No. 10-545

IN THE

Supreme Court of the United States

LAWRENCE GOLAN, et al.,

Petitioners,

v.

ERIC H. HOLDER, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, UNIVERSITY OF MICHIGAN DEAN OF LIBRARIES, INTERNET ARCHIVE AND WIKIMEDIA FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

This brief amicus curiae in support of Petitioners is submitted pursuant to Rule 37 of this Court. Amici curiae are cultural institutions and non-profit educational resources, old and new, that seek to serve the global community by collecting and sharing public domain works, including traditional and online libraries, digital encyclopedias, and, more generally, digital repositories (collectively, "libraries and digital repositories"). Thanks to the Internet and other new technologies, Amici are able to preserve and share a vast wealth of information, allowing a virtually unlimited number of patrons worldwide access to digitized books, photographs, music, and other works. However, new and unexpected legal barriers threaten to inhibit their work.

The Association of Research Libraries (ARL) is a nonprofit organization of 126 research libraries in North America, including university, public, governmental, and national libraries. The American Library Association (ALA) is a nonprofit professional organization of more than 67,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries (ACRL), the largest division of

1. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, or its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioners' blanket consent and respondents' blanket consent were filed with the Court on May 19, 2011 and April 20, 2011, respectively. Web sites cited in this brief were last visited on June 15, 2011.

the ALA, is a professional association of academic and research librarians and other interested individuals. Collectively, these three library associations represent over 139,000 libraries in the United States, institutions that are increasingly being called upon to serve the needs of their patrons in the digital age. As a result, the associations share a strong interest in the balanced application of copyright law to new digital dissemination technologies.

The Internet Archive is a public non-profit organization that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format. The Internet Archive receives data donations and digitizes material, much of which is in the public domain, from a multitude of sources, including libraries, educational institutions, and private companies. The Internet Archive then provides free access to its data—which includes text, audio, moving images, software, and archived web pages—to researchers, historians, scholars, and the general public. In order to collect and share this data freely, the Internet Archive and its volunteers necessarily rely on determinations as to what information resides in the public domain.

The Wikimedia Foundation is a non-profit organization that seeks to empower a worldwide volunteer community to collect and develop educational content under a free license or in the public domain, and to disseminate it effectively and globally at no cost. With approximately 400 million people every month and millions of page requests per hour, the Foundation's projects constitute the fifth most visited website on the Internet. One well-known

project is Wikipedia (www.wikipedia.org), the world's largest and most popular encyclopedia, which contains more than 18 million articles in over 280 languages. In pursuit of its mission to create "a world in which every single human being can share freely in the sum of all human knowledge,"[2] the Wikimedia Foundation and its volunteers support other projects, including: Wikimedia Commons, an educational media repository containing more than 10,000,000 freely usable images, videos, and sound files; Wikisource, an online library of free content publications; and Wikibooks, a collection of open-content textbooks.[3]

The University of Michigan Library in Ann Arbor is one of the largest university library systems in the United States. In locations all over the Ann Arbor campus, MLibrary holds more than 8.5 million volumes. Each year, it adds the equivalent of 2.5 miles of new material to one of the finest and most comprehensive collections of any academic library in the world. It also leads a coalition of nearly 30 libraries in the creation of a rapidly growing digital collection that currently exceeds 6 million volumes, the HathiTrust Digital Library. MLibrary's mission is to support, enhance, and collaborate in the instructional, research, and service activities of the faculty, students,

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2. *See Home*, Wikimedia Foundation, http://wikimediafoundation.org/wiki/Home.

3. *See FAQ*, Wikimedia Foundation, http://wikimediafoundation.org/wiki/Frequently_Asked_Questions. Although sometimes confused with each other, Wikimedia has no affiliation with the organization named WikiLeaks. *See* http://en.wikipedia.org/wiki/Wikipedia:WikiLeaks_is_not_part_of_Wikipedia.

and staff, and contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge. This mission is accomplished through the provision of the various collections and programs available to patrons of the library system. In 2008, the University of Michigan Library was awarded a National Leadership Grant from the Institute of Museum and Library Services to create a Copyright Review Management System (CRMS). The purpose of the project is to increase the reliability of copyright status determinations of books published in the United States from 1923 to 1963 in the HathiTrust Digital Library, and to help create a point of collaboration with other institutions.

