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# GOLAN V. HOLDER, THE COPYRIGHT CLAUSE, AND THE CHANGING PUBLIC POLICY UNDERLYING COPYRIGHT LAW IN THE UNITED STATES

JOHN J. SIEROTNIK\*

## INTRODUCTION

On January 18, 2012, many of the most popular sites on the Internet, including Google, Wikipedia, and Craigslist, blacked out their home pages in protest over the Stop Online Piracy Act (SOPA).<sup>1</sup> They argued that SOPA, a law strongly supported by the copyright lobby, imposed too high a burden on the Internet and gave the government too many powers in the fight against piracy. The protest was highly successful in raising public awareness of the bill, which soon lost congressional support.<sup>2</sup> The copyright lobby ultimately lost the battle over SOPA, but the very same morning of the protest, it scored a major victory in the Supreme Court. In one of the most significant decisions on copyright law it has ever handed down, the Court ruled that Congress has the power to remove works from the public domain and enable rights holders to commercially exploit what had previously been available to the public at no charge.<sup>3</sup>

The controversy surrounding *Golan* was nearly twenty years in the making. It traces its origin to March 1, 1989, when the United States joined the Berne Convention, an international agreement for the protection of intellectual property.<sup>4</sup> One of the chief principles of the Convention is reciprocity for copyrights.<sup>5</sup> As Justice Ruth Bader Ginsburg stated, Congress “punted” on a key issue of the Convention, Article 18, when it passed the initial legislation implementing the treaty in 1988, the Berne Convention Implementation Act (BCIA).<sup>6</sup> Article 18 of the Convention extends its protections to all foreign works that have not fallen into the public domain due to the expiry of a term of copy-

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1. Haley Tsukayma & Sarah Halzack, *Internet Blackouts Appear to have Desired Effect*, WASH. POST, Jan. 19, 2012, at A11.

2. *Id.*

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

4. Marshall Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373, 379 (1990) (The U.S. was the last major western country to join the Convention).

5. Berne Convention for the Protection of Literary and Artistic Works art. 18, Sept. 9, 1886, 828 U.N.T.S. 251 (Article 18 grants protections to works that “have not yet fallen into the public domain in the country of origin” but excludes works that “through the expiry of the term of protection” have “fallen into the public domain of the country where protection is claimed.”).

6. *Golan*, 132 S. Ct. at 879.

right protection.<sup>7</sup> Because there were many works by Berne signatory nations that were never subject to copyright protection in the United States due to a lack of copyright protection for works from their country of origin, the medium of the work, or a failure to comply with the then existing formalities under copyright law, the U.S. implementation of the Berne Convention was incomplete.<sup>8</sup> Following the Uruguay Round of trade agreements in 1994, Congress passed the Uruguay Round Agreements Act (URAA), which finally addressed the issue of these works.<sup>9</sup> This Act restores copyrights to a broad class of works that for a number of reasons were never subject to copyright protection in the United States.<sup>10</sup> As a result of the URAA taking effect, copyright protection was restored to things as diverse as troll dolls, the never-ending staircases drawn by M. C. Escher, and Prokofiev's *Peter and the Wolf*.<sup>11</sup>

The passage of the URAA particularly affected symphony orchestras because they are one of the greatest utilizers of the public domain. For works not subject to copyright protection, they can obtain sheet music for a mere hundred dollars and perform the pieces freely without any need for licensing fees.<sup>12</sup> Copyrighted works, however, may require fees of over ten thousand dollars.<sup>13</sup> This dramatic increase in costs presented a significant obstacle to orchestras. At the time Congress passed the URAA, eighty-seven percent of orchestras had a total budget of less than \$750,000.<sup>14</sup> Because of the substantial financial burden, many small, struggling orchestras stopped programming these works, depriving many communities of the opportunity to hear them live until they reverted to the public domain.<sup>15</sup>

In the fall of 2001, a broad collation of musicians and distributors of classical music led by conductor Lawrence Golan filed suit in the District of Colorado, claiming the grant of copyrights to works in the public domain afforded by § 514 of the URAA was unconstitutional.<sup>16</sup> The suit would take over a decade to resolve as it worked its way up and down the federal court system, culminating in oral arguments in the

7. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 5, at art. 18.

8. *Golan*, 132 S. Ct at 877–78.

