IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854

LAWRENCE GOLAN,
1777 Larimer Street, #1805
Denver, CO 80202

RICHARD KAPP,
20 Oakdale Drive
Hastings on Hudson, NY 10706,

S.A. PUBLISHING CO., INC.,
d/b/a/ ESS.A.Y RECORDINGS,
145 Palisade Street
Dobbs Ferry, NY 10522-1617,

SYMPHONY OF THE CANYONS,
attn: Kortney Stirland
14 East Center
Kanab, Utah 54741,

RON HALL, d/b/a FESTIVAL FILMS,
6115 Chestnut Terrace
Shorewood, MN 55331, and

JOHN MCDONOUGH, d/b/a TIMELESS
VIDEO ALTERNATIVES INTERNATIONAL,
3303 Fiechtner Drive, S.W.,
Fargo, ND 58103,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity
as Attorney General of the United States,
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.,
Washington, D.C., 20530-0001,

Defendant.

COMPLAINT

COMPLAINT

Plaintiffs, through their undersigned counsel, bring this action seeking declaratory relief that the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298 ("CTEA"), which amended and is codified in relevant parts at 17 U.S.C. §§ 301-304, and Section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, which amended and is codified at 17 U.S.C. §§ 104A, 109(a), are unconstitutional. Plaintiffs also seek preliminary and permanent injunctive relief against the enforcement of both provisions.

INTRODUCTION

1. This is an action to challenge the constitutionality of Congress's attempt to remove and radically deplete the supply of literary and artistic works from the public domain. Central to the constitutional design of our copyright system is the preservation of a rich and vibrant public domain in which books, paintings, drawings, music, films, photographs, and other artistic works are free for all to use and copy – which, in turn, fuels the further creation of original works of authorship. Works enter the public domain in one of two constitutionally guaranteed ways: first, all copyrighted works fall into the public domain once their *limited* term of copyright ends; second, all works that fail to satisfy the requirements of the Copyright Act enter the public domain *immediately* and *irrevocably* upon general publication. However, in two recent and dramatic expansions of the Copyright Act, Congress has attempted to dismantle both of these constitutionally guaranteed sources of works for the public domain.

2. Continuing its recent effort – over 10 times in the past 40 years – to expand the term of copyright to unlimited duration, Congress enacted the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298 ("CTEA"), increasing the term of copyright by another 20 years to the previous term of copyright protection – even for existing works (many of whose authors have long since passed away), with no corresponding benefit to the public or effort to promote the progress of science and the useful arts.

3. Congress's dramatic expansion of the term of copyright has been accompanied by an even more radical depletion of works from the public domain. On December 8, 1993, Congress amended the Copyright Act to recognize for the first time in the history of our copyright law a general provision that purports to "restore" copyrights – retroactively – in numerous works that heretofore had indisputably been in the public domain for failure to satisfy the requirements of the Copyright Act. Purportedly to further the North American Free Trade Agreement ("NAFTA"), Congress restored copyrights to motion pictures fixed in Mexico or Canada from January 1, 1978 to March 1, 1989 that were in the public domain in the United States for failure to affix the proper copyright notice as required by pre-1989 U.S. copyright law. The North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182.

4. A year later, on December 8, 1994, Congress went even further in its wholesale diminishment of the public domain. This time, under the auspices of Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465 ("§ 514" or "Section 514"), Congress has extended copyright restoration automatically to *all* foreign works

that were in the public domain in the United States if, among other things, (a) the work "is not in the public domain in its source country through expiration of term of protection," and (b) the work "is in the public domain in the United States due to (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972, or (iii) lack of national eligibility." 17 U.S.C. § 104A(h)(6). The effect of "copyright restoration" is the wholesale removal of vast amounts of existing works – thousands of books, paintings, drawings, music, films, photographs, and other artistic works – from the public domain.

5. Both of these acts of Congress are unconstitutional on their face, and as applied to plaintiffs. Neither the CTEA nor § 514 of the URAA can be squared with the limitations imposed by the Copyright Clause, which limits the power of Congress to grant copyright protection "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors * * * the exclusive Right to their respective Writings." U.S. CONST. art I, § 8, cl. 8. The CTEA creates a term of copyright that is neither "limited" nor designed "to promote the Progress of Science and useful Arts." In addition, § 514's removal of existing works from the public domain under the guise of "copyright restoration" flouts a fundamental principle of the Copyright Clause that requires that the public be allowed to use freely any work in the public domain. The CTEA's grant of extended copyright protection to works already in existence and § 514's restoration of copyrights to works already in the public domain violate the constitutional requirement of

originality, that works must be original to receive copyright protection. What's more, the CTEA and § 514 result in speech restrictions that violate the First Amendment. And the retroactive application of both Acts to works published years ago violates the Due Process Clause's proscription against retroactive legislation that so disrupts settled expectations as to be fundamentally unfair. At the heart of this case is the preservation of not only the public domain, but the constitutional design of our entire copyright system.

PARTIES

6. Plaintiff Lawrence Golan is the Director of Orchestral Studies, Conductor, and Professor of Conducting at the University of Denver's Lamont School of Music. He is also the Music Director and Conductor of the Portland Ballet Orchestra in Portland, Maine; the founder, Artistic Director, and Conductor of the Atlantic Chamber Orchestra in Portland, Maine; and the Principal Guest Conductor of the Bolshoi National Opera and Ballet Theatre of Uzbekistan in Tashkent. He resides at 1777 Larimer Street, #1805, Denver, CO 80202.

7. Plaintiff Richard Kapp is the founder and conductor of the chamber orchestra Philharmonia Virtuosi, which performs at The Metropolitan Museum of Art in New York and venues worldwide. Kapp resides at 20 Oakdale Drive, Hastings on Hudson, NY 10706.

8. Plaintiff S.A. Publishing Co., Inc., d/b/a ESS.A.Y Recordings ("ESS.A.Y Recordings"), is a New York corporation and a recording label started and headed by Plaintiff Kapp. ESS.A.Y Recordings records and sells to the public, through wholesale distributors and on the Internet at www.essaycd.com, an assortment of music on CDs,

ranging from classical to contemporary and children's music. ESS.A.Y Recordings is located at 145 Palisade Street, Dobbs Ferry, NY 10522-1617.

9. Plaintiff Symphony of the Canyons is a small, not-for-profit community orchestra and unincorporated association that is based out of Kanab, Utah and that performs at locations mainly in Utah. Kortney Stirland is the founder and conductor of Symphony of the Canyons, which has about 50 members. Symphony of the Canyons's address is (attn: Kortney Stirland), 14 East Center, Kanab, Utah 84741.

10. Plaintiff Ron Hall, d/b/a Festival Films ("Festival Films"), specializes in the sale of films, movies, television shows, and stock footage to colleges, universities, libraries, film archives, and other members of the public. Hall is the founder and sole proprietor of Festival Films, a self-run business that sells, through its website www.fesfilms.com, public domain stock footage of movies, television shows, and cartoons, as well as copyrighted movies on videotape, DVD, and 16-mm film. Festival Films's address is 6115 Chestnut Terrace, Shorewood, MN 55331.

11. Plaintiff John McDonough, d/b/a Timeless Video Alternatives International ("Timeless Video"), is devoted to the preservation and distribution of public domain movies, films, and television shows. John McDonough is the founder and sole proprietor of Timeless Video, a self-run business that serves as a channel of distribution of public domain works to television stations nationwide. McDonough also preserves old public domain films on video and sells them to the public. Timeless Video's address is 3303 Fiechtner Drive, S.W., Fargo, ND 58103.

12. Defendant John Ashcroft is the Attorney General of the United States and is responsible for the enforcement of the laws of the United States.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201 because this declaratory judgment action challenges the constitutionality of federal statutes. This Court has personal jurisdiction over defendant Ashcroft. Venue is properly laid in this District under 28 U.S.C. § 1391(e).