Amici share a concern that the effects of Section 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A—both the provision itself and the dangerous approach to the public domain that it represents—pose a significant threat to the ability of libraries and digital repositories to promote access to knowledge. This threat is particularly dangerous now, when the advent of new technologies is making it more possible to share more public domain works with more people, in more ways, than ever before. Indeed, the vast majority of those affected by Section 514 are neither copyright holders nor reliance parties, but rather members of the general public who regularly rely on (or would benefit from access to) public domain works that are, or could be, made available online for information, educational, and creative purposes. In serving these individuals, libraries and digital repositories necessarily rely on a robust and stable public domain that allows them to confidently determine their rights to provide access to a given work. Section 514 has undermined that confidence

by upending a basic tenet of copyright law: once a work enters the public domain, it stays in the public domain.

SUMMARY OF ARGUMENT

The public domain is our cultural commons, made up of more than just works that have "fallen" into disuse, but also "the raw material from which we make new inventions and create new cultural works." James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 39 (2008). As such, it is an integral part of the copyright bargain, a vehicle through which copyright's limited monopoly ultimately serves its purpose: to promote the progress of science and the useful arts.

Thus, this case raises an issue of extraordinary importance: whether the Constitution permits Congress to shrink the public domain and thereby refigure the copyright balance. Section 514 grants copyright protection to certain foreign works that have already been dedicated to the public domain. Those foreign works include those whose terms have not expired in their source countries and have ended up in the public domain because of: (1) noncompliance with U.S. copyright law; (2) lack of subject matter protection for sound recordings fixed before February 15, 1972; or (3) lack of national eligibility. 17 U.S.C. § 104A(h)(6) (2006). This encompasses wide swathes of our cultural building blocks, including, for example, all Russian works published before 1973, including works by Vladimir Nabokov, Maxim Gorky, Alexander Solzhenitsyn, and Sergei Prokofiev, paintings by Pablo Picasso, drawings by M.C. Escher, and writings by such authors as George Orwell, J.R.R. Tolkien, and Virginia Woolf. All of these works—and thousands, if

not millions more—were reliably in the public domain before passage of Section 514. By placing them back under copyright protection (and by signaling a willingness to do so with more works in the future), Congress thwarted the settled expectations of thousands of users of those works and collectors of public domain works, including the libraries and digital repositories that could be preserving those works and using new technologies to make them more accessible.

Librarians, archivists, and those who run digital repositories share Congress's concern that U.S. authors receive fair compensation for their work. Amici respectfully submit, however, that reversing a core default principle of copyright law—that a work in the public domain stays in the public domain—impermissibly puts potential benefit to some authors ahead of the public interest.

ARGUMENT

I. The Modern Efforts of Libraries and Digital Repositories to Provide Public Domain Materials to the Public at Large

A. The Historical Importance of Libraries in Facilitating Access to Knowledge

Libraries have long been specially positioned to facilitate access to the public domain, because, as this Court has recognized, they are institutionally committed to fostering a "regime of voluntary inquiry" that gives users wide and virtually unfettered access to speech and information. *Bd. of Educ., Island Trees Union Free Sch.*

Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982). In playing this role, they fulfill a vision by Thomas Jefferson that "nothing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the county under regulations that would secure their safe return in due time." Letter from Thomas Jefferson to John Wyche (May 19, 1809), *in Thomas Jefferson: A Chronology of His Thoughts* 223 (Jerry Holmes ed., 2002). By making the cultural commons accessible to the public, libraries have become, as President Franklin Roosevelt declared in 1941, "the great tools of scholarship, the great repositories of culture, the great symbols of freedom of the mind" and, as such, "essential to the functioning of a democratic society." Patti Clayton Becker, *Books and Libraries in American Society During World War II: Weapons in the War of Ideas* 49 (2005); *see also* Byron Anderson, *Public Libraries*, *in St. James Encyclopedia of Popular Culture*, 133 (Tom Pendergast & Sara Pendergast eds., 2000) ("U.S. libraries arose out of the democratic beliefs in an informed public, enlightened civic discourse, social and intellectual advancement, and participation in the democratic process.")