9. Uruguay Round Agreements Act, Pub. L. No. 103–465, § 514, 108 Stat. 4809, 4976–81 (1994).

10. *Id.*

11. Tresa Baldas, *Trolling for Rights; Suit over Dolls Turns on Whether Work Once In Public Domain Later Can Be Protected*, MIAMI DAILY BUS. REV., Sept. 21, 2004, at 4.

12. Marty Jones, *Bitter Suite*, DENVER WESTWORD MUSIC (May 2, 2002), <http://www.westword.com/2002-05-02/music/bitter-suite/full/>, cited in Brian Lee Pelanda, Note, *Copyright's "Traditional Contours" and "Bedrock Principles": Golan's Potential to Secure First Amendment Protection over the Public Domain*, 31 WHITTIER L. REV. 547 (2010).

13. Jones, *supra* note 12.

14. Catherine Wichterman, *The Orchestra Forum: A Discussion of Symphony Orchestras in the US*, ANDREW W. MELLON FOUND. (Feb 27, 2013, 12:54 PM), [http://www.mellon.org/news\\_publications/annual-reports-essays/presidents-essays/the-orchestra-forum-the-orchestra-forum-a-discussion-of-symphony-orchestras-in-the-us](http://www.mellon.org/news_publications/annual-reports-essays/presidents-essays/the-orchestra-forum-the-orchestra-forum-a-discussion-of-symphony-orchestras-in-the-us).

15. Jones, *supra* note 12.

16. *Id.*

Supreme Court on October 5, 2011.<sup>17</sup> In the interim, the Supreme Court decided another significant copyright case, *Eldred v. Ashcroft*, which had a substantial influence on its holding in *Golan*.<sup>18</sup> Finally, on January 18, 2012, as the Internet was protesting what it viewed as a draconian new copyright law, the Supreme Court delivered a crushing blow to the musicians and upheld the constitutionality of § 514 of the URAA.<sup>19</sup> This decision was widely criticized from rights groups, such as the Electronic Frontier Foundation (EFF) and various legal commentators.<sup>20</sup>

The decision reached by the Supreme Court in *Golan v. Holder*, while appearing to be a marked departure from statutory law and case law, is surprisingly consistent with precedent and the most recent trends. Part I of this Note explores the history of our current copyright regime from its origins in the English Reformation to the Sony Bono Copyright Term Extension Act of 1998 and the URAA of 1994. Part II will explain the musicians' arguments that § 514 of the URAA is unconstitutional and why the Supreme Court ultimately rejected them. Part III looks at how this decision fits in against the changing policy and historical norms underlying United States copyright law. Part IV considers how this decision impacts the future of the public domain.

## I. ORIGINS OF AMERICAN COPYRIGHT LAW

The history of copyright in the English-speaking world predates the first English settlement in what would become the United States by nearly one hundred years.<sup>21</sup> The first restrictions on printing grew out of the turmoil of the English Reformation. Henry VIII's Catholic daughter, Queen Mary I, established the Stationers' Company, a guild of printers organized to "prevent the propagation of the Protestant Reformation."<sup>22</sup> Following Mary's death, her successor Elizabeth I re-established the Church of England.<sup>23</sup> Over time, the Stationers' Company gained a monopoly on printing and grew in power.<sup>24</sup> The company allowed members to register a particular work with the guild and

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

18. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (holding the Copyright Term Extension Act of 1988 did not violate the constitutional requirement that copyrights endure for limited times and that the Copyright Term Extension Act did not violate plaintiff's First Amendment rights).

19. *Golan*, 132 S. Ct. at 878.

20. Corynne McSherry, *Supreme Court Gets it Wrong in Golan v. Holder, Public Domain Mourns*, ELECTRONIC FRONTIER FOUND. (Jan. 23, 2012), <https://www.eff.org/deeplinks/2012/01/supreme-court-gets-it-wrong-golan-v-holder-public-domain-mourns>. See also James Boyle & Jennifer Jenkins, *Public by Sufferance Alone: The Worst of 2012*, HUFFINGTON POST (Jan. 10, 2013 8:51 AM), [http://www.huffingtonpost.com/james-boyle/public-by-sufferance-alon\\_b\\_2443850.html](http://www.huffingtonpost.com/james-boyle/public-by-sufferance-alon_b_2443850.html).

