

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OVERVIEW BOOKS, LLC
and LEV TSITRIN,
Plaintiffs,

v.

No. 05-775C
Judge Lettow

THE UNITED STATES,
Defendant.

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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I. SUMMARY OF MOTION – RELIEF REQUESTED

Plaintiffs, Overview Books, LLC. and Lev Tsitritin, by their attorney, respectfully submit this brief in Opposition to Defendant's Motion to Dismiss and do hereby make a Cross-Motion, pursuant to RCFC § 56 for Summary Judgment, upon the pleadings and other papers before the Court, and upon the Proposed Findings of Uncontroverted Fact, Affidavits, and Exhibits attached hereto. Plaintiffs respectfully request that the Court find that the CIP eligibility restriction complained of herein, which prevents book authors and small publishers from access to library, bibliographic service, and book vendor systems, (1) is a taking of the book author's and small publisher's property under the Fifth Amendment of the U.S. Constitution, (2) is unconstitutional as a violation of the book author's and small publisher's rights under the First Amendment of the U.S. Constitution, (3) is unconstitutional as a violation of the book author's and small publisher's rights under the Due Process clause of the Fifth Amendment of the U.S. Constitution, (4) is arbitrary, unreasonable, and against public interest and public policy, only beneficial to large publishers, and therefore is unconstitutional as a taking not for public use. Plaintiffs further respectfully request that the Court then award them Five Hundred Thousand Dollars (\$500,000.00) in compensation for the losses suffered in consequence of the Unconstitutional Taking, and provide such other and further injunctive and declaratory relief, consistent with the Court's jurisdiction under the Tucker Act, 28 USC § 1491 et seq., as necessary to provide complete relief from the damage complained of.

II. QUESTIONS PRESENTED

1. Whether a governmental regulation that prevents access to library, bibliographic service, and book vendor systems for all book creators and disseminators except a specifically

favored set of commercial enterprises, is a taking of property under the Fifth Amendment of the U.S. Constitution.

2. Whether a governmental regulation that prevents access to library, bibliographic service, and book vendor systems for all book creators and disseminators except a specifically favored set of commercial enterprises, is an unconstitutional abridgement of the rights of free expression under the First Amendment of the U.S. Constitution of those so deprived of access.
3. Whether a governmental regulation that prevents access to library, bibliographic service, and book vendor systems for all book creators and disseminators except a specifically favored set of commercial enterprises, is unconstitutional as a violation of the book author's and small publisher's rights of equal access under the Due Process clause of the Fifth Amendment of the U.S. Constitution.
4. Whether a governmental regulation that prevents access to library, bibliographic service, and book vendor systems for all book creators and disseminators except a specifically favored set of commercial enterprises fails basic rational scrutiny and is thus an unconstitutional taking not for public use against the takings clause of the Fifth Amendment.

III. STATEMENT OF THE CASE

A. Lev Tsitrin's *The Pitfall of Truth* – its application and rejection for the CIP

1. A decade long exploration of the interplay of religion and society

As more fully described in Mr. Tsitrin's Affidavit attached hereto, Lev Tsitrin wrote *The Pitfall of Truth: Holy War, its Rationale and Folly* as a culmination of a substantial exploration on the intersection of world politics, religion, and the fanatic mindset.

His first article on the intersection of religion and society was published in the summer of 1996 ("Idle Truths, False Idols," *Deolog*, August 1996). Expanding on the thoughts in that article, he published his first book on the subject in 2000 (*Many Gods, One Idol: A Study of the Nature of Religion*, Authorhouse, April 2000) and following that publication was a guest on a number of radio programs.

Mr. Tsitrin wrote *The Pitfall of Truth* as a reaction to what he saw as a thorough failure on the part of politicians and the media to address the causes of terrorism following the 9/11 tragedy. After almost a decade of dealing with precisely the issues at hand as an academic exercise, Mr. Tsitrin's explorations and solutions had now become a topical and important matter.

2. CIP Application and Rejection

In the summer of 2004 Mr. Tsitrin began the process of having this book published and Overview Books, LLC ("Overview Books"), as his publisher, submitted an application to the Library of Congress for the book to be included in the CIP Program. He believed this step of fundamental importance because, as more fully described below, inclusion in the CIP program is a license without which a book will not be considered for purchase by the larger library systems and book vendors, will be ineligible for reviews in most publications (and certainly the more prestigious ones) and for participation in literary award competitions. Very simply, without the CIP, *the Pitfall of Truth* would be consigned to obscurity.

Overview Books' application for this license for access to the main public forums of printed expression was denied by an email dated December 31, 1969 on the grounds that the book was not owned by an approved commercial entity (Appendix C).

Believing that in a matter such as this one, implicating the fundamental property right of a creator to control, benefit, and profit from his own creation, as well as the most fundamental First Amendment principles of unimpeded access to the marketplace of ideas, there must be some reasonable means of accommodation, Mr. Tsitrin contacted the CIP Program by telephone. His discussion with Mr. John Chelley, the head of the CIP department, led nowhere. He was told that the Rules are the Rules and there's nothing to be done. (Appendix A, p.6)

B. The CIP (Cataloging in Publication) Program

1. Created to aid libraries in acquiring titles of wide interest

In 1971, the Library of Congress established the Cataloging in Publication (CIP) Program whose stated purpose was “to serve the nation’s libraries by cataloging books in advance of publication,” creating bibliographic records and distributing them “weekly in machine readable form to large libraries, bibliographic services, and book vendors around the world,” to be immediately available to each library that acquires a copy of the book. The aim of the program was “saving libraries the time and expense of individually cataloging each book they acquire” and therefore the stated aim of limiting eligibility to the program was in order to focus on “titles that are most likely to be widely acquired by the nation’s libraries” (Appendix D, pp. 1, 3. A full description of the services provided is included in the statement of Proposed Findings of Uncontroverted Fact attached hereto as Appendix B).

