

No. 10-545

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IN THE  
**Supreme Court of the United States**

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LAWRENCE GOLAN, et al.,  
*Petitioners,*

v.

ERIC HOLDER, JR., ET AL.,  
*Respondents.*

—————  
**On Writ of Certiorari to the  
United States Court of Appeals  
For The Tenth Circuit**

—————  
**BRIEF OF PETER DECHERNEY AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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

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*Amicus* Decherney is a scholar who has studied the history of the impact of copyright law on the United States film and television industries. He is interested in assuring that Congressional enactments, including the Uruguay Round Agreements Act, do not alter the traditional contours of copyright law's historic role in these industries. To this end, and in order to aid the Court in its deliberations, he presents a summary of his understanding of the role that the public domain has

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<sup>1</sup> In accordance with Supreme Court Rule 37.6, *Amicus Curiae* states that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than *amicus* and counsel have made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

played in the development of the American film and television industries.

### **SUMMARY OF ARGUMENT**

The history of the motion picture and television industries' longstanding reliance on public domain source materials demonstrates that these intended beneficiaries of copyright law structured their businesses on the understanding that the Constitution withholds from Congress the power to strip the public of its vested right to use source materials and other expressive resources in the public domain. This history also helps one to decry the traditional contours of copyright protection within these industries and shows that Section 514 of the Uruguay Round Agreements Act transgresses a traditional and important boundary in copyright law by annexing a significant portion of the public domain. Further, the uncertainty that would result from Respondents' interpretation of the Constitution, which would render public domain works only contingently available for reuse, would retard the growth of these economically significant industries; erect surprising and substantial barriers for new entrants into the industry; threaten investments in film preservation and archiving; and curtail the scope of research and teaching for those who study and write about the history of film and television.

## ARGUMENT

### I. HOLLYWOOD HAS RELIED ON A STABLE PUBLIC DOMAIN THROUGHOUT ITS HISTORY

This Court has already made clear that Article I, Section I, Clause 8 of the Constitution withholds from Congress the power to “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.” *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 146 (1989) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1, 6 (1966)). This rule protects the public’s vested interest in innovating by reusing and adapting technologies that have entered the public domain. There is no copyright exception to this rule that can find support in the Constitution or in the history of copyright.

As has been the case with other industries that produce and distribute works of popular culture, the culturally and economically important motion picture and television industries have implicitly relied on this rule throughout their history when making financial and expressive investments in retelling public domain stories or incorporating other public domain sources, such as music. Moreover, to the extent that these investments have been expressive, they also reflect implicit reliance on the First Amendment freedom to express oneself through the retelling or adaptation of a work originally told by another.

### A. The Public Domain Facilitated the Birth of the Film Industry

When the Edison Manufacturing Co. began to show films commercially in the United States in 1894, an American industry was born. While inventive in many respects, this industry borrowed extensively from other media, including magic lantern slideshows, theater productions, and newspaper comics, to develop the elements of cinematic storytelling as well as the stories themselves.<sup>2</sup> In their efforts to develop this new industry, filmmakers incorporated stories wholesale from newspapers, plays, and books without regard to the copyright status of these sources. In particular, the Motion Picture Patents Company (MPPC), the patent trust that dominated the early American film market, built its business by producing unauthorized adaptations of books and plays.<sup>3</sup> Public domain works, such as bible stories, fairy tales, and Shakespeare's plays proved to be particularly valuable as the MPPC courted a middle class audience. These familiar public domain works brought in audiences from all backgrounds. And because film companies were able to align themselves with the traditions of accepted art and literature, the movie industry branched out from its

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<sup>2</sup> See Charles Musser, *The Emergence of Cinema: The American Screen to 1907* (1990).

<sup>3</sup> Peter Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (Columbia University Press, forthcoming).

urban, ethnic, working-class origins to become the dominant medium of American entertainment.<sup>4</sup>

### **B. The Public Domain Brought Stability to Hollywood**

This Court's decision in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) largely curbed the growing industry's indifference to the copyright status of its sources. Unable to adjust to this new legal environment, the MPPC collapsed, and a new institution—one commonly referred to as “Hollywood”—arose in its place.<sup>5</sup> The newly formed studios developed a dual strategy for managing risk and competition. On one hand, they became vertically integrated, and film producers developed exclusive relationships with book publishers and Broadway producers. Film producers began to exploit their exclusive licenses to copyrighted works in order to prevent direct competition from their rivals, and this focus on exclusive rights to source material seemed to signal a move away from the heavy use of public domain works. One popular how-to guide even warned budding screenwriters to stay away from the public domain entirely, because studios did not want competition from other

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<sup>4</sup> See generally Robert Sklar, *Movie-Made America: A Cultural History of American Movies*, rev. and exp. (Vintage Books, 1994).

