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The Public Domain – Is it going to *The Birds*?

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On January 18, 2012, the Supreme Court confirmed 6-2 that certain works that had entered the public domain could have their copyright restored. *Golan v. Holder*, Case No. 10-545. The works affected are estimated to number in the millions and could include films by Alfred Hitchcock, such as *The Birds*; books by Virginia Woolf, such as *Mrs. Dalloway*; symphonies by Prokofiev, such as *Peter and the Wolf*; and paintings by Picasso, such as *Guernica*.

The decision will not only affect the copyright owners, but also anyone who relies on public domain works, particularly those creating derivative works, reprint publishers, musicians, orchestra conductors, teachers and film archivists.

The case considered the constitutionality of a portion of the Copyright Act, 17 U.S.C. § 104A, that was enacted in 1994 by Congress in order to comply with the international accord, the Berne Convention. Section 104A allows for certain works that had previously entered the public domain to have their copyright reinstated. The types of works are non-U.S. works that were protected in their country of origin, but were not protected in the U.S. for the following three reasons:

. They were exempt from copyright protection at the time of publication (i.e., Soviet-created works).
. They were sound recordings fixed before 1972 (the U.S. did not protect sound recordings prior to 1972).
. The author did not comply with U.S. statutory formalities of copyright under the old 1909 Copyright Act (such as the old requirement of copyright notice).

The case was initiated by a group of orchestra conductors, musicians and publishers who said that they relied on the free availability of such public domain works and challenged the constitutionality of Section 104A. After moving up and back through the district courts and the Tenth Circuit Court of Appeals, the Supreme Court agreed to hear the case. The majority (Justice Ginsburg wrote the opinion) upheld the law, stating that it does not unduly limit the First Amendment and that it supports the underlying purpose of the copyright laws to promote the progress of science and useful arts. The dissent (Justice Breyer wrote and Justice Alito joined) argued that Section 104A does not support the underlying purpose of the copyright laws because it does not directly result in the creation of new works and that the majority failed to take into account the importance of free expression, which would be limited by the extended monopoly being granted to these works.

In practicality, this decision means that the public domain has become simply unreliable and that even where a work has entered the public domain, it may later exit the public domain. This was acknowledged by Justice Ginsburg when she stated, near the beginning of the opinion, that “Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.” For those of you considering use of a copyrighted work, Venable can assist with wading through the complicated public domain analysis and determining whether a work falls within the public domain pursuant to the myriad of rules articulated in the Copyright Act.