

No. 10-545

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

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LAWRENCE GOLAN, ET AL.,

*Petitioners,*

*v.*

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

*Respondent.*

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

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***AMICUS BRIEF* ON BEHALF OF  
PROJECT PETRUCCI, LLC IN SUPPORT OF  
PETITIONERS**

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June 20, 2011

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**INTERESTS OF AMICUS CURIAE<sup>1</sup>**

Project Petrucci, LLC owns and operates the International Music Score Library Project (“IMSLP”), the largest freely accessible online repository for Public Domain music scores.<sup>2</sup> IMSLP is run primarily by a small group of volunteer musicians and music-lovers who wish to promote creativity through the study and enjoyment of music. Each day, IMSLP receives 90,000 visits from 60,000 unique visitors, totaling approximately 1.1 million different users per month.<sup>3</sup> Visitors enjoy free, unlimited, and instantaneous access to over 300 gigabytes of data comprised of almost 96,000 music scores from over 5,600 composers around the world. IMSLP’s users download these works from the website approximately 150,000 times each day. IMSLP’s consumers range from professionals and academics to hobbyists and casual inquirers.

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<sup>1</sup> Project Petrucci submits this amicus curiae brief in support of Petitioners pursuant to Rule 37 of this Court. 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. Both parties filed blanket consent for the filing of amicus curiae briefs. Nevertheless, Project Petrucci provided notice of its intent to file this brief to counsel of record for both parties. The parties have consented to the filing of this brief.

<sup>2</sup> IMSLP is located at <http://imslp.org>.

<sup>3</sup> All IMSLP numbers are true as of June 12, 2011. Documents pertaining to IMSLP figures and affairs are on file with Project Petrucci President Edward Guo.

Recent technological advances have made it possible to collect, catalog, and access the communal property that comprises the Public Domain for the benefit of our shared culture. Because an inaccessible Public Domain is in fact no “public” domain at all, IMSLP endeavors to map the Public Domain and offer it in nothing less than its entirety. Doing so ensures universal access to the wealth of common cultural resources envisioned by the Founders. Indeed, the amount of Internet traffic on IMSLP demonstrates the considerable demand for Public Domain works.

Project Petrucci files this brief because upholding the removal of works from the Public Domain under Section 514<sup>4</sup> would pose a significant threat to IMSLP and other entities that might undertake the task of collecting and providing access to the Public Domain. In an already uncertain copyright environment, undermining a settled and fundamental assumption — namely that works in the Public Domain will remain there — exposes businesses to potentially devastating liability and impedes the public’s rightful access to its shared resources in the Public Domain.

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<sup>4</sup> Section 514 of the Uruguay Round Agreements Act (“URAA”) was codified as 17 U.S.C. §§ 104A and 109(a). Hereinafter, the provisions will be referred to as “Section 514.”

## SUMMARY OF ARGUMENT

The decision below shakes the foundations of the Public Domain and erodes the last vestige of certainty available to entities hoping to harness the Public Domain while complying in earnest with copyright law. This Court has recognized that intellectual property law must be clear enough to allow businesses to organize their affairs. See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730–31 (2002) (“The monopoly is a property right; and like any property right, its boundaries should be clear. This clarity is essential to promote progress . . .”). Yet uncertainty regarding copyright law remains pervasive: a licensing structure that makes it difficult and sometimes impossible to license certain copyrighted works, a regime of draconian strict liability with an enormous and unpredictable range of statutory damages, and a multifactor fair use doctrine that has no bright lines and puts the burden of proof on the alleged infringer. See, e.g., Lyman Patterson and Stanley Lindberg, The Nature of Copyright: A Law of User’s Rights 103 (1991).<sup>5</sup> The last bastion of certainty was that once the copyright term concludes for a work, that work would belong to

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<sup>5</sup> “The paradox of section 107” according to Lyman and Lindberg, “is that while it is intended as a limitation on the copyright monopoly, it in fact works to enhance that monopoly . . . . [T]he factors of fair use are stated in terms of the interests of copyright owners; it fails to distinguish between users, who fall into two groups—competitors and consumers; and it provides the basis for an inference that the work and the copyright of the work are the same thing.”

the citizens of the United States as common property in the Public Domain in perpetuity. Businesses and the public at large could organize their affairs around the secure resources of the Public Domain. The decision below took away this last shred of certainty.

The Government and the court below err in their analysis of the impact of Section 514 on Free Speech as well as the harm the provision causes to the Public Domain and its users. First, both the Government and the court below failed to consider the realities of the Internet, which must be accounted for in today's economy.<sup>6</sup> Second, neither the Government nor the court below gave proper credence to the value of the Public Domain. Instead, the court opted for a formula that took away the benefit of certain Public Domain works from over 300 million Americans<sup>7</sup> and concentrated those benefits into the hands of relatively few foreign rights holders. According to the court, Congress did so in the hope that other

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<sup>6</sup> The importance of the Internet to the economy is a well tread topic in professional literature. See, e.g., John Quelch, Quantifying the Economic Impact of the Internet, HBS Working Knowledge (Aug. 17, 2009), <http://hbswk.hbs.edu/item/6268.html> (calculating direct economic value of the Internet to the rest of the U.S. economy at \$175 billion, employing 1.2 million directly, and amassing \$680 billion in "time value").

<sup>7</sup> At the time of this writing, the U.S. population was estimated at 311,576,492. United States Population Clock, U.S. Census, available at <http://www.census.gov/main/www/popclock.html> (last visited June 17, 2011).

countries might reciprocate, thereby providing an *added* windfall to relatively few American rights holders. Such faulty balancing burdens significantly more speech than necessary and cannot survive under this Court's jurisprudence.