<sup>5</sup> Decherney, *supra* note 3.

producers who could easily make their own versions of public domain works.<sup>6</sup>

On the other hand, managing the risk of failure was far more important than guarding against competition. As a result, the studios adopted structural and narrative strategies that promoted stability. Structurally, studios developed the star system, knowing that audiences could be counted on to buy tickets to see their favorite stars regardless of the films that they were in. Similarly, the genre system promised audiences familiar plots and characters, and during the golden age of the studio system, individual studios developed consistent “house styles”; audiences could count on MGM films to look like MGM films. These differences, however, were relatively minor because studios shared the goal of managing risk by adhering to tested formulas. In the 1910s and 1920s, cameramen, art directors, and other studio personnel developed a classical Hollywood style of cinematography, acting, and editing that remains largely unchanged today.<sup>7</sup> And, as every cinemagoer knows, the industry is prone to cycles in which every successful film spawns dozens of clones.

A stable public domain has been, and remains, the most dependable tool in Hollywood’s arsenal of risk-mitigating and stabilizing measures. Public domain works are time-tested; they have name recognition;

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<sup>6</sup> Frances Taylor Patterson, *Cinema Craftsmanship: A Book for Photoplaywrights* 81 (1st ed. 1920).

<sup>7</sup> See generally David Bordwell, Janet Staiger, & Kristin Thompson, *The Classical Hollywood Cinema* (1985).

and they come with built-in audiences. In the 1970s, studios began to look for “presold” films—films based on proven properties like the bestselling novels *The Godfather* (1972) and *Jaws* (1975).<sup>8</sup> But “presold” was only a new name for a practice that had been the backbone of the American film industry since the days of Edison. And the use of public domain stories has consistently provided a solid foundation for the risky business of producing entertainment media in the United States. For every bestselling novel that studios adapted to the screen in the 1970s, there was also a public domain classic, from Disney’s *Robin Hood* (1973) to Stanley Kubrick’s *Barry Lyndon* (1975).

If any business has depended on the stability and replenishment of the public domain, it is Hollywood, which has derived more profit from reusing public domain works than any other industry in history. [see Appendix A] Moreover, without a stable public domain, film studios would be forced to make decisions that introduce new risks to their business while the traditional contours of this major American copyright industry are changing.

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<sup>8</sup> See generally Peter Biskind, *Easy Riders, Raging Bulls: How the Sex-Drugs-and-Rock’n’Roll Generation Saved Hollywood* (1998); Douglas Gomery, *The Hollywood Studio System: An Introduction* (2005); Thomas Schatz, *The New Hollywood*, in *Film Theory Goes to the Movies* 8, 8-36 (Jim Collins, Hilary Radner & Ava Preacher Colli eds., 1993); Geoff King, *New Hollywood Cinema: An Introduction* (2002).

### **C. The Popularity of Public Domain Works Encourages Investments in New Film Genres and Technologies**

The public domain has proven to be especially important to Hollywood during technological, financial, and artistic upheavals. At each critical juncture, the industry has depended on the cultural persistence of public domain titles for sustenance. For example, Hollywood has turned repeatedly to Lewis Carroll's *Alice's Adventures in Wonderland* (1865) and *Through the Looking-Glass, and What Alice Found There* (1871). Film adaptations of these classic stories accompanied the introduction of film to American audiences, the establishment of the studios, the transitions to sound, the introduction of color, the advent of television, the move to widescreen, and most recently the revival of 3-D cinema. See Appendix B. Reusing familiar public domain works creates continuity during times of change and disruption, and continuity of content allows for technical, artistic, and commercial experimentation.