STANDING

14. Plaintiffs have standing to bring and maintain this action because their activities have been, and will continue to be, directly harmed by the CTEA's extension of the term of copyright and § 514's restoration of copyright to thousands, if not millions, of works. Each of the plaintiffs used, copied, distributed, performed, preserved, or sold works that were in the public domain and planned on using works that would have fallen into the public domain, but for the CTEA's recent extension of the term of copyright for an additional 20 years. Plaintiffs also used works in the public domain that now are subject to copyright restoration under § 514. Plaintiffs would have continued doing so, had it not been for the automatic copyright restoration effectuated by § 514.

15. Both the CTEA and § 514 can be civilly and criminally enforced (including monetary damages, impounding of articles, attorneys' fees, and imprisonment) against plaintiffs. 17 U.S.C. §§ 501-506. Under 17 U.S.C. § 506(a), criminal charges may be brought against "[a]ny person who infringes a copyright willfully either - (1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or

distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000."

16. As discussed further below, plaintiffs have each suffered concrete and particularized injuries because of the enactment of the CTEA and § 514. The impact of these laws on plaintiffs, their businesses, and artistic endeavors is an actual, present injury, and the threat of enforcement against plaintiffs who violate the laws causes an imminent injury. These injuries can be redressed by a declaratory judgment that the CTEA and § 514 are unconstitutional and by preliminary and permanent injunctive relief against their enforcement.

EVENTS UNDERLYING PLAINTIFFS' INJURIES

A. Copyright Law and the Preservation of the Public Domain

17. Article I, § 8, clause 8 of the United States Constitution bestows upon Congress a grant of authority as well as a limitation: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8; *see Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966). In interpreting this Clause, the Supreme Court has long recognized that the overriding goal of our intellectual property systems must be to *serve* the *public interest* in the wide dissemination of works and inventions. Put simply, "[clreative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of

literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

18. To that end, the Copyright Clause requires that the term of copyright must be only for "limited Times" and must ultimately serve the "Progress of Science and useful Arts." This ensures that the public receives the benefit of the constitutional bargain struck by our copyright system in giving authors exclusive rights to their works for limited times in exchange for the eventual dedication of the works to the public.

19. In addition to this strict temporal limitation, the Copyright Clause also ensures the entry of works into the public domain by requiring, in the first instance, that copyright protection be granted only to works that are original. *See Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (1991). Works that fail to satisfy the originality requirement necessarily fall into the public domain immediately upon general publication.

20. To implement the true promise of the public domain, the Copyright Clause guarantees that the public is free to use works in the public domain that have not, for whatever reason, qualified for copyright protection. As the Supreme Court has consistently recognized, there is a "'federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."' *Bonito Boats, Inc. v. Thunder Boats, Inc.*, 489 U.S. 141, 153 (1989) (quoting *Compco Corp. v. Day-Lite Lighting Inc.*, 376 U.S. 234, 237 (1964)).

21. And, once a work or invention goes into the public domain, Congress cannot remove it from free use by the public. That is the central tenet of the Supreme Court's holding in *Graham v. John Deere Co.,* 383 U.S. 1, 6 (1966) when the Court stated in interpreting the Patent Act: "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." And that is also the central tenet of the D.C. Circuit's conclusion in *Eldred v. Reno,* 239 F.3d 372, 377 (D.C. Cir. 2001), when the court of appeals stated in the context of copyright law: "these teachings would indeed preclude the Congress from authorizing under that Clause a copyright to a work already in the public domain."

22. The CTEA and § 514 of the URAA violate these foundational principles of the Copyright Clause, and they threaten to extinguish the supply of works in and to the public domain. The statutory provisions also impose speech restrictions that cannot withstand scrutiny under the First Amendment. And they both amount to retroactive legislation that so disrupts settled expectations as to violate substantive due process.

B. The Sonny Bono Copyright Term Extension Act of 1998

23. The term of copyright used to be limited. The original copyright statute of 1790 granted a term of 14 years, with an opportunity for the author to renew the copyright for an additional term of 14 years. In 1831, Congress extended the original term of copyright to 28 years, and in 1909 extended the renewal term to 28 years. Thus, for over a hundred years, Congress expanded the term of copyright protection only twice, with 56 years as the maximum possible duration of copyright (although not all authors

exercised their right to renewal, meaning that in many cases 28 years would be the only term of copyright).

24. In the past 40 years, however, Congress has expanded the term of copyright 11 times, so that now under the CTEA the maximum possible duration of copyright can be for some works 120 years or even greater (depending on the life of the author). Congress granted each of these copyright term extensions not just to future works, but also to existing works many of whose authors had long since passed away.

25. In addition, Congress amended the 1909 Copyright Act to make the renewal of copyright automatic for copyrights derived thereunder and did away with the renewal term altogether in the 1976 Copyright Act, thereby making the term of copyright virtually always the maximum term under the statute.

26. The CTEA is the culmination of this dramatic expansion of the term of copyright. Indeed, the CTEA's 20-year term extension marks the single greatest increase of the term of copyright (except, conceivably, the terms allowed under the switch to the "life of the author" metric under the 1976 Copyright Act). On October 27, 1998, President Clinton signed the CTEA into law. It grants – both prospectively and retrospectively – an additional 20 years to the term of copyright, which applies differently depending on when the work was created and the kind of work. For works published before 1978, the renewal term is extended from 47 to 67 years, thus giving a total term of copyright protection of 95 years for these works. For any copyrighted work created in 1978 or later, the CTEA extends the term of copyright from the life of the author plus 50 years to the life of the author plus 70 years. For any copyrighted work created in 1978 or

later that is a work made for hire (or an anonymous or pseudonymous work), the CTEA extends copyright protection from 75 to 95 years from the year of publication or from 100 to 120 years from the year of creation, whichever comes first. These changes took effect immediately upon passage of the CTEA.

27. In general, the CTEA added 20 years to the term of copyrights. Thus, prior to the enactment of the CTEA, a work that was copyrighted during 1923 would have entered the public domain on December 31, 1998, because its term of 75 years would have ended. The CTEA, however, extended the term of copyright of such work to 95 years, meaning that it will not enter the public domain until December 31, 2018. The CTEA's 20-year extension has already prevented works published in 1923, 1924, and 1925 from entering the public domain. But for the CTEA, all works published in these years would have already entered the public domain. And from now until 2018, the CTEA will keep works published in 1927 all the way through 1943 from entering the public domain – the result being that *no* copyrighted work will enter the public domain until 2019.

28. To put the current term of copyright in historical perspective, an author who publishes when 25 years old can now potentially obtain a term of copyright protection that is over 120 years (if the author lives, say, to age 75, greater if he or she lives longer). This expansion of the copyright term to over a century's worth of protection marks nearly a *329 percent increase* from the maximum term of copyright (28 years) and over a *750 percent increase* from the initial term of copyright (14 years) in the first Copyright Act of 1790. By comparison, the current term of patent protection is 20

years, 35 U.S.C. § 154(a), which marks an increase of only 43 percent from the original term of patent (14 years) in the first Patent Act of 1790. Although the first Copyright and Patent Acts both had 14 years as the original term of the "exclusive Right" granted, the CTEA now makes the term of copyright usually *4 to 5 times* greater than the patent term.

C. Section 514 of the URAA and Congress's Attempt to Remove Works from the Public Domain

29. In addition to extending excessively the term of copyright, Congress has also attempted to remove vast amounts of works from the public domain under the guise of "copyright restoration." The provision was first enacted on December 8, 1993, purportedly to further the goals of NAFTA. Pub. L. No. 103-182. The provision removed from the public domain and gave copyright protection to motion pictures fixed in Canada or Mexico from January 1, 1978 to March 1, 1989 that had fallen into the public domain in the United States due to lack of the requisite copyright notice. 17 U.S.C. § 104A (1994). The affixation of copyright notice on the work was an essential requirement of copyright eligibility under the 1909 Copyright Act and a requirement (subject to limited exceptions) under the 1976 Copyright Act. In 1989 Congress did away with the notice requirement – but only prospectively for future works – after the United States joined the Berne Convention, a multilateral agreement designed to establish minimum standards for copyright protection. 17 U.S.C. § 401(a); *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir. 1995).