2. Eligibility limited to select group of established commercial enterprises

Books are not chosen for the CIP Program by libraries or the Library of Congress but are presented, prior to their publication, by the entity interested in getting them distributed. However, authors are never eligible for the program. Likewise ineligible are small, new publishers. The only entities that are eligible to submit books to this program are publishers who

have previously published books by at least three different authors. (Appendix B, ¶ 16; Appendix D, p.3, ¶ 1; Appendix D, p.4, Bullet Points 3, 5)

3. The CIP is a substantial subsidy for government approved publishers

The CIP program is not simply a bibliographic service for the nation's libraries. As more fully described in the Proposed Findings of Uncontroverted Fact, there is no charge for entry into the CIP program or for any of the services provided by the program. The CIP therefore serves as a substantial subsidy for those publishers approved for entry. Ironically, these are the publishers who are best able to afford such expenses, while independent authors and new publishers are left both to match on their own the substantial services provided by the CIP, and to cover substantial further expenses necessary to at least somewhat overcome the deficiency (in the view of distribution channels) of not having a CIP number.

a. Free pre-publication worldwide advertising campaign

As one of the services of the CIP Program, before the accepted book is published, the Library of Congress provides a free, massive, worldwide advertising campaign by sending the initially prepared bibliographic record "in machine readable form to large libraries, bibliographic services, and book vendors around the world." This free advertising is further expanded exponentially as "[m]any of these organizations redistribute these records in products and services designed to alert the library community to forthcoming publications and to facilitate book ordering." (Appendix B, ¶ 8; Appendix D, p.2, ¶ 3; Appendix D, p.1, ¶ 3)

b. Second free worldwide advertising campaign after publication

After the book is published and the Library of Congress updates the bibliographic information, it provides a second worldwide advertising blitz by once more sending the

bibliographic record “in machine readable form to large libraries, bibliographic services, and book vendors around the world. Many of these organizations redistribute these records in products and services designed to alert the library community to forthcoming publications and to facilitate book ordering.” (Appendix B ¶ 10; Appendix D, p.2, ¶ 4, Appendix D, p.1, ¶ 3)

4. The CIP serves as a license to give a book entry to libraries and book sellers

Libraries, book vendors and other services will not consider a non-CIP book

Due to the combination of the modern pace of automation, the CIP program's provision of pre-made bibliographic information, and continuously dwindling funding for libraries (Appendix G, p.5), book vendors and libraries have adopted automatic systems which expect a fully verified CIP record for cataloging and will not purchase books which can not “be shipped with catalog card sets that reflect the final verified CIP record” (Appendix B ¶ 12, 13; Appendix D, p.2, ¶ 5).

Thus, any libraries with such systems, or without the staff to do their own cataloguing, and any vendors that cater to such libraries will simply not consider any book which was published without being part of the CIP program.

5. No second chance for the CIP

It is imperative to mention that the CIP is only available to a book prior to publication. Once the book is published, there is no second chance for the CIP. Thus, a book published by an independent author or by a new publishing house, regardless of its quality or the effort and expense put into its promotion, will never be eligible for entry into the larger library systems or to be picked up by vendors with automated tracking structures (Proposed Findings of Uncontroverted Fact ¶ 17 and subsequent).

6. No Real alternative to the CIP

In the CIP rejection letter, the Plaintiffs are advised that they may be eligible for the PCN (Preassigned Control Number) program. But, as described at the Proposed Findings of Uncontroverted Fact (§ 17, 18) this is not a real alternative.

While an initial bibliographic record is created under the PCN program, the book is not placed on any of the lists of the CIP program nor is information distributed to any of the channels that it would be distributed to under the CIP. But, once registered under the PCN program, the book is specifically no longer eligible to be registered under CIP.

Thus, and most importantly, without being catalogued in the CIP system, this book will still not be picked up by the large number of libraries and vendors who require CIP catalogue listing, and will still be prevented from any and all access which a CIP book has.

C. Overview Books – the sin of independence**1. Failure of the existing publishing system**

As a first time author in 1998, Mr. Tsitrin optimistically sent submissions of his manuscript to several household name publishers and, after it was rejected, he happily paid a fee to an unscrupulous “on demand publisher” – essentially a glorified printing service (Appendix A, p.2). Claiming that his book will be available on the internet and in thousands of bookstores, this “publisher” failed to advise that it did not provide registration with CIP. While the book became available at Amazon.com in August of 2000, it would never be found in Barnes and Noble or the vast majority of libraries and store chains which together comprise the general “marketplace of ideas” (since these were closed to the book for lack of the CIP). Likewise, his book was ineligible for press reviews in any of the prestigious media outlets as these commonly have a

policy of only reviewing books which are widely distributed in the same channels of distribution which were closed to the book for lack of the CIP. (Appendix G, p.3, 7).

For his second book, Mr. Tsitrin won representation with an agent who believed that in 2003, with the ongoing “war on terror” and the war with Iraq imminent, *The Pitfall of Truth* was a timely and important book that would sell quite easy. (Appendix A, p.3) Alas, a year and a good forty five submissions to “legitimate” publishing houses later, there were no replies.

In fact, this is as should have been expected. As he would learn later and as will be discussed in the argument section below, the publishing houses are unapologetic in acknowledging the fact that the vast majority of manuscripts are rejected unopened and those that are opened are given short shrift. The quality of a given manuscript is a distant second consideration that does not come into play until the first requirement of connections and/or notoriety is met by the candidate for publication. Simply put, even large publishing houses lack the resources to proceed in any other manner (Appendix G, p.6, Appendix F, p.4, 5). Unfortunately, Mr. Tsitrin had neither private connections in the field nor the public notoriety demanded. Added to that, he had the misfortune of proposing a novel argument which may give offense to special interests publishers believe themselves answerable to (Appendix E).

2. Formation of Overview Books

Since neither the established publishing house nor the glorified internet printer were workable options, but Mr. Tsitrin firmly believed in the importance and necessity of bringing *The Pitfall of Truth* to the public, he finally decided to publish the book himself. As he delved into the details of what it would take to publish, his plan developed into an idea to create a small, special focus publishing company (Appendix A, p.4).

The Pitfall of Truth was to be the first book published by Overview Books with the ambition that it would attract other authors with similar interests to sign with the company.

Overview Books was formed as a New York limited liability company in the spring of 2004 and *The Pitfall of Truth* was published in January of 2005.

3. The CIP eligibility restriction prevents Overview Books from being a viable business

Since the CIP eligibility restriction denies the books of the first three authors published by a new publisher access to the libraries, major retailers, and most important reviewers, Overview Books is currently faced with a moral dilemma. If the CIP eligibility restriction is left undisturbed by this court, the work of the next author that Overview Books will look to sign will be prevented from access to libraries and related distribution systems and consequently from access to the more important reviewers. Essentially, Overview Books would have to take on an author with the sure knowledge that his book will most likely not see the light of day.