#### **1. Genres Have Been Founded Using Public Domain Works**

Whole cinematic genres have been founded in reliance on public domain narrative material, greatly reducing the risk of creating new categories of film and television from scratch. Many early filmmakers, for example, including Georges Méliès and Siegmund Lubin, pioneered the genre of the science fiction film by adapting Jules Verne's work. And Verne has remained a staple of American film- and television-

making. There has been a Verne screen adaptation released almost every year since 1902.<sup>9</sup> At one point in the early 1960s, as the space race with the Soviet Union began to intensify, so many studios had Verne adaptations in production that the *New York Times* was moved to declare Verne, “the most popular author in Hollywood.”<sup>10</sup>

The financially successful genre of the horror film was founded in reliance on public domain sources as well. In the midst of both the Great Depression and the transition to sound film, Universal Studios licensed two theatrical adaptations of public domain novels, Mary Shelly’s *Frankenstein* and Bram Stoker’s *Dracula*. Together, these films inaugurated the 1930s cycle of horror films. The success of these two groundbreaking films spawned many original horror films, and the horror genre helped sustain Hollywood during the remainder of the Depression. It is unlikely, however, that studios would have taken a chance on developing a new film genre at that time without the support of resilient, popular public domain stories.

In both of these instances, the public domain served not just as a repository of shared heritage but also as an agent facilitating the creation of new expressive works, consistent with the goals of copyright.

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<sup>9</sup> The list of Verne adaptations on the Internet Movie Database, counts 143 to date.

<sup>10</sup> Gladwin Hill, *Hollywood Cycle*, N.Y. Times, Mar. 26, 1961, at X9.

## 2. A Stable Public Domain Has Sustained Hollywood Through Crises

More recently, Hollywood producers have regularly returned to the well of the public domain during times of crisis in the industry. In the 1990s, for instance, the Miramax Company, New Line Cinema, and other independent film producers began to make significant inroads into the American box office and home video markets with literate films, including *My Own Private Idaho* (1991) (based on Shakespeare's *Henry IV*) and a string of Jane Austen and Henry James adaptations, all based on public domain works. Hollywood studios responded with their own cycle of adaptations of European and American public domain literature, including *The Last of the Mohicans* (1992), *The Three Musketeers* (1993), *The Age of Innocence* (1993), and *Romeo + Juliet* (1996).

Hollywood is in crisis mode again today, responding to competition from other forms of entertainment, combating piracy, and trying to justify heavy investments in 3-D technology. In this environment, original films such as *Avatar* (2009) are aberrations. As they have in the past, Hollywood studios have returned to tried and trusted titles. It is telling that the second most successful 3-D film after *Avatar* is Tim Burton's new take on *Alice in Wonderland* (2010). As has been the case for over 100 years, the name recognition and familiar characters of *Alice* continue to smooth the transition to new technologies; when audiences decide to spend more money to experience the novelty of a 3-D film, it is easier to imagine how a trusted public domain

property will look than to hazard their extra dollars on a new film.

3. Section 514's Destabilization of the Public Domain Cannot Be Justified Simply Because Hollywood Recently Has Relied Less Heavily On Public Domain Works

In addition to relying on stable public domain works, Hollywood recently has adopted a strategy of self-cannibalization as a risk management strategy. Studios are “rebooting” faded series (*The Muppets*, *Planet of the Apes*, and *Winnie the Pooh*), remaking works from other media (*The Green Lantern* and movies based on the toys Stretch Armstrong, Battleship, and Magic 8 Ball), spin offs (*Puss and Boots* [spun off from the *Shrek* series]), prequels (*Star Trek*, *X-Men: First Class*), and of course sequels (*Scream 4*, *Mission Impossible: Ghost Protocol*, and *Fast Five*, among many others). Most recent 3-D movies have been sequels (*Kung Fu Panda 2*, *Toy Story 3*, *Shrek Forever After*, *Tron Legacy*, *Pirates of the Caribbean: On Stranger Tides*, etc.), where in previous eras studios might have drawn more heavily on the public domain. The current year, 2011, will see more sequels than any year in history,<sup>11</sup> including the fifth installment of *Planet of the Apes* and the eighth *Harry Potter* movie (both being released in 3-D).

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<sup>11</sup> Brandon Gray, *2011 Preview: Sequels-Now More than Ever*, Box Office Mojo (Jan. 28, 2011) <http://boxofficemojo.com/news/?id=3063>.

Hollywood has been permitted to build and sustain itself using public domain works, and the public domain has buttressed the industry through many crises and transitions. Moreover, the industry has depended upon the persistent popularity of public domain titles to ease the transition to new phases of growth. Without a stable public domain, American film companies have been forced to alter their approaches to new media and potential new developments. Section 514 of the Uruguay Round Agreements Act (URAA) was passed just as the Internet was becoming a viable medium for the distribution of Hollywood films and television shows. Hollywood has been unusually slow to develop content for the web. In part, this reflects the fact that the industry is adjusting slowly to its new copyright landscape. It is not a stretch to suggest that the shrinking public domain is a contributing cause. Without a robust and stable public domain, Hollywood has been denied its most reliable tool for embracing technological advances in production and distribution.