B. The Modern Role of Libraries and Digital Repositories in Facilitating Access to Knowledge

The importance of a robust and stable public domain to further a "regime of voluntary inquiry" becomes ever more clear in light of efforts by libraries and digital repositories to use digital technologies to promote access and re-use of the cultural commons. The Internet "provides relatively

unlimited, low-cost capacity for communication of all kinds." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 870 (1997). More specifically:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Id. Simply put, the proliferation of modern technologies is making the promise of the First Amendment—the right to speak and the right to receive speech—a reality on an unprecedented scale.

Libraries and digital repositories excel at providing access to cultural materials that have often been difficult to locate and maintain, including, for example, books and pamphlets with limited print runs, posters, and sheet music. Libraries traditionally housed these materials, limiting access to those able to physically visit. Thanks to the advent of new technologies for digitizing works and making them available online, it is possible for libraries and digital repositories to share those works with the world. Thus, scholars, artists and the general public can more easily access the wealth of knowledge that was once locked away in various institutions.

In addition, more and more often, works are created and then live entirely online, or are only available in digital

form because the physical copy is no longer available. When an author removes a website from the Internet, or removes certain content from a website, that site or content ceases to exist unless it has been preserved elsewhere. Without an effort to archive digital content, we risk losing much of our cultural memory.

C. Case Studies

Below are a few examples of how libraries and digital repositories can provide the general public with access to content, both in and out of the public domain, in a way that could not have been contemplated before the advent of the Internet.

1. The Internet Archive

Amicus Internet Archive offers permanent access for researchers, historians, scholars, and the general public to historical collections that exist in digital format. By digitizing this information, the Internet Archive makes works in the public domain accessible worldwide, promoting creativity in the arts and sciences by allowing individuals to clip and sample millions of public domain texts, films, and sound recordings with ease.

The Internet Archive's mission, to provide universal access to all knowledge, relies on a robust and stable public domain. For example:

- The Internet Archive features approximately 2,000 feature-length movies online available to the general public for free.[4] Most of these films are

4. *See* http://www.archive.org/details/movies.

uploaded by individual users who have possession of the films and have determined that they reside in the public domain. More than 2 million movie and audio items are downloaded from the Internet Archive daily.

- The Internet Archive archives various institutions' digital content. Some of this archiving is done at the request (and payment) of third parties, such as universities or the federal government. These collections are often curated, allowing the institutions the ability to organize, catalog, and manage their digital content. These collections include movies, audio, texts, software, and archived web content.[5] The Internet Archive contains nearly 1.5 million texts from American libraries alone.

- The Internet Archive runs a book project,[6] which is responsible for uploading approximately 1,000 digitized books each day and 1,000 reels of microfilm each week. This work is done in conjunction with libraries and other third parties who provide the books to be scanned to the Internet Archive. Also, individuals on their own accord scan and upload books. In each instance, the party providing the material to scan and upload is responsible for

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5. *See, e.g., Ebook and Texts Archive*, Internet Archive, http://www.archive.org/details/texts; *Audio Archive*, Internet Archive, http://www.archive.org/details/audio; Archive-It, http://www.archive-it.org.

6. *See Ebook and Texts Archive*, Internet Archive, http://www.archive.org/details/texts, Open Library, http://openlibrary.org/.

> making the determination as to whether a given text properly resides in the public domain. More than 500,000 books are downloaded from Internet Archive each day.

The reliability of the public domain plays an integral role in these Internet Archive projects. An enormous amount of the material made available at the Internet Archive—whether contributed by an individual user or an organized institution—resides in the public domain, and it is often up to the uploading users, and not copyright lawyers, to determine the status of the work.

Once a public domain item—be it a movie or text or any other content—has been posted to the Internet Archive, it is available free of charge to the general public to use in any manner whatsoever. The public, therefore, is free to create derivative works. This produces a chain of creativity, in which future creators are dependent not only on the prior creator's license or release of his or her work, but on every work in the chain. If a work inside that chain is removed from the public domain, it jeopardizes each of these works, resulting in confusion and inefficiency. As a practical matter, it may also be difficult or impossible to trace the content as it exists further down this chain of derivative works.[7]

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7. A subset of the Internet Archive that also houses and provides access to material online is the Prelinger Archive, which may be found at http://www.archive.org/details/prelinger_library. The Prelinger Archive consists of at least 3,760 distinct digitized items, which it offers for public usage on the Internet Archive.