IV. ARGUMENT

A. Opposing the Motion to Dismiss

1. Court has jurisdiction to rule on a Taking under the Fifth Amendment

Plaintiffs wholeheartedly embrace the defendants' characterization of this Court's jurisdiction. As the motion to dismiss states "The United States Court of Federal Claims is a court of limited jurisdiction. Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief." (Defendant's Brief, page 3, citations omitted)

Defendant's brief elaborates that "Suit is permitted against the United States only insofar as it has waived sovereign immunity. A waiver of traditional sovereign immunity cannot be implied but must be 'unequivocally expressed.' Plaintiffs in this Court must look beyond this

Court's jurisdictional statute, the Tucker Act, 28 U.S.C. § 1491, for a waiver of sovereign immunity with respect to their claim.

The Tucker Act requires that a plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491. The Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491 (a) (1). As interpreted by the United States Supreme Court, the Tucker Act waives sovereign immunity to authorize this Court to consider, among other things, claims based upon an express or implied contract with the United States and monetary claims based upon money mandating statutes.” (Defendant’s Brief, page 4-5, citations omitted)

The brief finally comes to the conclusion that “The takings clause of the Fifth Amendment is such a money mandating provision.” (Defendant’s Brief, page 5, citations omitted) That is to say, defendant clearly concedes that this Court does indeed have jurisdiction to grant relief in a takings claim under the Fifth Amendment of the U.S. Constitution – and of course, this is precisely the rationale under which the current controversy was brought before this Court.

2. The Court must draw all reasonable inferences in Plaintiff's favor and against the Motion to Dismiss.

While it is respectfully submitted that the Complaint quite clearly and unambiguously establishes a compensable taking under the Fifth Amendment of the U.S. Constitution, nevertheless, plaintiffs again embrace defendant’s summary of the rule that “When deciding a

motion to dismiss based upon a lack of subject matter jurisdiction, this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor." (Defendant's Brief, page 3-4, citations omitted) Likewise, "when confronted with a motion to dismiss for failure to state a claim," the court may only grant the motion if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." (Defendant's Brief, page 8, citations omitted) Thus, if the Court finds some ambiguity in the Complaint, per defendant's brief, the Court must interpret such ambiguity in plaintiffs' favor and, for the purposes of ruling on the defendant's motion to dismiss, must find that plaintiffs have sufficiently presented the claim that a compensable taking of property has occurred.

3. Motion to Dismiss does not dispute the facts presented by the Complaint.

Defendant's Brief presents the law with respect to factual disputes on a motion to dismiss by stating that "the Court may examine relevant evidence in order to resolve any factual disputes" (Defendant's Brief, page 4) but that "uncontroverted factual allegations are accepted as true for purposes of the motion" (Defendant's Brief, page 6). Therefore, since the Motion to Dismiss does not dispute any of the factual allegations of the Complaint, the Court must accept all of the allegations as true in ruling on the motion.

4. Motion to Dismiss uses a circular argument in fighting a straw man.

The argument presented by the defendant as their basis for the motion to dismiss can be summarized as follows – Plaintiffs can not challenge the eligibility restriction of the CIP, which denies independent authors and small publishers access to large libraries and book vendors, because that eligibility restriction prevents plaintiffs from being eligible for the CIP. There is

little to be said to that, except to respectfully refer the Court to the below discussion of the property rights taken by that eligibility restriction.

5. Summary of asserted property interests taken by the complained of CIP restriction.

To accept once again defendant's characterization, plaintiffs must have "a distinct property interest in the item that was allegedly taken at the time it was taken" (Defendant's Brief, page 7). The following is therefore a summary of the main property interests taken from plaintiffs by the CIP eligibility restriction which denies the benefits of the CIP program to all book creators and disseminators except for a specific set of commercial enterprises. The Court is respectfully referred to the further arguments in support of the Cross-Motion for Summary Judgment for more detailed discussion of the same property interests.

a. Taking of author's and publisher's fundamental property right in author's creation

An author's property rights in his work have been recognized since writing began and are certainly backed today by American "intellectual property" law. It is hard to credit that the defendant denies its existence in this case. Part and parcel of these rights is the ability of their holder to transfer rights and property, to control the property and its development, and to benefit from its value. The property value of a book is realized by that book being read and bought.

Likewise, a publisher who contracts with an author receives a transfer of those property rights, not merely interest in the book as a commodity but, at least in the case of old-style publishers, the interest in having the book read by as large a swath of the public as possible. Certainly in this case, where the publisher is indeed the author, all of the same property rights are as relevant to Overview Books as to Lev Tsitirin.

As stated in the CIP program's documentation materials, if a book is unable to enter the CIP program, it will be ineligible for inclusion in the holdings of most libraries and will not be distributed by larger vendors. Moreover, the majority of influential publications have stated rules or unofficial policies that preclude them from reviewing a book that is not easily available to the public – the fact that books without CIP are unavailable both in libraries and for distribution by major vendors squarely prevents these non-CIP books from being considered for review.

Without reviews, readers will not know to look for the non-CIP book even if they happen into the rare store that will sell it. Yet another opportunity for publicity is provided by awards, among the most prestigious being those given by the Library Association. Once again the non-CIP book is ineligible, since a requirement for consideration is library availability. Thus, every possible route for the book getting to the public is systematically blocked in a vicious cycle that starts with the inability to market to the public libraries.

As the CIP eligibility requirement which is here complained of states that only publishers who have already published books by three authors are allowed to register for the CIP, the only author who is able to derive any benefit from his creation is one who has transferred his rights to such an approved publisher. Any author who does not want to give up his intellectual property rights to an approved publisher or is unable to do so (which is, in fact, the usual situation), or prefers a publisher who is not approvable, will lose all of that book's property value. Likewise, a publisher who is not approvable, will be unable to realize any value in a book that they have undertaken to work with.

This CIP eligibility requirement is thus a taking under the Fifth Amendment in that it takes away all of the author's and related small publisher's ability to benefit from their property in the author's creation.

b. CIP is a license regulating First Amendment Expression

As described above, a book that does not participate in the CIP program is ineligible for the main library and vendor systems. The CIP thus acts as a gatekeeper to the public, a license that controls the availability of an author's and publisher's expression. As such, the CIP may only regulate in matters of "time, place, and manner" and may not regulate on the basis of viewpoint or membership in a given group. Certainly all comers who fulfill such neutral regulations must be able to qualify for the license. But the only restriction which the author and publisher in the herein case are unable to fulfill is the restriction on the type of applicant itself. As plaintiffs here were ready and able to fulfill all "time, place, and manner" requirements that license was plaintiffs' property and its denial based on their identity was a taking under the Fifth Amendment of the United States Constitution.