#### **D. The Public Domain was Built Into the Design of the Studio System**

The use of the public domain has been integral to the design of the studio system.

##### 1. “Music Detectives”

Starting in the 1920s, for example, every studio employed a team of music librarians, known as “music detectives.” The music detectives tracked down copyright information about potential film

music, and they maintained libraries of stock music. The most prized quality of a music detective was his or her ability to locate appropriate public domain compositions. They ensured that the studios did not pay royalties on public domain music, and they kept track of valuable works about to enter the public domain. George Schneider, who founded MGM's music library in 1928, reigned as the dean of music detectives for close to three decades. A 1947 *New York Times* profile of Schneider listed as one of his greatest accomplishments the discovery that studios had unwittingly been paying royalties on a public domain composition by Jacques Offenbach; the widely used piece had come to be shorthand for French café atmosphere.<sup>12</sup> The *Times* piece also noted the Holy Grail for music detectives: pinpointing the day when "Happy Birthday" would fall into the public domain. Schneider calculated that the event would occur in 1949, although the copyright status of "Happy Birthday" is still in dispute.<sup>13</sup>

Not only have studios taken advantage of works in the public domain, studio heads have also made calculated decisions and designed budgets with the expectation that their public domain music libraries would not unexpectedly disappear. For close to 100 years, producers have filled movie and television show soundtracks with public domain music with the expectation that they would not have to secure

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<sup>12</sup> Fred Stanley, *Film Tune Sleuths*, N.Y. Times, Aug. 17, 1947 at 60.

<sup>13</sup> *Id.* at 60; Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. Copyright Soc. U.S.A. 335, 335-426 (2009).

rights again when works are rereleased theatrically or on video.

2. The Motion Picture Association of America Continues to Manage Artificial Rights in Public Domain Works

The Hollywood studios have also sought to control and ease the use of public domain works through the creation of a rights clearing house, which remains active and up to date today. The Motion Picture Producers and Distributors Association and later the Motion Picture Association of America have allowed producers to register their ideas and forthcoming titles. They have also been allowed to stake their claim on public domain material for a period of up to four years.<sup>14</sup> Obviously, this clearinghouse could not exist without the expectation that public domain works would remain free to be used, at least during their period of registration. These industry-made rights to public domain material did not always avoid disputes, such as the time in the 1960s when two producers had a public fight over the right to make a film about the Boxer Rebellion.<sup>15</sup> More recently, Mel Gibson changed the name of his 2004 film from *The Passion* to *The Passion of the Christ*, because Miramax had

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<sup>14</sup> David Pierce, *Forgotten Faces: Why Some of Our Cinema Heritage is Part of the Public Domain*, 19 *Film History* 125, 131 (2007); Gladwin Hill, *Any Titles to Spare?*, N.Y. Times, Mar. 16, 1947, at X5.

<sup>15</sup> Eugene Archer, *Producer Decries Movie Practices*, N.Y. Times, Sept. 15, 1961, at 30.

already claimed his first choice title.<sup>16</sup> But for the most part, writers and producers have respected their colleagues' claims, and the rights clearinghouse continues to facilitate Hollywood's reliance on the public domain. It manages competition, and it creates a market for studios to sell the rights to public domain works to other studios.<sup>17</sup>

## II. THE PUBLIC DOMAIN HAS BEEN A GATEWAY TO THE INDUSTRY

As the Hollywood studio heads recognized in the wake of *Kalem*, reliance on the popularity of the public domain mitigated the studios' risk of failure. But the expressive freedom guaranteed by the public domain also presented the risk of competition both from other studios and from new entrants. Traditionally, the robust and stable public domain has facilitated independent producers and distributors entrance into the film and television business. New companies need to be able to access the same rich and expansive cultural heritage that facilitated the acceptance of movies in the 1890s and that has stabilized American film and television ever since. Without a stable public domain, the

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<sup>16</sup> The Miramax title referred to a novel about Napoleon and not a passion play. Nevertheless, this example demonstrates how the MPAA regulates the use of public domain works. See Gary Susman, *Napoleon Branding*, Entertainment Wkly., Oct. 16, 2003, available at <http://www.ew.com/ew/article/0,,519051,00.html>

<sup>17</sup> Thomas F. Brady, *Ferrer May Star in Film For Geiger*, N.Y. Times, Dec. 4, 1947 at 41; also Thomas F. Brady, *Hollywood Deals*, N.Y. Times, Feb. 1, 1948 at X5.

traditional cycle of industry renewal has been suspended.