2. The Wikimedia Foundation

Amicus Wikimedia Foundation is one of the largest hosts of public domain material in the world, supported by tens of thousands of volunteers. The Wikimedia mission envisions that all of its content be freely reusable by anyone in the world at no cost. Although Wikimedia relies considerably on free licenses, such as the Creative Commons Attribution ShareAlike License, for the distribution of copyrighted materials, only a small percentage of works are released in the world under such licenses. For that reason, Wikimedia and its volunteers depend heavily on the public domain to augment content.

Within the Wikipedia project specifically, public domain images, videos, and sound files are used to illustrate hundreds of thousands of encyclopedia articles. In addition, thousands of articles incorporate text from a wide variety of public domain sources. In many cases, the public domain material serves as a seed to germinate an article. Volunteer editors update and expand the material to make it more comprehensive, timely, and accurate. In other cases, public domain material is used to augment or inform existing articles. Reliance on the public domain is important when dealing with historical subjects, since free content licenses were not widely used before the 21st century. In these cases, public domain photos, maps, and illustrations may be the only media freely available for illustrating such articles.

The Foundation also runs one of the largest repositories of public domain media in the world, Wikimedia Commons. Wikimedia Commons currently hosts over 10 million files, of which about 3 million are in the public domain. These

include scans of books, documents, maps, illustrations, historical photographs and videos, sound recordings of public domain music and speeches, and various other works. Public domain media from Wikimedia Commons is not only used by other Wikimedia projects but also by websites across the Internet—on blogs, news sites, educational websites, etc. The value of this content is evident in the fact that public domain media hosted by Wikimedia Commons is even reused in books, magazines, and journal articles.

Wikimedia Commons also hosts thousands of works that are derived from other public domain works. For example, a diagram of the human brain from the 1918 edition of Gray's Anatomy has been reproduced with labels in five other languages.[8] In this way, an illustration that was previously locked away in university libraries can now be viewed by millions of people across the world from the convenience of their home or school, at no cost, and in their own language.

Another Wikimedia project that makes heavy use of the public domain is Wikisource. Wikisource is a free library of public domain, creative commons, and other legally available texts for free download. These texts are collected and maintained by a community of volunteers. In many cases the texts are painstakingly transcribed over months or years from scans of public domain books. On the English Wikisource alone, over 200,000 texts

8. *See File:Gray728.png*, Wikimedia Commons, http://commons.wikimedia.org/wiki/File:Gray728.png; *see e.g.*, *File: Brain diagram ja.svg*, Wikimedia Commons, http://commons.wikimedia.org/wiki/File:Brain_diagram_ja.svg.

have been compiled. These texts span a huge range of material—from the Spanish Constitution to Little Red Riding Hood. Each text can be read and searched online or exported to other formats.

As one of the largest hosts of the public domain, Wikimedia demonstrates the incredible value that these works provide to the global community, a value made possible by tens of thousands of engaged volunteers. However, though smart and dedicated, these volunteers are not practicing attorneys. They need clear rules to enhance knowledge in the public domain, not an ever-shifting and complex set of laws that could undermine the status of a public domain work.

3. The HathiTrust Digital Library

In 2008, the University of Michigan Library was awarded a National Leadership Grant from the Institute of Museum and Library Services (IMLS) in order to develop and implement the Copyright Review Management System (CRMS). CRMS was designed to enable cross-university collaboration in determining the copyright status of the books contained in the HathiTrust Digital Library that were published in the United States from 1923 to 1963.[9]

These books formed a special corpus of the HathiTrust Digital Library because many of the books published during this period failed to comply with the requisite

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9. *See Copyright Review Management System – IMLS National Leadership Grant*, University of Michigan Library, http://www.lib.umich.edu/imls-national-leadership-grant-crms.

copyright formalities (and thus were in the public domain). However, due to the difficulty of manually verifying the copyright status of these works, there was a great deal of uncertainty as to which works were still subject to copyright and which works were in fact public domain.

In order to address this problem, the University of Michigan Library developed the CRMS project, and, in partnership with the Indiana University Libraries, the University of Minnesota Libraries, and the University of Wisconsin-Madison Libraries, has reviewed more than 140,000 volumes to date, determining that more than 78,000 volumes are in fact in the public domain.[10] The benefits of these determinations are substantial; once a book is determined to be in the public domain it is "opened" in the HathiTrust Digital Library, and is then available for use by members of the public. Because of the CRMS project, tens of thousands of books that would have sat relatively unused are available for education, reading, and scholarship.