30. Congress went even further in removing works from the public domain when it amended § 104A (and § 109(a)) a year later in § 514 of the URAA. This

provision – which is currently in force and forms the basis of plaintiffs' challenge – now grants copyright automatically to any "restored work," which is defined as follows:

> an original work of authorship that –
>
> (A) is protected under subsection (a);
>
> (B) is not in the public domain in its source country through expiration of term of protection;
>
> (C) is in the public domain in the United States due to –
>
> (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;
>
> (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or
>
> (iii) lack of national eligibility; and
>
> (D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country.

17 U.S.C. § 104A(h)(6).

31. Copyright restoration is available to the works from any of the more than one hundred forty countries that are members of the World Trade Organization ("WTO") or the Berne Convention. *Id.* § 104A(h)(3). Section 514 also purports to give power to the President to declare and extend copyright protection to public domain works of other countries that provide substantially the same protection for restored works to U.S. nationals. *Id.* § 104A(g).

32. The date of restoration of a restored copyright is "January 1, 1996, if the source country of the restored work is a nation adhering, to the Berne Convention or a WTO member country on such date." *Id.* § 104A(h)(2)(A).

33. The term of copyright for restored works extends "for the remainder of the term of the copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States." *Id.* § 104A(a)(1)(B). This means that many works that had been in the public domain in the United States may now potentially claim copyright protection for the remainder of a copyright term of life of the author plus 70 years in the case of works created on or after January 1, 1978, or 95 years in the case of works made for hire or works in their renewal term as of October 27, 1998, the effective date of the Sonny Bono Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302(a), (c), 304(b).

34. The ownership of a restored copyrighted work "vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work." 17 U.S.C. § 104A(b).

D. The Harm to Plaintiffs and the Public

35. The CTEA's 20-year expansion of the copyright term and § 514's retroactive restoration of copyrights cause great harm to the plaintiffs, the public at large, and the very foundation of our public domain.

36. Before the CTEA went into effect, the public could expect that each year some copyrighted works would naturally fall into the public domain due to the expiration of the term of copyright. Thus, on December 31, 1990, the public (including plaintiffs)

could expect works published in 1915 to enter the public domain; on December 31, 1991, works from 1916; on December 31, 1992, works from 1917, etc. This yearly natural progression of works into the public domain is designed to ensure that the public has the wide availability of works envisioned by the Copyright Clause.

37. In establishing their businesses and pursuing their creative endeavors, plaintiffs relied on the existence of this natural progression of works into the public domain. Each year would bring "new" public domain works that plaintiffs could perform or make available for the public.

38. What the CTEA does is to put an end to this natural progression of works into the public domain for a 20-year period. On December 31, 1998, copyrighted works published in 1923 would have fallen into the public domain. The CTEA, however, prevented it. Starting from 1998, when the CTEA went into effect, and continuing for the next 20 years, the public no longer can expect that copyrighted works will enter the public domain due to expiry of the term. In fact, *no* copyrighted works will enter the public domain at all until January 1, 2019 – assuming of course Congress does not amend the term of copyright again as it has been wont to do.

39. Section 514's retroactive restoration of copyrights has also caused great harm to plaintiffs and the public. When plaintiffs began their respective businesses, they relied on the well-established principle of law – indeed one that has been recognized for nearly the existence of our copyright system – that works in the public domain were free for all to use and were simply beyond the reach of copyright. Indeed, the 1909 Copyright Act (the formalities of which § 514 now attempts to excuse retroactively) said so

expressly, stating: "No copyright shall subsist in the original text of any work which is in the public domain * * *." 1909 Copyright Act, as amended, 17 U.S.C. § 7; *see Bouve v. Twentieth Century-Fox Film Corp.*, 122 F.2d 51, 54 n.20 (D.C. Cir. 1941). Relying on this fundamental compact of our copyright system, plaintiffs invested considerable time and resources to the distribution or performance of public domain works. For all these years, plaintiffs had absolutely no notice, nor should they have had any expectation, that Congress would rewrite the copyright law and attempt to jettison this fundamental principle governing the availability of works in the public domain.

40. Section 514, however, now attempts to do precisely that by removing vast amounts of works from the public domain under the guise of "restored copyright." Under § 514, the owners of copyrights in restored works were given the option from January 1, 1996 to January 1, 1998 to file in the Copyright Office a notice of intent to enforce ("NIE") their restored copyrights against a "reliance party," which includes any person (such as plaintiffs) who had acquired or made copies of the work before copyright restoration. 17 U.S.C. § 104A(c), (h)(4). Owners of copyrights in restored works may also serve notice on a reliance party directly – at any point now and in the future. *Id.* § 104A(d)(2)(B). Either way, the filing or serving of notice essentially starts the clock running against the reliance party so that he or she can use, but not copy, the work only for a 12-month period from the date of notice. *Id.* §§ 104A(d)(2)(A)(ii), (d)(2)(B)(ii). During the 12-month period, the reliance party is nevertheless forbidden from making further copies of the work. *Id.* §§ 104A(d)(2)(A)(ii)(III), (d)(2)(B)(ii)(III). After the 12-month period, reliance parties are liable for copyright infringement if they copy or

distribute copies of the work without authorization of the restored copyright owner. *Id.* § 104A(d)(2). And the restored copyright owner is under no obligation to agree to license the restored work to any reliance party (except in the limited case of making phonorecords of nondramatic musical works that fall under the compulsory licensing provision of the Copyright Act, 17 U.S.C. § 115).

41. Section 514(b) of the URAA even purports to deprive reliance parties of their ability to dispose of copies of their works under the first sale doctrine, a doctrine that has been recognized for nearly 100 years. *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). Under the first sale doctrine, the copyright owner cannot claim any distribution rights over any copy of his or her work in the stream of commerce after its first sale. The lawful purchaser of the copy can dispose of the copy (e.g., by selling or renting the work) at will. Section 514(b), however, attempts to abrogate the first sale doctrine after a 12-month period for any copy of a restored work purchased before copyright restoration. *See* 17 U.S.C. § 109(a). This means that reliance parties cannot sell or rent the copies of works they legitimately owned after the 12-month period "for purposes of direct or indirect commercial advantage." *Id.*

42. Reliance parties who made derivative works of public domain works that have been restored to copyright under § 514 are given no right to continue to exploit their derivative works, unless "the reliance party pays to the owner of the restored copyright reasonable compensation." *Id.* § 104A(d)(3)(A). If the parties cannot agree, the restored copyright holder can seek an action against the reliance party in district court to

determine the amount of compensation that the reliance party must pay to the restored copyright holder. *Id.* § 104A(d)(3)(B).

43. Section 514 essentially subjects plaintiffs and other reliance parties to the mercy of the restored copyright holder for continued use of restored works. If the restored copyright holder simply refuses to authorize copying or distribution of a restored work (that is not a nondramatic musical work subject to compulsory licensing under § 115). § 514 leaves reliance parties, such as plaintiffs, absolutely no recourse.

44. Moreover, § 514 provides no administrative review to determine the veracity or validity of NIEs filed with the Copyright Office or served on a reliance party: the act of filing or serving is purely ministerial. Although an NIE is not supposed to "create a presumption of validity of any of the facts stated therein," *id.* § 104A(c), reliance parties are left with virtually no statutory means to even test the veracity and validity of the assertions made by purported restored copyright holders (who may be asserting, for example, that they acquired the rights through one of the heirs of the author – allegations that are made even more difficult for reliance parties to verify since the underlying facts are likely to have occurred long ago and in a foreign country). The only "recourse" for reliance parties to test the veracity and validity of such assertions is to be willing to be sued by the purported restored copyright holder for copyright infringement.

45. Individuals who are not reliance parties (such as people who did not possess a copy of the work before its restoration) are given even less time to adjust to the radical depletion of the public domain caused by copyright restoration. Such individuals may be liable for copyright infringement right away on the date of restoration, which may

start as early as January 1, 1996, if they attempt to copy a public domain work that is now subject to restoration. *Id.* § 104A(d)(l).

