

No. 10-545

In The
Supreme Court of the United States

LAWRENCE GOLAN, ESTATE OF RICHARD KAPP, S.A.
PUBLISHING CO., INC. d/b/a ESS.A.Y. RECORDINGS,
SYMPHONY OF THE CANYONS, RON HALL d/b/a
FESTIVAL FILMS, and JOHN MCDONOUGH d/b/a
TIMELESS VIDEO ALTERNATIVES INTERNATIONAL,

Petitioners,

v.

ERIC H. HOLDER, JR., in his Official Capacity as
Attorney General of the United States, and MARIA
PALLANTE, in her Official Capacity as Register of
Copyrights, Copyright Office of the United States,

Respondents.

**On A Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

**BRIEF OF *AMICI CURIAE* PUBLIC DOMAIN
INTERESTS IN SUPPORT OF PETITIONERS**

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Prelinger Library	

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INTEREST OF *AMICI CURIAE*¹

This brief *amici curiae* is filed on behalf of the following organizations and individuals, who represent a broad range of non-profit and commercial interests, including musical artists, filmmakers, visual artists, authors, performers, technology and communications companies, archives, educators, and academics. *Amici's* shared interest in this case is in communicating to this Court the fundamental importance of a vibrant, stable, and clearly delineated public domain to American creativity, innovation, and civic participation. *Amici* are described more fully in the Appendix.

Michael Chabon, Shepard Fairey, Steve James, Jonathan Allen Lethem, Barbara Kopple, Megan Prelinger, Gordon Quinn, and Rosanna Warren are American authors, visual artists, and filmmakers.

Patricia Aufderheide, James Boyle, Lewis Hyde, Peter Jaszi, Jennifer Jenkins, and Pamela Samuelson are American educators and academic authors who study film and media arts, writing, and copyright law.

¹ Letters from all parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission.

The **American Music Center**, **Cabin Creek Films**, **Chorus America**, **College Art Association**, **Film Independent**, **Fractured Atlas**, the **Future of Music Coalition**, the **International Documentary Association**, **Kartemquin Films**, the **National Alliance for Musical Theatre**, the **National Alliance for Media Arts and Culture**, and the **National Performance Network** are organizations of creators and companies that collectively represent the interests of hundreds of thousands of individual visual and musical artists, documentary filmmakers, and performers.

The **Center for the Study of the Public Domain at Duke Law School** is the first university center in the world devoted to the study of the contributions of the public domain to speech, culture, science, and innovation.

The **Computer & Communications Industry Association** is a non-profit membership organization focused on the technology and communications industries.

The **Prelinger Archives** is a collection and commercial licensor of films produced by and for hundreds of United States corporations, non-profit organizations, trade associations, community and interest groups, and educational institutions. The **Prelinger Library** is an unincorporated private collection containing approximately 30,000 books, 700 periodical titles, and 25,000 items of print ephemera, the majority of which are in the public domain.

Amici depend both on the rights copyright grants creators, and on its limitations. Filmmakers, authors, musicians, visual artists, performers, and innovative companies all rely upon copyright's economic protections to ensure a return on their investment in making and distributing creative works. Equally, all rely upon public domain materials in order to, variously, seed new creative works, invest in new business models, and fulfill their educational missions. And *amici* exemplify only some of the myriad organizations, businesses, and individuals – collectively, the public, itself – that rely on the material freely available in the public domain.



SUMMARY OF ARGUMENT

Public domain materials are essential to American creativity, innovation, and democratic participation. The public domain's range is enormous, comprising everything from philosophical texts to scientific discoveries; from sublime works of literature, music, and art, to diaries of mundane daily activity; and from high art to the commercial ad copy of bygone days. As the realm of material that can be used without permission or fee, "free" speech in its truest form, it is nothing less than the "basis for our art, our science, and our self-understanding." James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 39 (2008).

Works in the public domain represent the public benefit of copyright's essential structure as set forth in the Constitution: economic incentives to creators in the form of exclusive rights for limited times, in return for creative works that eventually enter the public domain. *See, e.g.*, U.S. Const. art. I, § 8, cl. 8; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985). The importance of works in the public domain goes well beyond their being inexpensive to purchase, use, or perform, though that is an important factor in access to knowledge. The public, including the artists, educators, and innovators represented among *amici*, depends on the public domain as the primary resource that fuels new cycles of speech. Indeed, public domain materials are essential to creative production. Moreover, a stable, clearly demarcated public domain supports investment in innovation and commercial enterprise. And the unrestricted availability of cultural materials, along with the right to use those materials freely for individual inquiry, debate, and expression, is fundamental to democratic participation.

In implementing Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"), Congress took the unprecedented step of removing, in one fell swoop, many tens of thousands – and likely, millions² – of works

² *See* Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 Fordham (Continued on following page)

from the public domain. In doing so, it upended vested public speech rights and public reliance on the availability of public domain materials. The questions in this case are thus of critical public and constitutional importance.

Section 514 frustrates copyright's public purpose. The public once enjoyed the right to freely distribute, draw from, recast, or revise any of the millions of works covered by Section 514; now, however, control over those works has been handed back to private owners. Section 514's limited protections for reliance parties fail to address the serious harm that removing materials from the public domain causes *amici* and indeed *all* members of the public who previously had enjoyed the ability to freely use now-restored works.

Indeed, Section 514 impairs the free expression rights guaranteed to the public by the First Amendment, U.S. Const. amend. I, and calls into question the Constitution's guarantee that copyrighted works pass into public ownership after "limited Times." U.S. Const. art. I, § 8, cl. 8. Further, Congress's decision to confer copyright on the foreign works covered by Section 514 raises serious questions about its willingness to remove other categories of works from the public domain in the future. If the Constitution permits Congress to reach into the public domain and

Intell. Prop. Media & Ent. L.J. 25, 31 (1996) (stating that affected works "probably number in the millions").

expropriate from it, then fear of retroactive liability for using materials presently freely available – but subject to Congress’s whim – is likely to stymie creativity and investment.

Amici therefore respectfully request that this Court recognize the vital importance of the public domain to American creativity, commerce, and civic participation, and that it protect the public’s vested reliance and speech interests in the cultural commons by reversing the decision below and making clear that works bequeathed to the public domain must remain there.



ARGUMENT

I. A Stable Public Domain Is Essential to American Cultural, Commercial, and Democratic Interests

A robust and stable public domain is fundamental to copyright’s essential purpose: to encourage the making and dissemination of creative works. As Justice Story explained, copyright will “promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.” Joseph Story, *Commentaries on the Constitution of the United States* § 502, at 402-03 (1987). Once “fully possessed” by the people, works in the public domain increase the well-spring that supplies the raw material for new

artworks, literature, music, and inventions. See Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 966 (1990). Together with copyright's economic incentives to create new works, the public domain fulfills the Constitution's goal that Congress "promote Progress" through the production and dissemination of creativity and learning. As such, the public domain has served as a central underpinning of American speech, commerce, and democratic participation for more than two centuries.

Whether Congress may remove materials from the public domain is a question of central importance to the creative, educational, and innovation interests *amici* represent. Closing portions of the "place we quarry the building blocks of our culture," Boyle, *The Public Domain: Enclosing the Commons of the Mind*, at 41, by removing material from the public domain, undermines at least three of the most important public interests advanced by copyright law. First, a vibrant, reliable public domain is essential to the production of creative expression. Second, a stable, clearly demarcated public domain supports investment in innovation and commercial enterprise. Third, the unrestricted availability of cultural materials, along with the right to use those materials freely for individual inquiry, debate, and expression, is fundamental to democratic participation.

