Millions of Foreign Works No Longer in the Public Domain: The Supreme Court Upholds 1994 Copyright Law

January 18, 2012 by Anthony Rufo

As the old adage goes, ask a simple question and you'll get a simple answer. So one might think a question like "how long does a copyright last" would merit an equally concise answer like “the life of the author plus 70 years.” Of course, nothing in life is as simple as it seems and anyone even casually familiar with U.S. copyright law knows that how long a copyright lasts may depend on several factors such as when the work was written, whether it was registered or published in the United States, and whether it was the result of individual or corporate authorship. Generally, how long a copyright lasts depends upon what was provided by law at the time the work was created, so a work created in 1925 is treated differently than one created in 1965.

Complication of U.S. copyright law aside, determining when a copyright was applicable has not been a complicated matter for those who wished to reproduce or perform works they did not create. Either the work was under copyright and you paid for the privilege (or otherwise got permission) or it had lapsed into the public domain and could be freely reproduced without cost or consent. Works that were in the public domain yesterday, or last year, or ten years ago, would stay in the public domain because they either never attained copyright protection or the protection had lapsed. That was, until the Supreme Court rendered its very recent decision in the case of Golan v. Holder. Things have now gotten a little more complicated.

U.S. Copyright Law and Works of Foreign Origin

For most of the history of U.S. copyright law, works of foreign authorship have been given substantially less protection than works created in the United States or, in many cases, no protection at all. The United States was a relative late-comer in joining the 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne), having become a member only as recently as 1989. Then, in 1994, Congress enacted Section 514 of the Uruguay Round Agreement Act (URAA), which had the effect of granting U.S. copyright protection to previously unprotected works provided that they were also protected in their country of origin under Berne. This meant that great works of music by the likes of Prokofiev or Shostakovich, paintings by Picasso, and films by Hitchcock previously unavailing of U.S. copyright protection would suddenly be snatched back from the elysian fields of the public domain and reproducing or performing them was going to start costing.

Sensing the far reaching cultural implications of the URAA, Lawrence Golan, a professional conductor, challenged the legislation in court, claiming that it ran afoul of Article I, Section 8, Clause 8 of the Constitution, the so-called Copyright Clause, which empowers Congress “[t]o promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive rights to their respective writings.” Golan argued that granting sudden copyright protection to works already in the public domain did nothing to promote the creation of new works, but rather only granted a benefit for works already created. Additionally, Golan argued that the URAA contravened the principles of free speech and freedom of expression. Now, nearly two decades after the URAA was enacted, the Supreme Court has issued an opinion in the matter and, in a 6 to 2 decision written by Justice Ginsburg, does not agree with Golan -- the URAA passes constitutional muster, in respect to both the First Amendment and the Copyright Clause.
Countless Works Exit the Public Domain

The Court’s decision applies principally to works first published outside the U.S. in Berne member countries between 1923 and 1989 and has a seemingly dramatic effect. It is estimated that millions of works are implicated. Sheet music publishers who could once freely publish certain master works of the 20th century will now require permission. Orchestras which once performed works such as Peter and the Wolf by Prokofiev without having to acquire or pay for a license will now have to do so. In regard to older more obscure works, the mere act of finding an author or his or her successor in interest to request copyright permission might prove to be a monumental or even impossible task. Electronic online databases containing volumes upon volumes of formerly public domain books now have to determine the effect of the URAA. Yet, despite these dramatic results, the High Court’s opinion is a mostly staid affair.

Drawing heavily from and building upon the Supreme Court’s decision in Eldred v. Ashcroft, 537 U.S. 186 (2003), which upheld Congress’s authority to extend then current copyright terms by 20 years, the Golan opinion takes an historical survey of Congress’s actions vis-à-vis copyright and finds no historical precedent, either congressional or judicial, which stands for the principle that Congress may not restore or grant for the first time copyright protection to works which were once in the public domain. Justice Ginsburg, additionally, is cognizant that there is another side to the URAA coin, the fact that U.S. authors benefit by reciprocal copyright treatment in Berne countries. She writes, “Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection.” Ultimately, the Court reasons, each act of Congress related to copyright need not in and of itself serve to promote creativity, but rather, need only contribute holistically to a copyright regime which, overall, has inspirational effect.

Justice Breyer Dissents

In a dissenting opinion joined by Justice Alito, Justice Breyer sides firmly and resolutely with Golan and others who challenged the URAA. He unequivocally believes that the principal purpose of the Copyright Clause is to encourage new authorship. Likewise, he views the removal of works from the public domain as interfering with freedom of speech. Justice Kagan, who presumably had contact with the URAA in her former capacity as U.S. Solicitor General, recused herself.

What This Decision Means to You

For the average person this decision won’t have direct implications, although indirect effects may start to appear. Perhaps that book of French poetry you thought you once found online won’t be available the next time you check. Maybe the concert tickets for your local symphony orchestra will be just a bit more expensive next season, or maybe they won’t be putting on that evening of great works by Russian masters after all. However, for people who have been actively engaged in exploiting twentieth century works of foreign origin, it is always better to be safe than sorry - you should verify whether or not a valid copyright now applies.