Intellectual Property Brief

Volume 3 | Issue 3 Article 3

8-13-2012

A Look at the Supreme Court Justices' Individual Biases Toward Copyright Law: Prediction and Reflection on the Golan v. Holder Decision

Elizabeth F. Jackson
American University Washington College of Law

A Look at the Supreme Court Justices' Individual Biases Toward Copyright Law: Prediction and Reflection on the Golan v. Holder Decision

Keywords
public domain, copyright protection

A Look at the Supreme Court Justices' Individual Biases Toward Copyright Law: Prediction and Reflection on the Golan v. Holder Decision

by Elizabeth F. Jackson[1]

I. Introduction

The Constitution aims "to promote the progress of Sciences and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] This Copyright Clause mandates a balance between two competing interests: protecting artists' investment in their art, while enriching society with the dissemination of that art.[3] When Congress fails to maintain this balance, the Supreme Court should deem the action unconstitutional. In the 1990s, the Court capably maintained that balance.[4] In 2003, however, the Court seemed to reverse course, tipping the balance in favor of copyright protection in *Eldred v. Ashcroft*.[5] And with the *Golan v. Holder* decision,[6] the Supreme Court skewed the balance even further.

This article began as an exploration of the justices' personal biases toward copyright law in order to predict the *Golan* decision. Part II details the history of the *Golan* case. Part III analyzes the justices' previous writings and words on intellectual property law. Part IV argues how the Supreme Court should hold in this case. I wrote Part II–IV before the *Golan* decision was handed down, and I have left these sections intact to compare the predictions originally made with the ultimate decision. Part V was written after and explains how the Supreme Court ultimately held in the *Golan* case and my reflections on that decision. Unfortunately, I hypothesized correctly that the justices would defer to Congress's extension and resurrection of copyright protection. In doing so, the justices effectively foreclosed constitutional avenues of protecting the safeguards of the First Amendment within the Copyright Clause: the public domain and the fair use doctrine.

Although they both lead to the same result—allowing others to use the work—the public domain and the fair use doctrine are two entirely different copyright law concepts. Public domain refers to works without copyright protection or works whose copyright protection has lapsed; anyone may use these works for any purpose.[7] Fair use is the lawful use of copyrighted works based on the nature of the use, for example, teaching, scholarship, and critique.[8] *Both* the public domain and fair use ensure the dissemination of information for the public good.

The public domain and fair use also protect individuals' freedom of speech from copyright legislation. In *Eldred*, Justice Ginsburg referred to them as "built-in First Amendment accommodations."[9] The First Amendment protects an individual's freedom of speech, press, religion, and assembly from government's interference.[10] Copyright protection takes certain works out of public use; it prevents people from exercising their freedom of speech with these works until that protection lapses. For example, an individual cannot use the phrase "Mickey Mouse" on a t-shirt until The Walt Disney Company's copyright expires. Copyright protection interferes with First Amendment rights. The public domain and fair use are the safeguards that maintain some freedom of speech despite copyright protection.[11]

1. J.D. Candidate 2012, American University Washington College of Law; M.A. in Literature from Florida State University; graduated magna cum laude from Vanderbilt University.

2. US. Const. art. I, § 8, cl. 8.

3. 1–1 Nimmer on Copyright § 1.05 (2011) (indicating this balance as the philosophical rationale of the Copyright Clause).

4. *See, e.g.*, Feist Publ'ns v. Rural Tel. Serv., 499 U.S. 340, 347 (1991) (distinguishing between a factual compilation that can be copyrighted and the compilation's underlying facts that cannot be copyrighted).

5. 537 U.S. 186 (2003) (finding the Copyright Term Extension Act (CTEA) constitutional).

6. 132 S. Ct. 873 (2012).

7. Warner Bros. Entm't, Inc. v. X One X Prods, 644 F.3d 584, 596 (8th Cir. 2011) (stating that the public is "free to use public domain materials in new ways").

8. *See* 17 U.S.C. § 107 (2006) (providing illustrative fair uses and the factors to determine which uses are fair: the purpose and character of the use, nature of the copyrighted work, amount of the copyrighted work used, and the degree to which the use affects the copyrighted work's market).

9. 537 U.S. at 190.

10. US. Const. amend. I.

11. *See Eldred*, 537 U.S. at 190 (explaining that the idea-expression dichotomy allows only expressions, not the ideas or facts being expressed, to be protected and fair use allows use of expressions for limited times).