A. The Public Domain Is Essential to Creative Expression

The public domain is the cultural commons from which artists draw the raw materials for new creative works. Justice Story's 1845 description of this practice is still fresh today: "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845). If creators were not able to build on what came before – for example, if Picasso could not refer to El Greco;³ if James Joyce could not borrow freely from Homer;⁴ and if Laurents and Sondheim could not turn *Romeo and Juliet* (much of which Shakespeare borrowed from others)⁵ into *West Side Story*⁶ – then copyright would cease to stimulate

³ See Susan Sinclair, *Viewing El Greco*, 27 *Art History* 353, 462 (2004).

⁴ See Harry Levin, *James Joyce: A Critical Introduction* 133 (2d ed. 1960).

⁵ Arthur Brooke's 1562 play, *The Tragicall Historye of Romeus and Juliet*, is considered to be William Shakespeare's chief source for his famous play *Romeo and Juliet*; he may also have used the basic storyline from William Painer's 1582 poem, *Palace of Pleasure*. See E. Pearlman, *Shakespeare at Work: Romeo and Juliet*, 24 *English Literary Renaissance* 315, 323-24 (1994).

⁶ See Ryan J. Merrill, *Star Cross'd Lovers in Song and Verse: An Interdisciplinary Engagement with Romeo and Juliet* (Continued on following page)

expression and would instead impede it. As such, “the public domain is the law’s primary safeguard of the raw material that makes authorship possible.” Litman, *The Public Domain*, at 967. This is true for every form of art – from music to film, from books to visual art – and for every genre.

In an essay for *Harper’s Magazine*, *amicus* Jonathan Lethem (borrowing from Siva Vaidhyanathan) relates a classic musical example. When asked about the genesis of his song, “Country Blues,” blues great Muddy Waters invoked traditional field songs; his mentor, Son House; Robert Johnson’s work recording a song with the same traditional tune; and his own experience being “mistreated by a girl.”⁷ By using a tune from the cultural commons – the public domain – Waters’ song evokes a series of historical and cultural touchpoints that communicate meaning within the blues genre. Similarly, the young Bob Dylan, “had a great absorptive ability”; about two-thirds of his early melodies were traditional Anglo- and African-American tunes. Dylan located this process squarely in “the folk music tradition. You use what’s been handed down.” Lewis Hyde, *Common as Air: Revolution, Art, and Ownership* 198-99 (2010) (“*Common*

and West Side Story, 26 *Interdisciplinary Humanities* 101, 103 (2009).

⁷ Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, *Harper’s Magazine* (Feb. 2007) (quoting Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* 120-26 (2001)).

as Air”) (quoting Robert Hilburn, *Rock’s Enigmatic Poet Opens a Long-Private Door*, Los Angeles Times, Apr. 4, 2004, at 10).

Examples abound of borrowing by the Western world’s greatest composers. For his masterwork, *The Ring of the Nibelung*, Wagner used Old Icelandic, Germanic, and other sources to “construct[] his own myth, picking, choosing and adapting to his own taste.” Árni Björnsson, *Wagner and the Volsungs: Icelandic Sources of Der Ring des Nibelungen* 276-79 (2003). In the score for *Don Giovanni*, Mozart used peasant dances to evoke the class barriers the troublesome Don insisted on traversing. See Wye Jamison Allanbrook, *Rhythmic Gesture in Mozart: Le Nozze di Figaro & Don Giovanni* 68-70 (1983). More than a third of Beethoven’s compositions reworked other music. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. Rev. 547, 604 (2006) (“*Musical Borrowing*”). Schubert and Brahms both borrowed from Beethoven in turn. *Id.*, at 605-06. Igor Stravinsky – a composer whose works Section 514 restored to copyright – copied seventeenth-century French court dances for the music in the critically acclaimed ballet, *Agon*. See Charles M. Joseph, *Stravinsky and Balanchine: A Journey of Invention* 229-30 (2002). And Shostakovich, another composer whose works are subject to restoration, borrowed from Rossini’s opera, *William Tell*, for his *Symphony No. 15*. Arewa, *Musical Borrowing*, at 607. Indeed, drawing from the public domain to create

new expression is ubiquitous in music. *See generally id.* at 550.⁸

Similarly, writers have drawn raw material from the cultural commons for centuries. In addition to drawing from earlier works for *Romeo and Juliet*, Shakespeare borrowed from anonymous tales and ballads, Ovid, Seneca, Chaucer, Spenser, Thomas Kyd, Giovanni Boccaccio, and dozens of others.⁹ Important twentieth-century works, including T.S. Eliot's *The Waste Land*, Ezra Pound's *Cantos*, and James Joyce's *Ulysses*, among others, directly incorporate materials from other authors. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 Colum.-VLA J.L. & Arts 103, 106 (1988) ("*Culture Vultures*"). This tradition continues as an integral feature of creative writing. As a recent example, *amicus* Michael Chabon borrowed from many public domain sources for his novel *Summerland*, including Norse and American Indian Trickster mythology, the Greek story of Prometheus, and American folktales about Paul Bunyan, John Henry, Mike Fink, and Pecos Bill.

⁸ Arewa's article catalogs a remarkable amount of copying by dozens of composers, working in many genres over hundreds of years. Arewa, *Musical Borrowing*, 601-07.

⁹ *Narrative and Dramatic Sources of all Shakespeare's Works*, THE BARD OF AVON: SHAKESPEARE IN STRATFORD-UPON-AVON, <http://www.shakespeare-w.com/english/shakespeare/source.html> (last visited June 7, 2011).

Moreover, the public domain houses far more than well-known myths, stories, and music – it also contains obscure but culturally valuable works, such as diaries, letters, and the ephemera of everyday creative production. These works can be highly valuable for new creative works, despite their modest private value. For example, *amicus* Megan Prelinger’s book, *Another Science Fiction: Advertising the Space Race 1957-62*, won critical acclaim for its analysis of Space Age American culture, as shown through advertising copy contemporary to the time and now in the public domain.¹⁰ It can also be especially difficult to find owners and obtain licenses for such works, whose relatively low private value makes them disproportionately likely to be “orphaned,” *infra* Section III(B)(1). This makes such works’ public domain status vital to creators’ ability to reuse them.

Examples from the newer medium of film are equally abundant. Myriad films appropriate public domain works and recast them into the immersive motion picture medium. Disney’s many films based on folk and fairy tales – *Snow White and the Seven Dwarfs*, *Cinderella*, *Mulan*, and *The Little Mermaid*, to name just a few – make prominent examples. But it is the repeat players – the oft-rendered classics – that fully demonstrate the vitality of public domain materials in studio films. Stories from the Bible have been interpreted in films ranging from major studio productions (*e.g.*, *The Ten Commandments* and *The*

¹⁰ See Dennis Overbye, *Reaching for the Stars When Space Was a Thrill*, N.Y. Times, Mar. 8, 2010, at D1.

Passion of the Christ) to children's cartoons featuring anthropomorphic vegetables (the *VeggieTales* series). *Jane Eyre* has been recast into film at least eighteen times.¹¹ Jane Austen's books have been made into at least twenty-five films or television productions.¹² And Shakespeare's plays alone have served as the basis for more than 1000 films.¹³

Public domain materials are equally important to documentary filmmaking. For example, traditional music performed by local musicians plays a key role in *amicus* Barbara Kopple's documentary *Harlan County, USA*, which depicts Kentucky coal miners' struggles to obtain safe working conditions and fair labor practices. The traditional songs featured in the film evoke a specific time and place, and the community's culture and history. Likewise, *amicus* Kartemquin Films' movie, *The Chicago Maternity Center Story*, relies heavily on public domain footage of the Chicago Maternity Center's earlier years to

¹¹ *Jane Eyre* has also been made into multiple ballets, musicals, and operas; one symphony; multiple radio shows and television series; and a graphic novel. See Dennis King & Gene Triplett, *Much-Filmed 'Jane Eyre' Gets Brisk, Unconventional Retelling*, PROJECTIONS (Apr. 6, 2011), <http://blog.wimgo.com/projections/2011/04/06/movie-review-much-filmed-%E2%80%99jane-eyre%E2%80%99-gets-brisk-unconventional-retelling/>.

