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**APPENDIX A**

United States Court of Appeals  
for the Federal Circuit

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ORTIZ & ASSOCIATES CONSULTING, LLC,  
Plaintiff-Appellant

v.

VIZIO, INC.,  
Defendant-Appellee

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2024-1783

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Appeal from the United States District Court for the  
Northern District of Texas in No. 3:23-cv-00791-N,  
Judge David C. Godbey.

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**JUDGMENT**

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THIS CAUSE having been considered, it is  
ORDERED AND ADJUDGED:  
**AFFIRMED**

December 17, 2025

Date

FOR THE COURT

Jarrett B. Perlow  
Clerk of Court

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

ORTIZ & ASSOCIATES	§
CONSULTING, LLC,	§
Plaintiff,	§
	§
v.	§Case No. 3:23-CV-00791-N
	§
VIZIO, INC.,	§
Defendant.	§

**ORDER**

This Order addresses VIZIO, Inc.’s (“VIZIO”) brief in support of attorneys’ fees [41]. This Court previously found this case exceptional and granted VIZIO’s motion for reasonable attorneys’ fees under 35 U.S.C. § 285. Order (February 27, 2024) [40]. For the following reasons, the Court awards VIZIO attorneys’ fees of \$161,777.53.

In exceptional cases, a district court may award reasonable attorneys' fees to the prevailing party. 35 U.S.C. § 285. Reasonable attorneys' fees include those expenses incurred in the preparation for and performances of legal services related to the case and nontaxable costs. *Maxwell v. Angel-Etts of Cal., Inc.*,

53 F. App'x 561, 569 (Fed. Cir. 2002). Because the Court has already determined this case to be exceptional, the Court now turns to the reasonableness of the fees requested by VIZIO.

To determine a reasonable fee award, courts calculate a “lodestar” amount by multiplying a reasonable billing rate by the number of hours reasonably spent litigating the successful claim. *Mathis v. Spears*, 857 F.2d 749, 755 (Fed. Cir. 1988). This calculation, however, excludes hours spent on “excessive, redundant, or otherwise unnecessary work” and on nonprevailing claims unrelated to successful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983). The lodestar amount is presumptively reasonable and should be modified only in unusual circumstances. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

VIZIO asks for \$161,777.53 in attorneys’ fees. Def.’s Br. in Supp. Atty.’s Fees 3. VIZIO arrived at this calculation by multiplying the hourly rates for four partners, one associate, and three paralegals by the total hours spent litigating this case, plus an additional \$294.03 for expenses incurred related to a pro hac vice application.<sup>1</sup> First, the Court determines

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<sup>1</sup> Attorneys’ and paralegals’ hourly rates ranged from \$250 to \$800 an hour.

that the hourly rates in VIZIO's fee calculation are reasonable. Ortiz & Associates Consulting, LLC ("Ortiz") complains that: VIZIO requests attorneys' fees for all hours billed to the matter (as opposed to hours dedicated to the "exceptional portion of the case"), four partners worked on the case, and VIZIO's summary of hours performed does not adequately specify the work performed. Pl.'s Obj. to Atty.'s Fees [43]. VIZIO has provided an invoice specifying all billed hours and descriptions of work performed. Def.'s App. APPX0005-0024 [42-1]. In total, VIZIO's attorneys expended 261.7 hours over around seven months. Def.'s Br. in Supp. Atty.'s Fees 4; Def.'s App. APPX0024. Ortiz does not point to any specific flaws in VIZIO's calculation or reference any specific time entries or invoices showing excessive or duplicative work. The hours expended by VIZIO's attorneys are reasonable for a patent infringement case.

Because the Court has previously found this case exceptional, and finds VIZIO's attorneys' fees request to be reasonable, the Court awards VIZIO attorneys' fees in the amount of \$161,777.53.

Signed April 23, 2024.

David C. Godbey  
Chief United States District Judge

## APPENDIX C

### IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ORTIZ & ASSOCIATES	§
CONSULTING, LLC,	§
Plaintiff,	§
	§
v.	§Case No. 3:23-CV-00791-N
	§
VIZIO, INC.,	§
Defendant.	§

#### MEMORANDUM OPINION AND ORDER

This Order addresses Defendant VIZIO, Inc.’s (“VIZIO”) motion for attorneys’ fees under 35 U.S.C. § 285, 28 U.S.C. §1927, or the Court’s inherent power [33]. The Court grants in part and denies in part the motion, as set forth below.

