

Curtain Call: Supremes Bow to Congressional Authority on Copyright Terms

By: Michael L. Raspino, Jeffrey S. Whittle, Erin S. Hennessy, and Matt D. Schneller

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The curtain has closed on judicial review of Congress' authority regarding copyright terms, and now Congress reprises on center stage. The high court, in [*Golan v. Holder*](#),¹ recently bowed to Congress' broad constitutional authority to legislate the duration of copyright terms. Congress can now, under *Golan*, recapture copyright protection for significant volumes of work that have been already made freely available in the public domain, even overriding, in many cases, freedom-of-speech rights. The epic struggle between copyrights and the public domain will play on with Congress in the lead role. The public now must choose: sit and watch Congress or proactively assist in picking new scripts or cast members.

The plot in *Golan* centers on the power of Congress to remove works from the public domain—that body of uncopyrighted works that are property of no one and free to all (e.g., music, books, or artwork that were either outside the scope of copyright to begin with or have expired from copyright protection). In particular, *Golan* directly addresses the constitutionality of Congress' 1994 enactment of Section 514² of the Uruguay Round Agreements Act [hereinafter "Section 514"]. By enacting Section 514, Congress brought the United States into compliance with the dominant international copyright scheme under the Berne Convention but, in so doing, removed a bulk of works by foreign authors from the public domain (e.g., certain symphonies by Shostakovich, books by Virginia Woolf, or artwork by Pablo Picasso).

More specifically, compliance with the Berne Convention required that the United States recognize copyrights in certain foreign works, at least to the same degree as applicable to domestic works. Section 514, therefore, established U.S. copyrights in works by foreign authors that were copyright-protected in the author's home country but not in the United States.³ Reciprocally, this country's compliance with Berne would allow works by United States authors to receive copyright protection in many foreign countries.⁴

As a result of Section 514, countless foreign works—which were previously free for all to use in the United States—suddenly became "copyright protected" in this country. Generally speaking, the public cannot now use such works without risking liability in an infringement action or without compensating the authors or their successors in interest.⁵ Of course, "fair use" of copyright-protected works is permissible, but "fair use" is not an automatic exemption—it is merely an affirmative defense. Accordingly, those engaging in ostensible fair use must still prepare to make their case in court.

The opening credits for *Golan* feature various stakeholders who had formerly enjoyed unfettered access to such works—orchestra conductors, musicians, publishers, and many others. These parties joined as plaintiffs to sue the U.S. Attorney General, hoping to invalidate Section 514.⁶ Plaintiffs alleged that Congress, by enacting Section 514,

had exceeded its authority under the Constitution (*i.e.*, Congress' authority arises under the "Copyright Clause" therein) and, furthermore, had deprived plaintiffs of their First Amendment rights to use works formerly in the public domain. The district court agreed—granting summary judgment and holding that Section 514's constriction of the public domain violated the First Amendment and was unjustifiable by any federal interest. The lower appeals court reversed this decision, however, finding permissible any resultant incidental restriction of First Amendment rights (applying judicial scrutiny applicable to content-neutral restrictions on speech and ruling that Section 514 was narrowly tailored to fit the important government interest of protecting U.S. copyright holders' interests abroad).

Upon petition by the plaintiffs, the Supreme Court stepped in to offer one final showing of the case. The program for the show highlighted two acts to come: (i) whether Congress had exceeded its authority under the Copyright Clause ⁷ by enacting Section 514, and (ii) whether the First Amendment inhibits the recapture of public-domain works authorized by Section 514. If the Court had found a constitutional violation on either of these grounds, Congress might have found its hands bound in further developing the nation's copyright laws. Also, if Section 514 were found invalid, lucrative foreign markets might have seized up for some of the nation's key exports, such as motion pictures, books, online content, and many other types of publications.⁸

The majority's opinion in *Golan* played like a sequel to the recent case of *Eldred v. Ashcroft*, which affirmed the constitutionality of another hotly-contested congressional extension of copyright terms (*i.e.*, the 1998 Sonny Bono Copyright Term Extension Act extended copyright terms by at least 20 years, just in time to keep beloved Disney characters, such as Mickey Mouse, from lapsing into the public domain).⁹ In summary, the *Golan* Court ruled that Congress had steered clear of First Amendment scrutiny and acted comfortably within the bounds of its constitutional authority in its attempt to secure adherence to the Berne Convention. See, *e.g.*, 565 U.S. at ___, slip. op. at 22 ("Full compliance with Berne, Congress had reason to believe, would expand the foreign markets available to U.S. authors and invigorate protection against piracy of U.S. works abroad....").