¹² Sue Parrill, *Jane Austen on Film and Television: A Critical Study of the Adaptations 187-201* (2002).

¹³ *Shakespeare: An International Database of Shakespeare on Film, Television, and Radio*, BRITISH UNIVERSITIES FILM & VIDEO COUNCIL, <http://bufvc.ac.uk/shakespeare/> (last visited June 8, 2011).

document the role the Center played in women's lives during nearly eighty years of providing safe home obstetric care. In these and similar cases, historical and cultural artifacts held in the public domain are crucial to documenting events and portraying cultural stories.

Visual artists have used existing images "throughout the history of art. Claude Monet, Henri Matisse, and Pablo Picasso borrowed images from their predecessors," as have many others. Villes R. Inde, *Art in the Courtroom* 3-4 (1998). Picasso's Cubist collages and Marcel Duchamp's "readymades" were followed by Jasper Johns' use of public domain imagery such as flags and maps. See Carlin, *Culture Vultures*, at 108-11. Andy Warhol's famous visual appropriations of commercial objects remain influential today, see *id.*, as does the tradition of borrowing. Like Picasso and Warhol before them, contemporary street artists, such as Banksy, Blek le Rat, and *amicus* Shepard Fairey, borrow and refer to existing images.¹⁴ And as with music, visual artists evoke meaning by borrowing public domain materials. In one famous provocation, Marcel Duchamp added a moustache, goatee, and a punning title¹⁵ to a reproduction

¹⁴ Mia R. Benenate, *From The Salon To The Streets: A Cultural Conversation Played Out On Public Property*, ARTNOWMAG, http://www.artnowmag.com/Magazine/World/2011/Mar/World_Mar_0111.html (last visited June 8, 2011).

¹⁵ The title is "L.H.O.O.Q." which is pronounced "Look" in English, and, when the letters are read individually in French, produces a bawdy comment.

of the *Mona Lisa* to comment on authority in art. Dalia Judovitz & Marcel Duchamp, *Drawing on Art: Duchamp and Company* 227 (2010).

Drawing from the cultural commons for new creativity is not only universal to artists; it is necessary for building new expression. See Litman, *The Public Domain*, at 966 (“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”); see also William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 66-67 (2003) (“[c]reating a new expressive work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it”). While licensing works under copyright for new uses is also an important feature of creativity – and *amici* and their members both license works for their own use and license works to others – it is no substitute for a robust cultural commons. For any creator wishing to license a new work, there is first the question of gaining permission and then the question of cost. Some copyright owners refuse to license works for uses they disapprove;¹⁶ statements with which they

¹⁶ Fair use may provide protection in some such cases, though it may be at a cost. See, e.g., *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (case brought by Yoko Ono against documentary producers who criticized the song *Imagine* in a film); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (case brought by “pro-choice” author against
(Continued on following page)

disagree;¹⁷ or any uses, at all.¹⁸ And as an unintended consequence of longer copyright terms and the abolishment of formalities, some copyright holders cannot be found or no longer exist, leaving behind copyrighted “orphans” that cannot be cleared at any cost.¹⁹

If obtaining their permission is possible, copyright holders may yet demand license fees that are far beyond the budgets of most creators. This hold-up problem is pervasive in the worlds of, for example, music;²⁰ poetry,²¹ and documentary film.²² For

a Catholic priest). In each case, the defendants prevailed on fair use theories, but at the cost of litigation.

¹⁷ For example, the author of a book on children’s art was denied permission to use a photograph of Picasso watching his daughter draw because the copyright owner disagreed with the author’s thesis. Hyde, *Common as Air*, at 235.

¹⁸ Robert Frost’s publisher never allows his poems to be set to music. Hyde, at 536.

¹⁹ Register of Copyrights, *Report on Orphan Works*, at 3 (Jan. 2006). See also *infra* Section III(B)(1).

²⁰ See Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 Mich. J. Race & L. 463, 464 (2005).

²¹ Poetry and New Media Working Group and Harriet Monroe Poetry Institute, *Poetry and New Media: A Users’ Guide* 15 (2009).

²² See Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* 7-9 (2004) available at www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf (“*Untold Stories*”); Ted Striphas & Kembrew McLeod, *Strategic Improprieties: Cultural Studies, the Everyday, and the Politics of Intellectual Properties*, 20 Cultural Studies 119, 119-20 (2006) (“*Strategic Improprieties*”).

filmmakers on shoestring budgets or in need of extensive footage essential to document the film's subject, licensing fees can be the difference between a documentary getting made and finding distribution and a story remaining untold.²³ For example, Kartemquin was initially stymied in making *The Chicago Maternity Center Story* by the unaffordable license fees demanded for essential footage. Kartemquin's discovery that the footage was in the public domain allowed the film to be made, and the Center's story to be told. Similarly, *Harlan County, USA* was made on a shoestring budget; in addition to the documentary and aesthetic value of the traditional music Kopple used, its low cost helped make it possible for Kopple to complete the film.

Beyond the benefit they provide to individual users, the unencumbered works in the public domain can support creativity and the dissemination of knowledge on a massive scale. Because there is no royalty owed and no need to assess the merits of individual uses under fair use or idea/expression jurisprudence, using works from the public domain carries few transaction costs. Thus, even those with few resources or small expected audiences – the amateur, the specialist, the low-budget beginner – can seed new expression with public domain works.

This is a benefit enriched by the low-cost distribution made possible by digital platforms. Because

²³ Aufderheide & Jaszi, *Untold Stories*, at 7-9.

digital reproduction and distribution can be far less expensive than older distribution forms, public domain materials can be distributed, reproduced, and recombined on a vast scale. For example, by 2009, *amicus* Prelinger Archives' public domain films hosted at the Internet Archive had been downloaded at least twelve million times. And because of their public domain status, films downloaded from the Archives have been copied in whole and in part, re-hosted on other online video services, and used for a great many – at a conservative estimate, tens of thousands – derivative works. To highlight just one example, one of the Archives' most celebrated films, *A Trip Down Market Street Before the Fire*, which was filmed a few months before the 1906 San Francisco earthquake, has been downloaded from the Internet Archive approximately 80,000 times. Many versions of the film, derived from the Archives' high-quality copy, exist on YouTube, where they have been viewed over three million times. Since it found new life in the public domain, *A Trip Down Market Street Before the Fire* has received critical acclaim and, in 2010, the Librarian of Congress placed it on the National Film Registry.

B. A Stable Public Domain Fuels Commercial Investment and Innovation

Since its original charter in the Statute of Anne, the public domain has benefited commerce and supported commercial investment. Today, a robust, reliable public domain supports numerous business

models and innovative practices. Public domain works are unencumbered, which lowers the transaction costs required to use or disseminate them, and encourages investment.

Many of the creative works described above in Section I(A) derive commercial value from the public domain materials incorporated in them. For works that recast public domain source material, like the Disney movie *Cinderella*, public domain components can represent a core feature of the work's commercial value. For commercial documentaries, novels, and other creative efforts that incorporate public domain materials within broader works, the availability of public domain works lowers the transaction costs that accompany licensing by obviating the need to negotiate deals for some materials, and lowers the overall cost of royalty payments. For small-budget films, royalty-free public domain material can make distribution possible where clearance costs would otherwise prevent the film's release. *See supra* note 22.