46. Section 514 has resulted in the removal of thousands, if not millions, of works from the public domain. In the two-year statutory period, notices of intent to enforce restored copyrights flooded the Copyright Office and filled pages and pages of the Federal Register. *See* Copyright Restoration of Works in Accordance with the Uruguay Round Agreements Act, 61 Fed. Reg. 19371-19388 (May 1, 1996); 61 Fed, Reg. 46133-46159 (Aug. 30, 1996); 61 Fed. Reg. 68453-68461 (Dec. 27, 1996); 62 Fed. Reg. 20211-20220 (April 25, 1997); 62 Fed. Reg. 44841-44854 (Aug. 22, 1997); 62 Fed. Reg. 66765-66811 (Dec. 19, 1997); 63 Fed. Reg. 5142-5216 (Jan. 30, 1998); 63 Fed. Reg. 19288-19366 (April 17, 1998); 63 Fed. Reg. 43830-43832 (Aug. 14, 1998). The works covered the gamut – including songs, motion pictures, paintings, books, literary works, photographs, etc. – from the obscure to the familiar and even famous.

47. The works claimed from the public domain for copyright restoration include, for example, several hundred paintings of Picasso; the collection of works by J.R.R. Tolkien including *The Hobbit, The Fellowship of the Ring, The Two Towers,* and *The Return of the King;* Virginia Woolf's *A Room of One's Own;* several books by H.G. Wells; numerous educational and literary books including *Dante, George Orwell, Jane Austen Practising, Joseph Conrad, Robinson* Crusoe, and *The Wasteland;* hundreds of songs and sheet music, including such favorites by the Russian composer Serge Prokofiev *as Six Pieces from Cinderella, Romeo and Juliet,* and *Three Children's Songs for Piano;* a collection of photographs of the Beatles; and still photographs from the

Japanese film *Godzilla.* These are just a few of the thousands of works claimed for copyright restoration.

48. This radical depletion of the public domain severely harms not just plaintiffs, but the very foundation of our democratic society. The wide availability of works envisaged by the Copyright Clause depends on the ability of authors, musicians, performers, and other artists to use freely works in the public domain for both the creation of new works and the further dissemination of the public domain works. Without the availability of such public domain material, the whole creative and artistic endeavor is severely hampered – and the public ultimately disserved.

1. The Harm to Lawrence Golan

49. Lawrence Golan is an acclaimed conductor, violinist, and professor of conducting, whose passion and professional mission is to bring classical music to new audiences, young and old. Golan earned his D.M.A. from the New England Conservatory of Music in May 1995, and is currently the Director of Orchestral Studies and Professor of Conducting at the University of Denver's Lamont School of Music, where he teaches students in orchestral music and conducting. Golan is also the Conductor of the school's Lamont Symphony Orchestra, which has 67 student members and which performs 6 symphonic concerts and 1 opera each year. All of the symphonic concerts are free to the public.

50. Golan is also the Music Director and Conductor of the Portland Ballet Orchestra, which has 42 freelance professional members and which performs the

Nutcracker and one other ballet each year for communities in and around Portland, Maine.

51. As a part of his mission to bring classical music to new audiences, especially young adults, Golan has founded and continues to conduct the Atlantic Chamber Orchestra. Under Golan's leadership, the orchestra has originated several innovative events that incorporate the performance of classical music with other entertainment that may be more familiar to the public. For example, the orchestra has put on concert/wine-tastings where every piece of music has a corresponding wine, and concerts involving Latin music combined with the serving of Latin food. These events are designed to attract individuals who have not yet experienced the pleasure of listening to the public performance of great orchestral works.

52. The CTEA's 20-year term extension and § 514's restoration of copyrights have a profound and lasting harm on Golan's selection of music. For each of his orchestras, Golan relies vitally on the availability of works from the public domain. Indeed, public domain works form the vast majority of the works performed by the Lamont Symphony Orchestra and by the Atlantic Chamber Orchestra, which have a limited annual budget of $2,000 and $300 respectively. For the Portland Ballet Orchestra, which has no funds at all for the renting of copyrighted music, Golan must rely exclusively on public domain works.

53. It is now cost prohibitive for Golan to perform many works that would have entered or that had already entered the public domain, but now are subject to copyright protection because of the CTEA and/or § 514. Like most orchestras across the

country, Golan's orchestras have a very limited budget or none at all, and simply cannot afford the rental of many copyrighted works. This is so because an orchestra's budget must cover two possible annual expenditures for sheet music: (1) the purchase of works in the public domain at inexpensive cost, or (2) the one-time rental of copyrighted sheet music typically for hundreds of dollars for each performance and many times more than the cost of such work when it enters the public domain. The benefit of purchasing a copy of a work in the public domain is that an orchestra can add the work to its library for repeated use and can save all the annotations or "markings" that it makes on the sheet music for the performance. Such markings (including phrase indications, bowings, and nuances) must be consistent in all instrumental parts and are imperative for the coherence of an orchestral interpretation. By contrast, renting a copyrighted work means that an orchestra cannot keep the sheet music with its markings after the performance, but must again pay for the sheet music and spend hours on the markings each time it wants to perform the work.

54. Because the CTEA and § 514 diminish the supply of public domain works and dramatically increase the number of copyrighted works for which copyright holders can exact rental fees, Golan has been forced to avoid even considering for public performance whole classes of orchestral works from great American and foreign composers, including hundreds of foreign works that had previously been in the public domain.

55. In particular, the CTEA has effectively prevented Golan from selecting for public performance works of several great American composers such as George

Gershwin and Aaron Copland, as well as works of great foreign composers such as Prokofiev, Dmitri Shostakovich, Igor Stravinsky, Jean Sibelius, and Maurice Ravel. Many of their works were published around 1923 and following and would have entered the public domain soon or already had it not been for the 20-year extension of copyright. For example, George Gershwin's most famous work, *Rhapsody in Blue,* was first publicly performed in 1924. Had it not been for the CTEA's 20-year term extension, the original *Rhapsody* in *Blue* would have already entered the public domain.

56. Copyright restoration has also greatly harmed Golan's ability to select music for his orchestras to perform. Whole classes of foreign works – from such luminaries as Prokofiev, Shostakovich, and Stravinsky – that had once before been in the public domain have now been restored to copyright under § 514 and are simply too expensive for Golan's orchestras to perform because of the cost to rent the copyrighted sheet music.

57. This year, the CTEA and § 514's harmful effects on Golan's ability to select music have been tremendous. As conductor of the Lamont Symphony Orchestra, Golan would have liked to perform a notable foreign work, either Shostakovich's *Symphony* No. 5, Prokofiev's *Symphony No. 1,* or Sibelius's *Symphony No. 7,* because such foreign works are essential to the diverse education of his students. Had it not been for the CTEA and § 514, these works would have been in the public domain and available for purchase at a relatively inexpensive price. However, because of the CTEA and/or § 514, these works are protected by copyright and must be rented typically for hundreds of dollars, if not more.

58. Because of the incredible expense of renting music in terms of both money and labor (for the markings), Golan could only select one copyrighted piece, *Symphony* No. 2 by the American composer Charles Ives, for rental this year at the "discounted" educational rate of $685. Because this single rental consumed over 25 percent of Golan's annual budget, he decided his orchestra simply could not afford additional rentals of copyrighted works to fill the anticipated 19 other pieces the orchestra would perform over the year. Instead, Golan purchased several less expensive copies of public domain works for performance and, for the other selections, had to choose from the public domain works in the library of the Lamont Symphony.

59. The CTEA and copyright restoration have had an even greater negative impact on Golan's conducting of smaller orchestras, particularly where he has no budget at all for the rental of copyrighted music. For these orchestras, Golan must rely almost exclusively on the availability of works in the public domain. For example, in his former capacity as Music Director and Conductor of the Community Orchestra of the Portland Symphony, a small community orchestra in Maine, Golan had no budget for the procurement of music. During his tenure, Golan wanted to perform several great orchestral works of Shostakovich, Prokofiev, Gershwin, Sibelius, Stravinsky, and Ravel, but, because of copyright restoration and/or the CTEA, the works were subject to extended or retroactive copyright and were simply too expensive for Golan's orchestra to rent. Had the CTEA and copyright restoration not been enacted, many of these works would have been in the public domain soon or already, and would have been available for purchase at a relatively inexpensive price.

