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 OF HEARTLAND ANGELS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Heartland Angels, Inc. ("Heartland Angels"), a corporation formed in 2003 under the laws of the State of Illinois, files this brief of *Amicus Curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF AMICUS CURIAE

Heartland Angels is a private equity organization that seeks out small companies in the early stages of development for the purpose of investment. Heartland Angels follows a formal analytical process to determine whether to provide capital to a target company and continuously reviews new target companies to determine whether it will make additional investments. As part of this process, Heartland Angels considers the future anticipated licensing costs of the target company. These anticipated future licensing costs are calculated by analyzing the portfolio of works being used by a target company – a portfolio consisting of both works original to the target company and works residing in the public domain. The recapture of works in the public domain by copyright owners, as permitted by Section 514 of the Uruguay Round Agreements Act ("URAA"), increases the

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus* and its counsel contributed monetarily to the preparation or submission of this brief.

anticipated future licensing costs of target companies. In addition, Section 514 creates an atmosphere of uncertainty with regard to the commercial use of works in the public domain. This increase in uncertainty can cause Heartland Angels to decline to make an investment which it otherwise would have made. For this reason, Heartland Angels has a direct interest in resolution of the question of whether the Constitution withholds power from Congress to remove works from the public domain as it has done through Section 514 of the URAA.

OVERVIEW OF THE INVESTMENT PROCESS

Like any Intellectual Property investment firm, Heartland Angels follows a defined process when deciding whether or not to invest capital in a target company. The key to this decision is the potential Return on Investment ("ROI") – the percentage of money gained in excess of the amount of money spent. The goal when investing in a target company is to increase the value of the target company to sell the shares purchased after a certain amount of time. A target company is sought after for the capital gains which can be realized upon liquidation of the investment, not dividends that can be earned in a set time.

When evaluating a target company, Heartland Angels considers several factors to determine whether it is likely to realize a positive ROI. The primary factor is the net present value of the target

company ("NPV"). To determine the NPV, Heartland Angels sets a timeframe for when it anticipates liquidating its shares in the target company – typically five years. Heartland Angels then projects forward the amount of revenue and increase in assets and asset value over the set timeframe for the target company. Heartland Angels then subtracts from this amount all projected costs and any expected decrease in assets or asset value over the set timeframe for the target company. This net projected amount is then discounted for inflation and the time value of money. The end result of these calculations is the NPV.

The purpose of the NPV is to determine the current market price of the target company per share. Once Heartland Angels makes an investment in a target company, it then works with the target company to increase the overall value of the company over the chosen timeframe: The greater the increase in value of the target company over the initial NPV, the greater the ROI. By way of illustration, if a target company has a NPV of $1.00 per share at the time of investment and Heartland Angels is able to grow the value of the target company to $2.00 per share at the time of liquidation then Heartland Angels has realized a ROI of 100%.

No ROI is ever guaranteed. Heartland Angels reviews the range of possible ROIs as a probability distribution. See Figure 1 at App. 1. Heartland Angels determines each possible ROI and then assigns to this ROI a probability of realizing this specific ROI.

The result is a probability distribution such as Figure 1. In each case, Heartland Angels compares the risk of loss (negative ROI) against the chance of realizing a gain (positive ROI).

The ultimate decision which Heartland Angels must make is whether the expected return is enough to justify taking the predetermined and quantified risk. Heartland Angels collects relevant information to determine all uncertainties to improve its investment decisions. The process that Heartland Angels follows can be described in the following way: Information reduces uncertainty; less uncertainty improves decisions; better decisions result in more effective actions; effective actions improve profit. Hubbard Decision Research, *Applied Information Economics: A New Method for Quantifying IT Value* (2004). With more information and more accurate information, Heartland Angels can calculate the expected ROI with greater accuracy. Heartland Angels also analyzes the probability that it will realize a negative ROI. See Figure 2 at App. 1. As Figure 2 shows, as the likelihood of negative ROI increases, the amount of expected ROI must increase to justify the initial investment. For any given ROI, there is a limit to the amount of risk an investor is willing to bear. If the risk of a negative ROI is too great then no investment will be made. This is displayed as the "Company's investment limit." This limit will vary for any given company depending on that company's investment strategy and risk tolerance.

An increase in any cost for the target company will hinder investment by Heartland Angels. Heartland Angels makes its decision on whether to invest in a target company by determining its expected ROI and the risk of a negative ROI. If the ROI is great enough to justify the risk (is within the "acceptable region of investment") then Heartland Angels will invest in a company. Should costs for the target company increase, this change has the effect of lowering the projected ROI for Heartland Angels. As on Figure 2, this would move the point of investment horizontally to the left. If this point crosses the barrier to Heartland Angel's investment limit, then Heartland Angels will choose not to invest in the target company. From another point of view, an increase in costs for the target company has the effect of raising the risk of a negative ROI. On Figure 2, this could move the point of investment vertically upward. Again, should the point of investment cross the investment limit, Heartland Angels will not invest in the target company.

