether in the public domain or under copyright protection. Thus, economics would not affect public access to the work.

In addition, access to the work can be blocked by other non-economic factors such as restrictions imposed by the author or an exploiter of the piece. Ultimately, as Congress found, the only difference is who reaps the commercial windfall, the original creator or the exploiter.

Even if the price will not affect accessibility to a work, it is theoretically possible for a copyright owner to block the use of the work. Two recent cases illustrate this possibility. In Salinger v. Random House, Inc., author J.D. Salinger successfully obtained a preliminary injunction to block the use of quotations from his unpublished letters. Although Salinger did not want his unpublished letters to be used at all, the Second Circuit permitted the defendant, biographer Ian Hamilton, to report facts contained in the letters. However, the court granted a preliminary injunction against the use of quotations from the letters on the rationale that the 1976 Copyright Act grants authors of unpublished works the right of first publication. Moreover, Hamilton’s desired use of quotations from the unpublished letters did not constitute fair use of the works.

184. See id.
185. Of course, foreign authors whose copyrights are revived may also do so. However, the justification for reviving their copyrights is based on their country’s adherence to the Berne Convention. American authors have no justification; thus, any potential problems require separate solutions to support the equitable goal.
186. 811 F.2d 90 (2d Cir. 1987).
187. Id.
188. Id. at 100. This result makes sense in light of the “Idea/Expression Dichotomy.” Salinger cannot copyright the ideas contained in his letters, only the expressions thereof. Id. at 95.
189. Id. at 94. The right of first publication is one of many rights accorded to copyright owners. 17 U.S.C. § 106(3).
190. Salinger, 811 F.2d at 99–100. The Second Circuit followed the Supreme Court’s four-step analysis of the fair use defense as applied to unpublished works enunciated in Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). The four factors are: (1)
In *Campbell v. Acuff-Rose Music, Inc.*, the holder of the copyright on Roy Orbison's song, "Oh, Pretty Woman," sued rap group 2 Live Crew for producing a parody. The group tried to obtain a license to the original song, but Acuff-Rose's agent refused to grant one. *Campbell* differs from *Salinger* because the copyright holder was not attempting to remove the original from the public. Instead, the owner merely sought to protect the underlying work from ridicule. *Campbell* also differs from *Salinger* in that musical compositions are subject to compulsory performance licenses whereas the letters in *Salinger* are not; thus, the copyright holder of non-performance pieces cannot "bottle up" a musical work.

Barring such differences, however, the nature of information allows a copyrighted work to be used in one manner without preventing another person from using the work in a different way. Thus, anyone can pay a fee to license the copyrighted work from the owner. According to the Coase Theorem, in the absence of impediments to bargaining, the copyright owner will license his work to the exploiter. This result occurs because the owner's marginal cost of licensing the copyright is effectively zero as he or she incurs no significant costs in allowing someone else to use the work, and the marginal benefit is the licensing fee charged. Consequently, given the balance where the marginal benefit exceeds the marginal cost, the copyright owner will likely choose to license the work.

While economics support licensing, other considerations may affect decisions to license works. Economists have noted that the largest potential roadblock to bargaining for licenses is not the transactional costs, but the strategic decisions behind bargaining. In particular, "[n]oncooperative outcomes occur because each player's strategy is best against opponents on average, but not best against every individual

purpose of the use; (2) nature of the copyright; (3) amount and substantiality of the portion used; and (4) effect on the market. *Id.* at 560–61. The Supreme Court considered the last factor "the single most important element of fair use." *Id.* at 566.


192. *Id.* at 572.

193. Roy Orbison's original song, "Oh, Pretty Woman" discusses the singer's attempt to romance a pretty woman. He is rebuffed initially, but later the woman changes her mind and goes with the singer. The 2 Live Crew version of "Pretty Woman" begins similarly, but then degenerates into a discussion of a "big hairy woman," a "bald headed woman," and a "two timin' woman." *Id.* at 594–96 ("comparing" the lyrics of both songs).

2 Live Crew enclosed a copy of the lyric sheet for its song in its request for permission to license "Oh, Pretty Woman." Acuff-Rose's agent wrote back, "I am aware of the success enjoyed by 'The 2 Live Crews,' [sic] but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" *Id.* at 572–73.

194. *See supra* note 158.

opponent." Thus, the possibility exists that an owner of several underlying works may refuse to accept a bargain for one work merely to raise the bargaining power in subsequent negotiations.

Section 514 solves this problem by allowing the owner of a derivative work to continue to exploit that work, subject to reasonable compensation to the owner of the underlying work. If the parties cannot agree on a reasonable price, a United States district court will set one. In essence, section 514 extinguishes the copyright owner's present right to prohibit continued sale of derivative works, and breaks bargaining impasses due to strategy tactics.

V. CONCLUSION

Section 514 of the Uruguay Round Agreements Act of 1994 is a temporary measure. It has no explicit sunset provision, but will become obsolete once the Copyright Act of 1909 is no longer applicable. Nevertheless, because that day is fifty-five years away, section 514 takes care of a pressing need: U.S. compliance with the Berne Convention.

Section 514 renders the existing stock of exploited works economically worthless, and thereby constitutes a constitutional taking. What saves section 514 from unconstitutionality, however, is that the Berne Convention satisfactorily provides for just compensation to the parties. And while section 514 currently only applies to foreign and not domestic works, arguably it should be extended to revive the copyrights of American works that have fallen into the public domain for failure to comply with notice and registration formalities. The analysis conducted herein suggests Congress could grant the revival as long as it formulates its action as a "public purpose."

196. Id. at 28.
198. The calculation stems as follows: The 1976 Act effectively extended copyrights under the 1909 Act to 75 years, 28 years for the first term, plus 28 years for the renewal term, and a 19 year extension of the renewal term. The 1976 Act went into effect in 1978; thus, the latest a work could be created and still fall under the 1909 Act was 1977. Seventy-five years after 1977 is the year 2052.