B. Repressing Expression through Suppression of Independent Publishing

Commonly familiar to those who followed the political developments in the former Soviet Union, and synonymous with the heroic fight for liberty, is the term "Samizdat." A grand word, it evokes images of heroes defying the state by passing along books created on a typewriter and multiplied by carbon copying. But in fact "Samizdat," directly translated, simply means "Self Published."

In creating laws to suppress speech outside of the official channels, the "totalitarian" regimes unwittingly created figures of epic heroism and slowly, inexorably led to the downfall of the same official channels. America's own publishing oligarchs have been much smarter in shoring up their power through the establishment of unquestioned official channels. They have harnessed the great power of derisive minimization.

In America, the word “Self Publication” is otherwise rendered as “Vanity Press” and the author and work published outside of the official channels is thus reduced to something less than worthy of attention. Ignoring the variety of an author’s interests in controlling his message, his expression, even the income that his creation generates, we have commonly come to regard our American Samizdat work as something unworthy of attention – an exercise in narcissism, a mere “booklike object” (according to Mr. Steve Wasserman of the Los Angeles Times, Exhibit ??) – not a “real book” published by a “real publisher.”

The complained of eligibility restriction of the CIP program expresses the government’s acceptance of this baseless paradigm of superiority of the official channels of expression and implements a vicious cycle of support for this paradigm – very effectively suppressing the activity of would-be authors and publishers and at the same time lending further credence to the derisive minimization paradigm by implementing it into law.

C. Summary Judgment for Plaintiff is Appropriate

There are no facts genuinely in dispute.

Pursuant to RCFC § 56 (c), as none of the material facts of the case, described above and stated in Mr. Tsitrin’s Affidavit and the Proposed Findings of Uncontroverted Fact, can be genuinely in dispute and upon all of the arguments herein, plaintiffs respectfully request that judgment for plaintiffs be rendered forthwith.

D. Identifying a Fifth Amendment Taking.

The Takings clause of the Fifth Amendment states “nor shall private property be taken for public use, without just compensation.” Thus, provided that the government acts “for public use” (discussed below) this clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power ... [by securing] compensation in the event of

otherwise proper interference amounting to a taking.” First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-315 (1987).

Property, for purposes of this clause is not defined as simply a physical object but is used more richly “to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” United States v General Motors Corp., 323 U.S. 373, 377-378 (1945)

While the most “paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property” Lingle v Chevron USA Inc., 544 U.S. ___ (2005), it was already recognized by the nineteenth century that such a narrow interpretation would cause “a very curious and unsatisfactory result, if ...it shall be held that, if the government refrains from the absolute conversion of real property... it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation.” Pumpelley v Green Bay Co, 13 Wall. 166, 177-178 (1872) (quoted in First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California, 482 U.S. 304 (1987)). Thus, it is in fact the degree of damage to the owner of property rather than any gain to the Government that defines a regulation as a taking. United States v General Motors Corp., 323 U.S. at 378 (“deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking”).

The case law has defined three general types of takings:

(1) The paradigmatic physical invasion of property. Importantly, even the smallest such invasion (like being required to allow the installation of a cable box) will be considered a compensable taking. Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

(2) A regulation that, without the physical taking, deprives the owner of “all economically beneficial use” of property. *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992).

(3) Takings which do not fall into the above two fairly definite categories are governed by a set of standards set forth in *Penn Central Trans. Co. v New York City*, 438 U.S. 104 (1978): (a) economic impact on the landowner, (b) the extent to which the regulation interferes with “distinct investment-backed expectations”, (c) the character of the government action.

Two crucial qualifications to the above definitions were provided in *Palazzolo v Rhode Island*, 533 U.S. 606 (2001):

(1) “Assuming a taking is otherwise established, a state may not evade the duty to compensate on the premise that the [owner] is left with a token interest.”

(2) The “investment-backed expectations” rule was substantially explained to prevent the state from escaping its obligations by being “allowed, in effect to put an expiration date on the Takings Clause.” Citing earlier language that “a State, by *ipse dixit*, may not transform private property into public property without compensation” *Webb’s Fabulous Pharmacies, Inc. v Beckwith*, 449 U.S. 155, 164 (1980), the court in *Palazzolo* said that limiting such value to owners of the property at the time the regulation was enacted would “work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to regulation.”

Because “[f]uture generations, too, have a right to challenge unreasonable limitations on ...use” the so-called “investment-backed expectations” value must survive purchase and inheritance and can rightfully be claimed by an heir, successor, or post-enactment owner.

In addition the Court has recognized that the takings clause also mandates compensation for a temporary appropriation of property rights – “‘temporary’ takings ...are not different in kind from permanent takings” *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*, 482 U.S. at 319; Cf. *Kimball Laundry Co. v United States*, 338 U.S. 1 (1949); *United States v Petty Motor Co.*, 327 U.S. 372 (1946).

Finally, if the government abandons a taking, or if the government taking is found to be illegal, compensation is likewise mandated on the model of the temporary taking. *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*, 482 U.S. 304 (1987).

E. The CIP Eligibility Requirement is a Taking of the Author's and Publisher's Intellectual Property.

1. Fundamental Property Rights in artistic creation are integral to the flourishing of First Amendment Expression.

The property right of an author in his creation has been acknowledged since the inception of writing. Pauper, slave, prisoner of war, a book's creator could reap great benefits (a pardon, wealth, knighthood, immortality) from that creation and, where the king's justice was approachable, a thief of such rights was punished to the barbaric extent of the law.

