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If there’s one thing we can claim to know in the complex world of copyright law and IP regulations, it is this: once information passes into the public domain, it is free for all to use. But the recent decision by the Supreme Court casts even this knowledge into the realm of uncertainty.

At issue in the case of Golan v. Holder (No. 10-545) is whether Congress has the right to retroactively restore copyright to foreign works in the public domain, works that may have “slipped into” the public domain while still copyrighted abroad (Parry “Library Rights”). In some ways, this is an odd question to be asking now. Congress, whether they had the “right” or not, adopted a bill in 1994 to do just that: place foreign works back under the shield of copyright protection in order to align U.S. policy with the Berne Convention, an international copyright treaty whose aim “was to ensure that works copyrighted in one country get comparable protection elsewhere, ‘since there is no such thing as international copyright’” (Parry “Library Rights”).

It was this 1994 law that would inspire Lawrence Golan to begin his legal battle. For conductors like Mr. Golan, the removal of works from the public domain meant that he suddenly had limited access to pieces that he had been playing freely for years. “It was a shocking change,” Mr. Golan says, “You used to be able to buy Prokofiev, Shostakovitch, Stravinsky. All of a sudden, on one day, you couldn’t anymore” (Parry “Library Rights”).

This “now you see it, now you don’t” scenario is what inspired Anthony Falzone, one of Golan’s lawyers and the executive director of The Fair Use Project, to argue to the Supreme Court in October 2011 that Congress violated the First Amendment and Copyright Clause when it pulled works out of the public domain and essentially re-copyrighted them. Justice Ginsberg -- who wrote the majority opinion in Eldred v. Ashcroft, the controversial 2003 decision that extended copyright protection for an additional 20 years -- was (perhaps understandably) impatient with this argument. But Chief Justice Roberts found some merit in the claim saying: “There is something, at least at an intuitive level, appealing about Mr. Falzone’s First Amendment argument. One day I can perform Shostakovich; Congress does something: The next day I can’t. Doesn’t that present a serious First Amendment problem?” (Parry “Equal Protection?”).

Beyond the First Amendment concerns, Falzone stressed the argument of legal precedent. If you can’t rely on the status of something in the public domain today – that is, if you never know whether Congress is going to act again and yank it out – you’re going to be more cautious about doing anything with these materials. You really destroy the
value and the usefulness of the public domain in a profound way if the rug can be pulled out from you at any time (Parry “Supreme Court”).

But Golan v. Holder is not merely a philosophical argument about the value of public domain or the interpretation of the Constitution. It is a case about real people whose creative lives have been limited by Congressional action. Mr. Golan’s University of Denver orchestra went from being able to purchase sheet music and perform that music ad infinitum, to having to rent the same (newly copyrighted) sheet music for one performance at a cost that quadrupled the earlier price. While this drastic change doesn’t really affect larger city orchestras like the Boston Pops or the New York City Philharmonic (since they have much larger budgets), it does affect smaller ensembles, like those at universities, who now report being “priced out” of performing pieces that were previously in the public domain (Parry “Supreme Court”).

Golan’s concerns extend beyond the realms of sheet music and scores. Because his fight is centered on the concept of the public domain – more to the point, how it is defined and defended – it touches “a broad swath of academe for years to come, dictating what materials scholars can use in books and courses without jumping through legal hoops” (Parry “Supreme Court”). Golan’s concerns also extend to libraries and archives, since the 1994 law he seeks to overturn has “hobbled [their] efforts to digitize and share books, films, and music” (Parry “Supreme Court”). Beyond all of the people affected is the sheer volume of works that have been pulled from the public domain by the 1994 law. Though the exact number of works is unknown, Marybeth Peters (then U.S. Register of Copyrights) noted in 1996 that it would “probably number in the millions” (Liptak).

Despite these facts and far-reaching implications, the Supreme Court voted (6-2) to uphold the 1994 federal law, saying that “the public domain was not ‘a category of constitutional significance’” (Liptak). In writing the majority opinion, Justice Ginsberg said that the law merely leveled out the international playing field, putting “foreign works on an equal footing with their U.S. counterparts” (Liptak). Justice Breyer wrote the dissenting opinion for himself and for Justice Alito and argued that the law seriously threatened not only the spirit of the copyright clause but also the First Amendment Right to free expression. Justice Breyer asked:

Does the [copyright] clause empower 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? (Liptak).

His answer to this rhetorical question is certainly a resounding “no.” Yet, the Supreme Court ultimately voted to uphold a law that makes it even more difficult to discern where the public domain begins and ends.

The public domain has been a moving target for most of the 20th and all of the 21st century. It is not coincidence that, had it not been for the Eldred v. Ashcroft decision in 2003, Mickey Mouse would have been in the public domain
that same year (Carnevale). And with the Golan v. Holder decision rendered in January 2012, we have lost the assurance that the works that do enter into the public domain will stay there. Without some clear sense of the boundaries, we may lose our ability (and perhaps our incentive) to create, which is what the copyright clause was originally designed to protect.

The Supreme Court decision marks the end of Mr. Golan’s fight, but could signal the beginning of a new battle: “the only remedy now,” according to Golan’s lawyer, Anthony Falzone, “would be a change in U.S. law” though such a change would be “highly unlikely” (Young). It is both poignant and ironic that the Golan v. Holder decision was rendered on the same day that thousands of scholars and citizens across the globe joined together to protest the next generation of restrictive copyright laws: the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). Yet even with one step forward and two steps back, we may still find a path toward balance for the future.

Works Cited


