No. 10-545

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IN THE

Supreme Court of the United States

LAWRENCE GOLAN, ET AL.,

Petitioners,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL, ET AL.,

Respondents.

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

AMICUS BRIEF ON BEHALF OF INTERNET ARCHIVE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

This brief amicus curiae in support of Petitioners is submitted by the Internet Archive pursuant to Rule 37 of this Court.

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. Founded in 1996 and located in San Francisco, California, the Internet Archive receives data donations and digitizes source material from a multitude of sources, including libraries, educational institutions, and private companies. The Internet Archive then provides free access to its data—which include text, audio, moving images, software, and archived web pages—to researchers, historians, scholars, and the general public.

The Internet Archive files this brief because the effects of Section 514—both the provision itself and the radical approach to the public domain that it represents—pose a significant threat to the ability of libraries and archives to promote access to knowledge. The emergence of this threat is particularly unfortunate now, when the advent of new technologies is making it

[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. Pursuant to Supreme Court Rule 37.2(a), amicus curiae provided at least ten days' notice of its intent to file this brief to counsel of record for all parties. The parties have consented to the filing of this brief.

more possible to share public domain works with more people, in more ways, than ever before—making the public domain truly "public." In accomplishing this task, libraries necessarily rely on a robust and static public domain that will allow them to confidently determine that they have the right to provide access to a given work.

INTRODUCTION

The public domain is our cultural commons. It encompasses not just works that have "fallen" into disuse, but the future "basis for our art, our science, and our self-understanding" and "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).

Thus, Petitioners ask this Court to consider an issue of extraordinary importance: whether the Constitution permits Congress to undermine the public interest in a stable cultural commons. As Petitioners explain, in passing Section 514 of the Uruguay Round Agreements Act ("URAA"), Congress upended the settled expectations of thousands of secondary users and collectors of public domain works, including the libraries and archives that have traditionally provided preservation and access to our culture's greatest works.

Libraries, as institutions, are uniquely committed to protecting and facilitating access to this cultural commons. A robust and reliable public domain is essential to their ability to meet this commitment, for at least two related reasons: First, a stable public

domain means that libraries can build systems and procedures to facilitate access to and use of works in their collections with much less fear that those procedures will have to be adjusted to accommodate works that are subtracted from the public domain. Second, a stable public domain means that libraries can operate without fear of incurring unexpected legal risk.

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 their patrons 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 laws—and the First Amendment—require. Indeed, by threatening the ability of libraries to promote access to books and other foreign works, Section 514 altered the traditional contours of copyright protection.

As a librarian, the Internet Archive shares Congress' concern that U.S. authors receive fair compensation for their work. The Internet Archive respectfully submits, however, that reversing a centuries-old principle of copyright law—that a work in the public domain stays in the public domain—was both misguided and constitutionally impermissible.

ARGUMENT

A. The Public Domain and the Cultural Commons it Embodies Promote Free Speech Values and Protect Our Cultural Heritage.

The public domain encompasses both that which is excluded from copyrightability (e.g. titles and facts) and that as to which copyright protection has expired or has otherwise not been renewed. Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 992-93, 976 (1990). Once the works are in the public domain, anyone may use them "at will and without attribution." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-35 (2003).

The public domain is essential to accomplishing one of copyright's principal purposes: promoting public access to information while protecting creative incentives through intellectual property laws. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) ("[Copyright] is 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."); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (stating that the Copyright Act demonstrates a "balance between the artist's right to control the work . . . and the public's need for access"); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the Copyright Act's limited monopoly "is intended to motivate the creative activity of authors and inventors . . . and to allow the public access to the products of their genius after

the limited period of exclusion control has expired"); *see also Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) ("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 the materials already available.").

By protecting content for widespread and unlimited use, the public domain likewise protects our cultural commons—those materials that exist, such as "knowledge, truths ascertained, conceptions, and ideas [that] become, after voluntary communication to others, free as the air to common use." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). This "free as the air" knowledge then becomes the building blocks of our modern culture. "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) ("Creating 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."); Litman, *supra* at 967 ("[T]he public domain is the law's primary safeguard of the raw material that makes authorship possible.").

