SUPREME COURT DECIDES *GOLAN V. HOLDER*

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Public Domain?—Maybe Not

When information enters the public domain it is free for anyone to use it—right? Maybe yes and maybe no. This uncertainty is likely the better answer in light of the recent decision by the Supreme Court in *Golan v. Holder* decided January 18, 2012.

The *Golan* case stems from Congressional action that was deemed necessary to bring the U.S. into full compliance with the international copyright agreement known as the Berne Convention (Berne or the Convention), which the United States joined in 1989. The Convention requires member countries to recognize the copyrights of "foreign works" the same way they recognize copyrights by their own citizens.

Congress enacted section 514 of the Uruguay Round Agreements Act in view of Berne, to restore copyright protection to foreign works that fell into the "public domain" in order to harmonize U.S. and international copyright laws, and fulfill the international treaty obligations under the Convention. Justice Ginsburg's majority opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Sotomayor. Justice Kagan recused herself from the case.

Section 514 of the Uruguay Round Agreements Act (URAA) grants foreign authors copyright protection under Berne to works protected in their country of origin, but lacking protection in the United States for any of three reasons: (1) the United States did not protect works from the country of origin at the time of publication; (2) the United States did not protect sound recordings fixed before 1972; or (3) the author had not complied with certain U.S. statutory formalities.

Petitioners are orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works §514 removed from the public domain. They maintain that Congress, in passing §514, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations.

The District Court granted the government's motion for summary judgment that Section 514 was constitutional. On appeal, the Tenth Circuit, affirming in part, agreed that Congress had not offended the Copyright Clause, but remanded for First Amendment review of Section 514. On remand, the District Court granted summary judgment to petitioners on the First Amendment claim, holding that Section 514's constriction of the public domain was not justified by any of the asserted federal interests. On a second appeal, the Tenth Circuit reversed, ruling that Section 514 was narrowly tailored to fit the important government aim of protecting U. S. copyright holders' interests abroad.

The case was then appealed to the Supreme Court which held that Section 514 does not exceed Congress' authority under the Copyright Clause.

The Supreme Court found nothing in the Copyright Clause, historical practice, or its own precedents precluded restoring copyright protection to these public domain foreign works. The Court also rejected the argument

that this revived copyright protection violated the First Amendment.

The majority held that the text of the Copyright Clause of the U.S. Constitution does not exclude application of copyright protection to works in the public domain.

The 2003 case of *Eldred v. Ashcroft*[1] was deemed by the majority to be largely dispositive of petitioners' claim that the Clause's confinement of a copyright's lifespan to a "limited Tim[e]" prevents the removal of works from the public domain.

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In *Eldred*, the Court upheld the Copyright Term Extension Act (CTEA), which extended, by 20 years, the terms of existing copyrights. The text of the Copyright Clause, the Court observed, contains no "command that a time prescription, once set, becomes forever 'fixed' or 'inalterable,' " and the Court declined to infer any such command.[2]

However, in *Eldred*, nothing was removed from the public domain. Instead, copyright protection, for existing protected works, was granted an extended term of another 20 years by the Congress.

According to the majority, the arguments presented by the petitioners in *Golan* were just as invalid as the arguments presented in *Eldred*.

> The copyright terms afforded the foreign works restored by Section 514 are no less "limited" than those the CTEA lengthened. Nor had the "limited Tim[e]" already passed for the works at issue here—many of them works formerly denied any U. S. copyright protection—for a period of exclusivity must begin before it may end.

Justice Breyer, joined by Justice Alito, argued in dissent that extending copyright protection to works previously in the public domain failed to "promote the progress of science" because it provided no incentive for the production of new works. As Justice Breyer wrote in his dissent:

> The fact that, by withdrawing material from the public domain, the statute inhibits an important preexisting flow of information is sufficient … to convince me that the copyright clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute.

The surprising breadth of the court's opinion could be viewed as a warning that no "public domain" work may ever be off-limits for future Congressional activity in the area of copyright protection. ■

[1] *Eldred v. Ashcroft,* 537 U.S. 186

[2] *Eldred,* 537 U. S., at 199.