SUMMARY OF THE ARGUMENT

Section 514 undermines investor confidence in industries that rely on copyright. Congress breached the copyright bargain established by the Framers of the Constitution under which works that enter the public domain remain there indefinitely for all. Investors have an investment backed expectation that works in the public domain will remain there.

The uncertainty of protection and licensing costs caused by Section 514 raises the risk of loss of investment. This effect causes a decline of investment in the copyright industries and harms the economy.

In addition, Section 514 altered a traditional contour of copyright protection when it permitted works to be removed from the public domain. This alteration chills the freedom of speech that individuals exercise when they invest in the creative arts or use public domain works as a shorthand method of expressing a message.

For these reasons, the judgment below should be reversed.

ARGUMENT

I. Section 514 Undermines Investor Confidence In Industries That Rely On Copyright By Removing Works From The Public Domain And Transgressing The Traditional Boundaries Of Copyright.

Section 514 changed a basic tenet of copyright law which investors have historically relied upon. When works enter the public domain, they have traditionally remained in the public domain. Section 514 violates this fundamental premise of copyright law. Such a fundamental shift undermines investor confidence and hinders investment in copyright industries.

Additionally, Section 514 chills the freedom of speech that individuals exercise when they invest in the creative arts. Congress altered the traditional contours of copyright law with the passage of Section 514 when it annexed a portion of the public domain and transferred title to these new exclusive rights to foreign authors. Individuals rely on public domain works as a shorthand method for expressing themselves. Removing these works from the public domain also hinders an individual's freedom of speech that is exercised when the individual invests in the creative arts. Individuals are now deterred from investing in creative works that rely on the public domain for fear of loss due to the recapture of those works.

A. Section 514 Undermines Investor Confidence By Breaching The Copyright Bargain.

Copyright in the United States is based on a bargain offered by the Constitution itself. Investors rely upon the proper operation of the terms of this bargain to decide whether to invest in companies in industries that rely on use of works within the subject matter of copyright. Even though the law disfavors monopolies, the Constitution gives Congress the power to grant authors nearly exclusive control over their works. Yet, at the same time, the copyright laws that Congress creates must ultimately serve the public good, lasting for only a limited duration. Thus, after a work's copyright expires, it enters the public domain. *See* Viva R. Moffat, *Mutant Copyrights and*

Backdoor Patents: The Problem of Overlapping Intellectual Property Protection, 19 BERKELEY TECH. L.J. 1473, 1485-86 (2004).

To effectuate this bargain, copyright requires a delicate balance between the rights of authors and the benefit given to the public. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Indeed, this balance is precarious, as both over and under protection can disserve copyright's ultimate purpose. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring). On one hand, the law encourages authors to create works by giving them a marketable right from which they can profit. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). In doing so, authors continually add to our cultural heritage. *Aiken, supra,* at 156. Then, when copyright expires, as the Constitution requires, the works that these authors create enter the public domain, joining a myriad of works that copyright does not protect, where they are free for anyone to use and/or build upon. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975-76 (1990).

The public domain is essential to the proper operation of the copyright bargain, and until the enactment of Section 514 there has been a clear dividing line between what the law protects and what it does not. Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 222 (2003). Accordingly, this Court has repeatedly reassured investors that the public benefit, and not

authors' private interests, is the primary focus of copyright law. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public."); *Aiken, supra,* at 156 ("Creative 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."); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.")

Once a work of authorship enters the public domain, the rights to use and adapt this work vest in members of the general public. In the context of patent law, this Court has stated unequivocally that formerly patented inventions cannot be removed from the public domain. *Graham v. John Deere Co. of Kansas City,* 383 U.S. 1, 6 (1966). To do so would harm the public by reducing the available knowledge that the patent system is designed to foster. Deriving from this same Constitutional source, the public domain of works of authorship is no less deserving of maximum protection and preservation for all.

Unforeseen by the investment community, Section 514 of the URAA breached the copyright bargain, undermining the confidence that investors like Heartland Angels have put in the stability of the public domain and creating an atmosphere in which determining the copyright status of any number of works has become quite uncertain. Knowing exactly where

the boundaries of copyright were, Heartland Angels could negotiate and assess the value of investment confidently without worrying about additional licensing fees or the threat of copyright infringement for uses of public domain works. Section 514, however, shakes this confidence. It makes investment much more difficult for firms like Heartland Angels.