Public domain materials also form the basis for a wide array of commercial distribution models. Major publishing houses distribute public domain imprints – for example, Penguin Classics, Norton Critical Editions, and Dover Thrift – as do smaller specialty publishers, such as Higginson Book Company and Tri-Horn International. Petitioners Ron Hall and John McDonough provide but two examples of businesses built on public domain films. *Amicus* Prelinger Archives makes its public domain collections available for commercial licensing through Getty Images.

Moreover, numerous emergent online video companies have harvested Prelinger Archives' public domain films from the Internet Archive and used them as a base for their own offerings. Films from the Archives are, for instance, offered by video-on-demand services and sold on DVD through a number of retailers,²⁴ illustrating the positive network effects generated by unencumbered material.

By dramatically lowering transaction costs and providing a high level of certainty with regard to legal liability, public domain materials also support innovation and investment in digital distribution platforms and other communications technologies. Public domain works do not require negotiation or payments to right-holders, nor do they require systems for responding to takedown requests, *see* 17 U.S.C. § 512, or otherwise resolving copyright disputes. This supports investment in large-scale digital hosting and distribution programs for public domain content. For example, Google Inc. has been able to digitize and make available at least two million public domain books²⁵ – a significant public benefit – while works

²⁴ *E.g.* AMAZON.COM, <http://www.amazon.com/Duck-Cover-Plus-Atomic-Films/dp/B000M049NM> (last visited June 16, 2011) (offering video compilations such as “Duck and Cover Plus – Atomic Age Films Volume 1,” which incorporates Prelinger Archives' material).

²⁵ *See Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 3 (2009) (testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google Inc.).

under copyright remain the subject of litigation. *Authors Guild v. Google Inc.*, 2011 U.S. Dist. LEXIS 29126 (S.D.N.Y. 2011).

Similarly, Yahoo!'s Flickr has invested in the Flickr Commons service, which hosts public domain photographs, covering over 350 topics, from over fifty institutions.²⁶ In turn, Flickr Commons individual members have used the photos to generate new works for personal and commercial use.²⁷ As such, Flickr Commons provides an additional example of the positive network effects supported by common ownership.

All of these commercial actors invest time and money with the expectation that public domain materials will remain free of copyright encumbrances. By raising the specter of future encumbrances on materials that presently are freely available, Section 514 calls into question commercial investment in public domain materials.

²⁶ See *Flickr: The Commons: Your Opportunity to Contribute to Describing the World's Public Photo Collections*, FLICKR, http://www.flickr.com/commons?GXHC_gx_session_id_=6afecb2055a3c52c (last visited June 16, 2011).

²⁷ For example, Flickr user "pennyrichardsca," creates and sells purses made from acrylic paints and public domain Flickr images, and others create personal artwork. See, e.g., *Re-mix! Mashing Up the Commons Your Way*, FLICKR, <http://www.flickr.com/groups/flickrcommons/discuss/72157612988593338/> (last visited June 16, 2011).

C. The Public Domain Is Fundamental to Public Participation in Democracy, Culture, and Civic Institutions

An informed public is central to a functioning democratic system. As James Madison observed, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (1910).

A citizen thus armed with knowledge must then be able to draw upon it for his own expression. A robust public domain – replete with facts, ideas, and scientific knowledge, and with philosophical, legal, and cultural works, all available in common to the public – is thus a basic prerequisite for a healthy democracy.²⁸ Indeed, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original).

²⁸ See generally Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 Duke L.J. 783 (2006) (discussing scholarly viewpoints on the public domain’s importance to, among other things, deliberative democracy).

The public domain, as a repository of information freely available for unfettered access and use, safeguards the citizenry's First Amendment right to receive information, and its concordant rights to express opinion. Documents crucial to any citizen's understanding of American democracy – the Federalist papers, court decisions, federal statutes, the Declaration of Independence, and the Constitution itself, to name a few – reside in the public domain and belong to us all. Moreover, making democracy's source documents freely available, for the specific purpose of supporting an informed citizenry, is a longstanding American practice. In contrast to Britain, where the Stationers' Company long controlled the publication of all books, from the early days of the United States, important historical texts were freely available in inexpensive editions. Hyde, *Common as Air*, at 57. Benjamin Franklin claimed that this practice "made the common tradesmen and farmers as intelligent as most gentlemen from other countries." *Id.*

With the advent of Internet-based digital archives, these basic materials of citizenship are freely and widely available, to be studied, debated, and used to inform political participation. Digital archives give educators and individual citizens access to an unprecedented amount of public domain materials for teaching, learning, and discussion. These materials include the basic texts of our democracy, but also encompass music, art, and film. For example, *amicus* Prelinger Archives' advertising, educational, and

industrial films are widely used in elementary, secondary, college, and university teaching²⁹ and by homeschooling families who may be unable to purchase commercial educational materials;³⁰ are shown regularly as part of museum exhibits;³¹ and are played on radio and television. The films are used to recall, describe, and contextualize key events in U.S. history, to characterize historical periods and situations, to communicate the richness of regional American cultures, and to acquaint younger generations

²⁹ For example, the 1957 documentary film, *In the Suburbs*, is used in a wide range of university classes, including classes in anthropology, history, communications, and theatre. *See, e.g.*, <http://www.butler.edu/media/687722/hs226-02deno.pdf>; <http://sananet.org/syll/Heiman2.pdf>; <http://adcrit-tamucc.blogspot.com/2009/07/redbook-in-suburbs-1957.html>. Prelinger films are also heavily used as sources of editable material for film, television, media and communications, as in, for example, classes offered at the University of Wisconsin, Milwaukee; the University of Texas, Arlington; and George Mason University. *See, e.g.*, <http://film420ppa.wordpress.com/syllabus/>; www.uta.edu/ra/real/syllabi/12287_6122_2358_syllabus.docx; and <http://historymatters.gmu.edu/mse/film/filmonline.html>.

³⁰ *See, e.g.*, Serfronya Wallace, *Get Free Educational Videos for Homeschool Using the Internet Archive*, ASSOCIATEDCONTENT FROM YAHOO! (May 10, 2010), http://www.AssociatedContent.com/article/2978336/get_free_educational_videos_for_homeschool.html?cat=4.

³¹ Prelinger Archives' public domain footage has appeared in over 150 universities, museums, theaters, and film festivals worldwide, including the Smithsonian Institution's National Museum of American History, the Museum of Modern Art (New York), the Science Museum of Minnesota, San Francisco's Exploratorium, the National Building Museum, and the Wexner Center for the Arts.

with the experiences of their parents, grandparents, and great-grandparents.³² As such, they communicate American culture and values to new generations and support democratic participation.

More directly, the rights to receive and freely use public domain information support individual citizens' rights to express their own political opinions. *Amicus* Prelinger Archives' public domain films are also used frequently by grassroots and independent producers of political advertising, as well as by speakers who incorporate the films into videos advancing viewpoints across the political spectrum.³³ Combined with the Internet's "vast platform" for speech, the public domain's role in nourishing democratic participation is greater than ever before. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997).

³² A Walt Disney short film commissioned by the U.S. government during World War II, for example, promotes tax paying as an essential wartime patriotic duty. *The Spirit of '43* (Walt Disney 1943), INTERNET ARCHIVE, http://www.archive.org/details/TheSpiritOf43_56 (last visited June 6, 2011). Moreover, *In the Suburbs*, see *supra* note 29, extols 1950s suburbanites as citizens and consumers.

³³ To name just two uses of Prelinger Archives' material from different political viewpoints, Dave Ridley augmented a Ron Paul speech with archival footage, *If Spending Were [sic] Solution, There'd Be No Problem*, YOUTUBE, <http://www.youtube.com/watch?v=NmK2lHX7T0U> (last visited June 6, 2011), and a documentary filmmaker included archival footage in *Golden Rule: The Investment Theory of Politics* (2009), featuring Noam Chomsky.