In 1511, Albrecht Durer “Self Published” a book of woodcuts with the following warning:

“Hear, you pirate of other people's work and you thief of artistic property, who wants to copy my work with insolent hands: beware, because you should know that it was conceded to me by the Emperor Maximillian that whoever dares to copy these woodcuts or to sell them within the frontiers of the Roman Empire, whether by contempt or by the crime or avarice, will be heavily punished after all the goods have been confiscated”

William H Schab Gallery, *Catalogue Forty-five: Great Master Drawings and Prints* (circa 1975) Item 54 “Albrecht Durer (1471-1528) The Apocalypse. 16 woodcuts including title. The edition of 1511 with the Latin text on verso [offered in loose sheets]”

Likewise, a 1513 publication of Caesar's Commentaries includes edicts from pope Alexander VI and pope Julius II setting forth the penalty of excommunication for “piracy or counterfeiting” of the publisher’s books. (Harvard College Library Department of Printing and Graphic Arts Catalog of Books and Manuscripts Part II: Italian 16th Century Books compiled by Ruth Mortimer, commonly known to bibliographers as "Mortimer Italian", catalog number 96: Caesar, *Commentariorum de bello gallico libri viii...* Venice, Aldo Manuzio and Andrea Torresano, April 1513. Papal edicts cited on title page and printed on leaves B2r-B4r)

The two popes and emperor mentioned above all recognized the great value of the works in question and likewise recognized that a strong protection of the author’s and publisher’s property right in the work was imperative for the encouragement of further works.

Of course, our modern “intellectual property” law is implemented with the same underlying rationale that the recognition and protection of property rights in First Amendment Expressive creations is imperative for the continued flourishing of such First Amendment Expression. Thus, for example –

17 USC § 201. Ownership of copyright (d) Transfer of Ownership. -

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

Likewise, see generally the Tucker Act itself at 28 U.S.C. § 1498, protecting intellectual property from infringement by the US government. It has specifically been held that an action for intellectual property infringement under 28 U.S.C. § 1498 is an eminent domain action with damages measured as a reasonable royalty based on “what the owner has lost, not what the taker has gained” *Leesona Corp. v. United States*, 599 F.2d 958 (Ct. Cl.), cert. denied, 444 U.S. 991

(1979). The Publisher's right, based on his contract with the author is recognized as a property right for purposes of the Takings Clause by *Lynch v United States*, 292 U.S. 571 (1934).

The critical need for a strong recognition and protection of property rights as integral to the flourishing of unfettered intellectual expression is felt (and unhappily quite well illustrated) in the newly free countries of the former Soviet Union. In his article "Secondary product, or a mean spirited comment on V.Shpakovsky's 'Summer of 1223 – Battle on the Kalka'," the historian Alexander Lemeshko laments:

In any event, to the self-serving complaints of Vladimir Olegovitch Shpakovsky about the lack in our country of a series like "Osprey," with which he begins his "Eastern Knights" I can only say this:

The release of such books in our country will not be realized until the time comes that there is a fundamental change in the relationship to intellectual property.

Slapdash hacks and plagiarists, who quickly manufacture and "push" cheaply the fruits of the labor of others do not aid in the appearance of quality popular works in Russian, and this niche is slowly and surely being filled by "secondary product," product that is quickly manufactured, but smells quite foully.

Tozhe Gorod (2003) (web version available at www.tgorod.ru/index.php?topgroupid=2&groupid=17&subgroupid=&contentid=269)¹

Thus, ancient "natural" law, modern American statutes and case law, and the practical experience of new democracies all establish an author's and contracted publisher's property right in artistic works and illustrate that this must be a robust property right and that this right is an integral part and parcel with the interests of our society in the uncompromised free exchange of expressive ideas. That is to say that the Fifth Amendment guarded property right in a book is fully integral with the First Amendment rights of expression of author and publisher.

¹ Article in Russian. Translation approved by author.

2. CIP eligibility requirement is therefore a taking of author's and publisher's property right in author's creation.

As stated in the CIP program's documentation materials, where a book is unable to enter the CIP program, the book will be ineligible for the libraries and kept away from the larger vendors (Proposed Findings of Uncontroverted Fact ¶ ??).

Moreover, the majority of influential reviewers have stated rules or sometimes less official policies that they will not review any book which is not easily available to the public. Thus, in his speech, parts of which are attached hereto, Mr. Sam Tanenhaus, Editor of The New York Times Book Review, said quite simply that self-published and print-on-demand books will not be considered for a review (Appendix G, p. 3, fragment 4). After he was pressed on the subject and found himself at a loss, he was rescued by a representative of Publisher's Weekly who happened to be in the audience. Quite concisely, she explained that "the problem with the self publishing is the distribution" – if the book was to be reviewed, it needed to be easy to find for the person who had read the review (Appendix G, p. 3, fragment 5). After she suggested the answer, Mr. Tanenhaus of The New York Times found himself in full agreement. Of course, largely at fault for this lack of distribution is the fact that, specifically due to the lack of CIP, the books without CIP will be unavailable in libraries and for distribution by the vendors.

As Mr. Tanenhaus said, even a bad review is quite good for book sales (Appendix G, p. 2, fragment 2). Without reviews, readers will not know to look for the non-CIP book even if they happen into the rare store that will sell it. The power of reviews in driving sales is implied as a given when Andre Schiffrin laments the strict rules of a chain bookseller "that if a book did not sell a certain number ...during the first week ...it would be moved ...and then returned. It did not matter if the reviews were late" (Schiffrin, Andre "Market Censorship" in Atkins, Mintcheva, *Censoring Culture: Contemporary Threats to Free Expression*, The New Press, New York,

2006). Further, bookstores who do have the freedom to buy their own stock, look to those same review publications to determine what's hot (Appendix G, p. 2, fragment 1) and thus what to buy.

Yet a final opportunity for publicity is normally provided by awards, among the most prestigious being those given by the Library Association (pretty close to household names like the Caldecott Medal and "Notable Books"). As with reviews, it is a given that awards (even nominations for awards) will generate guaranteed sales. But again, since one of the requirements for consideration is library availability, the non-CIP book is not eligible to compete. Thus, every possible route for the book getting to the public is blocked in a vicious cycle which starts with the inability to market to the libraries.

Clearly, due to the operation of the CIP program, the current state of publishing is such that a non-CIP book will be left valueless, irreparably and permanently injured "in effect, subject it to total destruction." *Pumpelley v Green Bay Co*, 13 Wall. 166, 177-178 (1872) Of course, as the devil said in *The Master and Margarita* – "Manuscripts do not burn." (Mikhail Bulgakov, *The Master and Margarita*, Moskva, 1966) and so doubtless defendants will be able to find the odd sale, or even, doubtfully, a success or two, to point out that value remains, but any of these are the results of a unique author's heroism and the unlikeliest of chances. They are precisely the "token interest" contemplated in *Palazzolo v Rhode Island*, 533 U.S. 606 (2001). In *Reno v ACLU*, 521 U.S. 844 (1997) the Court found that requiring the providers of Internet Pornography to implement child proofing by demanding a password, or requiring a credit card, or to build in some identifier that would be picked up by parental blocker software, was too heavy a burden and would sufficiently chill First Amendment expression as to be unconstitutional, this is certainly the case with whatever token value may be found here.