## ARGUMENT

### I. NEW COLLABORATIVE FORMS OF PRODUCTION PROMISE GREATER ACCESS TO THE PUBLIC DOMAIN.

IMSLP is but one example of a burgeoning movement that uses new technologies to reshape education, culture, and the economy through a new form of production — what one scholar has termed “commons-based peer production.” See generally Yochai Benkler, Coase’s Penguin, or, Linux and the Nature of the Firm, 112 Yale L.J. 369 (2002). In contrast to the traditional top-down, firm-based production model, commons-based peer production is a form of production in which a decentralized network of individuals coordinate in the development of large-scale projects, usually without a hierarchical structure, and often without any form of monetary compensation. Id. In their spare time, these volunteers have been able to produce incredible resources that might have been unthinkable just a short time ago, rivaling — and sometime besting — the products of competing for-profit ventures. These products are typically offered to the public at no cost. See id.; see also Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom (2006); Timothy Armstrong, Crowdsourcing and Open Access: Collaborative Techniques for Disseminating Legal Materials, 26 Santa Clara Computer & High Tech. L.J. 591, 607–08 (2009). Popular examples of commons-based peer production include Wikipedia (an online encyclopedia), Linux (a computer operating

system), and Project Gutenberg (an online library of Public Domain and freely-licensed books).

According to leading accounts, this new means of production is a result of recent advances in communication technology, most notably the Internet:

[As of 2005, the Internet connected] close to a billion people around the planet. . . . The fact that this vast pool of human talent, interest, knowledge, and experience now has, as it never had before, access to the basic necessary physical capital necessary to make and communicate cultural materials of all sorts has created a deep transformation in the digitally networked environment, and in the information economy and society. The critical change is that social production based on commons, rather than property, has become a significant force in the economy.

Yochai Benkler, Common Wisdom: Peer Production of Educational Materials 1–2, The Center for Open and Sustainable Learning (2005), available at [http://www.benkler.org/Common\\_Wisdom.pdf](http://www.benkler.org/Common_Wisdom.pdf).

The Internet enables connected individuals to build a common project and then release the fruits of their labor to the public for free. IMSLP is a textbook example: volunteer contributors are encouraged to upload Public Domain music scores or provide recordings of themselves performing Public Domain works (with the recordings



released under an open license). IMSLP receives approximately a hundred submissions of Public Domain material per day and makes nearly 100,000 works available in the database. Additionally, volunteers help manage IMSLP's infrastructure through website maintenance, translating text into other languages, and participating in IMSLP's various projects. See IMSLP:Introduction to Contributing, IMSLP, [http://imslp.org/wiki/IMSLP:Introduction\\_to\\_Contributing](http://imslp.org/wiki/IMSLP:Introduction_to_Contributing) (last modified on January 22, 2011).

Although these volunteers are dedicated to the cause of sharing Public Domain compositions, the difficulty of determining which works are in the Public Domain jeopardizes their ability to provide this service. These individuals volunteer their love of music and their commitment to jointly producing an exemplary resource for the benefit of all. While these individuals must always navigate the already formidable and growing uncertainties of copyright law, Section 514 imposes a new, continuous burden on them to re-verify the copyright status of every work *ad infinitum* in order to avoid potentially crushing liability. Such a system turns a blind eye to one of the most radically productive developments in the modern economy, to the detriment of these volunteers and those who rely on their work.

## II. UNCERTAINTY IS THE PRIMARY ENEMY OF THE PUBLIC DOMAIN AND SECTION 514 CREATES ENORMOUS UNCERTAINTY.

Uncertainty permeates U.S. copyright law. The complexity and fact intensiveness of copyright law creates immense confusion regarding who can do what with which works. Ultimately, this confusion results in fewer entities collecting, offering, and accessing works that are rightfully in the Public Domain. Consequently, large swaths of culture fall into obscurity and disuse.<sup>8</sup> Section 514 has exacerbated this problem by taking away the only remaining pillar of the Public Domain — that, absent extraordinary circumstances, works in the Public Domain must stay there.

### A. IMSLP Case Studies: How copyright uncertainty hurts a Public Domain business.

Because the Public Domain is common property, its rewards are frequently diffuse and limited for individuals, but great for society. As a result, even though mapping, offering, and protecting the Public Domain is a laudable and important enterprise, it is not necessarily profitable enough to offset its inherent exposure to copyright liability. Although IMSLP's traffic is a

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<sup>8</sup> For an example discussion regarding the availability of music scores for a restored work — Prokofiev's Romeo & Juliet — and the costs associated renting before and after restoration, see: List of Composers affected by GATT/TRIPS, IMSLP Forums (December 10, 2006) <http://imslpforums.org/viewtopic.php?f=6&t=4958#p25873>.

testament to the value of the Public Domain to its users, the financial rewards pale in comparison to the maximum penalty of \$150,000 in copyright liability *per work* for each of the 96,000 works it hosts. In business terms, risk is liability multiplied by probability. Under our current copyright regime, liability is immense while the probability of liability is uncertain, but ever increasing. While the value of the Public Domain is undeniable, a businessperson less dedicated to the sanctity of the Public Domain would likely have little interest in such an enterprise.