60. The CTEA and § 514 impact not only conductors and educators such as Golan, but also his students and the public at large. By removing works from the public domain and limiting the selection of music that orchestras can afford to perform, the CTEA and § 514 deprive Golan's students of learning whole classes of orchestral works from great American and foreign composers. And, perhaps worst of all, these laws deprive the American public of the important benefits – cultural, intellectual, emotional, and educational – of experiencing the public performance of many significant orchestral works.

2. The Harm to Richard Kapp and ESS.A.Y Recordings

61. Richard Kapp is a renowned conductor, who is dedicated to spreading the beauty of classical works to the public through performance and recordings. He founded the Philharmonia Virtuosi in 1968 and continues to conduct the orchestra in approximately 60 to 80 public performances each year. He also established a series of musical programs for young children between the ages of 4 and 8 entitled the Cushion Concerts (a name referring to the fact that children sit on cushions during the performance), which introduces children to classical music through live performances at a minimal expense.

62. The CTEA's 20-year extension of the term of copyright has greatly harmed the supply of public domain works for Kapp and ESS.A.Y Recordings to perform and record. Before the CTEA was enacted, Kapp and ESS.A.Y Recordings relied on the yearly natural progression of copyrighted works into the public domain due to the expiry of the term. The CTEA, however, puts an end to this vital supply of public domain

works, at least for 20 years. Because the CTEA increases protection for all copyrighted works for another 20 years, the term of copyright protection for any existing work will not end until December 31, 2018 at the earliest.

63. Before the CTEA went into effect, Kapp and ESS.A.Y Recordings had anticipated that numerous musical works published in 1923 or later would soon enter the public domain starting in 1998. Kapp and his orchestra (a not-for-profit group) relied on the availability of such public domain works because they could be performed without the considerable expense of renting copyrighted sheet music or the payment of royalties. The CTEA, however, extends the term of copyright for such existing works at least until December 31, 2018, thereby substantially increasing the cost to perform or record such works. The CTEA gives copyright holders another 20 years to exact payment for the renting of sheet music and the payment of royalties for public performances.

64. The CTEA has the effect of keeping from the public domain for another 20 years important classical works written in the prolific post-World War I era. Many of these works, which were written by such luminaries as Ravel (including *Boléro, Tzigane, Chansons Madécasses,* and *Piano Concerto for the Left Hand),* Stravinsky (including his orchestral works *Concerto, Suite No. 1, Suite No. 2,* and *Suite from "Pulcinella"),* and the great Finnish composer Jean Sibelius (including *Suite Champêtre, Symphony No. 6, Symphony No. 7,* and *Tapiola)* were written in or after 1923 and would have entered the public domain soon (within approximately the next five years) or already, had it not been for the retroactive extension of the term of copyright.

65. Because the term of copyright has been extended for such works for another 20 years, the performance or recording of such works remains expensive. Orchestras like Philharmonia Virtuosi must pay hundreds of dollars simply to rent the sheet music of such works for a single performance. In addition, should it decide to record such works for sale to the public, ESS.A.Y Recordings would be responsible for the payment of mechanical royalties on the sale of each copy. Copyright term extension has effectively left Kapp and ESS.A.Y Recordings without any supply of "new" public domain works until 2019.

66. Copyright restoration has also had a tremendous negative impact on Kapp and ESS.A.Y Recordings. Between 1968 and the time § 514 went into effect, Kapp purchased the music of several famous works that had fallen into the public domain in the United States. The public domain works included works from the famous Russian composers Stravinsky, Shostakovich, and Prokofiev. Because the works were in the public domain, Kapp obtained copies of the music at a relatively low price, approximately $15 or so to purchase a copy of the score, and approximately $20 to $40 for the music for the individual instruments.

67. Copyright restoration has caused the prices of sheet music for formerly public domain works to increase dramatically, since now the restored copyright holder has, in effect, a monopoly on the sale and distribution of the music. Kapp and others in the orchestra community may now expend a thousand dollars or more for the sheet music of a restored work, which is usually only available for renting (but not purchasing) a copy for a single performance. After the performance, Kapp must return the copy back to the

asserted restored copyright holder, thus requiring Kapp's orchestra to pay several thousand dollars more should it wish to perform the work again.

68. Copyright restoration also subjects the public performance of restored musical works to the payment of royalties. Before § 514 went into effect, Kapp's orchestra could perform these public domain works for the public freely, without having to pay royalties for the performance. Now, however, with copyright restoration, Kapp and his orchestra must pay royalties for performance of such works to the collecting agency ASCAP.

69. For example, for years, Kapp's orchestra performed the famous children's symphonic fairy tale *Peter and the Wolf,* which was written by the Russian composer Prokofiev. The performances were for children at the Cushion Concerts at small venues in Westchester County, New York. Before § 514 went into effect, Kapp could perform *Peter and the Wolf* for children without being subject to a licensing requirement and fee under ASCAP for the performance. Now, because of copyright restoration, both are required.

70. Section 514 has also made it more difficult, if not unpleasant, for Kapp to perform restored works. For example, the music publisher G. Shirmer Inc. – a large corporation that has asserted restored copyrights in numerous musical works, including the works of Prokofiev – contacted Kapp to warn him about his performance of *Peter and the Wolf* and told him that he was not entitled to perform the work because he had not licensed the performance or rented the performance materials from Schirmer. The representative of Shirmer even suggested to Kapp that he could not own the copy of

Peter and the Wolf that he had purchased years ago when it was in the public domain, but must rent it from Shirmer. Kapp, however, informed Shirmer that he legally owned his copy of *Peter and the Wolf,* is a longstanding member of ASCAP, and has always paid his ASCAP license fees for performances of any copyrighted work.

71. Section 514 has also negatively impacted several of Kapp's own recordings on his CD label ESS.A.Y Recordings. For example, in 1991, Kapp decided to make a recording of Stravinsky's sextet *Apollon Musagète*. One of the main reasons Kapp chose to record this work was that it had entered the public domain and therefore would not be subject to the payment of royalties. Given the substantial cost of making a sound recording, and the relatively small market for classical works, Kapp believed that the best chance of getting any kind of return on his investment would be to make a recording of a work in the public domain. Kapp's hopes have been dashed, however, by § 514. The copyright to Stravinsky's *Apollon Musagète* has now been restored, and ESS.A.Y Recordings must pay mechanical royalties to the collecting agency Harry Fox on each copy sold. In addition, ESS.A.Y Recordings must expend time and labor in keeping records of such sales for payment of royalties.

72. Kapp and ESS.A.Y Recordings also now face a diminished supply of foreign classical works that they would consider economically feasible for them to record and sell to the public. Before § 514 went into effect, Kapp and ESS.A.Y Recordings had available many classical works from Russian and other foreign composers that were free for them to use because they had fallen into the public domain. But now that supply of works is subject to copyright and is available only at a significant price. Because the cost

of producing and recording such copyrighted works would yield so little likely return (and probably only a loss) for Kapp and ESS.A.Y Recordings, they have decided to forego recording such works altogether.

3. The Harm to the Symphony of the Canyons

73. For over sixteen years, Plaintiff Symphony of the Canyons has been performing orchestral and other music to small and medium-sized communities in Utah. Under the direction of its founder and conductor, Kortney Stirland, Symphony of the Canyons puts on 8 to 10 public performances each year, as well a major musical and a performance of *Messiah.* Symphony of the Canyons is a not-for-profit, community orchestra that draws its members from Kanab, Utah and surrounding areas in Utah and Arizona. The ages of the members who perform in the Symphony of the Canyons range from as young as 12 to as old as 70 years old. Members are paid for travel expenses, but otherwise receive no compensation.

74. Symphony of the Canyons depends vitally on the availability of music in the public domain. Nearly 80 percent of the music it performs is public domain music. Symphony of the Canyons simply cannot afford to pay for renting or performing a large amount of copyrighted music due to the cost of the rental fees.