#### I. ORIGINS OF THE DISPUTE

This motion arises out of a patent dispute between Plaintiff Ortiz & Associates Consulting, LLC (“Ortiz”) and VIZIO. Ortiz brought suit against VIZIO for direct infringement of U.S. Patent No. 9,147,299 Patent (“the '299 Patent”) and U.S. Patent No. 9,549,285 (“the '285 Patent”) (collectively the “Asserted Patents”). Pl.’s First Am. Compl. ¶¶ 6, 8, 11, 13 [20]. Ortiz has been involved in a number of suits involving the Asserted Patents. This Court

dismissed Ortiz's First Amended Complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for twice failing to plead facts sufficient to state a claim for relief. Order (November 1, 2023) [30]. Now, VIZIO moves for attorneys' fees and to find the case exceptional.

## **II. The Court Grants VIZIO's Motion For Attorneys' Fees Under 35 U.S.C. § 285**

The Patent Act provides that in exceptional cases a district court may award reasonable attorneys' fees to the prevailing party. 35 U.S.C. § 285. Reasonable attorneys' fees include those expenses incurred in the preparation and performance of legal services related to the case and nontaxable costs. *Maxwell v. Angel-Etts of Cal., Inc.*, 53 F. App'x 561, 569 (Fed. Cir. 2002). In addition, a district court has wide discretion whether to award costs under Federal Rule of Civil Procedure 54(d). *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471 (5th Cir. 2006). But if a district court does not award costs, it must state its reasons. *Id.*

An exceptional case "stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). A case brought in subjective bad faith or that

makes especially meritless claims is exceptional and warrants a fee award. *Octane*, 572 U.S. at 554. District courts determine whether a given case is exceptional on a case-by-case basis and in light of the totality of the circumstances. *Id.* Factors to be considered include frivolousness, motivation, and objective unreasonableness of a case’s factual or legal components. *Id.* at 554 n.6. Litigants seeking fees must show the case is exceptional by a preponderance of the evidence. *Id.* at 557. Courts do not award attorneys’ fees as “a penalty for failure to win a patent infringement suit.” *Id.* at 548. Rather, the “legislative purpose behind § 285 is to prevent a party from suffering a ‘gross injustice.’” *Checkpoint Sys., Inc. v. All-Tag Security S.A.*, 858 F.3d 1371, 1376 (Fed. Cir. 2017). The Court holds that this case is exceptional and awards reasonable attorneys’ fees to VIZIO under section 285.

VIZIO argues that Ortiz’s position was substantively weak given it knew, or should have known, that its complaint stated no viable damages theory. Def.’s Mot. for Atty.’s Fees 10. The Court agrees. See Order (November 1, 2023) [30]. The expired patents could not give rise to future damages, and Ortiz was apprised of the need to plead compliance with 35 U.S.C. § 287(a) to support its claim for pre-suit damages in VIZIO’s first motion to dismiss but failed to do so. Def.’s Mot. for Atty.’s Fees 10–11; see *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1365 (Fed. Cir. 2017) (citing 35

U.S.C. § 287(a)); *Estech Sys. IP, LLC v. Mitel Networks, Inc.*, 2023 WL 6115252, at \*7 (E.D. Tex. July 17, 2023), report and recommendation adopted, 2023 WL 6065865 (E.D. Tex. Aug. 2, 2023). Ortiz asserts that it “did not have guidance from the Court on the marking issue” prior to dismissal. Pl.’s Resp. 5. This argument is unavailing because district courts are “not obliged to advise [litigants] of the weaknesses in [their] litigation position.” *Blackbird Tech LLC v. Health In Motion LLC*, 944 F.3d 910, 916 (Fed. Cir. 2019). Moreover, the Court finds that Ortiz’s litigation conduct was unreasonable in that it failed to comply with the Court’s discovery deadlines, including deadlines to serve infringement contentions and discovery requests, and that Ortiz made a settlement demand unrelated to the merits of litigation. See *Blackbird Tech LLC*, 944 F.3d at 916–17 (affirming district court’s finding of unreasonable litigation conduct including “nuisance value settlement offers” that were less than the cost of defense and unexcused delays in document production).