### A. Independent Producers

From Walt Disney to the team of Ismail Merchant and James Ivory (whose public domain adaptations include *The Europeans* [1979], *A Room With a View* [1985], *Howard's End* [1992]), film and television producers have adapted public domain material in order to enter the industry. As it has for Hollywood, the public domain has offered tested, recognizable, and popular material for new producers making risky investments in the media business.

#### 1. Walt Disney

Independent animator Walt Disney's first forays into filmmaking included versions of the folk tales *Little Red Riding Hood*, *The Four Musicians of Bremen*, and *Jack and the Beanstalk* (all 1922). When he made his first feature-length film, it is no coincidence that he turned to the Brothers Grimm's version of the tale of *Snow White*. *Snow White* adaptations were already a staple of the American stage and screen by the 1930s. There had been at least three earlier film versions of *Snow White*, including a 1902 version by Siegmund Lubin, a 1916 version by the Famous Players-Lasky company (which eventually became part of Paramount), and a 1933 animated version by Disney's rival Max

Fleisher, featuring the character Betty Boop.<sup>18</sup> When Disney chose to use public domain material, he could count on audiences' familiarity with the characters as well as a fan-base that would come see the latest version of the fairy tale. With a major technical undertaking, it was also convenient to have a familiar story and characters to ground the film. When asked why he chose to make *Snow White*, Disney once remarked, because "it was well-known."<sup>19</sup> He also remembered having seen the play or film with a delighted audience when he was growing up in Kansas City.<sup>20</sup> Disney knew both personally and professionally that *Snow White* was a trusted property.

While he was making *Snow White*, Disney also considered making a film of *Alice in Wonderland* starring a live-action Mary Pickford in an animated world. (He had already made a series of films based loosely on the Alice character.) But Disney put the project on hold, because he believed that rights to *Alice* in the United Kingdom were not in the public domain. (The copyright term in the United Kingdom, however, seems to have ended in 1907.<sup>21</sup>) Disney was so committed to using public domain works that he was willing to wait until all of the rights were

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<sup>18</sup> The Betty Boop version remains a favorite among Betty Boop fans, and in 1994 it was named to the National Film Registry of the Library of Congress.

<sup>19</sup> Quote of Walt Disney in Neal Gabler, *Walt Disney: A Triumph of American Imagination* at 216 (2006).

<sup>20</sup> *Id.*

<sup>21</sup> John Davies, *Introduction*, to *The Illustrators of Alice* 11 (Graham Ovenden, ed., 1972)

clearly lapsed, and he finally released his version of *Alice* in 1951. This kind of patience is not a luxury that filmmakers have today.

## 2. More Independent Producers Who Relied on the Public Domain to Launch Their Careers

The ability to rely on the public domain has encouraged many other producers to enter film and television production using similar strategies. When the production company Grant-Realm decided to take a chance and make films for the relatively young medium of television in 1948, the company began by adapting nine public domain works by Guy de Maupassant, Nathaniel Hawthorne, and Robert Louis Stevenson, among others.<sup>22</sup> After MGM executive Samuel Bronston launched a career as an independent producer, he specialized in large-scale public domain creations, including *King of Kings* (1963), *El Cid* (1961), and the *Fall of the Roman Empire* (1964).<sup>23</sup> Another independent producer with an interest in music, Irving Allen, used public domain folk songs as the basis for a series of western films in the 1940s, and he patiently waited for Gilbert and Sullivan's operettas to enter the public domain so that he could make a compilation film

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<sup>22</sup> Thomas F. Brady, *Film Studio Lists Stories for Video*, N.Y. Times, Oct. 19, 1948, at 33.

<sup>23</sup> Archer, *supra* note 15, at 36.

from them.<sup>24</sup> He finally succeeded in 1952 with a short film titled *The Return of Gilbert and Sullivan*.

Today's independent producers can no longer expect new works to enter the public domain any time soon. They also have a smaller pool of public domain works to draw from than their predecessors. Section 514 of the URAA (1994) and the Copyright Term Extension Act (1998) have placed tangible barriers before the next generation of Walt Disneys and Ismail Merchants, who will have to find new methods of entering the entertainment business.