II. Background

In 1991, the Supreme Court defined the public domain in the seminal case of *Feist Publications v. Rural Telephone Services*.[12] The Court held that a telephone book, though time-consuming and difficult to create, is not copyrightable, thereby memorializing one of copyright law's greatest tenets: information is not copyrightable, though the creative expression of that information might be.[13] The Court rationalized that facts are not original to the author and therefore not copyrightable.[14] While it is possible to acquire a copyright in just the arrangement of those facts, there must be a modicum of creativity in the arrangement.[15] However, information, ideas, facts, and processes must remain in the public domain.

Three years later, the Supreme Court expanded the fair use doctrine in *Campbell v. Acuff-Rose Music, Inc*.[16] The Court found that 2 Live Crew's rap parody of Roy Orbison's "Pretty Woman" was—despite being a highly commercial endeavor—a fair use.[17] Though the Court still used the four factors outlined in the Copyright Act to determine fair use,[18] it emphasized "transformativeness" above all other considerations. Transformativeness is the degree to which the new user repurposes the copyrighted work, such as: including concert posters in a biographical coffee table book,[19] displaying modeling photographs in a newspaper article,[20] and showing clips of an actor's films in a television news report.[21] In *Acuff-Rose*, Justice Souter explained the emphasis on transformativeness: "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."[22] In essence, *any* work may be used if you can alter its purpose enough. This supports Judge Leval's claim, in an article written before *Acuff-Rose* and the rise of transformativeness, that the objective of copyright law is to "stimulate creativity for public illumination."[23]

Feist and *Acuff-Rose* defined the space of unprotected works, where rights holders cannot prevent users from expressing themselves. Some commentators claim that the Court's motivation was fear of excessive protection and its effect on competition.[24] In the next significant copyright case to reach the Supreme Court, however, the Court flipped sides. In 2003, the Court heard *Eldred*, a constitutional challenge to the Copyright Term Extension Act (CTEA).[25] The CTEA extended copyright protection from the life of the author plus fifty years to the life of the author plus seventy years, and for works for hire, from seventy-five years from creation to 120 years from creation or ninety-five years from publication, whichever came sooner.[26] The CTEA was dubbed the "Mickey Mouse Protection Act" because of the Walt Disney Company's lobbying efforts; its passage effectively froze the protected status of Steamboat Willie and other stories as they were once again on the verge of falling into the public domain.[27]

The petitioner's argument in *Eldred* was twofold: that the expansion of copyright protection violated the Copyright Clause's "limited Times" restriction *and* the expansion harmed the First Amendment's protection of free speech. In an opinion

12. 499 U.S. at 344 ("'The most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates.'"(quoting Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985)).

13. *Id.*; *see also* Baker v. Selden, 101 U.S. 99, 100–101 (1879) (holding that Selden's expression of a system of book-keeping was copyrightable, but the system itself was not).

14. *Feist*, 499 U.S. at 345.

15. *Id.* at 346.

16. 510 U.S. 569 (1994).

17. *Id.* at 594.

18. *Id.* at 570-72; 17 U.S.C. § 107 (2006) (considering purpose of the use, nature of the copyrighted work, amount of the copyrighted work used, and effect of the copyrighted work's market).

19. Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

20. Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000).

21. Video-Cinema Films, Inc. v. CNN, Inc., 60 U.S.P.Q.2d (BNA) 1415 (S.D.N.Y. 2001).

22. *Acuff-Rose*, 510 U.S. at 579.

23. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990); *see also* Patricia Aufderheide & Peter Jaszi, Reclaiming Fair Use 82 (2011) (connecting Judge Leval's article to the rise of transformativeness in *Acuff-Rose* and beyond).

24. *See, e.g.*, Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 Wash. U. J.L. & Pol'y 11, 16 (2006) (hypothesizing the Rehnquist Court's motivation underlying intellectual property jurisprudence).