By 2012, the University of Michigan Library and the IMLS are projected to have spent $1,067,000 on the CRMS project, and the University is currently seeking additional grant and staffing commitments of more than one million dollars to expand the project over the next three years. This is a significant investment of time and capital for the University of Michigan Library, but one it has been willing to undertake to further the substantial public good achieved by making these public domain works available.

10. *Id.*

II. By Destabilizing the Public Domain, Section 514 Impedes Access to Knowledge

A. Loss of Public Domain Works

The automatic restoration provision of Section 514 affects potentially millions of works formerly in the public domain, many of which could be made available at the Internet Archive, on Wikimedia sites, in the HathiTrust Digital Library, or via myriad other libraries or digital repositories. For example, Section 514 automatically restored[11] copyright protection to all works that had not been protected in the United States because no treaty existed at the time of creation between the United States and the source country, such as Russian works created before May 27, 1973, when the Soviet Union jointed the Universal Copyright Convention. Thus, Section 514 pulls out of the public domain works by Maxim Gorky, Sergei Prokofiev, Dmitri Shostakovich, Sergei Yesenin, and Marina Tsvetaega.[12]

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11. While Section 514 restores copyright protection, a copyright's owner may only enforce that right against a reliance party upon filing a notice of intent with the Copyright Office or serving notice of intent to enforce upon the reliance party. 17 U.S.C. § 104A(d)(2).

12. There is no plausible basis for arguing that restoring copyright protection for the works created by long dead authors in a Communist country that did not recognize property rights in any way promotes the progress of science and the useful arts. Gorky died in 1936; Prokofiev died in 1953; Shostakovitch died in 1975; Yesenin died in 1925; Tsvetaeva died in 1941. While their struggles to express themselves artistically in the face of brutal totalitarian repression are worthy of great admiration, providing their heirs with royalties does not fulfill the constitutional purpose of the Copyright Clause.

B. Uncertainty Impedes Accessibility

1. Section 514 Dilutes Scarce Resources

Section 514 also makes it significantly more difficult (or in some cases impossible) to determine the copyright status of foreign works and thus whether or not they may be legally hosted. In order to acquire and provide access to digital materials, libraries and digital repositories are dependent on reliable conclusions as to whether a work is in the public domain. An unstable public domain forces them to operate in a legal gray area, subject to real litigation concerns and subsequent chilling effects. Given the constrained legal budgets of non-profit organizations, libraries and digital repositories are understandably reluctant to take that risk, even where the probability of litigation is relatively low. *See* James Boyle, *The Public Domain* at 12 ("[s]ince it is so difficult to know exactly who owns the copyright (or copyrights) on a work, many libraries simply will not reproduce the material or make it available online until they can be sure the copyright has expired—which may mean waiting for over a century. They cannot afford to take the risk.").

Time and energy spent confirming the public domain status of a given work are resources that could be devoted in more publicly beneficial ways, such as acquiring new works or making them available. For example, it is imperative that the University of Michigan Library and their partner institutions be able to trust that a work in the public domain will remain in the public domain if they are to continue investing staff time, energy, and resources into projects like the CRMS. Establishing the facts and processes of a project like the CRMS takes time and effort;

uncertainty about the reliability of a work's public domain status or other essential facts calls to question their ability to undertake this socially useful project and others like it.

This same uncertainty—and its negative effects—apply not just to organizations, but to the users and volunteers who seek out and upload public domain materials to supplement the libraries and digital repositories. The participation of volunteers is indicative of a remarkable societal transformation, one that shows no signs of slowing. They are amateur archivists who harness the power of the Web to distribute works in the public domain. Any rule that imposes complicated, after-the-fact copyright restrictions on previous public domain works or injects any more uncertainty into an already complicated legal regime results in confusion and hesitancy by the laymen archivist and his or her ability to support libraries and digital repositories.

Finally, not only does the removal of items from the public domain breach a social contract between a work's author and those who later use those works, but it increases the expense of serving the public interest. In particular, it injects uncertainty and confusion about the parameters of the public domain into the marketplace, preventing ideas, capital, and commerce from flowing efficiently. The more complicated the rules, the higher the costs and the greater the reluctance to identify and distribute public domain works. For example, as noted above, HathiTrust has spent more than $1 million determining whether works fall into the public domain. Should the contours of the public domain shift during this project (or once it is complete),

it will leave the HathiTrust Digital Library saddled with potentially paralyzing uncertainty.