Because it protects our cultural commons, the public domain is equally essential, in turn, to free speech, helping to give meaning to the First Amendment right to receive information. *See, e.g.*, 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." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original).

B. Libraries Protect the Cultural Commons and Rely on the Public Domain to Accomplish This Task.

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

Historically, various types of institutions have served to protect—and in some instances even house—the public domain. For generations, the library has played this role, fulfilling 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 country under regulations that would secure their safe return in due time." Thomas Jefferson, Letter from Thomas Jefferson to John Wyche (May 19, 1908), *in Thomas Jefferson: A Chronology of His Thoughts* 223 (Jerry Holmes ed., 2002); *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.").

Libraries are specially positioned to facilitate access to the public domain because, as this Court has also recognized, they are institutionally committed to fostering a "regime of voluntary inquiry." *Pico*, 457 U.S. at 869. But that regime of inquiry can only exist if libraries are able to make materials available so that users can peruse them conveniently at their own pace.

2. The Public Domain is Crucial to Libraries' Ability to Promote Online Access to Knowledge.

As libraries and archives migrate online, the importance of a robust and static public domain to further a broad "regime of inquiry" becomes ever more clear. The Internet "provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. Am. 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. By the same token, the Internet makes it more possible than ever for more people to gain access to more information (which can then be shared more widely) than ever before. As a result 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 in the digital world play a central role in that process because they excel at providing access to materials that have often been harder to locate and maintain—the ephemera, the gray material, the lost classics. Historically, culture was archived by newspapers and other ephemeral matter, such as posters and other cultural references. However, more and more often, works are created and then live entirely online, or are only available in digital form because the physical copy has been destroyed or is no longer available. Unlike a newspaper or other hard-copy print out, when an author removes a website from the Internet, or removes certain content from a website, that site or content within that site ceases to exist unless it has been preserved elsewhere. Without an effort to archive this content, we face a risk of losing our cultural memory.

In order to locate, acquire, and provide access to this material, however, libraries must depend on reliable conclusions as to whether any given content is in the public domain. For example, libraries follow a statutory

exception that allows them to lend out material that may be covered by valid copyright. 17 U.S.C. § 108 (2006). However, it is not always clear that this exception applies to digitally preserving and providing access to some materials, leaving libraries and archives at potential risk when they provide access to digital materials where they do not have explicit rights or where they are not certain that the works reside in the public domain. As Professor James Boyle puts it:

> Copyright is what lawyers call a "strict liability" system. This means that it is generally not a legal excuse to say that you did not believe you were violating copyright, or that you did so by accident, or in the belief that no one would care, and that your actions benefited the public. Innocence and mistake do not absolve you, though they might reduce the penalties imposed. Since 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.

Boyle, *supra* at 12.

Of course, libraries could attempt to rely on defenses such as fair use, but it is not certain that libraries could always assert them successfully, even in a non-digital context. Furthermore, as nonprofit institutions, libraries have highly-constrained legal

budgets and must avoid the appearance of impropriety so as to retain public trust. What is worse, given the large number of works in the collections of U.S. libraries, libraries must reasonably fear that they could be sued multiple times if they continued to provide access to the materials in their collections that might be withdrawn from the public domain.

In short, because the law is less clear for digital (and digitized) works, digital library activities and archives are especially dependent upon a vibrant public domain.[2]

3. Case Study: 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. It is able to do this by taking advantage of digital technology, which allows for storage and transmission of massive amounts of data. By digitizing this data, the Internet Archive makes information accessible worldwide, promoting creativity in the arts and sciences by allowing individuals to clip and sample millions of public domain words, films, and sound recordings with ease.

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[2] This problem is especially pronounced with audio and visual recordings. One can allude to written text with a short reference or quote. Yet oftentimes, in order to reference audio or visual works, one must show or provide that work in an embedded fashion, making it harder to later remove that work or otherwise separate it from its larger whole.

