



IP Update

Supreme Court Argument Preview: *Golan v. Holder* - Oral Argument Scheduled for October 5, 2011

October 3, 2011

Eight years ago in *Eldred v. Ashcroft*, the Supreme Court addressed Congress' power under the Progress Clause of the Constitution, which provides Congress with the ability to grant copyrights and patents to "promote the Progress of Science and the useful Arts." In *Eldred*, the Court rejected a challenge to a copyright term extension act which extended existing copyrights and provided for a copyright term of 70 years plus the life of the author, concluding that Congress had broad powers to determine what copyright scheme best promoted progress.

Now, in *Golan v. Holder*, the Court again faces a challenge to the outer limits of congressional power in enacting copyright laws. The case concerns a 1994 act of Congress which implemented treaties aimed at harmonizing global copyright laws. The act restored copyrights to foreign works, including numerous famous orchestral pieces, that had previously been in the public domain in the U.S. Petitioners, a collection of orchestra conductors, educators, and others that have relied on the public domain in their work, argue this violates the principle that works cannot be removed from the public domain, and highlight the potential danger in granting Congress a restoration power. The government counters that such restorations have previously occurred in both copyright and patent arenas, and that this is a rational exercise of Congress' power by ensuring compliance with international obligations, promoting recognition of rights for American authors abroad, and remedying past inequalities in copyright protection.

Petitioners also challenge Congress's action here under the First Amendment, often viewed as a complimentary restriction on the outer limits of Congress copyright powers. For example, in *Eldred*, challengers raised but the Court rejected a First Amendment argument, with the Court pointing to the built in speech protections in copyright law such as fair use. However, the Court left open the possibility that a First Amendment scrutiny may be appropriate if Congress alters the "traditional contours of copyright protection." Petitioners here allege that just such an alteration has taken place, while the government argues that traditional First Amendment protections relied on in *Eldred* remain intact here.

This case has drawn wide attention and amicus activity on both sides, with groups generally opposed to broad copyright power or reliant on the public domain weighing in on the side of the Petitioners, such as the American Library Association, the Conductors Guild, and Google. Groups generally reliant on copyrights or protective of intellectual property have supported the government, such as the AIPLA, IPO, and a joint brief by groups representing songwriters, composers, publishers, authors, photographers and others.

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