2. Section 514 Creates New Orphan Works, Exacerbating a Problem that Already Plagues Libraries and Digital Repositories

Removing works from the public domain has also resulted in the creation of new "orphan works," i.e., works that appear to be "in-copyright" but whose authors cannot be identified or located. In light of the legal risks described above, libraries are reluctant to make orphan works available online. In a letter to the Copyright Office, the College Art Association described Section 514's operation as follows:

> [T]he "orphan works" problem has been enormously exacerbated by the restoration of foreign works as a result of Section 514. . . . Literally, in one fell swoop, hundreds of thousands, if not millions, of works that were once in the public domain have been given the full protection of United States Copyright. The vast majority of foreign works were never registered, so registrations and renewals cannot be found to identify the rights owners, particularly if they are not famous. . . . In the vast majority of cases, identifying, finding and clearing rights is realistically impossible. This restoration to the full protection of United States copyright law has largely occurred without any commensurate benefit to the

> American public because most of these works are not being disseminated unless the rights owner is identifiable and can be found (or unless the works are currently being exploited by the copyright owner or his or her licensee).[13]

The College Art Association offered examples of this serious problem, including:

- The Hispanic Society of America has thousands of photographs from dealers worldwide, especially Latin America, where the copyright owner could not be located. These included images of buildings that have since been destroyed (making it impossible even to travel to the site to take a duplicate photograph). *Id.* at 12.

- Photographs of works by Haitian artists, where even the artist is not easily determined, much less the publisher. *Id.* at 16.

- A photograph of a 14th Century wall painting printed in a small scholarly book from France, where the author could not be located. The researcher had to travel to France to take photos of the same paintings. *Id.* at 19.

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13. Letter from Jeffrey P. Cunard, Counsel for the College Art Association, to Jule L. Sigall, Associate Register for Policy & International Affairs, U.S. Copyright Office (March 25, 2005), 6-7, *available at* http://www.collegeart.org/pdf/caa_orphan_letter.pdf (citation omitted).

In a similar letter,[14] the Library Copyright Alliance gave other examples:

- A project under consideration was digitization of approximately 1200 rare ethnomusicology 78rpm records of folk music. The project had to be severely limited to records that were clearly in the public domain, since most of the record labels were out of business. *Id.* at 4.

- The University of California, Los Angeles Library maintains the Frontera Collection, "which consists of more than one hundred thousand recordings and thirty thousand performances of Mexican folk music. Most of the collection is covered under copyright and the library is unable to locate the copyright owners. Accordingly, the Library cannot make the collection available outside UCLA, *e.g.*, by interlibrary loan." *Id.* at 5.[15]

In its own letter, the UCLA library further described the difficulty in obtaining rights to the Frontera

14. Letter from Miriam M. Nisbet, Legislative Counsel, American Library Association to Jule L. Sigall, Associate Register for Policy & International Affairs, U.S. Copyright Office (March 25, 2005), *available at* http://www.arl.org/bm~doc/lcacomment0305.pdf (hereinafter, *Nisbet Letter).*

15. *See also* The Strachwitz Frontera Collection of Mexican and Mexican American Recordings, http://frontera.library.ucla.edu/, the web site for the Frontera Collection. "Due to copyright restrictions," the collection can only be accessed at UCLA. *See Copyright and Access*, The Strachwitz Frontera Collection of Mexican and Mexican American Recordings, http://frontera.library.ucla.edu/access.html.

Collection of Mexican and Mexican-American recordings, and lamented the "effect of current copyright law" on "restricting or limiting access to our cultural heritage."[16]

The problem of orphan works, which is already acutely felt in the library and digital repository community, is exacerbated by Section 514's reduction of the public domain. When works previously in the public domain become orphans because of Section 514, it means that works that once belonged to the public may not be shared—even if parties wish to pay royalty fees—because the authors of those works are unknown. In essence, Section 514 takes works previously in the public domain and places them in a black box.

Moreover, by threatening the integrity of the public domain, Section 514 sets a dangerous precedent; no longer will libraries and digital repositories be able to do their essential work with confidence that, at some future date, a work currently out of copyright will not suddenly become the subject of a copyright dispute.