## **B. Independent Distributors**

As the industry has matured, the once-copyrighted films from its earlier era have become a new pool of public domain resources upon which other industry actors rely. In particular, the availability of public domain films has traditionally been the starting point for cinephiles who want to enter the industry as distributors. Since the 1950s, many important filmmakers and industry executives have begun their careers by distributing 8mm and 16mm films and later video. Blackhawk Films, Cinema 16, Encyclopedia Britannica Films, Thunderbird Films, Reel Images, Lobster Films, Kino Video, Gartenberg Media, Milestone Films, and the Prelinger Archives, are just a few of the companies that have distributed public domain films.

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<sup>24</sup> Thomas F. Brady, *Movie is Planned on Savoy Operas*, N.Y. Times, June 24, 1950, at 6.

## 1. New Line Cinema

In 1967, a Columbia Law School graduate, Robert Shaye, decided that he wanted to enter the film industry. With very little capital, Shaye worked out of his Greenwich Village apartment and began distributing *Reefer Madness* (1936), European film classics, and other public domain films to universities. Twenty years later, Shaye's New Line Cinema had grown into a top tier independent producer-distributor, releasing hits such as *Rush Hour* (1998), *Austin Powers* (1997), and *Dumb and Dumber* (1995). In the 2000s, New Line produced the enormously successful *Lord of the Rings* trilogy (2001, 2002, 2003). As often happens, the road to the production of great financial and artistic achievement began with the public domain. That potential film executives today lack the same opportunities is a blow to the industry, the full impact of which may not be felt for decades. It is also an impact that will be impossible to gauge with precision because we have, as yet, no way of counting the films and television shows that are not produced, distributed, and viewed.

## 2. Thunderbird Films: From Piracy to Public Domain Distributor

Another public domain film advocate, Tom Dunnahoo, began as a bootlegger. In 1971, Dunnahoo was charged with selling a print of *Beach Blanket Bingo* (1965) to an undercover agent. After his arrest, he discovered the public domain, and realized that there was a legitimate route to entering the world of film distribution. Through Thunderbird

Films, he was soon distributing Shirley Temple films and Frank Capra classics.<sup>25</sup>

In the 1970s, these were the two routes available to undercapitalized fledgling film distributors: the public domain and piracy. Today, the options remain largely the same, except that the opportunity to distribute works that have recently entered the public domain has been foreclosed, and some of the most popular public domain works, like *Metropolis* (1927), *The Third Man* (1949), and Alfred Hitchcock's British films are no longer available to new distributors because their copyrights have been restored.

Since the 1990s, the landscape for independent distributors has changed. Hollywood studios acquired New Line Cinema, Miramax, Good Machine, and all of the large independent distributors.<sup>26</sup> Hollywood has periodically absorbed its independent rivals in an established cycle of competition and growth. But today the cycle is broken, and entry has been largely denied to the next wave of independent producers that would traditionally have been fed by the public domain.

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<sup>25</sup> Pierce, *supra* note 14 at 126.

<sup>26</sup> Anthony Kaufman, *Ghost of the Machine*, Village Voice (May 28, 2002).

### III. THE ABSENCE OF A STABLE PUBLIC DOMAIN ENDANGERS THE PRESERVATION AND STUDY OF FILM HISTORY

#### A. Politically and Historically Important Works Can No Longer Be Studied

While copyright law at times serves as an engine of expression, it also has a long and tangled history with censorship. In film, which incorporates a range of works of authorship, the author of one work, a piece of music, might use the leverage afforded by copyright to censor distribution of a film to which the music's copyright owner objects. As a result, studios have also turned to public domain works when use of music that required copyright clearance might have suppressed important political statements. To take just one example, Hollywood's first major anticommunist film of the Cold War, William Wellman's defection drama, *Iron Curtain* (1948), used the music of important Soviet composers on its soundtrack. Music by Dmitri Shostakovich, Serge Prokofiev, Aram Khachaturian, and Nikolai Myaskovsky conveyed the cultural and emotional environment as no other musical choice could. After the film's release, the composers filed a lawsuit against Twentieth-Century Fox, the studio that made the film, in both French and United States courts. United States courts rejected the composers' moral rights claims,<sup>27</sup> but French courts allowed the

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<sup>27</sup> *Dmitry Shostakovich v. Twentieth Century-Fox Film Corporation*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949).

film to be enjoined from distribution in that country.<sup>28</sup> Because the works were in the public domain and filmmakers did not need to seek permission, *Iron Curtain* emerged as a seminal anticommunist statement in the 1940s.<sup>29</sup> Unfortunately, many of the musical compositions on the soundtrack have had their copyrights restored, and the film has only been distributed on a Spanish DVD, which cannot be played on region 1 DVD players sold in the United States. Generations of students have been prevented from studying an important cultural artifact.