In the first act, the Court danced around the petitioners' attempts to find nuanced restrictions in the text of the Copyright Clause (*i.e.*, the constitutional authority empowering Congress to enact copyright legislation). Petitioners argued that the constitutional requirement that copyright protection be "for limited Times" mandates an impenetrable barrier to the extension of copyright protection for works that were, for whatever reason, already in the public domain. But this, the Court reasoned, does not mean that a time prescription, once set, becomes forever fixed or inalterable. The Court pointed to several instances throughout history in which Congress had, in fact, protected works that were once freely available.¹⁰ Petitioners also argued that Congress' authority to "promote the Progress of Science and the useful Arts" through copyrights (or better said, to promote learning and knowledge) is limited to spurring the creation of new works—which favors an expansive public domain. The Court also disregarded this theory, reasoning that Congress is more broadly empowered to induce *dissemination*—which favors stronger copyrights—as an appropriate means to promote learning and knowledge.¹¹

The second act, however, provided the showstopper. Petitioners' most impassioned argument—that Section 514 trounced on constitutionally guaranteed freedom of expression—fell flat on the stage. The Court recognized that “[s]ome restriction on expression is the inherent and intended effect of every grant of copyright.”¹² But under *Eldred*, First Amendment scrutiny does not come into play unless the “traditional contours” of copyright protection have been violated. These “traditional contours,” the Court held, were limited to just two doctrines: the “idea/expression” distinction and the “fair use” defense.¹³ Accordingly, the Court declared that there were simply no First Amendment issues to resolve because Section 514 did not disturb either “traditional contour.” In its reasoning, the Court took comfort in that Section 514 did not entirely foreclose use of the newly-protected works but merely required compensation to the author or, alternatively, “fair use.”¹⁴

By holding that First Amendment issues do not arise absent some disturbance of the “idea/expression” distinction or the “fair use” defense, *Golan* slams the door on future First Amendment challenges to copyright terms except in limited circumstances. Specifically, the Court was unimpressed by the attempts of petitioners and other stakeholders to characterize the “inviolability of the public domain” as an additional “traditional contour” of copyright protection.¹⁵ Similarly, petitioners’ novel theory of “vested rights” in public domain works failed to gain traction. 565 U.S. at ___, slip. op. at 28 (“Once the term of protection ends, the works do not revest in any right holder. Instead, the works simply lapse into the public domain.... Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.”).

Even an alternate ending, however, might not have changed the story. The Court seemed prepared to satisfy scrutiny under the First Amendment, for example, by balancing alleged speech restrictions against significant government interests, such as “ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors.”¹⁶ What remains unclear is whether Section 514’s protection of “reliance parties” had any real constitutional bearing. One would assume that Congress baked such provisions into Section 514 so that any restriction on free-speech rights was “no greater than necessary,” which is what the Court would have weighed if First Amendment scrutiny was warranted. Nevertheless, the Court did not suggest that Section 514’s preservation of the “traditional contours” of copyright protection hinged on its protection of reliance parties.¹⁷ Accordingly, under *Golan*, Congress will likely enjoy less judicial pressure to accommodate such protections in future copyright legislation.

As the copyright law develops post-*Golan*, Congress is likely to remain on center stage as long as it follows this simple script: (i) copyright terms must have some outer bound; (ii) the idea/expression distinction must be preserved; and (iii) the fair use defense must remain available. Regarding the first point, the Court suggested that it might be inclined to address concerns that successive copyright term extensions effect a perpetual copyright term if facts evincing some “legislative misbehavior” are properly before the Court.¹⁸ These last two points echo the “traditional contours” of copyright protection, which the Court believes are sufficient to prevent Congress from chilling what is deemed “true free speech.” For example, a hypothetical law requiring the destruction of public domain works would likely violate First Amendment rights by eviscerating the fair use defense.

In the continued struggle between copyrights and the public domain, *Golan* and *Eldred* signal that Capitol Hill is the only show in town. Stakeholders should consider how they can help to revise this script, for example, through greater involvement in the legislative process.¹⁹ In addition, the recent shelving of the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) in light of public outcry suggests that Congress is reading the critics' reviews.²⁰ Nonetheless, the audience should not bide its time for a Supreme Court encore.

¹ 565 U.S. ___, No. 10-545 (2012) (Justice Ginsburg delivered the opinion of the court, in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Sotomayor joined. Justice Breyer filed a dissenting opinion, in which Justice Alito joined. Justice Kagan took no part in the consideration or decision of the case.).