II. The Public Domain Is a Fundamental and Historical Feature of American Intellectual Property Law

The Framers, wary of monopolies, and cognizant of the high democratic value of access to knowledge,³⁴ chose to encourage creativity and innovation via a balanced system of incentives. Limited economic rights incentivize creation by providing a return on creative investments and then expire, bequeathing the works to the public domain. U.S. Const. art. I, § 8, cl. 8.

While Congress has leeway to organize the intellectual property system, the Constitution places limits on what it may do. To safeguard the public's expression rights, copyright protection does not extend to ideas or facts, which instead belong to the public domain. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003); *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., Inc.*, 499 U.S. 340, 344-45 (1991); *Mazer v. Stein*, 347 U.S. 201, 206 note 5 (1954). Similarly, the First Amendment requires that certain "fair uses" of protected works be permitted. *Eldred*, 537 U.S. at 190; *Harper & Row*, 471 U.S. at 549; 17 U.S.C. § 107. And, the Constitution permits the grant of copyrights

³⁴ *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 *The Writings of James Madison* 274-75 (1904); *see also* 13 *The Writings of Thomas Jefferson* 326, 334 (1907); George Washington, Address from George Washington to Congress, 20-21 (Jan. 8, 1790), in Thorvald Solberg, *Copyright in Congress, 1789-1904*, 115 (1905).

only for “limited Times.” U.S. Const. art. I, § 8, cl. 8. The “limited Times” provision guarantees that copyrights will eventually expire, and that the public will ultimately receive full rights to use previously copyrighted works.

Importantly, the public must not only be permitted to make certain uses of works during the copyright term, but it must also be free to make unfettered use of works after they enter the public domain. This Court has stated clearly in the patent context that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989). The Court has thus repeatedly rejected attempts by former right-holders to recapture material that has entered the public domain. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (“The right to copy, and to copy without attribution, once a copyright has expired, . . . ‘passes to the public.’”) (citations omitted). *See also Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).

Traditionally, Congress has also safeguarded the public domain. In fact, when updating the copyright laws, it has often made protections for the public domain explicit. The 1976 Copyright Act states that copyright protection does not extend to “any work that goes into the public domain” prior to the Act

taking effect. Pub. L. No. 94-553, 90 Stat. 2541. *See also, e.g.*, Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075, 1077 (1909); Act to Amend the Several Acts Respecting Copy Rights, ch. 16, 4 Stat. 436, 439 (1831). Indeed, the act that implemented the Berne Convention expressly protected the public domain. Berne Convention Implementation Act, Pub. L. No. 100-568, § 12, 102 Stat. 2853, 2860 (the BCIA “does not provide copyright protection for any work that is in the public domain in the United States”).

III. By Removing Works from the Public Domain, Section 514 Limits Public Speech Rights and Creates Disincentives to Creativity and Innovation

By upending “the long-standing practice of refusing to resurrect works from the public domain,” 4 David Nimmer, *Nimmer on Copyright* section 18.06[C][1] (2010), Congress also upended the public’s settled expectations that it enjoys “full possession and enjoyment . . . without restraint” of all public domain materials. Story, J., *Commentaries on the Constitution of the United States* at 402-03; *see also Dastar*, 539 U.S. at 33-34 (citing the “federal right to copy and use” public domain materials). Section 514 thus “depart[s] from two centuries of constitutional jurisprudence,” *Nimmer on Copyright*, at section 18.06[C][2][b], and “contravene[s] a bedrock principle of copyright law that works in the public domain remain in the public domain.” *Golan v. Gonzales*, 501 F.3d 1179, 1192 (10th Cir. 2007). As such, Section 514

both limits existing public speech rights and creates disincentives to future investment in public domain materials.

A. Section 514 Impairs Public Speech Rights

In departing from the longstanding tradition of protecting the public domain by withdrawing a vast swathe of works from it, Congress trampled on the public's speech rights. Restored works, once "free as the air to common use," *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting), are now closed off and removed from the cultural commons, extinguishing the public's prior right to make free use of them.

This heavily burdens speech. For instance, among the millions of works no longer available for unfettered expressive uses are books by C.S. Lewis, Virginia Woolf, H.G. Wells, Maxim Gorky, Vladimir Nabokov, and Alexander Solzhenitsyn; music by Prokofiev, Stravinsky, and Shostakovich; films by Federico Fellini, Alfred Hitchcock and Fritz Lang; and visual art by M.C. Escher and Pablo Picasso. *See* Pet. Cert. at 3, 22; Br. of Internet Archive as *Amicus Curiae* at 20-21. Each of these artists' oeuvres contains works of great artistic, cultural, or political value to the public. Prior to Section 514's passage, these valuable works could, without question, be copied, recast into new forms, freely distributed, and freely performed, by anyone, in any manner. Now,

many of them are again encumbered by copyright, either usable on certain terms only or altogether unavailable, impairing activities this Court has identified as examples of clearly protected speech. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (musical performance); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 (1980) (motion pictures); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-67 (1963) (books). As such, Section 514 harms core speech rights.

But a listing of famous works barely scratches the surface of the public's loss. As the Prelinger Archives' experience shows, the cultural value of overlooked works – the obscure, the previously lost, and the ephemeral – becomes apparent when they enter the public domain and become freely available. Such works can be rehabilitated, recast, and redistributed in the millions when made “free as the air to common use,” and this is increasingly likely with the growth of inexpensive digital reproduction and distribution techniques. But when they are encumbered by copyright, new life for these works is much less likely. While famous works may grow costly when pulled from the public domain, overlooked, obscure works – by far the greater in number – may simply disappear altogether. Where *A Trip Down Market Street Before the Fire*, see *supra* Section I(A), could find new acclaim and offer new meaning to the public by virtue of its public domain status, restored works cannot. While all works, in theory, may be discovered, licensed, and make their ways into new expressions,

the difficulty of locating right-holders and negotiating licenses makes this unlikely for the vast majority of restored works.

Further, fair use and the idea/expression dichotomy, while important safeguards to speech, *see Eldred*, 537 U.S. at 220, are not by themselves sufficient to safeguard the public's speech rights. The government asserts that "[t]he quantity of speech affected by Section 514 of the URAA is relatively small" due to these protections. Opp. Br. at 18. It is mistaken. Fair use, and the use of facts, ideas, and other information not covered by copyright are, indeed, all important to creative practice and innovation, and all provide needed breathing space for expression while copyright is in force. Nonetheless, these safeguards are limited in scope and effect, and cannot substitute for the right to use entire expressive works in the public domain. Fair use is available only for certain purposes and is subject to other limitations, *see* 17 U.S.C. § 107; it is also perceived to be less certain than using freely available public domain works. *See supra* note 16. The ability to draw freely on ideas and facts is important, but leaves the expressive aspects of a work unavailable. *See* 17 U.S.C. § 102.

Materials in the cultural commons, by contrast, are available unencumbered. Creators and performers are free to draw on all of the *expression* of these works, for any purpose, without constraint. This is the main fuel for copyright's "engine of free expression." *Harper & Row*, 471 U.S. at 558.

B. Section 514 Creates Disincentives to Creativity and Innovation

Amici and others invest scarce resources of time and money in locating works and editing, restoring, or otherwise preparing them for preservation, distribution, or use in a derivative work. Especially for those on shoestring budgets – documentary filmmakers, independent musicians, educators, non-profits – and those who archive, organize, or distribute large numbers of works, the expectation that these works will remain in the public domain is vital to the willingness and ability to invest.

