

No. 10-545

**In the
Supreme Court of the United States**

LAWRENCE GOLAN, et al.,
Petitioners,

v.

ERIC H. HOLDER, JR., Attorney General, et al.,
Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

**BRIEF OF THE CONDUCTORS GUILD AND
THE MUSIC LIBRARY ASSOCIATION AS
AMICI CURIAE SUPPORTING PETITIONERS**

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INTEREST OF *AMICI CURIAE*

The Conductors Guild is the only music service organization devoted exclusively to advancing the art of conducting and serving the artistic and professional needs of conductors. It has a membership of over 1,600 members representing all fifty United States and more than thirty other countries.¹ The Guild's goal is to enhance the professionalism of conductors by serving as a clearinghouse for information regarding the art and practice of conducting, and to support the artistic growth of orchestras, bands, choruses, and other conducted ensembles. The Guild also expresses the views and opinions of the conducting profession to the music community. Many Guild members serve as music directors and conductors for smaller orchestras that rely on the availability of classical works in the public domain for their performances.

The Music Library Association (“MLA”) is the professional association for music libraries and librarianship in the United States. Founded in 1931, it has an international membership of over 800 librarians, musicians, scholars, educators, and members of the book and music trades. Complementing the Association's national and international activities are eleven regional chapters that carry out its programs on the local level. The

¹ The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

MLA provides a professional forum for librarians, archivists, and others who support and preserve the world's musical heritage.

SUMMARY OF ARGUMENT

This case presents issues of enormous importance to the *amici*. Section 514,² alone among amendments to the Copyright Act, makes previously available works of art effectively unavailable for performance or scholarly analysis. Permitting Section 514 to remove from the public domain many landmark works of twentieth-century music—works by Prokofiev, Stravinsky, Shostakovich, and others—imposes a tremendous financial burden on local and regional music organizations and has a debilitating effect on music scholarship. Perhaps more important, it also risks preventing a new generation of performers and music lovers from experiencing or studying a transformative period in musical innovation.

Some privileged musical organizations in larger cities can afford to continue performing the affected works. But their musicians and patrons make up a tiny fraction of the nation's musicians and music lovers. Most Americans are exposed to the arts not by these few wealthy entities, but in their schools and local communities. These smaller musical entities face limited and inflexible budgets, and removing important works from the public domain will force them to forego performing these works at all. Music

² “Section 514” refers to the corresponding section of the Uruguay Round Agreements Act (“URAA”), Act of Dec. 8, 1994, Pub. L. No. 103-465, 108 Stat. 4809.

libraries—the great repositories of our musical heritage—face similar economic constraints. Section 514 therefore will harm not only the members of the *amici* organizations, but also millions of music students, scholars, and audience members throughout the country.

Preventing the performance and study of works that have long been in the public domain cannot be squared with the First Amendment. This Court therefore should reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

I. Section 514’s amendment to the Copyright Act retroactively grants copyright protection to works previously in the public domain.

In 1994, Congress enacted the Uruguay Round Agreements Act (“URAA”). Section 514 of that Act “restores” copyrights in foreign works that were formerly in the public domain in the United States for one of three specified reasons: failure to comply with formalities; lack of subject-matter protection; or lack of national eligibility. *See* 17 U.S.C. § 104A(h)(6)(C).

Congress thus removed from the public domain a vast number of important works by foreign composers and, for the first time, granted them the protection of United States copyright law. These works include landmarks of twentieth-century music by the most important composers of their day. Works by Sergei Prokofiev, Igor Stravinsky, and Dmitri Shostakovich are central to the repertoire of any orchestral group

interested in twentieth-century classical music. They are also works that any music lover must experience to fully appreciate the evolution of classical music over the past century.

II. This grant of restored copyright protection has had a direct and dramatic effect on orchestras, musicians, music libraries, scholars, and students.

If an orchestra wishes to perform a work in the public domain, it typically has two choices. It can purchase the necessary sheet music for its collection, or it can rent physical copies of the sheet music. For a work subject to copyright protection, however, there is typically only one option—renting the sheet music. And even if an orchestra purchased sheet music before implementation of Section 514, a copyright-protected work can be performed only after paying a separate performance fee or purchasing a blanket license.

Rental fees for a full orchestration of a copyright-protected work can be \$800 or more for a single performance. Rental costs are even higher for an orchestral group that requires a longer rehearsal period, such as a student orchestra or an amateur group. Rental costs and playing time of a composition are often directly related, with longer pieces commanding a higher fee. Similarly, a piece with more instrumental parts, such as Shostakovich's *Symphony no. 10*, is more expensive to rent than a piece for only a few instruments, such as Stravinsky's *Octet*. Finally, the popularity of a piece also can lead to a higher-than-average rental fee.