Disputes arising in the aftermath of Section 514's enactment fuel investor uncertainty. For example, in *Dam Things from Denmark v. Russ Berrie & Company, Inc.*, 290 F.3d 548 (3rd Cir. 2002), plaintiff asserted its copyright "restored" by Section 514 to claim infringement by Russ Berrie for producing copies of its Troll Doll designs. Russ Berrie had been safely making dolls using these designs for more than thirty years without any interference, additional licensing fees, or concern about a potential infringement lawsuit. *Id.* at 553. Russ Berrie had every reason to believe its investment-backed expectations that the doll designs were in the public domain were well founded because in 1965, the District Court for the District of Columbia had adjudged these works to be in the public domain and no longer subject to copyright protection in the United States. *Id.* at 543 (*citing Scandia House Enters., Inc. v. Dam Things Establishment*, 243 F.Supp. 450, 453-54 (D.D.C. 1965)). Enactment of Section 514 frustrated Russ Berrie's reliance on the public domain. Having had its public domain rights stripped away by Section 514 and transferred to the plaintiff, Russ Berrie conceded and relinquished its right to make the dolls. Joan

Verdon, *Russ Berrie Gives Up Fight to Make Troll Dolls; Gift Maker Settles Dispute with Danish Company*, THE RECORD, March 5, 2004, at B03.

In an uncertain environment like this, in which a company can be sued at any time, even after decades of safely using a supposedly public domain work, investors rightly are deterred from investments that rely on the public domain. When investors cannot predict with any degree of certainty where the limits of copyright begin and end, logic often counsels investors to avoid the copyright market altogether. What is more, the safe harbor and reliance provisions that the law offers are inadequate to truly protect investors. The threat of unpredictable litigation is a significant deterrent; one year of safety for reliance parties or required licensing fees for derivative works are not enough to assuage the concerns that unpredictable restoration of public domain works creates.

This breach of the copyright bargain has affected Heartland Angels directly. Heartland Angels considers the increase in licensing costs of a target company when determining whether to place an investment. This increase in licensing costs for use of recaptured works has the effect of lowering any expected ROI. Likewise, Heartland Angels considers the possibility of future licensing costs for works which may be recaptured in the future. This possibility of future licensing costs has the effect of raising the risk of a negative ROI.

Heartland Angels also considers whether a target company may itself recapture the copyrights to works in the public domain, thus increasing licensing revenue. However, a large percentage of the time no increase in revenue is measured for two reasons. First, a target company is very unlikely to own any work which may be recaptured. Second, the number of public domain works used by a target company, which may be recaptured by others if Congress has the power to authorize such recapture, and the licensing costs associated, far exceed any works the target company itself may recapture.

After taking these costs and probabilities for future costs into account, Heartland Angels will often find itself in a position beyond its investment limit. Hence, Heartland Angels will find itself in a situation where it likely would have placed an investment in a target company had it not been for Section 514. Heartland Angels has placed investments in several companies in various industries, including food ingredients, medical services, healthcare products, thermal management, and nano materials. It has reviewed several target companies whose primary business was content distribution for both video and audio. To date, Heartland Angels has not invested in any target company operating in the copyright industries. It has an interest in investing in the copyright industries but because of the uncertainty created by Section 514 has decided that the unknown risk of fees and costs are too great to justify investment.

Under normal circumstances, Heartland Angels would be able to utilize insurance to hedge against this unknown risk. For instance, it can purchase insurance that mitigates the cost of patent litigation. The insurance plan may or may not relate to the validity of the patent. Such insurance coverage allows Heartland Angels to protect an investment from future claims and losses due to patent infringement. However, unlike insurance products in the patent system, there is no insurance offering that would allow Heartland Angels to hedge against losses caused by the recapture of works from the public domain. Thus, Heartland Angels lacks a basic insurance tool which would enable it to hedge against these potential risks under normal circumstances.

For these reasons, Section 514 undermines the investment-backed expectation that works in the public domain will remain there for all. Section 514 does nothing but create confusion about the status of copyright ownership and disrupt the foundational bargain upon which the copyright system was founded. Investors operate under the assumption that copyright lasts for a certain amount of time, and when it expires, those works are free. Change of this fundamental premise by Congress has shaken investor confidence, dampening investment at a time when it is sorely needed.

B. Section 514 Alters the Traditional Contours of Copyright and Chills Free Expression

The public domain has been a crucial part of the copyright bargain since its beginnings. With Section 514, however, Congress altered copyright's traditional boundaries. In doing so, it has chilled free expression by preventing investors from contributing capital to copyright industries and exercising their freedom of expression.

A copyright law may violate the First Amendment's free speech guarantees if it alters the "traditional contours of copyright law." *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). The clear line between private ownership and the public domain is certainly one of those traditional contours. Since its earliest days, copyright has made a clear distinction between what is protected and what is freely available to the public. Indeed, The Framers of the Constitution intended the public domain to be an "engine of free expression." *Harper & Row Publishers, supra,* 471 U.S. at 558. Its contents are the very building blocks of expression. Thus, the free availability of the public domain is essential to expression.

