

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

**BRIEF OF THE CONDUCTORS GUILD
AS *AMICUS CURIAE* SUPPORTING
PETITIONERS**

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INTEREST OF *AMICUS CURIAE*

The Conductors Guild is the only music service organization devoted exclusively to the advancement of the art of conducting and to 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 Many of its 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 Guild is concerned with the art and the craft of conducting, with practical problems encountered within the profession, with repertoire, and with the multiple roles that Music Directors must fulfill in orchestras, choruses, opera and ballet companies, wind ensembles, bands, musical theater, and other instrumental and vocal ensembles. Its mission extends to any such ensemble, whether professional or amateur, functioning independently or within the context of colleges, universities, or secondary schools. The Guild's overall goal is to enhance the professionalism of conductors by serving as a clear-

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

Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file 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.

inghouse 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 has the broader role of expressing the views and opinions of the conducting profession to the music community.

SUMMARY OF ARGUMENT

This case presents issues of enormous importance warranting this Court's review. Section 514,² alone among amendments to the Copyright Act, has the effect of making previously available works of art effectively unavailable. Permitting Section 514 to remove from the public domain many landmark works of twentieth-century music imposes a tremendous financial burden on local and regional music organizations. Perhaps more important, it also risks preventing a new generation of performers and music lovers from experiencing a transformative period in musical innovation—works by Prokofiev, Stravinsky, Shostakovich, and others.

While certain privileged musical organizations in larger cities can afford to continue performing such works, their musicians and patrons are a tiny fraction of musicians and music lovers in this country. 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

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.

forego performing these works at all. Section 514 therefore will harm not only the Guild's members, but also the millions of music students and audience members throughout the country.

Preventing the performance of works that have long been in the public domain cannot be squared with the First Amendment. This Court should therefore grant review.

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). In sum, public-domain works that previously had been available to all have now been granted copyright protection

Congress thus removed from the public domain a vast number of important works by foreign composers and granted them for the first time the protection of United States copyright law. These works include numerous landmarks of twentieth-century music that were composed by the most important composers of their day. Works by composers such as 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 hundred years.

II. This new grant of copyright protection has a direct and dramatic effect on the ability of musicians and orchestras to perform these works.

A brief overview of how copyright protection influences the way in which orchestras perform will aid in appreciating the dramatic effect of removing these seminal works from the public domain.

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

Rental fees for copyright-protected music are an enormous financial burden on small orchestras. Despite the fact that sheet music rentals are charged on a per-performance basis, the fees are normally between three and four times the purchase price for sheet music for a work in the public domain. And of course, unlike an ensemble that owns the sheet music for a work in the public domain, an ensemble

wishing to perform a copyright-protected work must pay rental fees every time the work is performed. Fees thus continue to accumulate season after season. Even when a group is able to pay the rental fees, the recurring performance fees often prevent repeated productions. And when orchestral parts of a copyright-protected work are rented, the parts may not be duplicated for any reason, save for “emergency” replacement in the event that certain necessary parts are missing, damaged, or destroyed. Such emergency copies, however, must be destroyed promptly after the performance takes place.

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 period of rehearsals, such as a student orchestra or an amateur group. Further, the rental cost and the 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 Tenth Symphony, will be 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.

The “restoration” of copyright protection to previously available works both demands a new financial investment from orchestral groups and undermines their previous investments. These new higher rental fees inevitably will result in orchestral groups choosing not to perform canonical works that have been performed frequently for decades. Moreover, an orchestra’s earlier investment in its own sheet

music is undermined by this restoration. If the work in question is newly protected, an orchestra is not entitled to perform it simply because it previously purchased a copy of the score. Instead, performance of such a work requires payment of a performance fee or purchase of a blanket license.

These new hurdles to performance will limit the breadth of education for music students and will deprive audiences of valuable artistic, intellectual, and emotional experiences. The consequences will be 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, the inevitable result is that a new generation of musicians will receive an incomplete musical education.

III. A survey of Guild members demonstrates the practical consequences of Section 514.

In preparation for this brief, the Conductors Guild conducted a survey of its membership to learn whether and how conductors and music directors have been forced to alter their programming due to the restoration of copyright under Section 514. Members were asked whether they were forced to alter their programming because of the costs associated with performing a copyrighted work, whether they had been forced to make programming changes specifically because of Section 514, whether they owned the sheet music for any of the newly protected works, and several other questions.

The survey results reveal the impact of Section 514. Eighty-three percent of respondents indicated that they have a general practice of conserving resources by limiting their performance and recording of copyrighted works. As to the specific impact of Section 514, seventy percent of respondents indicated that they 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. Only thirty-seven percent of respondents own the sheet music for any of these works. Therefore, even if the money exists to pay only the performance fee, very few groups have their own copies of the music. And, of course, it is no longer possible to purchase new copies.

The surveyed members also provided specific examples of how these legal changes have impacted their work. One conductor for a chamber ensemble lists 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 further explains that the fees to perform such a work are at least \$300, and that, due to budgetary constraints, his ensemble is unable to afford such fees. The problem is particularly acute for chamber ensembles, because those groups have fewer members and the works typically are shorter. In his words, “there is so much great chamber music out there to be performed, but who is going to spend \$300 to rent a 12 minute work for 8 players?”

A conductor for a university orchestra explains that the high rental fees for music by Shostakovich, Prokofiev, and Stravinsky make it impossible for his

groups to program such works, although his students would benefit from those performances. As he explains, “this has severely curtailed the possibilities for the education of our music students” Another conductor for a university orchestra explains that his 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 troublesome, as it is considered an essential piece for conductors who are training to become professionals. He further notes that because his ensemble is comprised of students, they require an extended rental for a long rehearsal cycle. Such fees, he reports, can exceed \$1,200.

Another respondent fears that *Peter and the Wolf*, which he and others consider to be an essential work, is in danger of becoming a secondary piece as a result of these new restrictions. Another explains 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 explains 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 fur-

ther burden on live music making ensembles is a form of slow suicide.

The survey also reflects the fact that it is by no means easy 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). The survey responses express uncertainty as to which works have now been granted copyright protection and which have not. This uncertainty, combined with the members’ unwillingness to risk subjecting themselves to penalties, will result in music not being performed when there is nothing more than 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 bemoan Section 514’s impact on their own expressive freedom, but reflect a concern for the impact on their audiences’ exposure to essential works. The director emeritus of a regional orchestra explains 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 explains that these works “are extremely important to the classical music world and 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.”

These survey results illustrate the practical realities at issue in this case. The scope of copyright protection is a fundamental issue for members of the Conductors Guild and the audiences they serve. Section 514 is uniquely important 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.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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