The CIP eligibility requirement, which is here complained of, states that the only entities allowed to register for the CIP are those publishers who have already published books by three authors. This means that the only author who is able to derive any benefit from his creation is one who has transferred his rights to such an approved publisher. However,

“The right to exclude others is generally ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984), quoting *Kaiser Aetna* 444 U.S. 164, 176 (1979).

So the CIP eligibility regulation quite directly demands that the author make the hard choice to give up this right or to give up the value of the book. An author who does not want to give up his intellectual property rights to one of the described approved publishers, or an author who finds himself unable to do so (which is, in fact, the usual situation), or an author who wanted to deal with a publisher who is not currently approvable, will lose all of that book's property value. Likewise, a publisher who is not approvable, will be unable to realize any value in a book that he has undertaken to work with.

This CIP eligibility requirement is thus a taking under the Fifth Amendment in that it takes away all of the author's and related small publisher's ability to benefit from their property in the author's creation.

F. Understanding Property Rights in a Book in Light of the Demands of the First Amendment.

As discussed above, the definition and understanding of the property rights in a book is fully and inherently tied together with the rights granted by the First Amendment and the social goals embodied in it. The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

In the realm of freedom of speech and the press, the case law has distinguished between commercial and non-commercial speech. Commercial speech is generally “speech proposing a commercial transaction ...the offspring of economic self-interest” Central Hudson Gas & Elec. V. Public Serv. Comm'n, 447 U.S. 557 (1980) – it is essentially advertising.

As this “commercial speech” has been held to be less central to the “unfettered interchange of ideas for the bringing about of political and social changes” New York Times Co. v Sullivan, 376 U.S. 254 (1964), a lower standard of protection has been afforded to it than to non-commercial speech. Nevertheless, even this lower standard requires some substantial testing of the government regulation. The criteria for testing the constitutionality of a statute impacting commercial speech was well set out in Central Hudson Gas & Elec. V. Public Serv. Comm'n, 447 U.S. 557 (1980) as a four part inquiry:

- (1) The speech must concern a lawful activity and not be misleading.
- (2) The government interest in regulating the speech must be substantial.
- (3) The regulation must directly advance the asserted government interest.
- (4) The regulation must be no more extensive than is necessary to serve that interest.

It must be noted that “commercial speech” is not to be confused with “commercial interest” in protected speech. “Commercial speech” is not at issue in the case here before the Court but rather the full-fledged First Amendment protected expression Metromedia, Inc. v San Diego, 453 U.S. 490 (1981).

In the case of non-commercial speech, the Courts have made one other area allowing for a lowered standard of regulation – commonly termed “time, place, and manner” regulation. That is to say regulation that does not address the content of speech but the forms used. Restrictions that can properly be considered in this group are those that “are justified without reference to the

content of the regulated speech... serve a significant governmental interest, and ...leave open ample alternative channels for communication of the information.” Virginia Pharmacy Board v Virginia Citizens Consumer Council, 425 U.S. 748 at 771 (1976)

Very importantly, the existence of a reasonable alternative opportunity for speech does not excuse a regulation once some content-based criteria is present for that regulation Reno v ACLU, 521 U.S. 844 (1997) “the Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books” (the choice of example is appropriate here, where we are forced to argue that the government may not prevent independent authors from publishing books on equal terms with established publishers).

Outside of these two specific exceptions, the Court must apply strict scrutiny to governmental regulations impinging on speech and the press, working on the assumption “that government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” Reno v ACLU, 521 U.S. 844 (1997) Even in the situation where there are recognized problems that may be solved by government intervention “Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer ‘the power of reason as applied through public discussion’ and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation’s press.” Miami Herald Publishing Co. v Tornillo, 418 U.S. 241 (1974)

G. CIP Eligibility Requirement is a Taking of Author's and Publisher's Property Right to a Subsidy for First Amendment Expression and License Which Regulates It.

1. CIP - subsidy for First Amendment Expression or appointment of Government speakers.

As described in the Proposed Findings of Uncontroverted Fact and in the Statement of the Case above, the CIP provides a substantial financial windfall to the entity who makes their book part of the program (including two worldwide, public information – advertising campaigns). Current case law provides two paradigms for understanding the relationship between the government and private actor where the private actor benefits financially.

The first is that by funding the speaker, the government has established a governmental program with the speaker charged with delivering a governmental message. Clearly, if the government is the speaker and the private party is simply the government's mouthpiece, substantial regulation is permitted, including thoroughly viewpoint based regulation. *Rust v Sullivan*, 500 U.S. 173 (1991). The current CIP regime, where an author must surrender his creation to an approved other, certainly feels that way. In its opinion invalidating an Internet "decency" statute, *Reno v ACLU*, 521 U.S. 844 (1997), the court described an evocative image of a cadre of private citizens who would have acquired the power to censor – "It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who may simply log on and inform the would-be discourses..." Largely, this is the case at hand here – As the author is forced to go to the official group of publishers and present his manuscript for them to publish, and as they are rightly free to reject that manuscript *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974), the current CIP structure confers broad powers of censorship on this approved set of publishers. But it surely cannot be correct that the entire established base of the American press is meant to be turned into a group of government

agents. Putting every publisher who benefits from the CIP into the role of speaker for the government would thoroughly invert every notion of a free press.

The alternate paradigm is that the substantial benefits of the CIP program are a subsidy to private speech. The stated purpose of the CIP was “to serve the nation’s libraries by cataloging books in advance of publication ...saving libraries the time and expense of individually cataloging each book they acquire” and aid them in focusing on “titles that are most likely to be widely acquired by the nation’s libraries.” Thus, inasmuch as the CIP is simply a subsidy (CIP as a “license” is analyzed below) it is a subsidy to advance book publishing and book availability through the libraries – to facilitate private speech. *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001); *Rosenberger v Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

When, as here, the government uses or attempts to regulate a particular medium, the Courts have sought guidance from that medium’s accepted usage to prevent Government regulation from distorting its usual functioning. “The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium.” *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001); *FCC v League of Women Voters of Cal.*, 468 U.S. 364 (1984) By restricting entry into the program to specific types of entities, the government distorts the medium of the press by artificially creating “more valid” and “less valid” types of expression. The restriction shores up a thoroughly artificial structure whereby books which come from publishers who have published the work of more than three authors are “real” books – and may appear in libraries and other book venues, while other books are somehow “unworthy” of full recognition as books and thus “unworthy” of being allowed access into the various public access venues – the “market places of ideas”. This is a thorough subversion of the normal functioning of a free press and therefore the CIP regulation

which restricts eligibility for the program to books from publishers who have previously published three or more authors is Unconstitutional as contrary to the First Amendment. *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001).