² Pub. L. No. 103-465, 108 Stat. 4809, 4976-80 (1994).

³ A different system of transnational copyright protection was established long ago in the United States. Until 1891, foreign works were categorically excluded from protection by the Copyright Act. Throughout most of the 20th century, the only eligible foreign authors were those whose countries granted reciprocal rights to U. S. authors and whose works were printed in the United States, and protection depended on compliance with notice, registration, and renewal formalities. See Act of Mar. 3, 1891, §3, 13, 26 Stat. 1107, 1110.

⁴ At the time of the opinion, 164 countries adhered to the Berne Convention. *Golan*, 565 U.S. at ___ (slip. op., at 9 n.10). Members of the Berne Union agree to treat authors from other member countries as well as they treat their own. Berne Convention, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, Art. 1, 5(1), 828 U. N. T. S. 221, 225, 231-233. Nationals of a member country, as well as any author who publishes in one of Berne's 164 member states, thus enjoy copyright protection in nations across the globe. Art. 2(6), 3. Each country, moreover, must afford at least the minimum level of protection specified by Berne. The copyright term must span the author's lifetime, plus at least 50 additional years, whether or not the author has complied with a member state's legal formalities. Art. 5(2), 7(1).

⁵ No liability was imposed, however, for any use of foreign works occurring before restoration or for one year following enactment. See 17 U.S.C. §104A(h)(2)(A). Additionally, "reliance parties" who had used or acquired a foreign work previously in the public domain were protected from liability unless the copyright owner provided constructive or actual notice of intent to enforce. See *id.* at §104(A)(c), (d)(2)(A)(i)-(ii), and (B)(i)-(ii). Those who had created a "derivative work" based on a restored work were allowed to exploit the derivation indefinitely upon payment of "reasonable compensation." See *id.* at §104A(d)(3).

⁶ *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004), *rev'd*, 609 F.3d 1076 (10th Cir. 2010), *rev'd* 565 U.S. ___, No. 10-545 (2012).

⁷ See U.S. Const. art. I, § 8, cl. 8 (empowering the United States 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").

⁸ The Court recognized the early potential for conflict with the governments of Mexico, Turkey, Egypt, Austria, Thailand, and Russia if the United States failed to comply with Berne. *Golan*, 565 U.S. at ___ (slip. op. at 6). The Court also recognized that the enforcement mechanism created by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) from the Uruguay round of multinational trade negotiations "gave teeth" to the Berne Convention's requirements by subjecting non-compliant member countries to tariffs or cross-sector retaliation. *Id.* at 7-8.

⁹ 537 U.S. 186 (2003).

¹⁰ See *Golan*, 565 U.S. at ___, slip. op. at 14-15 (relying on *Eldred* and refusing to entertain the petitioners' argument that such a reading of the Constitution opened the door to perpetual copyright terms); see also *id.* at ___, slip. op. at 16-19 (identifying, for example, an act in 1790 allowing copyrights in maps, an act in 1808 restoring patent protection to a flour mill, and acts in 1919 and 1941 granting protection to foreign works that had fallen into the public domain during the first and second world wars).

¹¹ *Id.* at ___, slip. op. at 21.

¹² *Id.* at ___, slip. op. at 23; see also *id.* at ___, slip. op. at 24 (reasoning that the "traditional contours" of copyright protection balance such inherent restrictions on expression).

¹³ See 17 U.S.C. §102(b) (codifying the idea/expression distinction: "In no case does copyright protec[t] . . . any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . described, explained, illustrated, or embodied in [the copyrighted] work."); see

also 17 U.S.C. §107 (codifying the fair use defense: “[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

¹⁴ *Golan*, 565 U.S. at ___, slip. op. at 29.

¹⁵ *Id.* at ___, slip. op. at 23-24 (characterizing the “traditional contours” as “built-in First Amendment accommodations”)

¹⁶ *Id.* at ___, slip. op. at 32.

¹⁷ *Id.* at ___, slip. op. at 25.

¹⁸ *Id.* at ___, slip. op. at 15.

¹⁹ See, e.g., Amy Schatz, Geoffrey A. Fowler & Erica Orden, *The Web's Growing Muscle*, Wall St. J., Jan. 24, 2012, available [here](#) (last visited Jan. 24, 2012).

²⁰ See, e.g., Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. Times, Jan. 20, 2012, available [here](#) (last visited Jan. 23, 2012)

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