In short, when the public domain shrinks, so does the ability of digital archivists, librarians, and volunteers to preserve and provide access to cultural works, now and in the future. It is a sad irony indeed that this should occur at the very moment when new technologies make it possible for the public domain to be more truly "public" than ever.

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16. Letter from Gary E. Strong, University Librarian and Director, University of California, Los Angeles, to Jule L. Sigall Associate Register for Policy & International Affairs, U.S. Copyright Office (March 2005), 10-12, 14, *available at* http://www2.library.ucla.edu/pdf/GES_orphan_works_comments.pdf.

3. Section 514 Discourages Productive Third-Party Uses

Section 514 discourages artists, writers, and others from incorporating third-party material into their own future works because Section 514 creates ambiguity—whether fear of retroactive copyright liability or confusion over complex copyright restoration rules. This uncertainty harms the speaker, as well as others who may benefit from that speech. Kevin Cooper, for example, published a book in 2005 of children's songs called *Snakes, Snails, and C Major Scales* (2005). *See Nisbet Letter, supra* at 8. Mr. Cooper's original draft included "a variety of multicultural pieces," including Native American, Jewish, Russian, French, Japanese, and Mexican songs. *Id.* However, because Mr. Cooper could not determine whether many of the songs were in the public domain, the book was limited to Russian, French, Japanese, and American songs. *Id.* "Therefore, it resembles the multicultural music education materials of the past with an imbalance of songs from mostly white, European cultures and superficial songs written about cultures but not by the cultures themselves, like 'Ten Little Indians.'" *Id.* Section 514 exacerbates this problem and keeps important pieces of the cultural commons out of the hands of the people to whom it rightly belongs: the public.

III. Copyright Legislation Should Protect the Public Interest

As the above examples illustrate, Section 514, and the uncertainty it introduces, undermine efforts to make public domain works available in new ways, at the very moment when digital technologies are helping to expand

public access to our cultural commons. As discussed in greater detail in Petitioners' brief, the Constitution does not countenance Congress's decision to put the interests of a few authors ahead of the public interest.

A. The Progress Clause Limits Congress's Ability to Shrink the Public Domain

This Court has declared that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the useful Arts.'" *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991), quoting U.S. CONST. Art. 1, § 8, cl. 8. According to this Court, copyright protection "is intended *to motivate the creative activity* of authors . . . by the provision of special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired*." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

By reserving a broad, consistent swath of content for widespread and unlimited use, the public domain provides a secure home for a cultural commons; it becomes, in turn, a crucial resource for subsequent creation and innovation, helping copyright law attain its goal. "Nothing today . . . is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before." *White v. Samsung*

Elecs. Am. Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of rehearing en banc); *see also* William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 66-67 (2003) ("[c]reating a new expressive work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it"); Jessica Litman, *The Public Domain,* 39 EMORY L. J. 965, 967 (1990) ("the public domain is the law's primary safeguard of the raw material that makes authorship possible").

Thus, the public domain is an essential part of the traditional copyright bargain, and any effort to change its contours must comport with the copyright's fundamental legal authority: the Progress Clause of the Constitution. U.S. CONST. Art. 1, § 8, cl. 8. *See Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) ("The clause is both a grant of power and a limitation"). As this Court has held,

> Article I, § 8, cl. 8, of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." . . . the Clause contains both a grant of power and certain limitations upon the exercise of that power.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989); *see also Sony Corp.,* 464 U.S. at 428-29 (under the Progress Clause, "[t]he monopoly privileges

that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit").[17]

As Petitioners explain in greater detail, destroying the longstanding expectation that works in the public domain stay there runs directly contrary to the policy and letter of the Progress Clause. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 18.06[C][1], 18-80 (2008). Worse, Congress did not even consider its Constitutional mandate when it enacted the legislation behind Section 514. *Id.* at 18-82-83 (neither the House nor Senate reports "betrays the slightest awareness of the breadth of the changes being implemented or their departure from two centuries of constitutional jurisprudence under the Copyright Clause").