By way of example, IMSLP receives approximately one hundred Public Domain submissions each day from users. Without even considering Section 514, IMSLP must vet each work as it is submitted, which is no easy task because copyright renewal records are not entirely searchable online. Thus, there is already uncertainty about whether certain post-1923 works are in the Public Domain.<sup>9</sup> Theoretically,

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<sup>9</sup> In the U.S., owners of works published between 1923 and 1963 were required to submit a form to the U.S. Copyright Office renewing copyright twenty-eight years after publication. Although there is general agreement that the majority of works were not renewed, there is still great uncertainty. Officially, only records from 1978 onward are searchable online with the Copyright Office, meaning that each time IMSLP or any other Public Domain business wishes to check the status of a work that at one time required renewal, a representative must go to the U.S. Copyright Office in Washington D.C. to know for certain. See Jon Orwant, [U.S. Copyright Renewal Records Available for Download](http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html), Inside Google Books, (June 23, 2008, 9:45 AM) <http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html>. Although unofficial scans of

IMSLP could look up the printed renewal records in person at the Copyright Office, but the daily volume of new submissions renders impracticable a daily trip from Boston to Washington, D.C.

Instead, other online Public Domain resources simply assume that everything after 1923 is still under copyright. For IMSLP and others who value the Public Domain, this option is unacceptable. Of the 95,967 Public Domain works available on IMSLP, 2,539 of them are post-1923 works. Moreover, this figure almost certainly understates the reality of the problem. Because IMSLP relies on user-submissions, it is likely that users never submit countless works due to copyright status uncertainty. Thus, thousands of works, which are rightfully and lawfully the common property of all Americans, are effectively removed from the Public Domain because of uncertainty and the threat of liability.

Section 514 exacerbates this problem. Public Domain companies must not only vet submissions, but also continually monitor the copyright status of their Public Domain inventory in order to avoid liability. IMSLP's staff of twenty part-time volunteers can verify the status of a handful of works as they are submitted, but constantly and continually re-auditing an inventory of almost *one hundred thousand* works is likely too daunting a task for a predominantly volunteer-run effort.

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renewal records exist, there is no guarantee of accuracy or completeness, nor are they legally authoritative. Id.

## **B. IMSLP Case Studies: Businesses who wrongfully capitalize on uncertainty.**

There are entities that exploit the uncertainty surrounding copyright.<sup>10</sup> For example, IMSLP often encounters music publishers who wrongfully try to remove works from IMSLP.

Recently, the Music Publishers Association of the U.K. (“MPA”) sent an entirely untruthful DMCA takedown notice<sup>11</sup> to IMSLP’s third-party domain registrar (rather than to IMSLP itself), who subsequently disabled the *entire* site without any notice to IMSLP. Fortunately, this action caused such public outcry among IMSLP supporters that the MPA voluntarily rescinded its takedown notice less than a day later. MPA also requested that IMSLP’s registrar restore access to the domain name despite the ten-business day

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<sup>10</sup> Examples include groups of “copyright plaintiffs” conducting “spam litigation” and “mass settlement” campaigns such as the US Copyright Group, Copyright Enforcement Group, and Righthaven. See, e.g., Comprehensive List of Copyright Infringement Lawsuits Filed by Righthaven, LLC, Righthaven Lawsuits (last updated June 19, 2011), <http://www.righthavenlawsuits.com/lawsuits.html>; Copyright Enforcement Group Announces Extensive Portfolio of 5,500 Titles, RushPR News (May 10, 2010), <http://rushprnews.com/2010/05/10/copyright-enforcement-group-announces-extensive-portfolio-of-5500-titles>.

<sup>11</sup> The claim alleged that IMSLP violated copyright by offering Rachmaninoff’s The Bells, Op. 35, even though the piece was a Public Domain work in the United States under every measure of copyright.

mandatory curfew under the DMCA counternotice procedure. 17 U.S.C. § 512(g)(2). As the Deputy Legal Director at Public Knowledge noted in an official blog post, a less well known website with less legal expertise and popular support than IMSLP may not have been as lucky in these circumstances.<sup>12</sup>

Section 514 provides undue leverage to those who would exploit copyright uncertainty to the detriment of businesses like IMSLP and the public at large. In many ways, Section 514 generates even more legal risk than the DMCA because the latter provides a dispute resolution procedure. See 17 U.S.C. § 512 (g)(2)–(3). The risk of hundreds of thousands to *billions* of dollars in immediate liability under Section 514 is enough to chill most Public Domain-reliant enterprises.

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<sup>12</sup> Sherwin Siy, Sheet Music Goes Down Over Bogus Copyright Claim, Public Knowledge (April 22, 2001, 3:56 PM), <http://www.publicknowledge.org/blog/sheet-music-domain-goes-down-over-bogus-copyr> (“MPA’s trigger-happy notice demonstrates the problems that can arise when you put the power to take down something as broad as a domain in the hands of anyone with an email account and a willingness to send notice . . . . The good news is that IMSLP, after some back-and-forth, is back up and running . . . . The news is less good for a less popular site with less legal or technical sophistication that might suffer the same fate.”).

**III. THE LOWER COURT UNDERESTIMATED THE POTENTIAL IMPACT OF SECTION 514 ON RELIANCE USERS AND IGNORED THE REALITY OF THE INTERNET.**

As against reliance parties, all of 17 U.S.C § 504's copyright infringement remedies are available if copies or phonorecords of a restored work are made after either (i) publication in the Federal Register of notice of intent to enforce copyright or (ii) receipt of notice directly from the owner. 17 U.S.C. § 104A(d)(2). Once notice is received, or published in the Federal Register, a reliance party must immediately cease copying and is granted twelve months solely for the purpose of selling off his or her inventory. 17 U.S.C § 104A(d)(2)(A)(ii)(III)–(B)(ii)(III). In the Digital Age, this provision is wholly unreasonable.

Although the court below characterized the twelve-month window as a “grace period to continue exploiting the work,” Golan v. Holder, 609 F.3d 1076, 1093 (10th Cir. 2010), this period exists only so that reliance parties can sell-off copies made prior to the publication of notice in the Federal Register or receipt of direct notice. The Government's Brief in Opposition of Certiorari makes the same mistake by characterizing the period as a “protection[]” providing the ability to “continue to exploit an existing work for an additional year” after receiving notice. Gov't Br. Op. Cert. at 5. However, such a claim confuses the exploitation of a work with the selling of it.