The Internet Archive's mission, at its most basic, relies on a robust and static public domain. For example:

- The Internet Archive features approximately 2,000 feature-length movies online available to the general public for free. Most of these films are uploaded by individual users who have possession of the films and have determined that they reside in the public domain. Users of the Internet Archive are encouraged to download these films.[3]

- 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. The Internet Archive contains nearly 1.5 million texts from American libraries alone.[4]

- The Internet Archive runs a book project, which is responsible for uploading approximately 1,000 digitized books each day and 1,000 reels of microfilm each week.[5] This work is done in

[3] *See* Moving Image Archive, INTERNET ARCHIVE, http://www.archive.org/details/movies (last visited on Nov. 22, 2010).

[4] *See, e.g.*, Ebook and Texts Archive, INTERNET ARCHIVE, http://www.archive.org/details/texts (last visited on Nov. 22, 2010).

[5] *See generally* OPEN LIBRARY, http://openlibrary.org/ (last visited on Nov. 22, 2010).

> 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 texts. In each instance, the party providing the material to scan and upload is responsible for making the determination as to whether a given text properly resides in the public domain. Approximately 1.5 million books are downloaded from the Internet Archive each day.

The reliability of the public domain plays an integral role in each of these Internet Archive projects. Each item that is digitized and uploaded to the Internet Archive—whether by an individual user or an organized institution—resides in the public domain, a determination that is often made by Internet Archive's uploading users.

Once an item—be it a movie or text or any other content—resides on the Internet Archive's servers, it is available free of charge to the general public to use in any manner whatsoever. Individual users often then incorporate that content into their own content, thus creating a virtual chain of creativity. If a work inside that chain is removed from the public domain, it irrevocably upsets the balance created by a free, open, and consistent public domain. Further, as a practical matter, it may be virtually impossible to trace the content as it exists further down this chain of derivative works.

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 that work, but it makes for bad business. In particular, it injects uncertainty and confusion about the parameters of the public domain into the marketplace, which impedes the efficient flow of ideas, expression and commerce.

4. Case Study: The Prelinger Library

The Internet Archive is just one example, albeit on a large scale, of an online library that relies on the public to sustain its business model. Other, smaller libraries, oftentimes without the resources of the Internet Archive, likewise use the Internet to provide widespread access to their content.

The Prelinger Archives is a commercial, for-profit moving image and sound archive. Founded in 1982 with the stated goal to "collect, preserve, and facilitate access to films of historic significance that haven't been collected elsewhere," the Prelinger Archives has licensed most of its film material to the Library of Congress. However, a private sister facility—the Prelinger Library—currently houses approximately 50,000 books, periodicals, and related ephemeral works.[6]

The Prelinger Library opened its doors in 2004 and receives approximately 1,000 visitors each year. Many of those visitors are writers, artists, and filmmakers who

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[6] *See* Prelinger Library, INTERNET ARCHIVE, http://www.archive.org/details/prelinger_library (last visited on Nov. 22, 2010).

use the material for transformative purposes.[7] It has also digitized 3,760 distinct items, which it offers for public usage on the Internet Archive. Before those titles could be shared electronically to such a wide audience, the Prelinger Library made a substantial investment to determine the copyright status of each item by conducting manual copyright searches for each item before providing it to the Internet Archive.

The Prelinger Library does not organize or catalogue its materials in a traditional manner. Instead, the Library flows like a traditional bookstore in a scheme of topic clusters (e.g., from city planning and urban studies to other kinds of built landscapes, such as those that lay between cities and suburbs).[8] Also, the Prelinger Library does not formally record or otherwise follow what any individual does with the content. In other words, once an individual either downloads or copies any material from the Prelinger Library, there is no way to track or know where or how that material is being used.

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[7] The Prelinger Archive "warmly" encourages users to "download, use and reproduce [its] films in whole or in part, in any medium or market throughout the world" and "to share, exchange, redistribute, transfer and copy these films, and especially [are] encouraged to do so for free." *See* Prelinger Archives, INTERNET ARCHIVE, http://www.archive.org/details/prelinger (last visited on Nov. 22, 2010).