B. The First Amendment Limits Congress's Ability to Shrink the Public Domain

The First Amendment also limits Congress's scope of authority. Because it protects our cultural commons, the public domain is essential to free speech, helping to give meaning to the First Amendment right to receive

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17. Although *Graham* and *Bonito Boats* involved the patent laws, the Progress Clause limits both patents and copyrights. In these situations, it is appropriate to refer to patent cases "because of the historic kinship between patent law and copyright law." *Sony*, 464 U.S. at 439. Respondents incorrectly assert (see Petition Opposition at 16) that *Eldred v. Ashcroft*, 537 U.S. 186 (2003) is to the contrary. *Eldred* merely held that *Bonito Boats* and other patent cases do not apply to issues dealing with "a grant's duration," 537 U.S. at 216-17. Unlike *Eldred*, this case does not involve the duration of copyright—it involves granting new copyright protection to works that formerly were in the public domain. *Graham* and *Bonito Boats* speak directly to this point.

information. *See* Diane Leenheer Zimmerman, *Is There A Right To Have Something to Say? One View of the Public Domain,* 73 FORDHAM L. REV. 297, 326 (2004) ("A constitutional guarantee of free speech that promised to protect little more than our right to mumble meaningless sounds or scribble random lines on a piece of paper would be an empty concept. Speech requires content to be meaningful. This includes some ability to acquire such content and certainly the privilege of using it."). Indeed, "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867 (emphasis in original).

With a reduction to the public domain, the right to receive information is diminished, as is the voice of the community. As a practical matter, as explained above, it impairs the rapidly expanding ability of libraries and digital repositories to make information available to the community. Given the essential role that libraries and digital repositories can play in facilitating a vibrant regime of inquiry, this represents a significant harm to free speech interests.

What is worse, this is not a case, as in *Eldred v. Ashcroft*, where the works in question had never entered the public domain. In *Eldred*, this Court upheld the constitutionality of the Copyright Term Extension Act (CTEA) Pub.L. 105–298, §§ 102(b) and (d), 112 Stat. 2827–2828 (1998), which extended the term of existing (non-expired) copyrights for 20 years. Unlike Section 514, however, the CTEA did not remove anything from the public domain, since it only applied to works currently under copyright protection.

Section 514, by contrast, deprives Petitioners, amici and their patrons of access to speech that already belonged to the public. Thus, as the initial Tenth Circuit panel reviewing this case noted, the First Amendment interests implicated in the public domain here are greater than those raised in *Eldred*:

> The *Eldred* plaintiffs did not — nor had they ever — possessed unfettered access to any of the works at issue there . . . the most the *Eldred* plaintiffs could show was a weak interest in "making other people's speeches." 537 U.S. at 221, 123 S.Ct. 769. By contrast, the speech at issue here belonged to plaintiffs when it entered the public domain.

Golan v. Gonzales, 501 F.3d 1179, 1193 (10th Cir. 2007) (citing *Eldred*, 537 U.S. at 221).

On appeal, the second Tenth Circuit panel ignored this distinction and based its ruling on the faulty assumption that Petitioners were using speech that was not their own. *See* Petitioner's Brief at 44; *Golan v. Holder,* 609 F.3d 1076, 1084 (10th Cir. 2010) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speech.") (*quoting Eldred,* 537 U.S. at 221). As Petitioners explain, the first Tenth Circuit ruling had it right: once works enter the public domain, they belong to the public, not the former copyright holder. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.,* 539 U.S. 23, 33-34 (2003) (anyone may use works in the public domain "at will and without attribution"); *Bonito Boats,* 489 U.S. at 153 (recognizing "free access to

copy whatever the federal patent and copyright laws leave in the public domain") (*quoting Compo Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234, 237 (1964)).

Section 514 should have been crafted and interpreted in a manner consistent with the constitutionally mandated purpose of copyright law. *Cf., Bilski v. Kappos*, 561 U.S. ___, 2010 WL 2555192, at *3252 (June 28, 2010) (Stevens, J., concurring) (the Court should interpret patent laws in light of the Constitution's Progress Clause). As set forth above, Section 514 actually frustrates that purpose, to the detriment of the public interest in a vibrant cultural commons.

CONCLUSION

As the above suggests, Section 514 contradicts copyright's central purpose of fostering creativity. In enacting Section 514—and, in the process, signaling a willingness to reconsider the boundaries of the public domain again should future speculation seem to require it—Congress took the certainty out of the public domain and drastically eroded the ability of libraries and digital repositories to know what works are available for use and, even more troubling, what works might not be available in the future. This is not the balance that the copyright law and policy—and the First Amendment—require. Amici respectfully urge the Court to recognize that Congress has gone beyond its authority and find Section 514 unconstitutional.

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