2. CIP is a license regulating First Amendment Expression.

As described above, a book which does not participate in the CIP program is ineligible for the main library and vendor systems. The CIP thus acts as a gatekeeper or license which regulates the availability of an author's and publisher's expression to the public. Such pre-publication licensing of books takes us back to the very earliest debates that brought about the creation of the First Amendment. It is at this point uncontroversial that pre-publication restrictions of the press are unconstitutional even under a plausible threat to national security *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The only permissible kinds of licenses of free speech are purely technical ("time, place, and manner") regulations which may sometimes be necessary for regulation of traffic and order issues which may be attendant to free speech expression. For the most part, this sort of possibly legitimate regulation attends public protests, with situations of street congestion, security, and excessive noise; seldom, this may be attendant to substantially public displays – like billboards, which again implicate administrative issues such as traffic.

However, as described at point F above, the courts strictly scrutinize any licensing scheme to confirm that while the government agent "has a legitimate interest in regulating the noncommunicative aspects of a medium of expression ... proper judicial role is to conduct 'a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.'" *Metromedia, Inc. v San Diego*, 453 U.S. 490 (1981). Any such administrative regulation loses its legitimacy as soon as it attempts to "evaluate the strength of,

or distinguish between various communicative interests [of non-commercial speech]" *Carey v Brown*, 447 U.S. 455 (1980). Thus, regulations must be struck down where they discriminate "among different users of the same medium" *Police Department of the City of Chicago v Mosley*, 408 U.S. 92 (1972) and were struck down where they allowed only labor protestors *Mosley; Cox v Louisiana*, 379 U.S. 536 (1965), denied park permits to Jehovah's Witnesses *Fowler v Rhode Island*, 345 U.S. 67 (1953); *Niemotko v Maryland*, 340 U.S. 268 (1951), created a list of permissible billboards *Metromedia, Inc. v San Diego*, 453 U.S. 490 (1981).

Thus, the CIP program, which directly controls the access of books to libraries and vendors (and somewhat less directly to the rest of the "marketplace of ideas"), must be available to all comers, limited only to thoroughly technical issues strictly necessary to the operation of the program (perhaps items like font, paper quality...).

3. CIP eligibility requirement is therefore a taking of author's and publisher's property right to the CIP license and subsidy.

With plaintiffs having properly attempted to apply for the license and subsidy, and having been ready and able to fulfill any possible neutral requirements of the program, plaintiffs properly had the property right to the CIP license and subsidy and the CIP eligibility requirement which improperly denies access to independent authors and small publishers is a taking of that property right.

H. CIP Eligibility Requirement is Illegal as a Taking Against Public Interest.

1. Public Interest Criteria for a Taking

As discussed above, a government regulation may take property (with compensation) provided that the taking is in the public interest.

The determination of whether a public interest for the taking existed is based on rational-basis review. A regulation will be struck down upon a clear showing that its public benefits were only incidental or pretextual. *Kelo v New London*, 125 S. Ct. 2655; 162 L. Ed. 2d 439; 2005 U.S. LEXIS 5011 (2005). In his concurrence, Justice Kennedy clarified that such a clear showing would exist where “the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose...”

2. CIP eligibility requirement is irrational with respect to the overall program.

While the CIP program clearly has the laudable public interest purpose of enhancing the ability of libraries to provide services and hence to increase access by the public to communication and information, CIP eligibility restriction which prevents entry into the book market by independent authors and new businesses while shoring up and giving counter-competitive advantages to established publishers runs directly contrary to that purpose by limiting the types of information available. The CIP eligibility restriction is thus irrational at the very basic level of opposing to the purpose of the program as a whole.

3. Public Interest in encouraging business and enhancing free market competition

In difficult cases, the public interest has been held to consist of the need to expand the ability of new businesses to enter and compete in the pesticide market *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), to eliminate a long-standing “land oligopoly” and promote fair competition in the residential real estate market *Hawaii Housing Authority v Midkiff*, 467 U.S. 229 (1984), to promote economic opportunity and development in a stagnant neighborhood *Kelo v New London*, 125 S. Ct. 2655; 162 L. Ed. 2d 439; 2005 U.S. LEXIS 5011 (2005); *Berman v Parker*, 348 U.S. 26 (1954).

The CIP eligibility restriction which purposefully prevents entry into the book market by independent authors and new businesses while shoring up and giving counter-competitive advantages to established publishers thus runs directly counter to generally applicable public interest of American society of opening markets and enhancing competitive opportunity. It is in direct opposition to all of the case law establishing public interest government takings.

4. CIP eligibility requirement is directly in opposition to the long standing, fundamental public interest of promoting the free exchange of ideas

Approximately thirty two years ago, in discussing the facts of *Miami Herald Publishing Co v Tornillo* 418 U.S. 241 (1974), Justice Burger described in some detail the concentration and conglomeratization of the nation's newspapers and press media as a whole, noting with regret the increasing monopolization of newspaper markets and dwindling public access, leading to slanted and biased reporting without the possibility for correction. "The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse..." (quoting from "The Great Rights" 124-125, 127 (E. Cahn ed. 1963). Nevertheless, the Supreme Court had to strike down the government regulation which was attempting (consistent with the public interest takings cases discussed above) to solve the problem by forcing newspapers to grant access to those with contrasting views. Of course, the difficult decision in that case was necessary as

"we have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle... Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."

Well, the problems of conglomeratization and lack of access certainly have gotten worse (as discussed below) but, on the other hand, with the advance of technology, there has also been

a move towards the democratization of the publishing process with individuals now able to create viable publications with limited resources (Appendix G, p. 6).

