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Restoration of Copyright in Foreign Works Passes Constitutional Muster

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A 1994 statute extended U.S. copyright protection to foreign works previously unprotected in the United States, removing an estimated "millions" of foreign works from free, public domain availability. Recently, the Supreme Court of the United States upheld this law despite challenges based on the U.S. Constitution's Copyright and Patent Clause and First Amendment.

In a 6–2 decision that some have criticized as a blow to free speech, the Supreme Court of the United States affirmed a decision by the U.S. Court of Appeals for the Tenth Circuit upholding a federal law that restored copyright protection to foreign works that had entered the public domain in the United States. *Golan v. Holder*, Case No. 10-545, (Supreme Court January 18, 2012) (Ginsburg, J.) (Breyer, J., dissenting, joined by Alito, J.).

Golan concerned the extent of U.S. copyright protection granted to foreign works. The Berne Convention, enacted in 1886, is the major treaty governing international copyright protection. Berne requires member countries to accord foreign works the same copyright protection as works created by its nationals. The United States joined Berne in 1989, but did not protect foreign works as Berne required. As a result, some foreign works never received copyright protection in the United States.

In 1994, to bring the United States into compliance with Berne, U.S. Congress enacted the Uruguay Round Agreements Act (URAA). Section 514 of the URAA (applying mainly to works first published abroad from 1923 to 1989) grants U.S. copyright protection to foreign works of Berne member countries the same term of copyright protection given to U.S. works. The statute restores U.S. copyrights to foreign works that had never received U.S. copyright protection as they should have under Berne. This restoration of copyright effectively removed those foreign works from the U.S. public domain. The statute imposed no liability for any use of foreign works occurring prior to restoration, and provided a grace period allowing anyone to copy and use copyright-restored works for one year following the statute's enactment. Further, the statute included additional protections for "reliance parties," those who had, before the statute's enactment, used or acquired a foreign work previously in the public domain.

In 2001 Lawrence Golan, an orchestra conductor and music professor, along with other conductors, artists, musicians and publishers, brought suit in the U.S. District Court in Colorado challenging § 514 of the URAA as unconstitutional, arguing that Congress had exceeded its authority under the Constitution's Copyright and Patent Clause and the First Amendment by restoring U.S. copyright protection to foreign works that had been public domain. Plaintiffs stated that they had relied for years on the free, public domain availability of foreign works. With an annual music budget for

his university ensemble of only $4,000, Golan's orchestra relies on public domain works for approximately 80 percent of its repertoire. With the enactment of § 514 of the URAA, many orchestras and educators are priced out of performing pieces previously in the public domain. Golan has explained that "[t]he core issue is wanting to have the ability to perform this great body of literature that we used to be able to perform but no longer can. What we used to do was absolutely legal and in concert with the Constitution, and right now what we're being told is that what we used to do is now illegal, you can't do it anymore."

After the district court granted the Attorney General's motion for summary judgment (that § 514 was constitutional), the Tenth Circuit agreed that Congress had not offended the Copyright Clause, but remanded the case for further First Amendment analysis in light of the Supreme Court's 2003 decision in *Eldred v. Ashcroft* (*IP Update*, Vol. 6, No. 1). On remand, the district court granted summary judgment to petitioners, holding that § 514's constriction of the public domain was not justified by any of the asserted federal interests. This time the Tenth Circuit reversed. Deferring to Congress' predictive judgments in matters relating to foreign affairs, the Tenth Circuit held that the law survived First Amendment scrutiny because § 514 was narrowly tailored to fit the important government goal of protecting U.S. copyright holders' interests' abroad.

In upholding the Tenth Circuit's ruling that Congress has the authority to restore the copyrights, Justice Ginsburg, writing for the majority, stated "[n]either 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." Further, the Supreme Court explained that the law merely "places foreign works on an equal footing with their U.S. counterparts."

Concerning the Copyright and Patent Clause, which authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," the majority disagreed with petitioners that the clause requires federal legislation to promote the creation of new works. Noting that it had rejected a nearly identical argument in *Eldred*, the Supreme Court explained that Congress is empowered to determine the intellectual property regimes that overall will serve the general purpose of the clause. In addition to providing incentives for the creation of new works, "the dissemination of existing and future works" serves its purpose. Concerning petitioners' First Amendment objections, the majority determined that free speech interests are adequately protected by the fair use doctrine and the idea/expression dichotomy—the "built-in First Amendment accommodations" of copyright jurisprudence.

In dissent, Justice Bryer, joined by Justice Alito, argued that in enacting § 514 of the URAA, Congress had exceeded its authority "under any plausible reading of the Copyright Clause," because the clause does not authorize Congress to enact a statute that does not provide incentives for creation of new works. Phrasing the issue as to whether "the clause empower[s] Congress to enact a statute that withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly,

educational, or cultural purposes—all without providing any additional incentive for the production of new material," the dissent answered "no."