Rental fees for copyright-protected music impose an enormous financial burden on small orchestras. Sheet-music rentals are charged on a per-performance basis, and the fees are normally three or four times as much as buying the sheet music for a public-domain work. Because a fee must be paid for each performance, fees accumulate season after season, often preventing repeated productions. And some publishers prohibit renters from duplicating orchestral parts of a copyright-protected work, except to replace missing or damaged parts with “emergency” copies that must be destroyed after the performance.

Restoring copyright protection to previously available works demands a new financial investment from orchestral groups while undermining the value of their previous investments in sheet music, because the orchestra now must pay additional performance fees or purchase a blanket license for the music that it formerly owned outright. The inevitable result is that orchestral groups choose not to perform, or to less frequently perform, popular canonical works that have enthralled audiences for decades.

These new hurdles to performance limit the breadth of education for music students and deprive audiences of valuable artistic, intellectual, and emotional experiences. The consequences are particularly dire for student groups. Such groups not only have limited budgets but also require more rehearsal time to prepare for a performance. This entails a longer rental period and even higher fees. Without the resources to pay those fees, a new generation of musicians will receive an incomplete or quite costly musical education.

Section 514 has had an equally deleterious effect on the world of musical publishing, scholarship, libraries, and education. With the passage of the URAA, publishers of reprinted music no longer supply scores for some of the most important classical works of the twentieth century. Most of these works became available only for rental, making scores difficult or impossible for librarians to obtain and for students to study. Publishers of excerpt books (which instrumentalists use to practice common orchestral excerpts used in auditions) were likewise forced to discontinue publication. Works that had been staples of competitions everywhere no longer could be performed because libraries could not obtain the multiple copies needed to provide each performer with an original copy. Sound recordings featuring “restored” works quickly went out of print. All of these developments lessened the ability of music libraries to fulfill their educational and public-service missions.

III. Surveys of members of The Conductors Guild and of the Music Library Association demonstrate the practical consequences of Section 514.

In preparation for this brief, the Conductors Guild and the Music Library Association surveyed their members to learn whether and how they have been affected by copyright restoration under Section 514. We discuss the results of each survey below.

A. The Guild survey revealed the ill effects of Section 514 on musical performances and education.

The Guild survey revealed that eighty-three percent of respondents have a general practice of conserving resources by limiting their performance and recording of copyrighted works. Seventy percent are no longer able to perform works previously in the public domain—works performed regularly before the passage of Section 514—because those works are now under copyright protection. And thirty-seven percent own sheet music for these works, but are now required to pay performance fees.

The surveyed members provided specific examples of how the legal changes have impacted their work. One conductor for a chamber ensemble listed a number of works by Igor Stravinsky that his group has performed in the past, but no longer will perform because they are now protected. He explained that the fees to perform such a work are at least \$300, and that his ensemble cannot afford such fees.

A university-orchestra conductor explained that high rental fees for music by Shostakovich, Prokofiev, and Stravinsky make it impossible for his students to perform those works. As he explained, “this has severely curtailed the possibilities for the education of our music students . . .” Another conductor for a university orchestra noted that his student ensemble no longer can perform Prokofiev’s *Peter and the Wolf* or Stravinsky’s *Soldier’s Tale*, among other titles. The loss of *Soldier’s Tale* is particularly troubling, as it is considered an essential piece for conductors training to become professionals. He further noted that his

students require an extended rental for a long rehearsal cycle. Those fees, he reported, can exceed \$1,200.

Another respondent feared that *Peter and the Wolf*, which he and others consider an essential work, is in danger of becoming a secondary piece as a result of these new restrictions. Another explained that these are “outstanding works by some of the most artistically and historically important composers of the late-19th and early-20th centuries. Studying and performing these works is a vital part of the training of young musicians”

Another respondent eloquently explained the burden these restrictions impose on smaller orchestras:

[S]maller professional or part-time professional orchestras and even many of the medium-sized cities with full seasons and long and cherished reputations are hurting. Against all aesthetic reason they are forced [to] find ways to shrink their seasons and reduce the size of their full-time performing personnel. Introducing a further burden on live-music-making ensembles is a form of slow suicide.

The survey also revealed how hard it can be to determine the copyright status of a given work, particularly when that work has been in the public domain for decades. *Cf. Dam Things from Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 556-60 (3d Cir. 2002) (engaging in a complex and extended legal and factual analysis to determine whether copyright in a doll was “restored” by Section 514). Respondents

expressed uncertainty as to which works have been placed back under copyright protection and which have not. This uncertainty, combined with an unwillingness to risk exposure to penalties, will result in music not being performed based on speculation that it is no longer in the public domain. Put another way, Section 514 will have a chilling effect on the exercise of the members' free-speech rights.

The members' responses not only lament Section 514's impact on their own expressive freedom, but also reflect a concern for the impact on their audiences' exposure to essential works. The director emeritus of a regional orchestra explained that "Russian symphonic works are very important to an orchestra's repertoire as well [as] to an educated audience. They are absolutely part of an orchestra's basic library." Another respondent explained that these works "are extremely important to the classical-music world and [to] the entire world in general. Having them under lock and key robs the world of more performances of the seminal works of the great Russian composers."