## B. Preservation and Restoration

Without permission from the copyright holder or an assurance that a work is solidly in the public domain, archives are unable to preserve a film, regardless of its importance or its imminent demise. Film deteriorates quickly. By most estimates, more than half of the films made before 1950 have already been lost forever, and more become endangered every year, many spontaneously igniting in vaults.<sup>30</sup> Preserving and restoring films is very expensive. A film preservation effort usually requires grant funding in addition to television and home video

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<sup>28</sup> *Soc. Le Chant de Monde v. Soc. Fox Europa*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 13, 1953, Gaz. Pal. 1953, 191, note Ancel (Fr.).

<sup>29</sup> Decherney, *supra* note 3.

<sup>30</sup> Center for the Study of the Public Domain, *Access to Orphan Films*, submission to the Copyright Office (March 2005); Dave Kehr, *Film Riches, Cleaned Up for Posterity*, N.Y. Times, Oct. 14, 2010.

licensing. Grant funders generally will not invest in film preservation unless the public domain status of the film is clear. Section 514 has added additional uncertainty to the already precarious act of preserving films. Now, archivists can no longer be certain that a film will remain in the public domain.

The Library of Congress has long recognized that “orphan films,” those without clearly identified copyright owners, are at the greatest risk of deteriorating before preservation can be accomplished.<sup>31</sup> There is a reasonable expectation that many film studios and copyright holders will take an active interest in preserving films that they still control, while archives are free to preserve films in the public domain. But orphans fall between the cracks; they are neither looked after by their owners nor are they able to be cared for by those interested in saving history and serving posterity. In one fell swoop, Section 514 created thousands of new orphan works, and it sentenced many of the films among those works to oblivion.

## CONCLUSION

Section 514 of the URAA has already had a dramatic and palpable effect on the American film and television industries, and it has upset the process of growth and renewal that made Hollywood a global leader in the entertainment industry. For

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<sup>31</sup> Report of the Librarian of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation* 5(1993).

over 110 years, film companies have drawn on public domain works for stability during times of transition and crisis; independent media artists, producers, and distributors have drawn on public domain works in order to overcome the many barriers to entry into the entertainment industry; and archivists, students, and scholars have relied on works' remaining in the public domain so that those works may be saved from decay and extinction. Instead of growth and stability, we are seeing retrenchment and stagnation in many parts of the entertainment industry, from the transition to 3-D to the preservation of classic films.

It is often thought that all expansions of copyright benefit the Hollywood studios.<sup>32</sup> But history shows that the public domain has been one of the most important drivers of the studio system, and Hollywood needs a stable public domain in order to thrive. This Court found the CTEA to be constitutional, because it “has not altered the traditional contours of copyright protection.” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). There is strong evidence that Section 514 of the URAA has altered those contours.

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<sup>32</sup> See, for example, the comments of Rep. Mary Bono: “Actually, [Rep.] Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. ... As you know, there is also Jack Valenti’s proposal for the term to last forever less 1 day. Perhaps the Committee may look at that next Congress.” Congressional testimony on the Sonny Bono Copyright Term Extension Act. (CR.144.H9952)

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## **APPENDIX**

**APPENDIX A**  
**Highest Grossing Movies Based on Public Domain**  
**Source Material**

Rank	Title	Studio	Inflation Adjusted	Actual Gross	Year
1	The Ten Commandment	Paramount	<b>\$1,029,660,000</b>	\$65,500,000	1956
2	Snow White and the Seven Dwarfs	Disney	<b>\$856,740,000</b>	\$184,925,486	1937
3	Pinochio	Disney	<b>\$529,790,200</b>	\$84,254,167	1940
4	Around the World in 80	United Artists	<b>\$507,876,900</b>	\$42,000,000	1956
5	The Passion of the Christ	New Market Films	<b>\$469,280,100</b>	\$370,782,930	2004
6	Aladdin	Buena Vista (Disney)	<b>\$412,196,800</b>	\$217,350,219	1992