According to the court below, the grace period was part of a “careful balance” that

included allowing “reliance users a sufficient opportunity to recoup their investment.” Golan, 609 F.3d at 1088 (quoting favorably the Joint Hearing statements of Eric Smith and Sen. DeConcini, respectively). The lower court’s appraisal of Congress’s balancing act is yet another instance of copyright logic working for a physical world for which it was designed, but failing in the digital domain. See, e.g., Whitney Harper v. Maverick Recording Co., 131 S. Ct. 590, 590 (2010) (Alito, J. dissenting) (finding a “strong argument” that a particular copyright provision does not apply to certain digital activities because the “provision was adopted in 1988, well before digital music files became available on the Internet” and technology had significantly changed the context in which the provision operates) cert. denied.

Both the Government and the court below suffer under the assumption that reliance parties will necessarily have pre-existing inventories of copies that can be sold off to recoup their investment. This belief is misguided on multiple counts. First, Internet-based companies like IMSLP have no inventory — only the ability to offer and make copies through downloads. Following the receipt of notice to enforce, websites must instantaneously remove specified works from their website in order to comply with Section 514 and avoid copyright liability. IMSLP is not even afforded the opportunity to investigate or dispute the claims after receiving notice. There is no “grace period” whatsoever for IMSLP and with no inventory to sell off, IMSLP is not able to “recoup”



the investment incurred by supplying Public Domain works to the public.

Second, the Register of Copyrights publish notices of intent to enforce “commencing not later than 4 months after the date of restoration for a particular nation and every 4 months thereafter for a period of 2 years.” 17 U.S.C.

§ 104A(e)(1)(B)(i). Accordingly, in order to avoid liability, companies like IMSLP must divert their resources from their meager budgets to constantly monitor restoration dates for particular nations. They must also constantly monitor the Federal Register for up to two years after the restoration date in case a notice is subsequently filed. Even after the two years have lapsed, copyright owners may still serve notice of intent to enforce directly to reliance parties *ad infinitum*.

Third, if notice of intent is served directly, Section 514 provides no window for companies to investigate claims or verify copyright status before incurring liability for failing to remove the disputed work. Businesses are forever under the threat that notices of intent “may be served . . . *at any time* after the date of restoration of the restored copyright” and therefore liability may ensue at any moment. 17 U.S.C. § 104A(e)(2)(A) (emphasis added). Because IMSLP users download more than 150,000 works from the site daily, there is genuine danger that IMSLP cannot act fast enough to comply. Thus, reliance parties must be prepared at all times to immediately pull any and all content upon receipt of any notice, no matter how specious.

The only defense against false actions is that a party who makes a materially untrue statement about a restored work will void all claims as to that restored copyright. 17 U.S.C. § 104(A)(e)(3). This is hardly a fair trade. While IMSLP must instantaneously shut down all downloads the instant notice is received — without the ability to investigate or dispute on the merits — the party who *knowingly* makes a false statement loses only the right to enforce the restored work. The efficacy of this remedy assumes that the party providing notice will always *possess* a right that may be voided. This scheme provides no defense whatsoever against companies like MPA (see supra Section I.1) that capitalize on copyright uncertainty to bolster otherwise baseless claims. Moreover, given the meager budgets of organizations like IMSLP, the costs of litigation are generally prohibitive. Thus, when faced with a copyright claim of dubious merit, Public Domain enterprises have little recourse but to comply with the claim, as they cannot risk the costs that would be incurred if the matter went to trial. In this way, Section 514 places organizations like IMSLP at a significant disadvantage.

#### **IV. THE PUBLIC DOMAIN SERVES AS A SHARED RESOURCE FOR CULTURAL CONSTRUCTION.**

Both the Supreme Court and Congress have long recognized that the Constitutional power to create and enforce copyright is not primarily designed to provide a special private benefit:

Rather, the limited grant is a means by which an important public purpose may be achieved. It 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.*

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (emphasis added). There, the Court addressed how interpretations of copyright ought to reflect this central purpose in the face of technological development. Courts should apply similar logic to the changing circumstances of the Public Domain.

Recent scholarship has increasingly challenged the notion that “authors create something from nothing,” and instead has recognized that “the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.” Jessica Litman, The Public Domain, 39 Emory L.J. 965, 966 (1990); see Julie Cohen, Creativity and Culture in Copyright Theory, 40 U.C. Davis L. Rev. 1151, 1183 (2007) (“[T]he unknown emerges from interactions with the known via practices of juxtaposition, iteration, dialogue, and experimentation . . . and that cannot be understood as the manipulation of abstract ideas to generate linear progress.”); William Fisher, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659, 1729 (1988) (“Creativity,

however, is often — perhaps always — a more social phenomenon . . . . Every writer, composer, and filmmaker draws on the work of his predecessors when creating something new, and most are stimulated by the ongoing work of their contemporaries.”); Edward Wisniewski, Conceptual Combination: Possibilities and Esthetics, in Creative Thought: an Investigation of Conceptual Structures and Processes 56 (Thomas B. Ward, Steven M. Smith, & Jyotsna Vaid, eds., American Psychological Association 1997) (“[T]he creation of new concepts by combining existing ones is a powerful and common way of *expanding* knowledge.” (emphasis added)).

