No. 20A-_____

In the Supreme Court of the United States

GEOPHYSICAL SERVICE, INCORPORATED,
Applicant,

v.

TGS-NOPEC GEOPHYSICAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

Don Cruse
Counsel of Record
Law Office of Don Cruse
1108 Lavaca Street,
Suite 110-436
Austin, Texas 78701
(512) 853-9100
don.cruse@texasappellate.com

Rule 29.6 Statement

The applicant, Geophysical Service, Incorporated, states that: (1) it has no parent corporation; and (2) no publicly held company owns 10% or more of its stock.

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TO THE HONORABLE SAMUEL A. ALITO, JR.,
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND
CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to Supreme Court Rule 13.5, the applicant Geophysical Service, Inc. (GSI) moves for an extension of time of 30 days, to and including January 13, 2020, to file a petition for writ of certiorari to review the decision and judgment of the Fifth Circuit in *Geophysical Service, Inc. v. TSG-NOPEC Geophysical Co.*, No. 18-20493 (5th Cir. Sept. 13, 2019) (per curiam). Jurisdiction rests on 28 U.S.C. §1254(1). Absent an extension, the deadline for filing the petition for writ of certiorari would be December 12, 2019. This application is being filed at least 10 days before that date. S. Ct. R. 13.5. The request for extension is not opposed.

1. This case presents important questions of copyright law, including the legal standard for determining the existence and proper scope of an "implied license" when a company in a regulated industry is required to deposit some of its copyrighted works with a foreign governmental regulator.

2. The dispute involves offshore seismographic survey materials created by GSI at its own expense, for the purpose of being licensed at a profit to other energy firms. The Fifth Circuit concluded that, by complying with a depository requirement of Canadian energy law, GSI had thereby conveyed an "implied license" under U.S. copyright law, and that this "implied license" was sufficiently broad for copies of its seismographic works to later be imported into the United States by TGS, a competing seismographic firm.

3. In its first opinion in this matter, the Fifth Circuit observed that this dispute involves "a question left open by *Kirtsaeng I*. … the difficult interpretive puzzle of what it means for a copy manufactured abroad to have been 'lawfully made under this title' within the meaning of §109." *Geophysical Serv. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 795 (5th Cir. 2017) (citing *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013)).

4. The Fifth Circuit explained how "the facts of the instant case supply a good example of the puzzle":

> [A]as in *Kirtsaeng I*, the copies imported into the United States here were manufactured abroad, but unlike in *Kirtsaeng I*, the parties dispute whether those copies were lawfully made. TGS would have us look to Canadian law to determine the lawfulness of the Board's making of the copies—it points to the fact that Canadian law appears to authorize the CNLOP Board to release copies of data submitted to it after ten years. Geophysical asks us instead to look to United States copyright principles … Applying foreign law

> seems to contradict the plain language of §109.... But applying United States law seems to foul the principle that the Copyright Act has no extraterritorial application, and creates some conceptual awkwardness where, like here, the foreign-made copies were made pursuant to some legal regime that finds no analog in United States law."

850 F.3d at 795-96. The Fifth Circuit remanded for the district court to analyze this legal question in the first instance, and then to apply it to the facts of this case. *Id.* at 796.

5. On remand, the district court concluded that, under *Kirtaeng I*, the question of whether copies were lawfully made abroad was controlled by United States copyright principles. *Geophysical Servs. v. TGS-NOPEC Geophysical Servs.*, No. 14-1368, 125 U.S.P.Q.2d 1118, 2017 WL 5598593, 2017 U.S. Dist. LEXIS 192803, at *25 (S.D.T.X. Nov. 21, 2017). Thus, it interpreted the phrase "lawfully made under this title" to "mean that a a copy is lawful if it was made ... in a foreign country in a manner that would comply with Title 17 if United States copyright law applied." *Id.*

7. Applying its view of *Kirtsaeng I*, the district court then granted summary judgment on a "license" defense, concluding that a company like GSI doing business in Canada's energy sector during this time was necessarily granting a copyright license to the Canadian government, not just to use the works for its own purposes, but to make copies of those works for importation back into the United States at the direction of TGS. The Fifth Circuit affirmed on the basis of implied license. Slip op. at 5 & 7 n.5.

8. The case involves important questions about "implied license" and, as the Fifth Circuit observed, one of those questions is how this type of "implied license" defense fits in the framework established by *Kirtsaeng I*, for which "the facts of the

instant case supply a good example of the puzzle." 850 F.3d at 795. When a foreign regulatory regime demands that a copyrighted work be deposited with the government, are copies later made at the direction of a third party "lawfully made under Title 17" such that the copyright owner cannot exclude their importation into the United States?

10. The case also presents a divide between the circuits about who bears the substantive and procedural burdens of an "implied license" defense. For express license, these burdens fall on the party seeking to avoid copyright liability. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989) ("copyright licenses are assumed to prohibit any use not authorized"); *see also* slip op. at 7 n.5 (acknowledging this rule). For implied license, the Fifth Circuit has instead shifted a substantive burden onto copyright owners to "object" to other potentially infringing uses of their work when they deposit a physical copy. Slip op. at 6 & 7 n.5; *cf.* 17 U.S.C. §202 (transfer of a copy "does not of itself convey any rights in the copyrighted work embodied in the object"). Other courts have adhered to the view that, as with express license, proving the scope of an implied license instead turns on whether there was a "'meeting of the minds' between the parties to permit the particular usage at issue." *Jose Luis Pelaez, Inc. v. McGraw-Hill Global Educ. Holdings, LLC*, 399 F. Supp. 3d 120, 141-42 (S.D.N.Y. 2019) (collecting authorities from the First, Fourth, Fifth, and Seventh Circuits divided on the correct legal standard to apply).

11. A 30-day extension to file a petition for a writ of certiorari is necessary so that counsel can appropriately prepare the petition and appendix. The completion of this process has been further complicated by lead counsel's other, previously engaged matters, including ongoing briefing deadlines and argument dates in *Tercero v. Texas Southmost*

University District (5th Cir.); *Jaffe v. City of West Lake Hills* (Tex. Dist. Ct.); *Murphey v. Old Dollar Properties, LLC* (Tex. Ct. App.); and *Stross v. Centerra Homes* (W.D.T.X.).

12. No prejudice would arise from granting this extension, and the requested extension is unopposed.

Prayer

GSI respectfully requests a 30-day extension of time to file a petition for a writ of certiorari, to and including Monday January 13, 2020.

Respectfully submitted,

/s/ Don Cruse

Don Cruse
Counsel of Record
LAW OFFICE OF DON CRUSE
1108 Lavaca St. #110-436
Austin, Texas 78701
(512) 853-9100
don.cruse@texasappellate.com

Counsel for Petitioner