21. Jamestown was founded in 1607. KENNETH MORGAN, *THE OXFORD HISTORY OF BRITAIN* 720 (2001).

22. EATON DRONE, *A TREATISE IN THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 55–56 (1879).

23. Morgan, *supra* note 21, at 302–03.

24. DRONE, *supra* note 22, at 55–56 n.1 (noting that a 1585 decree required printers to register with the Stationers' Company or face up to a year imprisonment).

received exclusive rights to publish it perpetually.<sup>25</sup> Those who contravened the ordinance were subject to arrest and destruction of the offending books by the members of the Company.<sup>26</sup> Parliament codified many of the powers granted to the Stationer's Company with the Licensing Act of 1662.<sup>27</sup> The Act was renewed several times, but Parliament eventually allowed it to permanently lapse in 1694.<sup>28</sup>

Following a brief period where anyone could freely print anything, the members of the Stationers' Company lobbied Parliament to pass a new copyright statute.<sup>29</sup> In response, Parliament passed the Statute of Anne in 1710.<sup>30</sup> Unlike during the Stationers' Company's earlier monopoly on all printing, this Statute vested the rights to works in the authors directly.<sup>31</sup> Authors enjoyed the exclusive right to designate a printer or printers to publish their work for a term of fourteen years with another renewal for the same term of years.<sup>32</sup> Following the expiration of the term, books were freely printable by anyone. The stated purpose of this Act was the very utilitarian "Encouragement of Learning," accomplished "by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."<sup>33</sup>

The influence of the Statute of Anne on early American copyright law is very apparent. The text of the Copyright Clause of the Constitution, "[t]o 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," shares many similarities with the English statute.<sup>34</sup> Additionally, the first copyright statute enacted under the Constitution, the Copyright Act of 1790, protected works for the same term as the Statute of Anne: fourteen years with an option to renew for an additional fourteen years.<sup>35</sup> It is important to note that this initial copyright Act only protected works created by citizens or permanent residents; foreign works received no such protection.<sup>36</sup> This Act, like the Statute of Anne, also mandated certain formalities, namely

25. Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 398 (2004).

26. DRONE, *supra* note 22, at 55–56.

27. *Id.* at 57–58.

28. *Id.*

29. Craig Joyce, *Prologue: The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 779, 782 (2010).

30. *Id.*

31. *Id.* at 783; Statute of Anne, 8 Anne, c. 19 (1710)

32. Statute of Anne, 8 Anne, c. 19 (1710) ("[A]nd that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of fourteen years").

33. *Id.*

34. U.S. CONST. art. I, § 8, cl. 8. I will argue, however that there are also some key differences, *infra* at note 92.

35. Copyright Act of 1790, ch. 15, 1 Stat. 124.

36. *Id.* at § 1 ("And that the author and authors of any map, chart, book . . . being a citizen or citizens of these United States, or resident therein . . . shall have the sole right and liberty of printing . . .").

registration and filing.<sup>37</sup> The exclusion of foreign works and required formalities for statutory copyright protection would later be a source of tension as works went unprotected.

Throughout the nineteenth and twentieth centuries, Congress amended or completely overhauled the copyright acts several times. Many revisions extended the duration of the copyright term. Initially, in 1831, Congress extended the term to a maximum of forty-two years;<sup>38</sup> in 1909, they extended it to fifty-six years.<sup>39</sup> In 1976, Congress abandoned a term of a fixed number of years and changed the term to the life of the author plus fifty years.<sup>40</sup> In 1998, Congress further extended the copyright term to the life of the author plus seventy years by passing the Sony Bono Copyright Term Extension Act (CTEA).<sup>41</sup> Alongside lengthening the term, the various acts also extended the reach of copyrights to keep up with the developments of modern technology. Additionally, in 1891, Congress amended the Copyright Act to grant protection to citizens of foreign states whose countries afforded adequate protections to American works, as determined by the President of the United States.<sup>42</sup>

In addition to its English heritage, American copyright law has in recent years come to be shaped by international concerns. In the late nineteenth century, the Swiss government convened an international conference to address copyrights in Berne.<sup>43</sup> While the Swiss government invited the United States to the conference, the Americans ultimately declined to adopt the resulting agreement, the Berne Convention, because it was incompatible with existing United States law which did not protect works of foreign authors at the time.<sup>44</sup> Additionally, the Berne Convention plainly stated that its focus was on protecting the rights of the authors and not utilitarian concerns.<sup>45</sup>

Over the next century, an additional sixty-seven countries would join the Berne Convention and the United States faced increasing inter-

37. *Id.* at § 3.