25. Eldred v. Ashcroft, 537 U.S. 186, 192 (2003).

26. Pub. L. No. 105–298, 112 Stat. 2827 (codified at 17 U.S.C. §§ 101–207 (2006)).

27. *See* Charles Kenny, *How Mickey Mouse Beat the Shit Out of Thomas Jefferson*, The Animation Anomaly (June 16, 2011), http://animationanomaly.com/2011/06/16/how-mickey-mouse-beat-the-shit-out-of-thomas-jefferson/ (listing the years when Mickey Mouse should have entered the public domain but for congressional intervention); *see also* Edward C. Walterscheid, The Nature of the Intellectual Property Clause: A Study in Historical Perspective 272 (2002) (stating that Jefferson wanted to set a definitive time period for copyright "monopolies," thereby precluding renewal and extensions).

by Justice Ginsburg, the Court found the CTEA constitutional because the Constitution only requires copyright protection to be limited, not fixed at a certain length of time, and Congress acted within the authority granted to it by the Copyright Clause.[28] But Justice Ginsburg explained that the two safeguards of the First Amendment remained in place: (1) the idea-expression dichotomy, first delineated in *Harper & Row Publishers, Inc. v. Nation Enterprises*[29] and subsequently reinforced in *Feist*, that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication"[30] and (2) the fair use defense articulated in *Acuff-Rose* allows use of a copyrighted work for a limited purpose.[31]

The attorney for the petitioner, Lawrence Lessig, reflected on the day with regret, wishing that he had stressed the harm done by delaying so many copyrighted works from entering the public domain, rather than relying on precedential arguments.[32] Lessing's strategy had been to focus on the danger of Congress's unlimited power, as the Court had done in *United States v. Lopez*, and to analogize the Copyright Clause to the Commerce Clause.[33] Lessig wished he could do it over; though, perhaps it would not matter because he noticed the president of the Motion Picture Association of America (MPAA) sitting in the seats usually reserved for the Court's family members during oral arguments.[34]

In 2011, the Supreme Court granted certiorari to *Golan*.[35] On December 8, 1994, President Clinton had signed the Uruguay Round Agreements Act (URAA),[36] an act that purportedly brought the United States into alignment with the Trade-Related Aspects of Intellectual Property Law (TRIPS) Agreement that the United States signed in April of 1994. Section 514 of the URAA gives copyright protection to foreign works currently in the public domain.[37] These foreign works may be in the public domain because they were never granted protected status in the first place *or* because they were improperly registered or renewed.[38]

Section 514 of the URAA affected the rights of many, including Lawrence Golan. Golan was an orchestra conductor who could not afford music licensing fees; he could only use works in the public domain.[39] Because section 514 took foreign works out of the repertoire of music Golan could use, he filed suit in district court claiming section 514 of the URAA was unconstitutional.[40] The case worked its way up the federal courts until the Supreme Court granted certiorari on March 7, 2011.[41]

The Supreme Court heard oral arguments on October 5, 2011.[42] Anthony Falzone, counsel for the petitioners, argued that section 514 violated the Copyright Clause and the First Amendment.[43] Falzone asserted that while Congress could extend the term of protection before the protection ends (thanks to *Eldred*), Congress could not resurrect that protection once the endpoint was reached.[44] Solicitor General Donald B. Verrilli, Jr. represented the respondent, arguing that resurrecting protection is a recognized Congressional right because all works were once in the public domain before the first copyright statute removed them from the public domain in 1790.[45] He framed his oral argument around the importance of international treaties and protecting foreign works as much as domestic works.[46] Justice Alito asked the Solicitor General whether Congress had the power to restart protection, and the Solicitor General answered that the Constitution did not provide an "ironclad limit" on Congress' ability to do so.[47] In his rebuttal, Falzone stressed that "limited" in "limited Times"

28. *Eldred*, 537 U.S. at 187-88.

29. 471 U.S. 539 (1985) (finding no fair use when the Nation scooped the most salacious part of Gerald Ford's biography).

30. *Eldred*, 537 U.S. at 219.

31. *Id.*

32. Lawrence Lessig, *How I Lost the Big One*, Legal Affairs (March/April 2004), *available at* http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp.

33. *Id.*

34. *Id.*

35. *Golan*, 609 F.3d 1076 (10th Cir. 2010), *cert. granted*, 131 S. Ct. 1600 (2011). The Court heard Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) between *Eldred* and *Golan*, but this Article does not consider it in this line of copyright jurisprudence because *Grokster* was concerned with the extent of vicarious infringement liability.

36. Pub. L. No. 103–465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3501 (2006)).

37. § 514, 108 Stat. at 4976–81.

38. *See* David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. Marshall Rev. Intell. Prop. L. 83, 87 (2011) (explaining the ways protection may be obtained, despite the Act excluding works whose protection has expired).

39. *Golan*, 609 F.3d at 1081–82.

40. *Id.* at 1082.