Additionally, VIZIO highlights Ortiz’s history of infringement actions involving the Asserted Patents that have been voluntarily dismissed or were dismissed for failure to state a claim before any discovery commenced. See Def.’s Mot. for Atty.’s Fees 5–8. “[A] pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one’s claims, is

relevant to a district court's exceptional case determination under § 285.” *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1350 (Fed. Cir. 2017). While “the mere existence of these other suits does not mandate negative inferences about the merits or purposes of this suit,” it is a factor to be considered in assessing the totality of the circumstances. *Newegg Inc.*, 793 F.3d at 1351; *see also Elec. Commc'n Techs., LLC v. ShoppersChoice.com, LLC*, 963 F.3d 1371 (Fed. Cir. 2020) (quoting *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1360 (Fed. Cir. 2017) (“While [a] district court need not reveal its assessment of every consideration of § 285 motions, it must actually assess the totality of the circumstances.”)). VIZIO has not provided evidence of the number or amount of settlement offers Ortiz made in other cases involving the Asserted Patents. However, the Court considers that Ortiz has filed and voluntarily dismissed with prejudice a number of cases involving the Asserted Patents before or at the motion to dismiss stage. *See Stone Basket Innovations, LLC v. Cook Med. LLC*, 892 F.3d 1175, 1183 (Fed. Cir. 2018) (quoting *Stone Basket Innovations, LLC v. Cook Med. LLC*, No. 1:16-cv-00858-LJM-TAB, 2017 WL 2655612, at \*1 (S.D. Ind. 2017) (affirming a district court’s finding of a lack of evidence to support litigant filing cases with no intention of testing their merits where the litigant “participated in each stage of the litigation for nearly two years and tested the merits of its claims.”); *see e.g.*, Notice of Voluntary Dismissal [11], in *Ortiz & Associates Consulting, LLC v. Panasonic Corp. of*

*North America*, Civil Action No. 1:19-cv-01921 (D. Del. 2020); Notice of Voluntary Dismissal [25], in *Ortiz & Associates Consulting, LLC v. Hisense Co., Ltd.*, No. 1:20-cv-02193 (N.D. Ill.); Notice of Voluntary Dismissal [7], in *Ortiz & Associates Consulting, LLC v. Actiontex Electronics, Inc.*, No. 6:23-cv-00139 (W.D. Tex.); Notice of Voluntary Dismissal [14], in *Ortiz & Associates Consulting, LLC v. Epson America, Inc.*, No. 2:23-cv-00308 (E.D. Tex.).

The totality of the circumstances here, including Ortiz’s history of filing and dismissing suits involving the Asserted Patents, failure to comply with discovery deadlines, making a settlement demand below the cost of defense, as well as the substantive weakness of Ortiz’s litigation position in the instant case, supports a finding of exceptionality. Accordingly, the Court holds that this case is exceptional and grants VIZIO’s motion with respect to reasonable attorneys’ fees and costs under section 285.

### **III. The Court Denies VIZIO’s Motion For Attorneys’ Fees Under 28 U.S.C. § 1927**

Under 28 U.S.C. § 1927, an attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” An award of attorneys’ fees under section 1927 requires “evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court.”

*Lawyers Title Ins. Corp. v. Doubletree Partners, LP*, 739 F.3d 848, 871 (5th Cir. 2014). Sanctions under section 1927 are “punitive in nature and require clear and convincing evidence’ that sanctions are justified.” *Id.* at 872 (quoting *Bryant v. Military Dep’t of Miss.*, 597 F.3d 678, 694 (5th Cir. 2010)). Further, “[a]n unsuccessful claim is not necessarily actionable.” *Hogue v. Royse City, Tex.*, 939 F.2d 1249, 1256 (5th Cir. 1991). The Court holds that attorneys’ fees pursuant to section 1927 are not warranted here.

VIZIO argues that Ortiz’s counsel should be jointly and severally liable for any attorneys’ fees award because they filed Ortiz’s complaints without a viable damages theory, failed to prosecute the case, and have a history of filing frivolous lawsuits for several clients. Def.’s Mot. for Atty.’s Fees 17. VIZIO seeks sanctions against counsel because it alleges Ortiz is a “shell company” VIZIO suspects may file bankruptcy and avoid paying attorneys’ fees awarded here. *Id.* The Court does not find that VIZIO’s argument is sufficient to show bad faith, improper motive, reckless disregard of duty, or unreasonable multiplication of the proceedings on the part of Ortiz’s counsel. VIZIO additionally argues that it may receive attorneys’ fees and costs pursuant to the Court’s inherent powers. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). The Court does not find there is sufficient evidence to show that Ortiz’s counsel acted in bad faith, vexatiously, wantonly, or for oppressive reasons. As such, the Court denies

VIZIO's request to hold Ortiz's counsel jointly and severally liable for attorneys' fees and costs under section 1927 or the Court's inherent powers.

## CONCLUSION

For the reasons stated above, the Court grants VIZIO's motion for reasonable attorneys' fees under 35 U.S.C. § 285 but denies VIZIO's motion to hold Ortiz's counsel jointly and severally liable for attorney's fees pursuant to 28 U.S.C. § 1927 or the Court's inherent powers.