Prior to Section 514's passing, the constitutional, statutory, and tradition-based safeguards that have long protected the public domain seemed reliable. But in adopting restoration for foreign works, Congress signaled that it was not bound by these safeguards, and hinted at the possibility that it could remove additional categories of works from the public domain in the future. Further, Section 514's limited protections for "reliance parties" who were making use of affected works at the time of restoration, *see* 17 U.S.C. § 104A(d)(2), are woefully inadequate to support confidence in a stable public domain. While "reliance" parties receive some limited protections, *see id.*, only makers of derivative works can expect to enjoy the continuing right to distribute restored works, 17 U.S.C. § 104A(d)(3)(A), and then only at an unpredictable cost. *Id.*

1. Section 514 Increases the “Orphan Works” Problem

Indeed, at a stroke, Section 514 also greatly exacerbated the existing problem of “orphan works” – those copyrighted works for which the owner cannot be found. Because many foreign works were never registered in the United States, no registration or renewal records exist to connect the works with the owners of the restored copyrights.³⁵ And given that the works covered by Section 514 are those foreign works that entered the public domain years ago, while the formalities were still in effect, a search for the heirs of long-dead creators is likely to be both costly and fruitless. As counsel for *amicus* College Art Association explained in a letter to the Copyright Office, Section 514:

[in] one fell swoop, [placed] hundreds of thousands, if not millions, of works that were once in the public domain [under] the full protection of United States Copyright. The vast majority of foreign works were never registered, so registrations and renewals cannot be found to identify the rights owners, particularly if they are not famous. . . . In the vast majority of cases, identifying, finding and clearing rights is realistically impossible. This restoration to the full protection of

³⁵ Letter from Jeffrey P. Cunard, Counsel, College Art Association, to Jule L. Sigall, U.S. Copyright Office (Mar. 25, 2005), at 6-7, available at http://www.collegeart.org/pdf/caa_orphan_letter.pdf (last visited June 7, 2011).

United States copyright law has largely occurred without any commensurate benefit to the American public because most of these works are not being disseminated unless the rights owner is identifiable and can be found. . . .

Cunard Letter, note 35, *supra*.

The letter goes on to cite numerous examples of the stymieing effect this has had on artists and art historical scholars. *Id.* CAA members have been unable to find owners for, among many other examples: thousands of Latin American photographs; images of ancient African art; slides of art objects in rare periodicals dating from the 1960s and 1970s; and a photograph of a 12th century Japanese drawing that itself has been lost.³⁶

The experience of CAA's constituents is likely indicative of the unhappy fate of many restored works. Costly searches and uncertain downside risk seriously limit the ability of independent artists to use orphaned works; large-scale archival and distribution services are also unlikely to be able to absorb the costs.³⁷ Where the previously obscure, but freely available, *A Trip Down Market Street Before the Fire*, see *supra* Section I(A), could find new acclaim and offer new meaning to the public by virtue of its public

³⁶ See *id.*

³⁷ See, e.g., *supra* note 19, *Report on Orphan Works*, at 23-34 (discussing obstacles faced by, among others, documentary filmmakers, libraries, and Google).

domain status, restored works cannot. Nor can they freely be incorporated into new expressions. As such, Section 514 significantly diminishes the expression available to the public, seriously burdening speech rights.

2. Section 514 Creates Uncertainty About the Public Domain’s Permanence

The uncertainty around copyright ownership and potential liability caused by Section 514 creates a strong risk of chilling investment and cultural production. Further, if Congress may restore copyright to public domain works at any time, possibly giving rise to retroactive copyright liability, then investors and creators are likely to avoid materials that might be affected in the future. This Court has recognized the importance of clearly marking the boundaries of intellectual property rights. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (“Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.”); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 731 (2002) (“A patent holder should know what he owns, and the public should know what he does not.”).

For example, investment in innovative tools and services that serve to make informational goods widely available – like Google Books, Flickr

Commons, or the Prelinger Archives and Library – ultimately benefit the public. Yet these types of investments are particularly vulnerable to uncertainty about the stability of the public domain. For services that work with large libraries of works, keeping transaction costs low is necessary for the library to maintain value. If a service provider is forced to make complex determinations about the copyright status of each element in the library, transaction costs can quickly swamp the library’s value, chilling investment.

Similarly, Section 514 calls into question the investments of time, effort, and capital necessary for producing new creative works based on public domain material. While Section 514 includes remedies limitations for reliance parties who created derivative works before it took effect, *see* 17 U.S.C. § 104A(d)(3)(A), it has no protections for later users of those works or for other works. More broadly, by dissolving the previously clear boundary between works under copyright and works in the cultural commons, Congress created uncertainty about what costs might arise in the future if materials, presently freely available, are pulled from the public domain and become subject to license fees. Especially for non-profits and independent artists, whose capacity for

additional costs is low, such uncertainty can chill production.³⁸

The uncertainty created by Congress's willingness to implement Section 514 also creates a risk that investors and creators will give short shrift to culturally valuable materials that presently reside in the public domain. For example, the government's view is that Congress may restore to copyright materials that entered the public domain because their owners did not choose to comply with the formalities. Opp. Br. at 12. If this view prevails, then one set of works Congress could consider removing from the public domain is the set of works by United States authors created prior to the 1976 Copyright Act, that entered the public domain through lack of registration or a copyright owner's decision not to renew the copyright. As Petitioners point out, Section 514 creates inequality between foreign authors, whose copyrights it restores, and United States authors who did not observe the formalities, whose works remain in the public domain. Pet. Cert. at 30, note 9. If Congress may restore copyright in such works, then its ability to have done so for foreign copyright owners creates uncertainty about whether similarly situated public domain works by U.S. owners will remain freely available.

If investors and creators shy away from reworking and disseminating these works, the public will

³⁸ See Aufderheide & Jaszi, *Untold Stories*, at 7-9; Striphas & McLeod, *Strategic Improprieties*, at 119-20.

suffer a great loss. A brief review of the registration and renewal data for the years prior to 1976 shows that an overwhelming majority of copyrighted works entered the public domain because creators did not seek extended copyright protection. See Register of the Library of Congress, Register's Report, in 2 *Studies on Copyright*, at 1251 (June 1960) (noting that "less than 15 percent of all registered copyrights are being renewed at the present time"). For example, nearly 90% of the works up for renewal in 1947 were not renewed by their owners.³⁹ In 1957, copyright owners failed to renew 87% of works up for renewal; in 1959, the number was 84%. As such, the vast majority of pre-1976 works now comprise a valuable resource in the cultural commons.

But if Congress can remove works from the public domain so long as they have not entered it at the end of the longest copyright term for which they *might* have been eligible, then the public – including *amici* and their constituents – can no longer rely on the public domain status of these millions of United States works. These works are of special concern to the public, as many are likely to have modest private value, and yet may have high social value. See Landes & Posner, *The Economic Structure of Intellectual Property Law* 408. Significant public benefits flow from new users' ability to draw freely from these

³⁹ Barbara Ringer, Study No. 31: Renewal of Copyright, in 1 *Studies on Copyright* at 618, Tbl. 2 (June 1960).

materials, and raising the cost of use is likely to limit investment in their adaptation and dissemination. If renewal rates are any indication, however, the public cannot rely on restored copyrights to incentivize investment by once-and-future copyright owners. *See id.*, at 238-40 (pointing to non-renewals as evidence of the non-renewed copyrights' low private value to the copyright owners).

Second, if Congress can skirt its constitutional limits in the interest of international harmonization and trade, *see Golan v. Holder*, 609 F.3d 1076, 1087-88 (10th Cir. 2010), then further categories of public domain materials may eventually be called into question. With Section 514's passage, Congress already restored protection for some works whose copyright had expired. *See* Pet. Cert. at 22 (noting that Section 514 covers materials in the public domain because their copyrights expired for lack of renewal). Future international proposals could contravene subject matter requirements or again challenge the Constitution's requirement that copyright exist only for "limited Times."⁴⁰ U.S. Const. art. I, § 8, cl. 8.