Scholars are even challenging the traditional dichotomy between producers and consumers: “fans of television shows, movies, comic books, and bands themselves participate in the creation of that culture . . . the postmodern individual’s response to media images is itself a creative and ultimately political act.” Margaret Chon, Postmodern “Progress”: Reconsidering the Copyright and Patent Power, 43 DePaul L. Rev. 97, 129–30 (1993). This reconceptualization of society’s production of cultural works uniformly militates in favor of a comparable reconceptualization of the Public Domain — not as a “quid pro quo for copyright or as the sphere of insignificant contributions,” but as the fundamental and necessary soil for the generation of new arts and sciences. Litman, 39 Emory L.J. at 968. Properly regarded, the Public Domain may be the ideal wellspring because it provides a bevy of pre-existing ideas that may be manipulated

infinitely, without limitation. Thus, the harm resulting from a precedent that allows works to be removed from the Public Domain would derail these newfound models of creative progress.

**V. THE PUBLIC DOMAIN IS AN IMPORTANT ALTERNATIVE TO COPYRIGHTED WORKS.**

The Public Domain offers unique benefits and deserves at least as much protection as copyright interests. See, e.g., Martin Hoffman, *Limitations on the Right of Publicity*, 28 Bull. Copyright Soc’y 111, 112 (1980) (“One man’s right is another man’s restraint, and to set levels of protection in the intellectual property . . . field[] only in response to the needs of one group . . . distorts the function of these laws . . .”). The copyright and licensing structure in the U.S. is remarkably complex and in many ways works against the study and performance of musical works. Simply put, there is no substitute for the unlimited, unimpeded ability to utilize works in the Public Domain. From the origins of intellectual property in this country, it has been recognized that there is a danger in overrepresentation of copyright interests at the expense of the Public Domain. Even to this day, it is well understood that the Public Domain must be secure and set off from the domain of monopoly, which naturally and perpetually seeks to expand.

**A. Licensed compositions are no substitute for the Public Domain.**

Copyright presents a unique difficulty for individuals who wish to make use of a particular

composition. Certain famous pieces are mandatory in the repertoire of any professional musician or scholar, yet no compulsory license grants the right to reproduce a work as a musical score. See Melville and David Nimmer, 2-8 Nimmer on Copyright § 8.04 (2011); see also, M. Witmark & Sons v. Standard Music Roll Co., 213 F. 532, 534 (D.N.J. 1914) (stating that the statutory mechanical license did not extend to printed or written works), aff'd, 221 F. 376 (3d Cir. 1915). Likewise, while three institutions license most public performance rights in the United States, see Meredith Corp. v. SESAC, LLC, 2011 U.S. Dist. LEXIS 24517, 3-4 (S.D.N.Y. Mar. 8, 2011), no aggregator exists for music scores. The lack of either compulsory or one-stop licensing forces music score users to license each composition individually, a process that hampers access and expression in several ways.

First, copyright owners are difficult to identify. The 1976 Copyright Act removed the need for formalities in copyright registration, creating a class of orphan works that are copyrighted, but for which it is difficult to determine the identity or location of the creator. U.S. Register of Copyrights, Report on Orphan Works 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. The orphan works problem affects all copyrighted material, but further frustrates licensing attempts where neither copyright aggregators nor compulsory licenses exist to minimize search costs. Even if the original author of a work is known, the current owner may be

entirely different. Lawrence Lessig, Free Culture 223 (2004). Where the owner cannot be found to license a work, the music is not likely to be used due to fear of reprisal. Id.

Even when a copyright owner may be located, negotiating individual licensing agreements may stifle expression. For example, copyright owners may refuse to license music because of a distaste for the new subject matter, out of a whim, or a desire to extract maximum revenues from their superior bargaining positions. Jeremy Beck, Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests, 13 *UCLA Ent. L. Rev.* 1, 19 (2005).

The Public Domain bypasses these risks and thereby encourages vital artistic expression. Studying American orchestras, operas, and classical music radio stations, one scholar found that “[t]he most performed, recorded and broadcast pieces of serious music are public domain works.” Charles Cronin, Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology, 28 *Colum. J.L. & Arts* 1, 30 (2005). IMSLP provides access to the scores necessary to perform those works, but relies on a vibrant and secure Public Domain to do so. Establishing a precedent whereby works may be removed from the Public Domain will not only be destructive to IMSLP and similar businesses, but also it will harm those who rely on them.

**B. The Founders regarded the Public Domain with equal or greater esteem than copyright itself.**

The Founders recognized that an intellectual property regime requires a delicate balance between copyright interests and the Public Domain. Moreover, because intellectual property monopolies caused great concern, they chose a balance that weighed heavily in favor of the latter. For example, Thomas Jefferson opined that “the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.” William F. Patry, 1 Copyright Law and Practice 23 (1994). Even though James Madison generally supported copyright, see The Federalist No. 43, at 309 (Benjamin Wright ed., 1961) (stating that “the utility of [the federal government’s copyright] power will scarcely be questioned”), he admitted that such monopolies “are classified among the greatest nuisances in Government.” Patry, supra at 23. While the debates of the drafting committees were secret, the Progress Clause further reflects the careful balance of copyright — protection of authors juxtaposed against the inherent dangers of monopoly — in only granting Congress the power to protect certain types of intellectual property for a “limited” time. U.S. Const. Art. I, § 8, Cl. 8.

In contrast to these concerns, Thomas Jefferson exalted the free cultural commons. See Thomas Jefferson, Letter to Isaac McPherson (August 13, 1813) reprinted in The Writings of Thomas Jefferson 13:333–35 (Andrew Lipscomb,



Ed., 1905) available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_8s12.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html) (an idea, once divulged, “forces itself into the possession of every one”). Jefferson found the basis of the Public Domain in the concept that “ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition . . . .” Id. Questioning the value of endorsing intellectual monopolies, Jefferson noted that just “as he who lights his taper at mine, receives light without darkening me,” so too do ideas give without taking. Id.