41. Golan v. Holder, 131 S. Ct. 1600 (2011) (mem.).

42. Golan v. Holder, 132 S. Ct. 873 (2012).

43. Transcript of Oral Argument at 3, *Golan*, 132 S. Ct. 873 (No. 10–545).

44. *Id.* at 4.

45. Brief for the Respondent at 11, *Golan*, 132. S. Ct. 873 (No. 10–545).

46. Transcript of Oral Argument, *supra* note 43, at 28–29.

47. *Id.* at 29.

means having an end to the copyright protection: "[I]f Congress is forever free to change its mind, then we can never know if the end has come."[48]

III. Analysis of Justices

The Supreme Court might find that section 514 of the URAA does not violate the Copyright Clause.[49] Many members of the current Court have certain predispositions toward copyright protection, and unfortunately, two of the public domain's main supporters—Justice Souter, who wrote the majority opinion in *Acuff-Rose*, and Justice Stevens, who dissented in *Eldred*—are no longer on the Court.[50] The new Court brings with it new biases. If the Court finds section 514 constitutional, the decision will be detrimental for numerous reasons. First, it renders the Constitution's "limited Times" restriction meaningless. Second, the decision would chill the public domain. Finally, it would destroy the safeguards of the First Amendment. These problems do not end with *Golan*; Congress's interest in the harmonization of international intellectual property law suggests many more disputes like this.

The biggest determinant in the *Golan* outcome is the legacy of *Eldred*. *Eldred* gave Congress a great deal of discretion in interpreting the Copyright Clause,[51] and all of the justices whose biases are explored below, with the exception of Justice Breyer, voted in the majority in *Eldred.*

Justice Breyer is a supporter of the public domain. As a Harvard professor, he wrote an article criticizing copyright protection as unnecessarily long.[52] He indicated that copyright holders will always have a financial interest in extending protection and the arguments they use are unconvincing.[53] For example, if copyright protection is to incentivize an author to sell his book, why should protection last longer than that author's lifetime?[54] Are we incentivizing him by the support it may give his great-grandchildren? Justice Breyer pointed out that only one out of one hundred books are even in print after fifty-six years.[55] Unsurprisingly, he dissented in *Eldred* and was the hardest on the Solicitor General during oral arguments for *Golan.*[56]

Some of the public domain's other defenders are no longer on the court. Justice Souter wrote *Acuff-Rose's* transformative—in more ways than one—opinion,[57] but he retired in 2009. Justice Stevens dissented in *Eldred*,[58] but retired last year. His replacement, Justice Kagan, seems to favorably lean towards fair use.[59] As Justice Marshall's law clerk, Kagan advised Justice Marshall to grant certiorari to a Second Circuit case finding no fair use for J.D. Salinger's personal letters used in an unauthorized biography.[60] As the United States Solicitor General, she recommended that the Supreme Court not hear a Second Circuit case finding no copyright infringement in DVR recordings.[61] Unfortunately, because Justice Kagan worked on *Golan* at the Solicitor General's office before her appointment, she recused herself in this case.[62]

Interestingly enough, copyright ideologies are not usually aligned with traditional partisan beliefs.[63] There is hope that Justice Alito is also a public domain

48. *Id.* at 52–53.

49. *See, e.g.*, Rebecca Tushnet, *Argument Recap: The Constitutionality of Zombie Copyrights*, SCOTUSblog (Oct. 11, 2011 12:00 PM), http://www.scotusblog.com/2011/10/argument-recap-the-constitutionality-of-zombie-copyrights/ ("Falzone took most of the heat at the argument; petitioners have an uphill battle, but not necessarily an unwinnable one.").

50. At the time of this writing, the current justices are: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, and Justice Kagan.

51. Eldred v. Ashcroft, 537 U.S. 186, 188 (2003) ("The CTEA is a rational exercise of legislative authority conferred by the Copyright Clause. On this point, the Court defers substantially to Congress.").

52. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970).

53. *Id.* at 324.

54. *Id.* (acknowledging that it is conceivable that an author writes for his children's income, but more probably "authors discount the value of future income").

55. *Id.*

56. *E.g.*, Transcript of Oral Argument, *supra* note 43, at 34–36 (asking repeatedly how restoring copyright protection provides any incentive to create new works).

57. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571 (1994).

58. Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (Stevens, J., dissenting).

59. James Hirsen, *Why Elena Kagan Makes Hollywood Nervous*, Newsmax.com (July 6, 2010 9:26 AM), http://www.newsmax.com/Hirsen/Elena-Kagan-Hollywood-Supreme/2010/07/06/id/363862.

60. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); *see also* Jess Bravin, *Kagan's Brushes with the Boldfaced (While a Supreme Court Clerk)*, Wall St. J., June 8, 2010, http://blogs.wsj.com/law/2010/06/08/kagans-brushes-with-the-boldfaced-while-a-supreme-court-clerk/.

61. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

62. Golan v. Holder, 131 S. Ct. 1600 (2011) (mem.) (stating that Justice Kagan did not consider the petition for certiorari).

63. Nick Baumann, *Hey Kids, Wanna Listen to "Peter and the Wolf"? Then Pay Up,* Mother Jones (Oct. 6, 2011, 5:45 AM) (predicting Breyer and Ginsburg as dipoles and Alito, Kennedy, and Sotomayor as wild cards in the *Golan* decision).

defender. As a judge for the Third Circuit, Justice Alito wrote a *Feist*-like opinion in *Southco, Inc. v. Kanebridge Corp*.[64] The court held that parts numbers used in captive fasteners did not have the requisite creativity necessary for copyright protection and must thus remain in the public domain.[65] The opinion is a thoughtful inspection of originality and, at the very least, we can expect Justice Alito to give *Golan* the time and thought it deserves.[66]

Though Justice Scalia was in the majority in *Eldred*, and *Golan* is arguably an extension of *Eldred*, there are glimmers of hope for Justice Scalia. In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, a trademark case, Justice Scalia wrote that authorship claims cannot be made after a work enters the public domain.[67] Hopefully, Scalia will draw the same conclusion for the authors of foreign works in copyright law.

Some of the justices have not shown a predisposition either way in copyright law. For example, Justice Thomas was in the majority for both *Acuff-Rose* and *Eldred*. Unsurprisingly, he did not reveal any biases—or anything else—during oral argument for *Golan*.[68]

Justice Kennedy gave some illumination into his copyright ideology in his *Acuff-Rose* concurrence. He was concerned with a court's post-hoc finding of fair use.[69] He reassured the country—or perhaps just himself—that fair use still had defined "proper limits."[70] Justice Kennedy explained that one of those limits is to gauge how much of a copyrighted work must be taken for the particular fair use; for example, if it is a parody, a great deal must be taken so that the fair user can evoke the original while also commenting on it.[71] Because the nature of the use determines the amount taken, it is more difficult for a court to presume an unintended fair use without matching the fair user's intent with the amount of the copyrighted work taken.[72] Justice Kennedy's concern for the copyright holder in *Acuff-Rose*, especially since he stood alone in his concurrence and there was no dissent, is worrisome for the impending *Golan* decision.

Chief Justice Roberts joined the Court two years after *Eldred*, but he argued two intellectual property cases before the Court prior to joining. In 1998, he argued that his client deserved a jury trial for statutory damages stemming from copyright infringement and the Court agreed with him.[73] And in 2001, when he argued a trademark case, the Court once again agreed with him, holding that his client could copy an expired patent, despite the trade dress infringement claim.[74] His confirmation process revealed little about his intellectual property beliefs[75] and he is known for his neutral tone during oral arguments.[76] However, he notoriously worried about Jimi Hendrix's rendition of the national anthem during oral arguments for *Golan* should the Star-Spangled Banner suddenly retain protected status.[77] But for everything besides his beloved Hendrix, it is unclear how the Chief Justice will hold.

Justice Ginsburg wrote the majority opinion in *Eldred* and has the strongest ties to a protectionist agenda. Her daughter is a professor at Columbia Law School and has numerous publications on the importance of copyright protection.[78] In the oral arguments for *Golan*, Justice Ginsburg was the most aggressive with petitioner's counsel and nearly silent during respondent's argument.[79]

64. 390 F.3d 276 (3d Cir. 2004).

65. *Id.* at 282.

66. *See generally* William Patry, *Judge Alito and Copyright*, The Patry Copyright Blog (Oct. 31, 2005), http://williampatry.blogspot.com/2005/10/judge-alito-and-copyright.html.

67. 539 U.S. 23, 37 (2003) ("To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.").

68. *See generally Justice Clarence Thomas's 5-Year Silence: By the Numbers*, The Week (Feb. 16, 2011, 6:20 PM), http://theweek.com/article/index/212188/justice-clarence-thomass-5-year-silence-by-the-numbers (detailing Justice Thomas's silence on the bench).