⁴⁰ As an example of one ongoing international discussion, the World Intellectual Property Association is presently drafting a treaty to protect "cultural expressions," including stories, epics, legends, poetry, riddles, songs, dances, plays, ceremonies, rituals, games, and material expressions of art. Presently, the draft treaty contains no requirements of originality or fixation, and its protections apply retroactively and survive in perpetuity. WIPO Draft Articles, IGC 18 (last revised on May 12, 2011).

This Court should make clear that there is a “bright line” around the public domain.⁴¹ Although other countries may choose to implement regimes that protect facts⁴² or “cultural expressions,”⁴³ in the United States, the Constitution guards the public domain. In passing Section 514, Congress destabilized this understanding and created uncertainty about the permanence of the public’s rights in the cultural commons. This Court should remove that uncertainty and make clear that the public’s rights to create, innovate, and speak using public domain materials are protected, and that works belonging to the public domain must remain there.



⁴¹ See Pet. Br. at 20 (citing Trans. of Oral Arg. 44, *Eldred*, 537 U.S. 186, available at <http://bit.ly/lcdn2F> (describing the Solicitor General’s assertion that the public domain likely presents a “bright line”)).

⁴² See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20.

⁴³ See *supra* note 40.

CONCLUSION

In order to protect the public's vested reliance and speech rights in the public domain, this Court should reverse for the reasons stated above.

Respectfully submitted,

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APPENDIX: AMICI CURIAE

The **American Music Center** (“AMC”) is a national service organization promoting new music and composers. AMC was founded in 1939 by a consortium of composers including Aaron Copland. It has a searchable online database of more than 57,000 works by 20th- and 21st-century United States composers and its online magazine, *NewMusicBox*, and radio station, *Counterstream*, promote the vast diversity of American music. AMC makes grants to hundreds of individual artists and ensembles each year. It represents a constituency of many tens of thousands of American composers.

Cabin Creek Films is a nationally known documentary film production company that has won Academy Awards for Best Documentary Feature for its films *Harlan Country, USA* and *American Dream*. Its other films include *Gun Fight; The House of Steinbrenner; Wild Man Blues; A Conversation with Gregory Peck*; and *Shut Up and Sing*. Cabin Creek’s works have aired on television outlets worldwide and have played in theaters both domestically and internationally. Cabin Creek received the “Best Documentary” award from the National Board of Review of Motion Pictures for its film *Wild Man Blues*, and the “Voices of Courage Award” from the Women’s Refugee Commission for its film *Defending our Daughters*. It has also been nominated for several Emmy Awards, including a 2009 nomination for *Woodstock: Now and Then*.

The **Center for the Study of the Public Domain at Duke Law School** is the first university center in the world devoted to the study of the contributions of the public domain to speech, culture, science and innovation. Its mission is to focus on the vital balance in our intellectual property system between the realms of material protected by exclusive rights and those which are “free as the air to common use,” and to study the effects of public domain status on the cost, accessibility and speed of dissemination of our collective science and culture.

Chorus America is a non-profit service organization for choral music that serves more than 2,000 choruses, individuals, arts organizations, singers, and businesses. Chorus America’s mission is to build an inclusive and dynamic choral community so that more people are transformed by the beauty and power of choral singing. It strengthens choral organizations and provides their leaders with information, research, leadership development, professional training, and advocacy to help them deliver the best possible contributions to their communities and to the choral art.

College Art Association (“CAA”) is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, conservators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000

university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching. CAA has a long-standing interest in issues relating to copyright and the First Amendment because its members create art, write about art, display art, and use art in the classroom and in published works.

The **Computer & Communications Industry Association (“CCIA”)** is a non-profit membership organization focused on the technology and communications industries. Its members include Google, Yahoo!, Microsoft, Facebook, Intuit, RedHat, Oracle, eBay, T-Mobile, Sprint, Advanced Micro Devices, and Fujitsu. CCIA members employ almost one million workers and represent computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. CCIA supports vigorous competition, freedom of expression, and openness, and it believes that understanding and protecting innovation is central to its industry’s future.

Film Independent (“FIND”) is a non-profit organization dedicated to helping independent filmmakers make their films, building the audience for independent film, and increasing diversity in the film industry. Every year, FIND provides its 4,000 members with over 250 hours of film education

programming, more than a hundred free preview screenings of the latest independent films, substantial production rental discounts, and fellowship and grant opportunities totaling over \$240,000.

Fractured Atlas is a non-profit organization that serves a national community of artists and arts organizations by helping them run their businesses more efficiently. Its programs and services facilitate the creation of art by providing artists and art organizations access to funding, healthcare, education, and other services, all in a context that honors their individuality and independent spirit. By nurturing today's talented but underrepresented voices, Fractured Atlas hopes to foster a dynamic and diverse cultural landscape of tomorrow.

The **Future of Music Coalition ("FMC")** is a national non-profit organization that works to ensure a diverse musical culture where artists flourish and are compensated fairly for their work, and where fans can find the music they want. FMC uses education, research and advocacy to ensure that working musicians have a voice in the issues that affect their livelihoods. FMC's activities are rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates.

The **International Documentary Association ("IDA")** was founded in 1982 as a non-profit membership organization dedicated to supporting the efforts of non-fiction film and video makers throughout

the United States and the world; promoting the documentary form; and expanding opportunities for the production, distribution, and exhibition of documentaries. Over the past twenty-nine years, IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 14,000 members and community users in more than fifty countries.

Kartemquin Films is a nationally recognized media arts organization that serves as a home for independent documentary filmmakers. Kartemquin has been making documentaries that examine and critique society through the stories of real people for more than forty-five years. It has received one of eight international 2007 MacArthur Awards for Creative and Effective Institutions and has twice received the prestigious Peabody Award, which recognizes distinguished achievement and meritorious service by broadcasters, producing organizations, and individuals.

The **National Alliance for Media Arts and Culture** (“NAMAC”) consists of 225 media arts organizations that collectively serve over 300,000 artists and media professionals nationwide. Its members include community-based media production centers and facilities, university-based programs; museums, media presenters and exhibitors; film festivals, distributors, and film archives; youth media programs; community access television; and digital arts and online groups. NAMAC’s mission is to foster and fortify the culture and business of independent

media arts. NAMAC believes that all Americans deserve access to create, participate in, and experience art.

The **National Alliance for Musical Theatre (“NAMT”)** is a national service organization dedicated exclusively to musical theatre. Its mission is to advance musical theatre by nurturing the creation, development, production, and presentation of new musicals. NAMT’s 150 members, located throughout thirty-five states and abroad, are some of the leading producers of musical theatre in the world, and include theatres, presenting organizations, higher education programs, and individual producers.

The **National Performance Network (“NPN”)** is a group of diverse cultural organizers working to create meaningful partnerships and to provide leadership that enables the practice and public experience of the contemporary arts in the United States. NPN’s resources currently support and connect 50-75 performing arts organizations, called NPN Partners, across the country. The NPN constituency ranges from two-person operations to multi-million-dollar arts centers. NPN Partners are ethnically, culturally, and stylistically diverse and reflect a cross-section of urban, suburban, and rural communities that are generally under-represented. More than 425,000 audience members have attended NPN-sponsored performances, and over 285,000 people have participated in NPN residency activities.

Prelinger Archives is an archival collection and commercial licensor of films produced by and for hundreds of U.S. corporations, non-profit organizations, trade associations, community and interest groups, and educational institutions. Until 2002, when a large portion of its collection was acquired by the Library of Congress, Prelinger Archives held over 60,000 historical films and approximately 30,000 cans of unedited archival footage, approximately 65% of which is in the public domain. The Archive licenses its remaining collection commercially through Getty Images and Alexander Street Press. It also provides approximately 2,100 public domain titles for free and unrestricted downloading and reuse through the Internet Archive.