Furthermore, early use of copyright was uncommon, which assuaged the Founders’ early fears. Few authors took advantage of the colonial statutes. Patry, supra at 21. Even after the ratification of the Constitution and the passage of the Copyright Act of 1790, copyright remained rare. Only about five percent of copyrightable works were registered; ninety-five percent fell immediately into the Public Domain. Lessig, supra at 133. Even registered works would remain copyrighted for only a short time, passing into the Public Domain after a maximum of twenty-eight years. Id. Formalities created the background assumption that works were free of copyright unless otherwise specified. Thus, at copyright’s birth in this nation, it was the Public Domain that reigned, not copyright. However, copyright has expanded radically ever since, ultimately creating the opposite assumption — that works are copyrighted rather than free — without

establishing a commensurate protection for the once vibrant Public Domain.

**C. The Public Domain must be set off from copyright with bright lines.**

Clearly delineating the boundaries of the Public Domain benefits the public, businesses, and rights holders alike. Justice Kennedy implicitly stated this proposition in 2002:

The monopoly is a property right; and like any property right, its boundaries should be clear. This clarity is essential to promote progress, because it enables efficient investment in innovation. A patent holder should know what he owns, and the public should know what he does not.

Festo Corp., 535 U.S. at 730–31. This Court has long recognized that the Public Domain should be clearly set off from the domain of copyright. See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003) (“The right to copy, and to copy without attribution, once copyright has expired, like the ‘right to make [an article whose patent has expired] — including the right to make it in precisely the shape it carried when patented — passes to the public.” (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230 (1964)). Even then-Solicitor General Theodore Olson noted during oral argument in Eldred v. Ashcroft — years after the passage of the URAA — the existence of a “bright line” protecting

“[s]omething that has already gone into the public domain, which other individuals or companies or entities may then have acquired an interest in, or rights to, or be involved in disseminating.” Trans. of Oral Arg. 44, 537 U.S. 186 (Oct. 9, 2002). Such a bright line is critical to a properly functioning Public Domain.

Judicial protection of the Public Domain is warranted. Parties creating as well as using intellectual property will suffer from the long-term status-uncertainty that a decision upholding copyright restoration would establish. *See, e.g., Elizabeth Townsend Gard, Copyright Law v. Trade Policy: Understanding the Golan Battle Within the Tenth Circuit*, 34 Colum. J.L. & Arts 131, 134 (2011) (“[T]his kind of amendment to the Copyright Act brings instability and uncertainty to the whole system. If no boundaries exist, the law itself becomes meaningless.”); Brian Lee Pelanda, *Copyright’s “Traditional Contours” and “Bedrock Principles”: Golan’s Potential to Secure First Amendment Protection over the Public Domain*, 31 Whittier L. Rev. 547, 586 (2010) (“The Supreme Court’s invalidation of section 104A’s removal of works from the Public Domain on First Amendment grounds would create certainty with respect to the previously assumed permanent free accessibility of ideas and works that enter the public domain.”).

IMSLP and its community of volunteers rely on a strong and clear Public Domain in order to build a collection of common cultural resources. Piercing the protective barrier surrounding the

Public Domain would not only jeopardize IMSLP and other valuable organizations that rely on the Public Domain — it would also undermine years of intellectual property jurisprudence.

**D. IMSLP Case Studies:  
Technological advances and new possibilities to tap the Public Domain.**

In their Amicus Brief the Conductors' Guild admirably conveyed the cost structure comparison between Public Domain works and those under copyright. See Am. Br. Conductors' Guild in Support of Cert. at 4–5 (noting that copyrighted works are “an enormous financial burden on small orchestras” and that per-performance rental fees for copyrighted works are “normally three to four times *the purchase price* for sheet music for a work in the public domain.”) (emphasis added). This fact underscores how new technologies can harness the Public Domain: in the analog world even Public Domain works bear significant cost, but in the digital world sheet music of copyright-free works can be obtained at no cost at all.

Recently, IMSLP launched an application for the iPad that allows IMSLP users to access sheet music on their mobile devices.<sup>13</sup> Rather than requiring orchestras to pay a costly and sometimes prohibitive per-performance fees for copyrighted works, or having them pay a slightly smaller sum

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<sup>13</sup> For the IMSLP press release, see <http://imslpjournals.org/padrucci-the-ipad-app-for-imslp>.

to purchase Public Domain works, an eighty-person symphony orchestra could have instantaneous, unlimited, and absolutely free access to all of IMSLP's 96,000 music scores via a computer application. Imagine a symphony never again having to pay for sheet music ever again. This is the potential of the Public Domain in the Digital Era.

Such technological progress in the Public Domain is especially timely considering the rash of bankruptcy filings that has plagued the classical music world in recent years.<sup>14</sup> IMSLP believes that this kind of progress, the kind that could be a boon to our faltering classical music environment,

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<sup>14</sup> For information regarding the financial troubles of American classical music groups, see: Tim Smith, Baltimore Opera bankruptcy filing shows \$1.2 million debt, Baltimore Sun (December 10, 2008) <http://www.baltimoresun.com/entertainment/balte.to.opera10dec10,0,5146491.story>; Honolulu Symphony Files for Bankruptcy, KITV.com (June 19, 2011), <http://www.kitv.com/r/21546833/detail.html>; Magdalena Sharpe, NM Symphony Files for Chapter 7 Bankruptcy, KOB.com (June 19, 2011), <http://www.kob.com/article/stories/S2074495.shtml>; Verena Drobnik, Board of troubled NYC Opera meets to talk future, Associated Press (May 19, 2011), <http://abcnews.go.com/Entertainment/wireStory?id=13637998>; Daniel J. Wakin & Floyd Norris, Philadelphia Orchestra Makes Bankruptcy Move, New York Times (April 17, 2011), <http://www.nytimes.com/2011/04/18/arts/music/philadelphia-orchestra-moves-toward-bankruptcy-filing.html>; Melinda Johnson, Syracuse Symphony will file for bankruptcy, board announces, Post Standard (April 5, 2011), [http://www.syracuse.com/news/index.ssf/2011/04/post\\_411.html](http://www.syracuse.com/news/index.ssf/2011/04/post_411.html).

is every bit the kind envisioned by the Progress Clause and is every bit as deserving of the government's protection as are the interests of copyright holders.