69. Campbell v. Acuff-Rose Music, Inc, 510 U.S. 569, 600 (1994) (Kennedy, J., concurring).

70. *Id.* at 599.

71. *Id.* at 598 (warning that this determination is "by no means a test of mechanical application").

72. *See id.* at 598 (emphasizing the importance of the third factor of the fair use analysis).

73. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

74. Traffix Devices, Inc. v. Mktg Displays, Inc., 532 U.S. 23 (2001).

75. Anne Broache, *Chief Justice Nominee Carries Slim Record on Tech*, CNET (Sept. 6, 2005), http://news.cnet.com/Chief-justice-nominee-carries-slim-record-on-tech/2100-1028_3-5851480.html.

76. Linda Greenhouse, *Supreme Court Memo; In the Roberts Court, There's More Room for Argument*, N.Y. Times, May 3, 2006, http://query.nytimes.com/gst/fullpage.html?res=9906E6D6113FF930A35756C0A9609C8B63 ("Roberts doesn't tip his hand as much. He asks hard questions of both sides without communicating his own preference.").

77. Oral Argument Transcript, *supra* note 43, at 40–41.

78. *See, e.g.*, Jane C. Ginsburg, *How Copyright Got a Bad Name For Itself*, 26 Colum. J.L. & Arts 61, 62 (2002) ("Worse, they would decry this enforcement as a threat to the Constitutional goal of promotion of the Progress of Science, and thus a threat to the public interest."); Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 Willamette L. Rev. 381 (2008).

79. *E.g.*, Oral Argument Transcript, *supra* note 43, at 53–57 (questioning Falzone throughout his rebuttal).

Justice Ginsburg's aggression against the petitioner was echoed by Justice Sotomayor, who has exhibited protectionist values in the past. As a litigator in New York, she protected the Fendi brand from counterfeiters.[80] As a judge for the Southern District of New York, she wrote the opinion for *Tasini v. New York Times, Co.*, holding that large media conglomerates have the right to put published works online.[81] This was much to the chagrin of the freelance journalists who thought they agreed only to written publication. The Supreme Court later reversed.[82] Justice Sotomayor's opinion could point to a fair use perspective—the media companies are rightly using journalists' work—but the fear is that her loyalties lie with the large rights holders, like the MPAA and the Recording Industry Association of America (RIAA), rather than those who employ the fair use doctrine.[83] At the Supreme Court level, *Tasini* is again a reminder of where the copyright biases diverge: Justice Ginsburg wrote the majority opinion, focusing on journalists' right to protect their work, and Justice Breyer and Justices Stevens were the only dissenters.[84]

In many ways, *Golan* repeats the themes of *Eldred* and only one of *Eldred*'s dissenters—Justice Breyer—is still on the Court. And while Chief Justice Roberts and Justice Sotomayor offer new voices, the prognosis does not seem favorable. If the dangers of *Eldred* continue, will "limited Times" have any meaning left?

IV. How the Supreme Court Should Hold

Congress does not have the option of omitting "limited" from "limited Times" in the Copyright Clause. The Solicitor General in *Golan* argues that "limited" only means that Congress does not have the power to grant *perpetual* copyrights.[85] This reading would render the rest of the clause meaningless;[86] there is no balance if works never enter the public domain and enrich society.[87] In the Supreme Court's first discussion of limited times, Justice Story stated that the purpose was to "admit the people at large, *after a short interval*, to the full possession and enjoyment of all writings and inventions without restraint."[88] And yet, when the CTEA was discussed on the House floor, Representative Mary Bono Mack stated that her husband—whom the law is nicknamed after—"understood the delicate balance of the constitutional interests at stake," and yet "wanted the term of copyright protection to last forever."[89] Clearly, there was a disconnect in Sonny Bono's thinking. Representative Mack then suggested the term proposed by the MPAA president Jack Valenti: forever minus one day.[90] This proposal is the equivalent of a perpetual copyright,[91] and the fact that the MPAA's lobbying efforts would reach this far—and that a representative would be so skewed to one side—confirms that only the Supreme Court can fix the constitutional violations that Congress accepts.

Eldred allows Congress to continually extend the length of copyright protection, but *Golan* adds a new snag: when the copyright protection ends, Congress can resurrect it again. "[L]imited Times" is now the "limited and limited again times." In the past, the Supreme Court has explicitly rejected this "species of perpetual patent and copyright."[92] The Court cannot waive this constitutional requirement just for admission into international intellectual property treaties.