As these survey results illustrate, the scope of copyright protection is a fundamental issue for members of the Conductors Guild and for the audiences they serve. Section 514 is uniquely disruptive because it, alone among amendments to the copyright laws, has the effect of making previously available works of art effectively unavailable to all but the most prominent orchestras and their fortunate audiences. For decades, members of the Guild have relied on the fact that these works were available in the public domain, and their removal has upset those decades of reliance.

B. A survey of Music Library Association members reveals Section 514's impact on music education, scholarship, and preservation.

Fifty-five percent of the respondents in the Music Library Association survey reported that they had had difficulty in the last ten years acquiring works by Soviet-era composers for their patrons. Fifty-eight percent knew of cases in which the unavailability of these works had hindered their patrons' performance or study of the affected music. And thirty-six percent had placed circulation restrictions on works by affected composers due to the difficulty of acquiring replacements.

The affected works include those of major composers like Shostakovich, Stravinsky, Prokofiev, and Rachmaninoff, as well as works by lesser-known composers who are nevertheless of keen interest to performers, scholars, and students, including Dmitri Kabalevsky, César Antonovich Cui, Aram Ilyich Khachaturian, Reinhold Moritzovich Glière, and Nikolai Myaskovsky.

Respondents commented on the difficulty of acquiring previously public-domain works. "Several Soviet-era works are much more difficult to acquire now. As an example, [Kabalevsky's] *Colas Breugnon Overture*, formerly available for sale from [music publisher] Kalmus, is now rental-only from [music publisher] Schirmer. It is technically available, but while we used to be able to acquire this score for our students to study the work, that is no longer possible." Another respondent recalled "a specific Shostakovich

chamber work” that was too difficult to acquire “until one of our faculty happened to be in Vienna where he could purchase it.”

Most often mentioned—and most deeply regretted—was the effect on music students. Purchasing works that have been placed back under copyright is prohibitively expensive for many young musicians. Students auditioning for professional orchestras often are asked to play selections from works by former Soviet composers. The difficulty of acquiring parts and out-of-print excerpt books makes it harder to prepare for these auditions.

Prices for scores of restored works are often substantially higher than when they were in the public domain. For example, Shostakovich’s *Preludes and Fugues Op. 87*, which one university librarian noted “was formerly available from Dover [Publications] for about \$13.00,” now costs \$90 for an authorized edition.³ As that librarian observed, “[a]side from costing libraries, this price puts the publication out of reach for most student pianists.” A chamber-orchestra director noted that “[t]he lack of readily available scores is a huge problem. For many pieces, one can only rent scores with parts,⁴ which means critics and music lovers cannot get access to scores for their own

³ See Hal Leonard Corp., <http://www.halleonard.com/product/viewproduct.do?itemid=50470230> (June 17, 2011); <http://www.halleonard.com/product/viewproduct.do?itemid=50489224> (June 17, 2011).

⁴ “Scores” display in one place all the parts that make up a symphonic work, whereas “parts” are instrument-specific. Being forced to rent the score with all the parts is more expensive.

study. This also adversely affects young musicians and orchestral players.” A university librarian stated: “Public domain works are the bread and butter of the learning process for young musicians. Restricting access to [these works] is detrimental to their ability to learn and prepare to be professional musicians. These restrictions need to be lifted to assure our students the best possible musical preparation they can get.”

Music scholars also feel the effect of Section 514. One university librarian remembered “a doctoral student who wanted to work on some obscure Shostakovich for his dissertation and was unable to [do so] due to the confusing state of the copyright.” That student ultimately decided to pick another subject. Another respondent recalled a student’s changing the subject of an honors thesis due to the unavailability of a Russian work.

MLA members also confirmed what The Conductors Guild members said about the impact of copyright restoration on musicians. As one respondent observed: “We are an orchestra library and the major impact for our organization has been rental costs, which are generally more expensive than purchasing orchestral material. For a nonprofit organization, this can be the decisive point when choosing what music is programmed.”

Music libraries suffer as well, because their effectiveness as research institutions is compromised by their inability to acquire important works. Accordingly, some libraries have stopped lending irreplaceable Russian works to other institutions, or even to their own students. Some have placed these

items in “special collections” to which access is tightly controlled.

Again, students pay the price for this restricted access. A librarian at a university-affiliated music conservatory wrote: “For affected works which we already own, we now only allow these sets to be used by the school’s primary large ensembles. This means that none of these works are now available to be performed by our student conductors on their degree recitals without having to pay prohibitively high rental fees.”

Finally, there is the effect of copyright restoration on music itself. A librarian at a music conservatory warned that, if the affected works become “too expensive to buy, no one will explore their performance or undertake their recordings. We will curtail intellectual curiosity and diminish our cultural heritage.”

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

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