**VI. WITH THE FOREGOING CONSIDERATIONS  
IN MIND, SECTION 514 CANNOT PASS  
INTERMEDIATE SCRUTINY.**

The court below shortchanged the value of the Public Domain and grossly understated the impact of Section 514. First, the “harm” addressed by Congress through restoration was not an actionable harm at the time the URAA was passed and should not be countenanced by this Court. Second, Congress has no power to legislate for foreign governments and thus its objective of obtaining reciprocity should not qualify as a valid government interest. Third, even if it were a valid interest, Section 514 burdens significantly more speech than is necessary to accomplish its goals.

**A. U.S. rights holders were not  
entitled to revenues in foreign  
nations when Section 514 was  
passed and therefore these sums  
should not qualify as “losses” or  
“real” harm.**

The court below endorsed this Court's ruling in Turner that a “statute must be directed at a real, and not merely conjectural, harm” to withstand intermediate scrutiny. Golan, 609 F.3d at 1084. The court reasoned that it “must examine whether Section 514 was ‘designed to address a real harm, and whether [it] will alleviate [that

harm] in a material way.” Id. (alteration in original) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)). Citing legislative materials, the appellate court determined that the “harm” addressed by Section 514 was the “billions of dollars . . . lost each year because foreign countries were not providing protections to American works that were in the public domain abroad.” Id. at 1086.

First, no harm existed at the time of Section 514’s passage. U.S. rights holders could not have *lost* billions of dollars through a lack of foreign copyright protection in the same sense that rights holders do not “lose” billions of dollars after their works enter the Public Domain upon the ordinary expiration of the copyright term domestically. Such revenues simply are not theirs to lose. Second, the solution is meaningless. Foreign governments had no obligation to protect the U.S. works in question within their borders before Section 514 was passed. Even if Section 514 is enforced, U.S. rights holders’ entitlement to foreign revenues remains contingent on the laws of each foreign nation. While Congress and rights holders may prefer that American copyrights generate more revenue abroad, there can be no “harm” where foreign nations had no obligation to provide those revenues in the first place. No harm existed at the time of URAA’s passage and none exists now.

**B. Congress targeted the speech of over 300 million Americans, which did not create the “same evils” sought to be remedied.**

“[T]he essence of narrow tailoring” is when a regulation “focuses on the source of the evils the [government] seeks to eliminate . . . without at the same time banning or significantly restricting a substantial quantity of speech that does not create the *same* evils.” Golan, 609 F.3d at 1091 (emphasis added) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). Here, as explained supra at 30, the “evil” sought to be remedied was the lack of *foreign* enforcement of *domestic* copyrights. To remedy this evil, Congress significantly restricted domestic speech and fundamentally altered the settled contours of copyright law in the hopes of encouraging foreign reciprocity. In a circuitous and non-binding attempt to coax more protection out of foreign governments, Congress’s actions here silence the speech produced by lax *domestic* enforcement of *foreign* copyrights. While Congress is entitled to deference in its policy judgment, the target of its regulation, strictly speaking, did not create the “same evil” that Congress sought to remedy. Thus, Section 514 should fail under this test.



**C. Section 514 curtails the speech of  
over 300 million Americans who  
share in the Public Domain.**

Intermediate scrutiny requires that the means embodied in Section 514 not “burden substantially more speech than necessary” to further an important government interest. See Turner, 520 U.S. at 189; accord Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001) (“[T]he incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest”); Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 508 (5th Cir. 2009) (a policy will pass constitutional scrutiny if, *inter alia*, “the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest”) cert. denied, 130 S. Ct. 1055 (2010).

The court below erred in ending its analysis with the determination that the burdens imposed on reliance parties were “congruent with the benefits Section 514 affords American copyright holders.” Golan, 609 F.3d at 1091. The court considered the impact of Section 514 only on reliance parties without acknowledging the broader impact of restoration. In order to be a reliance party, one must have been making use of the work prior to the restoration its copyright. See Troll Co. v. Uneda Doll Co., 483 F.3d 150, 160 (2d Cir. 2007) (holding that a manufacturer who did not claim to be disposing of dolls before the enactment of URAA was not entitled to reliance party status). Otherwise, later use constitutes

ordinary infringement subject to regular copyright liability rules. While reliance parties are allowed time to sell off restored works in their inventories, others are simply barred from using the work. Thus, the court wrongly limited the scope of its inquiry to Section 514's effect on reliance parties when in fact the provision places an even higher burden on the speech interests of every current and potential U.S. user of the Public Domain. As a limited but concrete example, the court erred in considering only the burden on reliance parties like IMSLP when, at a minimum, it should have considered the 1.1 million speakers who visit IMSLP each month to make use of its Public Domain offerings.

Because the Public Domain is the common property of every American, each work taken out of the Public Domain disadvantages every citizen while benefiting only the individual copyright holder. For every one foreign rights holder who is benefited through copyright restoration, over 300 million Americans' individual rights to that speech are burdened. For every foreign rights holder who receives an extra dollar or for every American rights holder who, *arguendo*, enjoys the windfall of a more favorable global copyright regime, over 300 million Americans have lost their individual and collective speech interest in the common property of the Public Domain.