Paradoxically, in the face of the normal public interest view of encouraging competition and expanding the accessibility of markets, and in the face of our two-hundred year strong specific public interest commitment that “presume[s] that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it” *Reno v ACLU*, 521 U.S. 844 (1997), and likewise, against the stated interests of the CIP program as a whole, the complained of eligibility restriction’s only purpose (certainly its only result) is to undermine the tendency of the publishing market toward democratization (Appendix G, p.3, fragment 5) and to shore up the conglomerates, “to give large publishers exclusive access to limited and valuable library acquisition funds, to hand them exclusive business opportunities with vendors who prefer CIP, and to push author-publishers and small publishers away from library acquisition funds and book markets” (Appendix A, p.8, ¶ 39) in effect, to substantially deprive the public of the majority of possible discussion and ideas.

a. The increasing commoditization of the publishing market.

Andre Schiffrin’s article “Market Censorship” in Atkins, Mintcheva, *Censoring Culture: Contemporary Threats to Free Expression*, The New Press, New York, 2006) goes into a fair amount of detail about the transformations of the publishing field in recent years. Companies have steadily become larger and more focused on a “scientific” view of economic self interest. Choices about new acquisitions have often been transferred from staff who are interested and educated about books to staff trained in business without book specific knowledge or interest. Book prices are raised precipitously with a change in philosophy from the desire to get the largest number of books to the largest number of people, to the desire to get the largest profit

with the smallest input. Similar trends in book selling have led to a vicious cycle of pressure from bottom-line driven chain-store booksellers to bottom-line driven publishing multinationals, while price fixing schemes have been used to push small booksellers and small publishers out of the market. With all of these trends in place, it is virtually impossible for a new author who can not offer a guarantee of return to be published, and, in fact, whole divisions, dealing with whole genres of books are often eliminated as unprofitable.

b. Its not what you write, its who you know.

In the summer of 2003, Stephen King wrote in an Entertainment Weekly column “‘The Memory of Running’ is the best novel you won’t read this year... So why can’t you read it? Because – so far, at least no publisher will touch it with a 10-foot pole.” Within weeks of that article, Ron McLarty, the writer of the mentioned book, had a two-book deal worth over Two Million Dollars (after a bidding war by book companies). Mr. McLarty was 56 years old and had been unsuccessfully trying to get his work (nine novels, 44 plays, and a number of poems) published for thirty-five years (Appendix F, p.6).

While Mr. McLarty’s is a stirring “Cinderella Story” of the right guy getting what he deserves, “Bombshell Blowback” (Appendix F, p.11) is the opposite – about how a group of talent-less hacks with business savvy and the right connections managed to subvert a newspaper’s integrity.

The story that was lately all over the news, about how Oprah and the book buying public were hoodwinked by a fake junkie memoir (“Picking up the Pieces” from Slate.com, Appendix F, p.13) is somewhere in between. According to Mr. Mnookin of Slate, “A Million Little Pieces” was originally written as a novel and, after the author was rejected by seventeen publishers, he was told by Doubleday’s Nan Talese that she would publish the book if he recast it as a memoir.

The author was picked up, but only after agreeing with the interested big-name publisher to perpetrate his fraud on the public.

The enclosed two articles from “The Sunday Times – Britain” describe an experiment where novels which are generally recognized as great works of literature, winners of prestigious awards, were submitted as new works by aspiring authors. There were twenty rejections and one qualified expression of interest. These articles make the most “scientific” case to prove that the established publishers have neither skill nor resources to truly acknowledge the work they receive and to recognize its value and potential.

The publishers are simply swamped, unable to deal with the submissions, and feel too keenly a perceived commercial pressure so they focus on celebrity and marketability, leaving quality to the wayside. This problem of over-focus on celebrity is lamented by Steve Salerno in *SHAM: How the Self-Help Movement Made America Helpless*, Crown, June 21, 2005. As he said in his June 28, 2005 interview on WNYC-Radio (Appendix G, p.4) “I wonder whether somebody like Dr. Phil, or particularly John Grey has the credentials to be giving people advice on dieting – When there are so many other people who have made this their lives work...– who can’t get a book deal – ...if its because of celebrity that we’re trusting Dr. Phil to tell us how we should be eating, ...that’s something that we need to take a sober look at.”

c. By limiting the CIP to the established publishing conglomerates, the quality and breadth of public discourse is negatively impacted.

As discussed above, the established publishing houses are currently faced with a number of market forces and social developments that work to substantially limit their ability to provide quality books. On the other hand, contrary market forces and technological advances have created a more “democratic” infant industry of independent authors and small publishers who are

trying to fill the gap. By limiting the CIP to established publishing conglomerates, the CIP eligibility requirement does a substantial disfavor to the public and contradicts the aims of the CIP program as a whole.

I. Calculation of Compensation for the Taking.

The complete calculation of the amount of compensation due is provided in the Affidavit of Lev Tsitrin ¶ 52 – 57 (Appendix A, p. 10, 11).

J. Ancillary Jurisdiction to provide complete relief.

While this Court's jurisdiction is primarily based on monetary claims upon money mandating statutes, the Court also has ancillary jurisdiction under 28 USC § 1491 (a)(2):

“ ...To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just...”

Thus, this Court has the jurisdiction, and is respectfully requested to issue an order that the CIP eligibility regulations be modified to allow entry to the CIP program of books submitted by independent authors and new publishers irrespective of the number of books previously published. Further, the court has jurisdiction to order that, in order for as complete a relief as possible to be afforded, a CIP record be provided to the plaintiffs for *The Pitfall of Truth: Holy War, its Rationale and Folly* in the form and numbered to match the data as currently printed – in order to avoid further damages that would arise if plaintiffs are forced to reprint all of the existing books.

V. CONCLUSION

WHEREFORE, Plaintiffs respectfully request entry of judgment pursuant to RCFC § 56, holding that the complained of CIP regulation is a Taking of the book author's and small publisher's property under the Fifth Amendment of the US Constitution and awarding compensation to the plaintiff in the amount of Five Hundred Thousand Dollars (\$ 500,000.00),

AND further that the complained of CIP regulation is unconstitutional, and providing such other and further injunctive and declaratory relief, including an order to modify the CIP eligibility regulations to eliminate the complained of eligibility restriction and to retroactively register *The Pitfall of Truth: Holy War, its Rationale and Folly* with the CIP program (using the current format and data as printed on the existing books) and to provide all services appropriate after publication, as consistent with the Court's jurisdiction under the Tucker Act, 28 USC § 1491 and subsequent, as necessary to provide complete relief from the damage complained of and as this Court may deem just and proper.

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