[8] *See* Megan Shaw Prelinger, On the Organization of the Prelinger Library, PRELINGER LIBRARY, http://www.home.earthlink.net/~alysons/LibraryOrg.html (last visited on Nov. 22, 2010).

The Prelinger Library plays a crucial role in providing everyday citizens access to material in the public domain, both electronically and in hard copy. In order to do this, however, the Prelinger Library invested in collecting and collating the materials and determining whether or not those materials were in the public domain. The risk of some of those works falling out of the public domain presents a scenario that would paralyze the Prelinger Library's business model and ability to provide its services going forward.

For example, due to the organization of the Prelinger Library, it could prove quite difficult and time-consuming to track down an item that was already offered to the public and remove it from that offering. It would likewise be nearly impossible to track downstream uses of that item.

C. Section 514 Threatens The Cultural Commons.

1. Congress Overstepped its Constitutional Mandate and its Own History in Passing Section 514.

In passing Section 514, Congress overstepped its constitutional mandate to use copyright laws to promote progress. According to this Court, copyright protection "is intended *to motivate the creative activity* of authors . . . 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." *Sony Corp.*, 464 U.S. at 429 (emphasis added); *see also Harper & Row*, 471 U.S. at 546 (copyright monopoly granted to induce creation of new material). Section 514, however,

provides no additional incentive to create. Nor does it "promote the Progress of Science and useful Arts," as the Constitution mandates. U.S. Const., art. I, § 8, cl. 8.

In implementing Section 514, Congress "shatter[ed] ... long-standing understandings" that, among other things, include "the long-standing practice of refusing to resurrect works from the public domain." 4 David Nimmer, *Nimmer on Copyright* § 18.06[C][1] (2010). Indeed, the copyright laws traditionally and explicitly protect works in the public domain. For example, the 1831 Copyright Act stated that it "shall not extend to any copyright heretofore secured, the term of which has already expired." Act to Amend the Several Acts Respecting Copy Rights, ch. 16, 4 Stat. 436, 439 (1831). The 1909 Copyright Act provided that "no copyright shall subsist in the original text of any work which is in the public domain." Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075, 1077 (1909). Notably, the 1976 Copyright Act explicitly protects the public domain, stating that it "does not provide copyright protection for any work that goes into the public domain" prior to its effective date. Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 103, 90 Stat. 2541, 2599 (1976).

In fact, it appears that Congress did not even consider the ramifications of ignoring its constitutional mandate and history of protecting the public domain when it enacted the legislation behind Section 514. 4 *Nimmer on Copyright* at § 18.06[C][2][b] (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"). Likewise, the Tenth Circuit below failed to consider carefully whether Section 514 was even necessary to comply with the Berne Convention (the government's stated purpose behind the Statute), or if it pursued any public purpose. *Golan v. Holder*, 609 F.3d 1076, 1091 (10th Cir. 2010); *see also* Petition for a Writ of Certiorari at 26-27.

Section 514 should have been interpreted in a manner consistent with the constitutionally-mandated purpose and function of the copyright laws. *See Bilski v. Kappos*, 130 S.Ct. 3218, 3252-53 (June 28, 2010) (Stevens, J., concurring) (stating that the "constitutionally mandated purpose and function of the patent laws" must be used in determining the scope of the term "process" in the Patent Act). This Court has declared that "[t]he primary objective of copyright is not to reward the labor of authors, but 'to 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 art. I, § 8, cl. 8). The Court has recognized that "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other Arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Because it jeopardizes librarians' efforts to promote access to knowledge, Section 514 clearly frustrates "the cause of promoting broad public availability of literature, music, and the other Arts." *Id.*

Further, the effects of Section 514 stand in contrast to the Copyright Term Extension Act ("CTEA"), Pub. L. No. 105–298, §§ 102(b), (d), 112 Stat. 2827, 2828 (1998), as interpreted by this Court. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Court upheld the constitutionality of the CTEA, which extended the term for existing (non-expired) copyrights for 20 years. The CTEA did not remove anything from the public domain, since it only applied to works currently under copyright protection. *See id.* In the words of the *Eldred* Court of Appeals, a "work in the public domain is, by definition, without a copyright" and such a work thus "has nothing to do with this case." *Eldred v. Reno*, 239 F.3d 372, 377 (D.C. Cir. 2001), *aff'd*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003). This Court thus found that the CTEA "has not altered the traditional contours of copyright protection" and therefore was constitutional. *Eldred*, 537 U.S. at 221.