Today, copyright industries are big business and investors are an integral part to the expression of many new works. Consider the motion picture industry. In 2006, the average cost of a major studio film was $100.3 million. S. Mark Young, James J. Gong, and Wim A. Van Der Stede, *The Business of Making*

Movies, STRATEGIC FINANCE, Feb. 2008, at 26, 30. Without outside investment, these creative projects simply could not exist. However, once again, investors cannot invest confidently in an environment where they might be subject to litigation for using supposedly unprotected works. But without investment money, new works, like major motion pictures, cannot exist. Thus, this expression could be muffled before it ever gets the chance to be seen.

Moreover, simply the act of investing money itself can be a form of speech. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Investment in the creative arts enables individuals to appoint a representative to express their own viewpoints and ideas. This allows a person to gain an audience that might not be accessible otherwise, to promote an alternative viewpoint which otherwise might not be disseminated, or to state a message in a much more poignant and unforgettable way than they may be able to by themselves. Alone, such a person's own statements may be ignored or forgotten. However, through investment in the arts, groups of individuals can aggregate together, forming critical mass behind a combined message, and can break through the noise to leave a lasting impression.

This mechanism for the exercise of free speech is just as deserving of protection as any other mechanism of appointing a representative to embody a certain point of view. Section 514 altered the traditional contours of copyright established by the Framers – that works should remain in the public domain for all to use. Removal of works from the

public domain has a chilling effect on the exercise of free speech. It steals from citizens a shorthand method of expression. No longer can citizens rely on a public domain work as a placard which expresses their viewpoint. To do so invites the risk of infringement and cost which had been absent prior to Section 514. Therefore, Section 514, by altering the traditional contours of copyright, betrays the intentions of the Framers to create a robust public domain to help drive expression and thus chills free speech.

CONCLUSION

When a private equity company invests in a target company in a copyright industry, it does so with a reasonable investment-backed expectation that public domain works utilized by the target company will remain in the public domain. Section 514, by breaching this bargain of copyright established by the Framers in the Constitution, raises the licensing costs for target companies. This raise in costs lowers the investor's expected ROI and raises the likelihood of a negative ROI, pushing a company beyond its investment limit. Thus, Section 514 hinders the availability of private equity funding to target companies at a time when it is sorely needed.

Section 514 also chills the freedom of expression that individuals enjoy when they fund the creative arts. Investors in the creative arts exercise their freedom of speech by permitting the creative company

to act as a surrogate for their message. The increase in risk of loss caused by Section 514 chills this investment, thus chilling their expression. In addition, removal of a work from the public domain robs individuals of a shorthand method of relaying their message to others in a meaningful way.

For these reasons, this Court should reverse the judgment below.

Respectfully submitted,

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Figure 1[1]

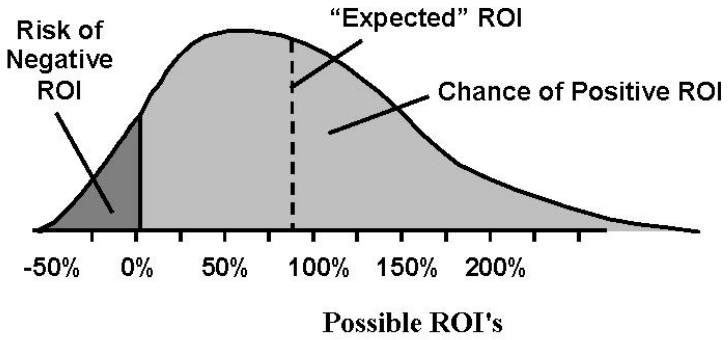
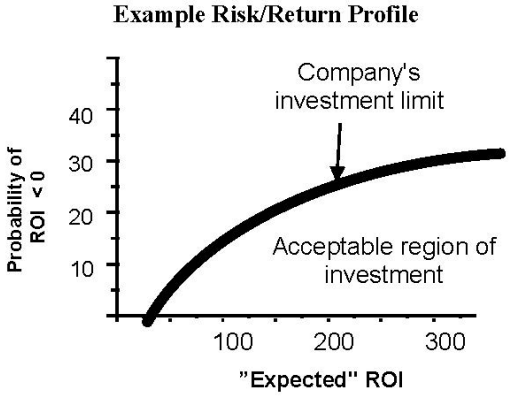


Figure 2[2]



[1] Figure 1 reproduced from Hubbard Decision Research, *Applied Information Economics: A New Method for Quantifying IT Value* (2004). www.hubbardresearch.com

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