The Court orders VIZIO to submit the specific fee award it seeks with evidentiary support within 14 days of the date of this Order. *See* FED. R. CIV. P. 54(d)(2)(B) Advisory Committee Note (1993) ("The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course . . .").

Signed February 27, 2024.

David C. Godbey  
Chief United States District Judge

## **APPENDIX D**

NOTE: This order is nonprecedential.  
United States Court of Appeals  
for the Federal Circuit

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ORTIZ & ASSOCIATES CONSULTING, LLC,  
Plaintiff-Appellant

v.

VIZIO, INC.,  
Defendant-Appellee

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2024-1783

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Appeal from the United States District Court for the  
Northern District of Texas in No. 3:23-cv-00791-N,  
Judge David C. Godbey.

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### **ON PETITION FOR REHEARING EN BANC**

Before MOORE, Chief Judge, LOURIE, BRYSON<sup>1</sup>,  
DYK, PROST, REYNA, TARANTO, CHEN,

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<sup>1</sup> Circuit Judge Bryson participated only in the decision on the petition for panel rehearing.

HUGHES, STOLL, CUNNINGHAM, and STARK,  
Circuit Judges.<sup>2</sup>

PER CURIAM.

**O R D E R**

Ortiz & Associates Consulting, LLC filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

February 2, 2026

Date

Jarrett B. Perlow  
Clerk of Court

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<sup>2</sup> Circuit Judge Newman did not participate.

## **APPENDIX E**

### **28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

## APPENDIX F

### **28 U.S. Code § 1295 - Jurisdiction of the United States Court of Appeals for the Federal Circuit**

**(a)** The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

**(1)** of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

## **APPENDIX G**

### **28 U.S. Code § 1927 - Counsel's liability for excessive costs**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

(June 25, 1948, ch. 646, 62 Stat. 957; Pub. L. 96-349, § 3, Sept. 12, 1980, 94 Stat. 1156.)

## APPENDIX H

### 35 U.S.C. 285 ATTORNEY FEES.

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(July 19, 1952, ch. 950, 66 Stat. 813.)

#### Historical and Revision Notes

Based on Title 35, U.S.C., 1946 ed., §70, part (R.S. 4921, amended (1) Mar. 3, 1897, ch. 391, §6, 29 Stat. 694, (2) Feb. 18, 1922, ch. 58, §8, 42 Stat. 392, (3) Aug. 1, 1946, ch. 726, §1, 60 Stat. 778).

This section is substantially the same as the corresponding provision in R.S. 4921; “in exceptional cases” has been added as expressing the intention of the present statute as shown by its legislative history and as interpreted by the courts.

## APPENDIX I

### 35 U.S.C. § 287(a)

Limitation on damages and other remedies; marking and notice (a) Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word “patent” or the abbreviation “pat.”, together with the number of the patent, or by fixing thereon the word “patent” or the abbreviation “pat.” together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

## APPENDIX J

### Article I, Section 8, Clause 8:

*[The Congress shall have Power . . . ] To 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.*

The Intellectual Property Clause<sup>1</sup> (IP Clause) empowers Congress to grant authors and inventors

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<sup>1</sup> This provision is also known as the Patent Clause, the Copyright Clause, the Patent and Copyright Clause, and the Progress Clause. *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 56 (1994) ([Article I, section 8, clause 8] is frequently referred to as either the Patent Clause, the Copyright Clause, or the Intellectual Property Clause, depending on the context in which it is being discussed.); Malla Pollack, *What Is Congress Supposed to Promote?: Defining Progress in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 810 n.1 (2001) (noting usage of Copyright and Patent Clause, Intellectual Property Clause, Exclusive Rights Clause, and Progress Clause). *See, e.g.*, *Allen v. Cooper*, 589 U.S. 248, 256 (2020) (using the term Intellectual Property Clause); *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (using the term Copyright and Patent Clause); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635 (1999) (using the term Patent Clause); *Goldstein v. California*, 412 U.S. 546, 555 (1973) (using the term Copyright Clause). Although this essay uses the term Intellectual Property Clause, the terminology is somewhat

exclusive rights in their writings and discoveries for limited times. This clause provides the foundation for the federal copyright<sup>2</sup> and patent<sup>3</sup> systems, with a parallel construction that divides into two parts, one for each form of intellectual property.<sup>4</sup> As to copyrights, Congress may grant Authors exclusive rights to their Writings in order to promote the Progress of Science. (The Progress of Science, at the

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imprecise because the Clause does not encompass all of the legal areas that may be considered intellectual property, such as trademarks and trade secrets. See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 *Geo. L.J.* 1771, 1845 n.1 (2006).