**D. The availability of a less restrictive alternative *must* be relevant under this Court’s jurisprudence.**

Even assuming that Congress’s objectives were valid, the court below wrongly dismissed the relevance of a less restrictive means of accomplishing those objectives. See Golan, 609 F.3d at 1092 (“[T]he ‘less restrictive-alternative analysis has never been a part of the inquiry into the validity of content-neutral regulations on speech.’” (quoting Turner, 520 U.S. at 217)). This appraisal is misleading for several reasons. First, the proposition is mere dicta. See Turner, 520 U.S. at 217 (prefacing the disutility of such analysis by first recognizing that it was “doubtful . . . that a narrower but still practicable” alternative could be drafted in that particular case).

Second, the Turner Court utilized this proposition to counter the appellants’ demand that the Court “sift through all the available or imagined alternative means of regulating” in order to determine whether the Government’s solution was “the *least* intrusive means.” Id. at 182 (citations and alterations omitted); see also id. at 217–18 (“[W]e will not invalidate the preferred remedial scheme because *some* alternative solution is *marginally* less intrusive on a speaker’s First Amendment rights.” (emphasis added)). Indeed, Turner quotes this proposition from Ward 491 U.S. at 797, which also utilized the proposition to counter a demand that the Court require the *least* restrictive alternative. Id. Ultimately, this

proposition originates from Regan v. Time, 468 U.S. 641, 656–57 (1984), which was decided *before* this Court established the requirement that the government’s chosen means not be “substantially broader than necessary” was established. See Ward, 491 U.S. at 800.

Although a less restrictive alternative might not have been part of the analysis in 1984 under Regan, it certainly became relevant after Ward. The only way to know whether the government’s chosen means are “substantially broader than necessary” is to compare them against a less restrictive means, if one exists. See Ward, 491 U.S. at 807 (noting that without being able to consider less restrictive alternatives Justice Blackmun was “at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.”) (Blackmun, J. dissenting).

#### **E. Section 514 leaves no alternative channels for communicating restored works.**

Under Ward, a content-neutral regulation may restrict time, place, and manner of protected speech provided, *inter alia*, that it “leave[s] open ample alternative channels of communication.” 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Because of the extraordinary difficulties in licensing copyrighted works, see supra Section IV.1, users wishing to make use of restored works

are hindered and possibly prevented from making such use. Because each composition is a unique piece of creative speech, users who would otherwise use a restored work are accorded no alternative channels for their specific expression. Cf. Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, Duke Conference on the Public Domain 173, 175 (2003) available at <http://www.law.duke.edu/journals/journaltoc?journal=lcp&toc=lcptoc66winterspring2003.htm> (“[C]opyright imposes substantial risks of harm to democracy and individual autonomy.”).

A rule survives scrutiny when it does not ban “any particular . . . type of expression.” Ward, 491 U.S. at 802. Examples of permissible bans include volume limits, id., forbidding sleep in some areas in a park while permitting others, Clark, 468 U.S. at 295, and banning picketing single residences while allowing picket marches through the surrounding neighborhood, Frisby v. Schultz, 487 U.S. 474, 483 (1988). Each ban on one mode of expression clearly leaves open other equally accessible if only slightly less potent avenues. Some courts have gone further to hold that the ability to picket in locations other than that of the picketers’ choice does not qualify as leaving open ample alternative channels of communication. Phelps-Roper v. Nixon, 545 F.3d 685, 693–94 (2009) (“[P]laintiffs wish to express an opinion about an individual to that individual and others, and they wish to direct their message at that individual . . . . Therefore, allowing them to picket in the town square or even the next block does not

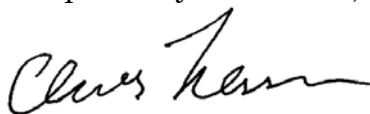
satisfy the second Ward requirement . . . .” (quoting Kirkeby v. Furness, 92 F.3d 655, 662 (8th Cir. 1996)). Where offering the opportunity to make the same message in a different location is insufficient, certainly the alternative of being forced to pay for the ability to express a particular message where otherwise it was free or to substitute one message for another — essentially censoring one chosen message altogether — must also be insufficient.

Musicians, publishers, and academics wishing to use Shostakovich’s 5<sup>th</sup> Symphony or Prokofiev’s Romeo & Juliet are now precluded from freely doing so. Where licensing may be untenable, as it often is, see supra Section IV.1, individuals wishing to make those forms of speech are blocked entirely. Public Domain pieces by other composers are not a viable substitute for a particular piece of music — aesthetically, philosophically, or functionally. Both Beethoven and Stravinsky composed beautiful and essential works, but one may not pass as an alternative channel of expression for the other. Section 514’s restriction on users fails not only to provide ample alternative channels, but also any guaranteed alternatives whatsoever.

**CONCLUSION**

For the foregoing reasons, Amicus respectfully requests that the Court reverse the judgment below and remand the case with instructions to enter judgment for petitioners.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles Nesson". The signature is fluid and cursive, with a long horizontal stroke at the end.

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**CERTIFICATE OF WORD COUNT**

I, CHARLES NESSON, declare as follows:

I am the attorney for *Amicus Curiae* in this matter. On June 19, 2011, I performed a word count of the above-enclosed brief, which revealed a total of 8,173 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19<sup>th</sup> day of June in Cambridge, Massachusetts.

A handwritten signature in black ink, appearing to read "Charles Nesson". The signature is fluid and cursive, with a long horizontal stroke at the end.

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