In this case, the initial Tenth Circuit panel noted the distinction between *Eldred*, which did not remove works from the public domain, and Section 514, which does:

> Section 514 has interfered with [plaintiff] Blackburn's right by making the cost of performance or creation of new derivative works based on Shostakovich's *Symphony No. 5* prohibitive. Moreover, as the example of Mr. Blackburn's composition suggests, plaintiffs' First Amendment interests in public domain works are greater than the interests of the *Eldred* plaintiffs. The *Eldred* plaintiffs did not—nor had they ever—

> possessed unfettered access to any of the works at issue there. As the *Eldred* Court observed, the most the *Eldred* plaintiffs could show was a weak interest in "making other people's speeches." By contrast, the speech at issue here belonged to plaintiffs when it entered the public domain. In reliance on their rights to these works, plaintiffs have already performed or planned future performances and used these publicly available works to create their own artistic productions.

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

On appeal, however, the second Tenth Circuit panel ignored this distinction and based its ruling on a faulty assumption: that Petitioners were using speech that was not their own. *Golan*, 609 F.3d at 1084 ("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 speeches.") (quoting *Eldred*, 537 U.S. at 221). As Petitioners explain, the Tenth Circuit failed to account for the fact that once works exist in the public domain, they no longer belong to the copyright holder, but to the public. *See, e.g., Dastar*, 539 U.S. at 33-35 (stating that anyone may use works in the public domain "at will and without attribution"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153 (1989) (recognizing "free access to copy whatever the federal patent and copyright laws leave in the public domain") (citing *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964)).

Congress' overreaching upends centuries of legislation and practice that protect the public domain and ensure that the cultural commons remain vibrant and available.

2. Section 514 Creates Disincentives for Libraries to Collect and Provide Access to Content.

The Internet Archive and the Prelinger Library are but two examples of the institutions that strive to provide the general public invaluable access to content that could not have been contemplated before the advent of the Internet. However, for the Internet Archive and the Prelinger Library—and countless other business and organizations like them—to conduct this service, they require a stable public domain, with defined boundaries, that allows them to determine what content exists in the public domain and to act accordingly.

The automatic restoration provision of Section 514 affects potentially millions of works—all those foreign works first published between 1923 and 1989—currently in the public domain, many of which are available at the Internet Archive. For example, Section 514 would automatically restore copyright protection to all works that had not been protected in the U.S. because no treaty existed as the time of creation between the U.S. and the source country. This means that all Russian works created before May 27, 1973, when the Soviet Union joined the Universal Copyright Convention, formerly resided in the public domain, and now they do not. This includes literature by Alexander Block, Sergei Yesenin, Marina Tsvetaeva, Vladmiir Mayakovsky,

Maxim Gorky, Vladimir Nabokov, Mikhail Sholokhov, Mikhail Bugaboo, and Alexander Solzhenitsyn as well as music by Prokofiev, Shostakovich, and Isa Dunayevsky. Currently, on the Internet Archive, one may find the works of Sergei Yesenin, Alexander Solzhenitsyn, and Marina Tsvetaeva recited aloud, books authored by Gorky, and music compositions made of the works of Prokofiev and Shostakovich.[9] Section 514 creates fundamental questions about these works and whether they still remain in the public domain.