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SOURCE: Box Office Mojo  
(<http://boxofficemojo.com/alltime/adjusted.htm>; last  
accessed June 12, 2011)

**APPENDIX B: American Films and Television  
Productions Inspired by or Adapted From *Alice's  
Adventures in Wonderland***

**U.S. Film Adaptations of *Alice's Adventures in  
Wonderland***

*Alice's Adventures in Wonderland* (1910, Edwin S.  
Porter, Edison Manufacturing Company)

*Alice in Wonderland* (1915, W.W. Young, American  
Film Manufacturing Company)

*Alice in Wonderland* (1931, Bud Pollard,  
Metropolitan Studios)

*Alice in Wonderland* (1933, Norman Z. McLeod,  
Paramount Pictures)

*Alice in Wonderland* (1949, Lou Bunin, Lou Bunin  
Productions)

*Alice in Wonderland* (1951, Clyde Geronimi, Wilfred  
Jackson, Hamilton Luske, Walt Disney  
Productions)

*Alice in Wonderland* (1955, George Schaefer,  
Hallmark Hall of Fame Productions)

*Alice at the Palace* (1982, Emile Ardolino, New York  
Shakespeare Festival)

*Alice in Wonderland* (1982, John Clark Donahue and  
John Driver, Children's Theatre Company and  
School of Minneapolis)

*Alice in Wonderland* (1983, Kirk Browning, WNET)

*Alice in Wonderland* (1985, Harry Harris, Irwin  
Allen Productions and Columbia Pictures  
Television)

*Alice in Wonderland* (1991-1995, Gary Halvorson,  
Walt Disney Television)

*Alice in Wonderland* (1995, Toshiyuki Hiruma,  
Goodtimes Entertainment, Jetlag Productions,  
Cayre Brothers)

*Alice in Wonderland* (1999, Nick Willing, Babelsberg  
International Film Produktion, Hallmark  
Entertainments, NBC Studios)

*Alice Underground* (1999, Robert E. Lee, General  
Productions LLC)

***U.S. Films Influenced by Alice's Adventures in  
Wonderland***

*Alice Comedies* (1924-1927, Walt Disney and Ub  
Iwerks, Walt Disney Productions)

*Alice in US Land* (1932, Paramount News newsreel  
feature about Alice Liddell's visit to New York  
City)

*Betty in Blunderland* (1934, Dave Fleischer,  
Fleischer Studios)

*Thru the Mirror* (1936, David Hand, Walt Disney  
Productions)

"Swee'pea Through the Looking Glass" *Popeye* (1960,  
Jack Kinney, Jack Kinney Productions)

*Alice in Wonderland (or What's A Nice Kid like You  
Doing in a Place like this?)* (1966, Alex Lovy,  
Hanna-Barbera Productions)

*Alice of Wonderland in Paris* (1966, Gene Deitch,  
Rembrandt Films)

- Alice in Wonderland: An X-Rated Musical Fantasy* (1976, Bud Townsend, Cruiser Productions, General National Enterprises)
- Cosmos: A Personal Voyage* (Episode 9: The Lives of Stars) (1980, Adrian Malone, KCET, Carl Sagan Productions, BBC)
- Dreamchild* (1985, Gavin Millar, PffH Ltd., Thorn EMI)
- A Nightmare on Elm Street 4: The Dream Master* (1988, Renny Harlin, New Line Cinema, Heron Communications, Smart Egg Pictures)
- The Matrix* (1999, Andy Wachowski and Lana Wachoski, Warner Bros. Pictures, Village Roadshow Pictures)
- Resident Evil* (2002, Paul W.S. Anderson, Constantin Film Produktion, Davis-Films, Impact Pictures)
- Brandy & Mr. Whiskers* (2004-2006, Russell Marcus, Toon City, Walt Disney Television Animation)
- Lost* (2004-2010, J.J. Abrams, Jeffrey Lieber, and Damon Lindelof, ABC Studios, Touchstone Television, Bad Robot)
- Charmed* (Season 8 Episode 2: Malice in Wonderland) (2005, Mel Damski, Paramount Pictures, Spelling Television, Viacom Productions)
- Phoebe in Wonderland* (2008, Daniel Barnz, Silverwood Films)
- Warehouse 13* ("Season 1 Episode 8") (2010, Jane Espenson, D. Brent Mote, Universal Cable Productions, Universal Media Studios)

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*Alice in Wonderland* (2010, Tim Burton, Walt Disney  
Pictures)