The most persuasive rationale that Petitioner argues is the chilling effect on free expression.[93] When works enter the public domain, anyone may use, enhance, or modify them. People may also create businesses around these works, investing time and resources into the new expression.[94] If there is a danger

80. Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. Times, May 26, 2009, http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html?pagewanted=1&_r=1.

81. *See* 972 F. Supp. 804 (S.D.N.Y. 1997).

82. New York Times Co. v. Tasini, 533 U.S. 483 (2001).

83. *See* John Herrman, *Obama's Supreme Court Nominee Knows Stuff About Computers*, Gizmodo (May 27, 2009, 11:00 AM), http://gizmodo.com/5271318/obamas-supreme-court-nominee-knows-stuff-about-computers (predicting that Sotomayor will hold for MPAA or RIAA if the Court hears any file-sharing cases).

84. *Tasini*, 533 U.S. at 506 (Stevens, J., dissenting).

85. Brief for the Respondent, *supra* note 45, at 13.

86. Clearly the limited times restriction has meaning since patent and copyright have two very different terms of protection.

87. Walterscheid, *supra* note 27, at 271. Patent protection lasts only twenty years.

88. *Id.* at 274.

89. 144 Cong. Rec. 9951–52 (1998), *available at* http://www.gpo.gov/fdsys/pkg/CREC-1998-10-07/pdf/CREC-1998-10-07-pt1-PgH9946.pdf.

90. *Id.*

91. Forever is not a definite number, so forever minus any definite number is still forever. The MPAA chairman's proposal is still unconstitutional. *See Is There Really Such Thing as Infinity?* University of Toronto Mathematics Network, http://www.math.toronto.edu/mathnet/answers/infinity.html (last visited Dec. 15, 2011).

92. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37 (2003).

93. Brief of Petitioner at 45, *Golan*, 132 S. Ct. 873 (No. 10–545).

94. *See* Elizabeth Townsend Gard, *Copyright Law v. Trade*

that these works will return to protected status at the whim of Congress, people will not invest time and resources and expression will be stifled. Even if the individual is almost certain that his use is a fair use, the individual might still be hindered by just the potential for liability.[95]

When people are hindered from using works in the public domain to create new expressions, their right to free speech is also impacted. Even Justice Ginsburg admits in *Eldred* that the guarantees of a public domain and fair use are the First Amendment's safety valves within the Copyright Clause.[96] And yet those safety valves are destroyed when Congress expands copyright protection to the detriment of the public domain. The current Court, tethered to the *Eldred* decision and influenced by individual biases, may fail the Constitution in *Golan*.

This problem does not end with *Golan* either. In oral arguments for *Golan*, the justices tried to rein in the petitioners by asking that they focus on the particular situation of resurrected copyright protection being litigated rather than sliding into hypothetical arguments of Shakespeare regaining copyright protection.[97] This slippery slope argument is not unfounded though. Harmonization in international intellectual property law is very important right now.[98] However, other countries do not have the same Constitution or Copyright Clause. So, when the United States signs international treaties with countries that have very different laws than our own, we risk violating our own laws. The copyright—and other intellectual property—issues arising from harmonization may not end with *Golan* and the Supreme Court cannot ignore the dangers of too much copyright protection as Congress signs treaty after treaty.

V. Retrospective

The Supreme Court handed down the *Golan* decision on January 18, 2012, holding that section 514 of the URAA was constitutional because neither the Copyright Clause nor the First Amendment "makes the public domain, in any and all cases, a territory that works may never exit."[99] Rather than focusing on the goal of the Copyright Clause—balancing protection with public dissemination—the Court looked narrowly at the language of section 514. There is nothing explicit in the Constitution that says works may not be taken out of the public domain.

Justice Ginsburg, the most protectionist-leaning of the justices, wrote the opinion.[100] As predicted, she was joined by Justice Kennedy and Justice Sotomayor. Any glimmer of hope for Chief Justice Roberts and Justice Scalia was quickly extinguished; they, along with Justice Thomas, rounded out the majority.[101] Unsurprisingly, Justice Breyer wrote an impassioned dissent.[102] He stressed that the Copyright Clause is supposed to encourage the creation of works, and section 514 of the URAA increases protection and restarts protection for already created works; the statute does not incentivize anyone to create something new.[103] Justice Alito—who protected the public domain in *Southco*—joined Justice Breyer in the dissent.[104]