<sup>2</sup> A copyright gives authors (or their assignees) the exclusive right to reproduce, adapt, display, and/or perform an original work of authorship, such as a literary, musical, artistic, photographic, or audiovisual work, for a specified time period. See 17 U.S.C. §§ 102, 106

<sup>3</sup> A patent gives inventors (or their assignees) the exclusive right to make, use, sell, or import an invention that is new, nonobvious, and useful, for a specified time period. 35 U.S.C. §§ 101–103, 271(a).

<sup>4</sup> 11 See generally Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 *IDEA J.L. & Tech.* 1 (2002) ([The IP Clause] exhibits a remarkably parallel or balanced structure . . . much favored in the eighteenth century . . . ); Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 *J. Pat. Off. Soc'y* 83, 84 (1952) (explaining the parallel structure of the IP Clause); *accord* Golan v. Holder, 565 U.S. 302, 319 (2012); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 n.1 (1966).

time of the Framing, referred to the creation and spread of knowledge and learning.<sup>5</sup>) As to patents, Congress may grant Inventors exclusive rights to their Discoveries in order to promote the Progress of . . . useful Arts—that is, to encourage technological innovation, advancement, or social benefit.<sup>6</sup> Relying on the IP Clause, Congress has protected copyrights and patents in some form under federal law since 1790.<sup>7</sup>

Under the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions.<sup>8</sup> Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place.<sup>9</sup> The IP

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<sup>5</sup> Golan, 565 U.S. at 324.

<sup>6</sup> Graham, 383 U.S. at 6.

<sup>7</sup> See Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (patents); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyrights).

<sup>8</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ([Copyrights and patents are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.)

<sup>9</sup> See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (The patent laws promote [the progress of the useful arts] by

Clause thus reflects an economic philosophy that the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.<sup>10</sup>

The Framers included the IP Clause in the Constitution to facilitate a uniform, national law governing patent and copyrights.<sup>11</sup> In the Framers' view, the states could not effectively protect copyrights or patents separately.<sup>12</sup> Under the patchwork state-law system that prevailed in the Articles of Confederation period, creators had to obtain copyrights and patents in multiple states under different standards, a difficult and expensive process that undermined the purpose and effectiveness of the legal regime.<sup>13</sup>

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offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development.).

<sup>10</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Although economic incentives provide the dominant justification for copyright and patents, the IP Clause also empowers Congress to protect the so-called moral rights of creators, such as the right of attribution, in order to promote the progress of science and useful arts. See, e.g., Visual Artist Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990).

<sup>11</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (One of the fundamental purposes behind the [IP Clause] was to promote national uniformity in the realm of intellectual property.).

<sup>12</sup> The Federalist No. 43 (James Madison).

<sup>13</sup> See *Goldstein v. California*, 412 U.S. 546, 556 (1973).

The IP Clause is both a grant of power and a limitation.<sup>14</sup> Two such limitations apply to both copyrights and patents. First, the Clause's plain language requires that the exclusive rights can only persist for limited Times. Thus, although the term of protection may be long, Congress cannot provide for a perpetual copyright or patent term.<sup>15</sup> Second, the exclusive rights must promote the progress of science or useful arts. Courts are broadly deferential to Congress, however, as to the means that it uses to achieve this goal.<sup>16</sup>

Other constitutional limitations of the IP Clause are specific to either copyright or patent law. For example, only works that are original are copyrightable, because copyright extends only to the Authors of Writings.<sup>17</sup> In the context of patent law, only inventions that are novel and nonobvious are patentable Discoveries of Inventors;<sup>18</sup> furthermore,

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<sup>14</sup> *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 (1966).

<sup>15</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 199–204 (2003).

<sup>16</sup> See *id.* at 212 ([I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.); *Graham*, 383 U.S. at 6 (Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose [of the IP Clause] by selecting the policy which in its judgment best effectuates the constitutional aim.).

<sup>17</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58–59 (1884).

<sup>18</sup> See *Graham*, 383 U.S. at 6 (Congress may not authorize the issuance of patents whose effects are to remove existent

patentable inventions must have some substantial utility to promote the progress of the useful Arts.<sup>19</sup>

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knowledge from the public domain.); *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248, 267 (1851) (concluding that the essential elements of every [patentable] invention require more ingenuity and skill [than] possessed by an ordinary mechanic acquainted with the business).

<sup>19</sup> *Brenner v. Manson*, 383 U.S. 519, 534 (1966) (The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility.); *Graham*, 383 U.S. at 6 (Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of . . . useful Arts.’).