75. The CTEA's 20-year extension of the term of copyright has greatly harmed the anticipated supply of public domain works for Symphony of the Canyons to perform. These musical works were published in 1923 or later and would have entered the public domain starting in 1998, had it not been for the CTEA's 20-year extension. These works include works of the famous and influential American composers George

Gershwin (including perhaps his most popular work *Rhapsody in Blue*, as well as *Concerto* in *F*, *Cuban Overture*, *I Got Rhythm*, *Embraceable You*, *The Man I Love*, and selections from *Porgy* & *Bess)* and Aaron Copland (including *Piano Concerto).* All of these works were written around 1923 and the decade following and would have entered the public domain soon (within the next ten years) or already, had it not been for the retroactive extension of the term of copyright. Now, with the enactment of the CTEA, Symphony of the Canyons cannot rent the music for these works or perform them for the public without considerable expense for payment to the copyright holder (or ASCAP in the case of performances) for at least another 20 years. Because Symphony of the Canyons is a small community orchestra, it simply cannot afford to pay such fees much beyond the amount it currently expends for copyrighted works (roughly 20 percent of the music it performs each year).

76. Section 514's retroactive restoration of copyrights also harms Symphony of the Canyons's selection and performance of works. By restoring copyrights to numerous foreign works that were in the public domain, § 514 diminishes the available foreign works – indeed, whole categories of works from the great Russian composers Prokofiev and Stravinsky – that Symphony of the Canyons can even consider performing.

77. The CTEA's and § 514's combined diminishment of available works in the public domain creates an inestimable loss for not only Symphony of the Canyons, but all the communities in Utah where it performs. These laws effectively make the public performances of many great orchestral works that had been or would have been in the

public domain simply beyond the reach of Symphony of the Canyons and the small communities in Utah where it performs.

4. The Harm to Ron Hall and Festival Films

78. For twenty-five years, Plaintiff Ron Hall, d/b/a Festival Films, has devoted his life to selling films for hobbyists, collectors, universities, film archives, and the general public. While Festival Films deals also with copyrighted works, a mainstay of its business has been the sale of public domain works, including such favorites as *Birth of a* Nation, Phantom *of the Opera, Meet John* Doe starring Gary Cooper, and Kansas *City Confidential.* For years, Festival Films has worked with the Bob DeFlores Archives to supply public domain stock footage to such shows *as A&E Biography, The South Bunk Show,* and other network and cable biographies and feature films. Hall's business at Festival Films was founded on the principles of copyright law that ensure that works go into the public domain after a "limited time" and that public domain works can be used freely by all.

79. Both of these foundations have now been shattered by the CTEA's 20-year extension of the term of copyright and § 514's retroactive restoration of copyright.

80. The CTEA's 20-year extension of the term of copyright has greatly harmed the supply of public domain works for Festival Films's business. Before the CTEA was enacted, Festival Films relied on the natural progression of copyrighted works into the public domain each year due to the expiry of the term. Such progression into the public domain was vital for Festival Films to offer "new" titles of public domain works.

The CTEA, however, puts an end to this vital supply of public domain works for 20 years.

81. In practical terms, the CTEA has wiped out Festival Films's anticipated supply of a whole category of films published in 1923 or later. Before the CTEA went into effect, Festival Films greatly anticipated a number of popular works entering the public domain due to the expiry of copyright, including a collection of Harold Lloyd films such as *Safefy Lost* (1923), which has recently been named by the American Film Institute as one of the 100 Most Thrilling American Movies ever made; numerous films starring Lon Chaney, Sr., such as *Tell It to the Marines*, *The Monster*, and *Laugh, Clown, Laugh;* and many silent films from the 1920s that are too numerous to name. Now, with the copyright term extension effectuated by the CTEA, Festival Films cannot make these classic films available to the public as public domain works.

82. Copyright restoration has had a similarly devastating impact on Festival Films's business. Before § 514 went into effect, Festival Films offered a wide selection of foreign titles of works that were in the public domain for failure to satisfy the requirements of the relevant Copyright Act. Festival offered these movies for sale to the public specifically because they were in the public domain. But, with copyright restoration, Festival can no longer. Copyright restoration has forced Festival to remove approximately 50 to 60 foreign titles from its selection, including such favorites as *Joffroi,* the French film directed by Marcel Pagnol; *Voyage Surprise; The Passion of Joan of Arc,* the classic movie about the life of Joan of Arc directed by Carl Dreyer; *Diary of a Country Priest,* the French masterpiece directed by Robert Bresson; numerous films by

Jean Renoir, including his epic about the French Revolution *Le Marseillaise,* the World War I drama *La Grande Illusion,* and *The Testament of Dr. Cordelier; Le Corbeau,* the French thriller by *Henri-Georges Clouzot;* the French short film and children's favorite *The Red Balloon;* Jean Cocteau's *Les Enfants-Terribles;* the classic German silent film *Faust; Variete;* the first German sound film, *The Blue Angel;* and the classic Fritz Lang film *Metropolis.* Festival Films has also been forced to forego selling hundreds more foreign films that it anticipated acquiring before copyright restoration.

83. Festival Films also used to sell several classic British films by Alfred Hitchcock, including *Blackmail, The Manxman, Murder,* and *Number Seventeen.* The works had been in the public domain in United States for years before § 514A went into effect, but now all of this has ended with copyright restoration. NIEs to restore copyrights in these Hitchcock works have been filed in the Copyright Office. With copyright restoration, Festival Films can no longer sell these Hitchcock films and has lost revenue from lost sales of these works.

5. The Harm to John McDonough and Timeless Video

84. John McDonough's vocation and avocation in life revolve around preserving and distributing old movies and television shows that are in the public domain. McDonough founded Timeless Video Alternatives International over 20 years ago, and has amassed a collection of approximately 800 public domain movies and 800 public domain television shows, including such favorites as *Charade* with Cary Grant, *Sante Fe Trail* with Erol Flynn, and *Royal Wedding* with Fred Astaire. Part of McDonough's business at Timeless Video facilitates the airing of such public domain works on TV.

McDonough arranges the airing of such shows with primarily small independent TV stations in exchange for commercial time, which McDonough in turn sells to advertisers. McDonough also preserves old films on video and sells them directly to the public. McDonough's entire business was founded on the principles of copyright law that ensure that works go into the public domain after a "limited time" and that public domain works are free for all to use and copy.

85. But the CTEA and § 514 now jeopardize these principles and seriously impact McDonough's business.

86. The CTEA's 20-year extension of the term of copyright has greatly harmed the supply of public domain works for McDonough's business. Before the CTEA was enacted, McDonough relied on the natural progression of copyrighted works into the public domain each year due to the expiry of the term. Such progression into the public domain was vital for McDonough to offer "new" titles of public domain works. The CTEA, however, puts an end to this vital supply of public domain works for 20 years.

87. In practical terms, the CTEA has wiped out McDonough's anticipated supply of a whole category of films published in 1923 or later. Before the CTEA went into effect, McDonough anticipated a number of popular works entering the public domain due to the expiry of copyright, including many silent films from the late 1920s that are too numerous to name, as well as a host of early sound movies from 1929 and later, including movies starring Edward G. Robinson, Humphrey Bogart, and James

Cagney. Now, with the copyright term extension effectuated by CTEA, McDonough cannot preserve these classic films or make them available to the public.