This Article predicted three consequences that would result from this decision: (1) the Constitution's "limited Times" would be rendered meaningless; (2) the use of works in the public domain would be slowed or stopped; and (3) the safeguards of the First Amendment within the Copyright Clause would be destroyed. It is too soon to know the chilling effect on the public domain, but the first and third predictions came true. With *Golan*, the Court effectively foreclosed the constitutional avenues of protecting the public domain.[105] The Court took the constitutional language at face value—"limited" means anything less than unlimited—rather than reading the Copyright Clause for the balance it created between protection and dissemination.[106] The Court found no First

Policy: Understanding the Golan Battle Within the Tenth Circuit, 34 Colum. J.L. & Arts 131, 138–139 (2011).

95. *See* Joseph P. Liu, *Copyright and Breathing Space*, 30 Colum. J.L. & Arts 429, 429 (2006-2007) (listing the ways fair users are "chilled").

96. Eldred v. Ashcroft, 537 U.S. 186, 217-21 (2003).

97. *See e.g.*, Oral Argument Transcript, *supra* note 43, at 8–9 (cutting off Falzone when he began to discuss resurrecting Ben Johnson and Alexis de Tocqueville for copyright protection).

98. Leahy-Smith America Invents Act, 125 Stat. 284 (2011) (attempting to harmonize international patent law).

99. Golan v. Holder, 132 S. Ct. 873, 878 (2012).

100. *Id.* at 877 (Ginsburg, J.).

101. *Id.*

102. *Id.* at 899 (Breyer, J., *dissenting*).

103. *Id.* at 900.

104. *Id.* at 899.

105. *See* Gard, *supra* note 94, at 192 ("We had been on the path of a constitutionally protected public domain. Now, trade law has blindly trumped copyright tradition.").

106. *See* Email from Peter Jaszi, Professor, American University Washington College of Law, to author (Mar. 9, 2012) (on file with author) ("[the decision] makes it a lot harder for public interest advocates to argue, with a straight face, that proposed legislation should be rejected because it isn't true to the spirit of Art. I, sec. 8, cl. 8.").

Amendment violation when Congress took works out of the public domain.[107] For all intents and purposes, these constitutional arguments are closed.

The Supreme Court has failed the public domain, but all is not lost.[108] In January 2012, the American people were able to send a bigger message to Congress than ever before. The Stop Online Piracy Act (SOPA) aimed to prevent websites from linking to or conducting business with websites that sell infringing items.[109] Many viewed the bill as the Government having too much control over the Internet; in response to SOPA—and aided by websites like Wikipedia and Reddit— millions of people signed petitions, boycotted the SOPA's advocates, and contacted their representatives to oppose the bill.[110] This public outrage was an extremely effective way to direct Congress; the bill was shelved almost immediately.[111]

If public domain advocates can channel this kind of public outrage against Congressional attempts to expand copyright protection, the result would be far more immediate than waiting for the Supreme Court to realize the error of its ways. Congress cannot avoid the voices of millions, especially since social media websites give those voices megaphones.[112] But it is not just sheer numbers of supporters, it is money too that influences the future of copyright protection. In the past, the more powerful entities—MPAA, RIAA, to name a few—were on the side of copyright protection. Now, there are large companies like Google and Wikipedia that are invested in the public domain and the free flow of information on the Internet.[113] When these companies combine with millions of American citizens on social media websites, the public domain does not need the Supreme Court to save it.

107. *Golan*, 132 S. Ct. at 890.

108. *C.f.* Peter Jaszi, *Goodbye to All That – A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 Vand. J. Transnat'l L. 595 (1996) (predicting over a decade ago that constitutional arguments might fail and public domain advocates need to find other routes).

109. H.R. 3261, 112th Cong. (2011).

110. Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling*, N.Y. Times, Jan. 19, 2012, http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?_r=1&pagewanted=1&ref=technology.

111. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, NY Times, Jan. 20, 2012, http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html.

112. *Stop SOPA: How People and Social Media Changed Lawmakers' Minds*, Huffington Post (Jan. 20, 2012 5:12 PM), http://www.huffingtonpost.com/2012/01/20/stop-sopa-congress-changed-their-mind-on-sopa_n_1219759.html (tracking mentions of SOPA on Twitter).

113. *See, e.g.*, *End Piracy, Not Liberty*, Google, https://www.google.com/landing/takeaction/ (expressing gratitude for SOPA's defeat and remaining committed to "our industry's track record of innovation and job creation.").