Prelinger Library is an unincorporated private collection containing some 30,000 books, 700 periodical titles, and 25,000 items of print ephemera. The library focuses on United States history, technology, geography, social and cultural history; the sciences; and the arts. The majority of items in the Library's collection are in the public domain. Prelinger Library's users are principally artists, writers, and community members; academic and independent scholars; radio and television producers; and interactive mediamakers. In partnership with the Internet Archive, the Library makes 3,794 public domain items available for free and unrestricted downloading and reuse.

Patricia Aufderheide is a University Professor of Film and Media Arts in the School of Communication, and Director of the Center for Social Media, at American University in Washington, D.C. Professor Aufderheide is co-author of the forthcoming *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Her other books include *Documentary: A Very Short Introduction*, *The Daily Planet*, and *Communications Policy in the Public Interest*. She has been a Fulbright Fellow and a John Simon Guggenheim Fellow and has received numerous journalism and scholarly awards, including career achievement awards in 2008 from the International Digital Media and Arts Association and in 2006 from the International Documentary Association.

James Boyle is the William Neal Reynolds Professor of Law and co-founder of the Center for the Study of the Public Domain at Duke Law School. His books include *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press); and *Shamans, Software and Spleens: Law and Construction of the Information Society* (Harvard University Press).

Michael Chabon is the author of the *Amazing Adventures of Kavalier & Clay*, which won the 2001 Pulitzer Prize; *The Yiddish Policemen's Union*, which won the 2008 Hugo and Nebula Awards; *The Mysteries of Pittsburgh*; *Wonder Boys*; *Summerland*; *Gentlemen of the Road*; and *The Final Solution: A Story of Detection*. Chabon has contributed to the *New York Review of Books*, the *New York Times*

Magazine, and *Harper's Magazine*, and has authored the essay collections *Maps and Legends* and *Manhood for Amateurs*. He has been called one of the most celebrated writers of his generation by the *Virginia Quarterly Review* and one of the "twenty best writers under forty" by the *New Yorker*.

Shepard Fairey is an American graphic artist, author, and creator of Obey Giant, a design and marketing company with corporate clients including Pepsi and Kobe Bryant. His works have been displayed at the Smithsonian Institution's National Portrait Gallery, the Los Angeles County Museum of Art, the Museum of Modern Art in New York, and the Institute of Contemporary Art in Boston.

Lewis Hyde is an American poet, essayist, translator, and cultural critic with a particular interest in the public life of the imagination. His 1983 book, *The Gift*, illuminates and defends the non-commercial portion of artistic practice. Hyde's most recent book, *Common as Air*, is a spirited defense of our "cultural commons," that vast store of ideas, inventions, and works of art that we have inherited from the past and that continues to enrich the present. A 2001 MacArthur Fellow and former director of undergraduate creative writing at Harvard University, Hyde teaches during the fall semesters at Kenyon College, where he is the Richard L. Thomas Professor of Creative Writing. During the rest of the year he is a Faculty Associate at Harvard's Berkman Center for Internet and Society.

Steve James is an American filmmaker whose acclaimed film, *Hoop Dreams*, won both a Peabody and a Robert F. Kennedy Journalism Award, and was nominated for an Academy Award. His other films include *Stevie*, which landed on a dozen year-end ten best lists; the acclaimed miniseries *The New Americans*; *At the Death House Door*; *The Interrupters*; and *No Crossover: The Trial of Allen Iverson* (for ESPN's Peabody-winning "30 for 30" series).

Peter Jaszi teaches domestic and international copyright law at American University, where he also directs the Glushko-Samuelsen Intellectual Property Law Clinic and helped to establish the Program on Intellectual Property and Information Justice. Professor Jaszi is co-author of the forthcoming *Reclaiming Fair Use: How to Put Balance Back in Copyright*, and also co-authors a standard copyright textbook, *Copyright Law*. Alone and with Martha Woodmansee, he has written several articles on copyright history and theory. In 2007, he received the American Library Association's L. Ray Patterson Copyright Award, and in 2009 the Intellectual Property Section of the District of Columbia Bar honored him as the year's Champion of Intellectual Property.

Jennifer Jenkins is a Senior Lecturing Fellow at Duke Law School and Director of Duke's Center for the Study of the Public Domain, where she heads its Arts Project – a project analyzing the effects of intellectual property on cultural production. She is co-author of *Bound By Law*, an educational comic book about copyright, fair use, and documentary film.

Barbara Kopple is an American filmmaker whose films on issues of cultural and historical importance include *Harlan County, USA*, about a Kentucky miners' strike, and *American Dream*, about a strike at Hormel Foods in Austin, Minnesota. Both films won Academy Awards for Best Documentary Feature, and in 1991, *Harlan County, USA* was named to the National Film Registry by the Librarian of Congress and designated an American Film Classic. Kopple's recent projects include *The House of Steinbrenner*, part of ESPN's Peabody-winning "30 for 30" series, and the Emmy-nominated *Woodstock: Now and Then*.

Jonathan Allen Lethem is an American novelist, essayist, and short story writer who has authored numerous works, including the *New York Times* best seller *The Fortress of Solitude*, the National Book Critics Circle Award winner *Motherless Brooklyn*, and Nebula Award finalist *Gun, with Occasional Music*. In 2007, he published the *Harper's Magazine* essay "The Ecstasy of Influence: A Plagiarism," in which he demonstrates the necessity of using existing materials in creative work. He is a recipient of a 2005 MacArthur Fellowship.

Megan Prelinger is an American author and citizen historian who interprets overlooked evidence of cultural history for popular and academic audiences. She is also the co-founder and architect of information design of the Prelinger Library, and co-principal of the Prelinger Archives. Her recent book, *Another Science Fiction: Advertising the Space Race*

1957-62, won critical acclaim for its analysis of Space Age American culture as reflected in contemporary advertising.

Gordon Quinn is an American filmmaker who has been making documentaries for over forty-five years, including *Vietnam*, *Long Time Coming*, and *Refrigerator Mothers*. He recently directed *Prisoner of Her Past*, about a Holocaust survivor suffering from late-onset post-traumatic stress disorder, and co-directed the 2011 release *A Good Man*, about the dancer Bill T. Jones.

Pamela Samuelson is the Richard M. Sherman Distinguished Professor of Law at the University of California at Berkeley, as well as a Director of the Berkeley Center for Law & Technology. She is recognized as a pioneer in digital copyright law, intellectual property, cyberlaw and information policy. She is a Fellow of the Association for Computing Machinery (“ACM”), a Contributing Editor of a computing professionals journal, a 1997 MacArthur Fellow, and an Honorary Professor of the University of Amsterdam. She is a member of the Board of Directors of the Electronic Frontier Foundation and the Electronic Privacy Information Center.

Rosanna Warren is the Emma MacLachlan Metcalf Professor of the Humanities and a University Professor at Boston University. She has authored the poetry collections *Ghost in a Red Hat*, *Snow Day*, *Each Leaf Shines Separate*, *Stained Glass*, and *Departure*. Her poems have recently appeared in the

New Yorker, the *Frankfurter Allgemeine Zeitung*, and *Slate*. Professor Warren has received numerous prizes, including the Witter Bynner Prize for Poetry of the American Academy of Arts and Letters, and the May Sarton Award from the New England Poetry Club. In 1997, she was elected to the American Academy of Arts and Sciences. She is also a member of the American Academy of Arts and Letters, and has served as Chancellor of the Academy of American Poets.