88. Copyright restoration has had a similarly devastating impact on McDonough's business. Before § 514 went into effect, McDonough had a selection of foreign works that were in the public domain in the United States for failure to satisfy the requirements of the relevant Copyright Act, including such classics as Sydney Gilliat's *Night Train to Munich*, *The Demi-Paradise* starring Laurence Olivier, *Against the Wind*, *The Baby and the Battleship, The Captive Heart, Doctor Blood's Coffin, Doctor in Distress, Elizabeth of Ladymead, The Fallen Idol, Forbidden, Green Grow the Rushes* starring Richard Burton, *Heidi, Intermezzo* starring Ingrid Berman, *Jericho, The Night Has Eyes, On Approval, One of Our Aircraft Is Missing, The Overlanders, The Private Life of Don Juan* starring Douglas Fairbanks, *The Private Life of Henry VIII, The Rules of the Game* directed by Jean Renoir, *Sanders of* the *River, Song* of *Freedom, The Spy in Black, Things to Come, The Third Man* starring Orson Welles, *Thursday's Child, Dark Journey* starring Vivien Leigh, *The Divorce of Lady X* starring Laurence Olivier, *Fire Over England* starring Laurence Olivier and Vivien Leigh, *Storm in a Teacup* starring Rex Harrison and Vivien Leigh, *Ikiru* directed by Akira Kurosawa, and several Alfred Hitchcock thrillers including *Blackmail, The Manxman, Murder, Number Seventeen, Rich and Strange*, and *The Skin Game.* McDonough offered these movies for sale to the public specifically because they were in the public domain. But, with the asserted copyright restoration in these movies, McDonough can no longer. Copyright restoration has forced McDonough to forego selling such works altogether.

89. While the loss to Timeless Video has been significant, the loss to the American public is even worse. Businesses like Timeless Video provide a huge public service in facilitating the *preservation* of old films (such as silent and early sound films) on videotape and making them available to the public. Most of the old silent and early sound films were made on material (primarily nitrate) that deteriorates rapidly and eventually becomes lost forever. Neither the Sonny Bono Copyright Term Extension Act nor the URAA provides any means to insure that such old films are not lost forever. To the contrary, both Acts exacerbate the problem of film deterioration by making it impracticable, as well as unlawful, for film preservers like Timeless Video to deal with works that fall within the ambit of either Act. But there is simply no guarantee that, for each film that has been granted a retroactive copyright under § 514 or an extended term of 20 years under the CTEA, a copyright holder even exists or intends to preserve the film. Section 514 and the CTBA make these "orphan" works essentially unavailable to the public.

90. The combined effect of term extension and copyright restoration is devastating to plaintiffs, who rely extensively on public domain works in their businesses and artistic pursuits. Extending the term of copyrights for another 20 years to existing works while granting retroactive copyright protection to a whole class of foreign works essentially shuts off both supply lines of works into the public domain. And waiting 20 years for these works to enter the public domain is essentially waiting a lifetime for plaintiffs, who are already in their productive years. This unbridled and unprecedented attempt by Congress to deplete the public domain is patently unconstitutional.

COUNT 1
(CTEA/Copyright Clause Violation)

91. Plaintiffs repeat and reallege paragraphs 1 through 90.

92. Article I, § 8, clause 8 of the Constitution limits Congress's authority to grant copyright protection only "*To promote the Progress of Science and useful Arts, by* securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8 (emphasis added).

93. Thus, Congress's power under the Copyright (and Patent) Clause is expressly limited to enacting laws that are designed "[t]o promote the Progress of Science and useful Arts." This stated constitutional purpose provides the standard by which all copyright law must be adjudged. Congress in the exercise of the copyright power may not exceed the limits imposed by the express constitutional purpose "[t]o promote the Progress of Science."

94. Moreover, the Copyright Clause further limits the means by which Congress may exercise its copyright power to one specific means: "by securing for *limited Times* to Authors * * * the exclusive Right to their respective writings." *Id.* (emphasis added).

95. Despite these constitutional requirements, Congress has prolonged the term of copyright repeatedly – even for subsisting copyrights. The CTEA is the most recent of Congress's continued expansion of the term of subsisting copyrights. From 1962 through 1974, Congress extended the term of copyright 9 times, with the end result being that the maximum term of copyright (including renewal) went from 56 to 70 years. In 1976, which effectuated a major overhaul to copyright law, Congress extended the

term of subsisting copyrights to 75 years, but also granted works published in or after 1978 a term of protection of life of the author plus 50 years. Finally, in 1998, Congress enacted the CTEA, which adds 20 more years to the term of copyrights – thus creating a total term of protection of 95 years or life of the author plus 70 years for most works depending on the date of publication and kind of work. Thus, works published in 1923 and following have had their term of copyright prolonged 11 times, culminating in the 20-year expansion of the CTEA. Had the original grant of copyright (including renewal) been the exclusive term of protection allowed, all works from 1923 through 1944 would have already entered the public domain (starting in 1979 and continuing each year up to the present). Because of Congress's retroactive term extensions, however, these works will not enter the public domain until December 31, 2018 through December 31, 2039.

96. The CTEA's retroactive extension of the term of copyright for subsisting copyrights provides no incentive to authors for the further creation of works, or any benefit to the public, and ultimately does not "promote the Progress of Science."

97. Moreover, Congress's 20-year expansion of the term of copyright for works already in existence has resulted in a term of copyright that is not "limited."

98. In addition, a separate requirement imposed by the Copyright Clause is that copyright protection can be granted only to works that are original. *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (1991). The retroactive extension of the term of copyright to existing works violates this originality requirement because, at the time the CTEA extended the term of copyright, the existing

works added not even a modicum of creative thought or selection. The works were simply the same as they were before.

99. The CTEA therefore violates the restrictions of Article I, § 8, cl. 8 and is unconstitutional.

100. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

101. A declaratory judgment will terminate the controversy between the parties.

COUNT 2
(CTEA/First Amendment Violation)

102. Plaintiffs repeat and reallege paragraphs 1 through 90.

103. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

104. The CTEA, in its application to both subsisting and future copyrights, is a law that restricts the plaintiffs' speech. But for the CTEA, plaintiffs could, without threat of legal punishment, publish works originally copyrighted in 1923 through 1925, and whose copyrights are presently subsisting. If the CTEA stands, plaintiffs can only publish such works with the permission of the copyright holder.

105. Whether the CTEA is considered a content-based or content-neutral restriction on speech, it violates the plaintiffs' freedom of speech.

106. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

107. A declaratory judgment will terminate the controversy between the parties.

COUNT 3
(CTEA/Due Process Violation)

108. Plaintiffs repeat and reallege paragraphs 1 through 90.

109. The Due Process Clause states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

110. The Due Process Clause serves to protect individuals from government action that results in fundamental unfairness, including retroactive legislation that unfairly burdens individuals and disrupts settled expectations. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 556-57 (1998) (Kennedy, J., concurring in judgment and dissenting in part). "[A] law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary." *Id.* For this reason, "[r]etroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Id.* at 532 (plurality) (quoting *Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Indeed, as the Supreme Court has admonished: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." *Id.* (plurality) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891)); *see also id.* at 547 (Kennedy, J.); *id.* at 558 (Breyer, J., dissenting).

111. The CTEA is fundamentally unfair in its retroactive increase of the term of copyright to numerous existing works.

112. The CTEA effectuates a sweeping change from prior copyright law. It attempts to add 20 more years to the term of copyright for works that have existed for

numerous years and that have, over the years, resulted in settled expectations of plaintiffs and the public about when the copyrighted works will enter the public domain.

113. The retroactive effect of the CTEA is severe in every respect. The CTEA reaches back over 75 years and grants an additional 20 years of copyright to thousands and thousands of existing works, many of which had been created years ago – potentially dating back to 1923. While Congress has extended the term of copyright to existing works several times in the recent past, it has never done so of the order or magnitude of 20 years. The previous term extensions were as follows: 3 years to subsisting copyrights in 1962 (Pub. L. 87-668); 2 years to subsisting copyrights in 1965 (Pub. L. 89-142); 1 year to subsisting copyrights in 1967 (Pub. L. 90-141), 1968 (Pub. L. 90-416), 1969 (Pub. L. 91-147), 1970 (Pub. L. 91-555), and 1971 (Pub. L. 92-170); 2 years to subsisting copyrights in 1972 (Pub. L. 92-566) and 1974 (Pub. L. 93-573); and 5 years to subsisting copyrights in 1976 (Pub. L. 105-298). The CTEA's 20-year increase is *4* times as great as the largest of these previous extensions.