Removing works from the public domain also results in the creation of new "orphan works," i.e., works that appear to be "in-copyright" but whose author cannot be 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

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[9] For examples of these expressive works that are currently located on Internet Archive, see, Allen Ginsberg Class 11 Expansive Poets, INTERNET ARCHIVE, http://www.archive.org/details/Allen_Ginsberg_Class_11_Expansive_Poetics_July_1981_81P130; Worrying about Tomorrow, INTERNET ARCHIVE, http://www.archive.org/details/Fr.VazkenMovsesianWorrying aboutTomorrow; Prokofiev: Peter and the Wolf, INTERNET ARCHIVE, http://www.archive.org/details/ProkofievPeterAndTheWolfkoussevitzky; Shostakovich: Prelude, INTERNET ARCHIVE, http://www.archive.org/details/ShostakovichPrlude; Maxim Gorky Mother, INTERNET ARCHIVE, http://www.archive.org/details/MaximGorkyMother (all last visited on Nov. 22, 2010).

> 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).[10]

The College Art Association offered examples of this acute 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 include images

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[10] Letter from Jeffrey P. Cunard, Counsel, College Art Association, to Jule L. Sigall U.S. Copyright Office (Mar. 25, 2005), at 6-7 (citation omitted), *available at* http://www.collegeart.org/pdf/caa_orphan_letter.pdf (last visited on Nov. 22, 2010).

of buildings that have since been destroyed (making it impossible even to travel to the site to take a duplicate photograph). *Id.* at 12.

- Works of ancient African Art at the National Museum in Lagos. *Id.*

- 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 fourteenth 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.

In a similar letter,[11] 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 would be severely limited to "clearly" public domain records, since most of the record labels were out of business. *Id.* at 4.

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[11] Letter from Miriam M. Nisbet, Legislative Counsel, Am. Library Ass'n, to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 25, 2005), *available at* http://www.arl.org/bm~doc/lcacomment0305.pdf [hereinafter Nisbet Letter] (last visited on Nov. 22, 2010).

- 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.[12]

In its own letter, the UCLA library further described the difficulty in obtaining rights to the Frontera Collection material, and bemoaned the "effect of current copyright law" on "restricting or limiting access to our cultural heritage."[13]

Simply put, when the public domain shrinks, so too does the ability of digital archivists and librarians to preserve and provide access to cultural works. By threatening the integrity of the public domain, Section 514 of the URAA sets a dangerous precedent; no longer

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[12] *See also* Strachwitz Frontera Collection of Mexican and Mexican American Recordings, UCLA FRONTERA LIBRARY, http://frontera.library.ucla.edu/. "Due to copyright restrictions," the collection can only be accessed at UCLA. *See* http://frontera.library.ucla.edu/access.html (both last visited on Nov. 22, 2010).

[13] Statement of Gary E. Strong, Univ. Librarian and Dir., University of California, Los Angeles, to Jule L. Sigall , Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office, at 14 (Mar. 2005), *available at* http://www2.library.ucla.edu/pdf/GES_orphan_works_comments.pdf (last visited on Nov. 22, 2010).

will librarians and archivists 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.

3. Section 514 Creates Disincentives for Third-Party Users to Take Advantage of Libraries' Offerings.

Not only does Section 514's instability harm the public by limiting the works in the public domain, it also discourages everyday Americans from incorporating third-party works into their own future works for fear of retroactive copyright liability, even if the work in question is currently available in the public domain. It is impossible to know how many works have not been created, or lack important content, because the work's author could not confidentially ascertain if the "building block" work was in the public domain.

This uncertainty harms the speaker, as well as others who may benefit from that speech. For example, Kevin Cooper published a book in 2005 of children's songs called *Snakes, Snails, and C Major Scales: Songs for Children with Fingerstyle Guitar Accompaniment* (2005). *See* Nisbet Letter 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 only included 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.* at 8.

Injecting further instability into the public domain only 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.

CONCLUSION

Section 514 directly threatens the robust and static public domain that both copyright law and the First Amendment should promote and upon which libraries and their patrons rely to preserve, access and build upon our cultural commons. Amicus urges the Court to grant the petition for a writ of certiorari so the Court may carefully consider whether this threat is Constitutionally permissible.

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