114. Given the existing law at the time, the plaintiffs had settled expectations that copyrighted works were entitled to protection for the statutory term granted when the works were created and published. Plaintiffs (as well as no doubt numerous other members of the public) reasonably relied on the then-existing statutory term for determining the entry of these copyrighted works into the public domain. In reliance on this bedrock principle, plaintiffs expended a considerable amount of time, money, and resources in their businesses to perform or make available public domain works for the public. Plaintiffs all purchased works that had entered the public domain and that were

free for all to use under the prevailing law. Plaintiffs also made business decisions in reasonable anticipation that copyrighted works published in 1923 and following would have entered the public domain soon or already.

115. By retroactively granting 20 more years of copyright to works already in existence, the CTEA greatly upsets the settled expectations of the plaintiffs and deprives them of property without due process of law. The result is particularly harsh and oppressive. Plaintiffs chose their vocations years ago and developed their respective businesses and artistic pursuits based in part upon the design of the copyright system that allowed them to use freely works in the public domain. Each year, they could expect the natural progression of at least some copyrighted works into the public domain. In each of the plaintiffs' lines of work, the availability of "new" public domain works is essential to their business. (Just imagine a business attempting to survive without any new product line for 20 years.) The CTEA, however, ends the plaintiffs' (and the public's) supply of public domain works for 20 years, until January 1, 2019 – which may as well be forever for plaintiffs, who are well into their productive years.

116. The CTEA is a law that is, at its essence, fundamentally unfair. It unsettles the reasonable expectations of plaintiffs about the progression of works into the public domain and deprives them of their property without due process of law.

117. Accordingly, plaintiffs seek a declaratory judgment that the CTEA is unconstitutional.

118. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

119. A declaratory judgment will terminate the controversy between the parties.

COUNT 4
(Section 514 of URAA/Copyright Clause Violation)

120. Plaintiffs repeat and reallege paragraphs 1 through 90.

121. Section 514 of the URAA violates the constitutional limitation on Congress's power to grant copyrights prescribed by Article I, § 8, clause 8 of the Constitution. Congress's enumerated power under the Copyright (and Patent) Clause is expressly limited to enacting laws that are designed "[t]o promote the Progress of Science and useful Arts."

122. The Copyright Clause also requires that the public have free access to copy and use whatever copyright law has deemed to fall in the public domain. Accordingly, once a work goes into the public domain, Congress cannot remove it from free use by the public by granting it a copyright – "restored," retroactive, or otherwise.

123. Section 514 of the URAA violates these restrictions of the Copyright Clause and is therefore unconstitutional. By its own terms, § 514 authorizes copyrights to works already in the public domain, many of them for many years. *See* 17 U.S.C. § 104A(a)(1)(B) (granting copyright to certain public domain works as "if the work never entered the public domain in the United States").

124. Section 514's retroactive restoration of copyright provides no incentive to authors for the further creation of works, or any benefit to the public, and ultimately does not "promote the Progress of Science."

125. In addition, a separate requirement imposed by the Copyright Clause is that copyright protection can be granted only to works that are original. *Feist*

Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 345 (1991). The retroactive grant of copyright protection to works in the public domain violates this originality requirement because, at the time § 514 granted copyright protection, the works were already in the public domain and contained not even a modicum of creative thought or selection when copyright protection was granted. The works were simply the same as they were before: works in the public domain.

126. Accordingly, plaintiffs seek a declaratory judgment that § 514 of the URAA is unconstitutional.

127. A declaratory judgment will terminate the controversy between the parties.

COUNT 5
(Section 514 of URAA/First Amendment Violation)

128. Plaintiffs repeat and reallege paragraphs 1 through 90.

129. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

130. Section 514 of the URAA is a law that restricts the plaintiffs' speech. But for § 514, plaintiffs could, without threat of legal punishment, publish works in the public domain whose copyrights now have been restored. If § 514 stands, plaintiffs can only publish such works with the permission of the copyright holder.

131. Whether § 514 of the URAA is considered a content-based or content-neutral restriction on speech, it violates the plaintiffs' freedom of speech.

132. Accordingly, plaintiffs seek a declaratory judgment that § 514 of the URAA is unconstitutional.

133. A declaratory judgment will terminate the controversy between the parties.

COUNT 6
(Section 514 of URAA/Due Process Violation)

134. Plaintiffs repeat and reallege paragraphs 1 through 90.

135. The Due Process Clause states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

136. The Due Process Clause serves to protect individuals from government action that results in fundamental unfairness, including retroactive legislation that unfairly burdens individuals and disrupts settled expectations. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 556-57 (1998) (Kennedy, J., concurring in judgment and dissenting in part). "[A] law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary." *Id.* For this reason, "[r]etroactivity is generally disfavored in the law, in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Id.* at 532 (plurality) (quoting *Kaiser* Aluminum & *Chemical Co. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Indeed, as the Supreme Court has admonished: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." *Id.* (plurality) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891)); *see also id.* at 547 (Kennedy, J.); *id.* at 558 (Breyer, J., dissenting).

137. Section 514 of the URAA is fundamentally unfair in its retroactive restoration of copyrights in numerous works that have been in the public domain, in many instances for years and years.

138. Section 514 effectuates a sweeping change from prior copyright law. It attempts to revise retroactively several copyright laws that have existed for numerous years and that have, over the years, resulted in settled expectations of plaintiffs and the public, including (but not limited to):

a. Whether a particular work is accorded copyright protection is determined by the law existing at the time of creation and publication of the work;

b. General publication of a work under the 1909 Act without compliance with the Act's formalities irrevocably injected the work into the public domain;

c Works in the public domain are free for all to use and copy;

d. Works in the public domain cannot be copyrighted; and

e. Under the first sale doctrine, an owner of a lawfully made and purchased copy of a work can sell, rent, or otherwise dispose of it freely without the authorization of the copyright holder.

139. The retroactive effect of § 514 is severe in every respect. Section 514 reaches back over 75 years and grants retroactive copyrights to thousands and thousands of foreign works, many of which had been created years ago – potentially dating back to the early 1920s. Under the settled law under the 1909 Act and later the 1976 Act, these works had unequivocally and unconditionally entered the public domain in the United States because they did not meet the requirements of U.S. copyright law. What § 514 attempts to undo is nearly a hundred years of copyright law retroactively.

140. Given the years of copyright law to support them, the settled expectations of plaintiffs were that these public domain works were free for them to use and copy. Plaintiffs (as well as no doubt numerous other members of the public) reasonably relied on the well-established – indeed, unassailable – principle of law that works in the public domain are free for all to use. In reliance on this bedrock principle, plaintiffs expended a considerable amount of time, money, and resources in their businesses to perform or make available public domain works for the public. Plaintiffs all purchased works that had entered the public domain and that were free for all to use under the prevailing law.

141. Section 514 now attempts to strip plaintiffs of their ability to continue to use their property, all of this by retroactively granting copyrights to works that have already entered the public domain. The result is particularly harsh and oppressive. Plaintiffs chose their vocations years ago and developed their respective businesses based in part upon the design of the copyright system that allowed them to use freely works in the public domain. Over the years, plaintiffs purchased, performed, or made available foreign works that they now must forego using in their businesses and artistic pursuits because of the retroactive grant of copyright under § 514.

142. Section 514 is a law that is, at its essence, fundamentally unfair. It unsettles the reasonable expectations of plaintiffs about the free availability of public domain works and deprives them of their property without due process of law.

143. Accordingly, plaintiffs seek a declaratory judgment that § 514 of the URAA is unconstitutional.

144. A declaratory judgment will terminate the controversy between the parties.

WHEREFORE, Plaintiffs Lawrence Golan, Richard Kapp, S.A. Publishing Co,, Inc., Symphony of the Canyons, Ron Hall, d/b/a Festival Films, and John McDonough, d/b/a Timeless Video Alternatives International request this Court enter judgment:

1. Declaring that the CTEA and § 514 of the URAA are unconstitutional;

2. Enjoining defendant from the enforcement of the CTEA and § 514 of the URAA;

3. Awarding plaintiffs the costs of this action, including reasonable attorneys' fees; and

4. Awarding any further relief this Court deems just and appropriate.

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