38. Copyright Act of 1831, ch. 16, 4 Stat. 436. Additionally, this Act required notice of the copyright to be printed on the work. *Id.*

39. Copyright Act of 1909, ch. 320, 35 Stat. 1075.

40. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

41. Sony Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

42. International Copyright Act of 1891, Ch. 565, 26 Stat. 1106. This resulted in reciprocity with Belgium, Great Britain, France, and Switzerland in 1891, Proclamation No. 3, 27 Stat. 981 (July 1, 1891); Germany and Italy in 1892, Proclamation No. 24, 27 Stat. 1021, 1043 (April 15, 1892); Denmark and Portugal in 1893, Proclamation No. 1, 28 Stat. 1219 (May 8, 1893); Proclamation No. 4, 28 Stat. 1222 (July 20, 1893), Spain in 1895, Proclamation No. 5, 29 Stat. 871 (July 10, 1895); and Mexico and Chile in 1896, Proclamation No. 10, 29 Stat. 877 (Feb. 27, 1896); Proclamation No. 13, 29 Stat. 880 (May 25, 1896).

43. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 12 (1988).

44. Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 174 (1989).

45. Burger, *supra* note 43, at 16.

national pressure to join.<sup>46</sup> In particular, foreign countries would cite the United States' lack of membership in the Berne Convention as being hypocritical during negotiations over piracy.<sup>47</sup> Due to disagreements with the underlying policy of the agreement and the incongruity of the terms of the Convention with the then-existing American copyright law, the United States continued to resist joining the Convention.<sup>48</sup> However, in response to the international pressure and following modifications to American copyright law that were more compatible with the terms of the Convention, the United States passed the Berne Convention Implementation Act of 1988<sup>49</sup> and ultimately joined the Berne Convention.<sup>50</sup>

Although, the United States officially joined the Berne Convention, additional changes to the law were necessary to fully adopt the Convention. The changes came about in the legislation implementing the results of the Uruguay round of international trade agreements.<sup>51</sup> The Act passed to implement the agreement, the Uruguay Round Agreements Act (URAA), had the effect of restoring copyright protection to works under copyright in their home country that had fallen into the public domain in the United States for one of three reasons.<sup>52</sup> First, the law restored protection if the work was in the public domain due to a failure to comply with United States formalities such as providing notice of the claimed copyrights.<sup>53</sup> Second, it granted copyright protection if the law, at the time a work was created, did not protect its subject matter, but later did.<sup>54</sup> Lastly, the URAA restored copyrights if the reason the work was in the public domain was that the United States did not afford copyright protection to works created in its country of origin.<sup>55</sup>

## II. *GOLAN V. HOLDER*

### A. *The Road to the Supreme Court*

In the fall of 2001, a group of musicians filed suit in the United States District Court for the District of Colorado challenging the constitutionality of both the Uruguay Round Agreement Acts (URAA) and the Sony Bono Copyright Term Extension Act (CTEA).<sup>56</sup> This case would be placed on hold for two years as the district court stayed the

46. Hatch, *supra* note 44, at 171, 178.

47. *Id.* at 178.

48. Burger, *supra* note 43, at 68.

49. Berne Convention Implementation Act of 1988, Pub. L. No. 100-658, 102 Stat. 2853.

50. Hatch, *supra* note 44, at 171-72.

51. *Golan v. Holder*, 132 S. Ct. 873, 877 (2012).

52. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

53. *Id.* at § 514.

54. *Id.*

55. *Id.*

56. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1216-17 (D. Colo. 2004).

proceedings while the Supreme Court ruled on a nearly identical claim challenging the constitutionality of the CTEA.<sup>57</sup>

In *Eldred v. Ashcroft*, the Supreme Court considered whether the CTEA unconstitutionally extended the length of the copyright term for existing works.<sup>58</sup> The CTEA was challenged on the grounds that it violated both the Copyright Clause and the First Amendment.<sup>59</sup> Writing for the majority, Justice Ginsburg upheld the constitutionality of the law, the reasoning of which would come to strongly influence the outcome of *Golan*. Citing a long history of term extensions for both copyrights and patents, she held that extending the copyright term of existing works did not violate the Copyright Clause's requirement that the term be limited.<sup>60</sup> The CTEA was also found to be a rational exercise of legislative power because Congress desired to extend the U.S. copyright term to be on par with that of European nations. This insured that American authors were not at a competitive disadvantage compared to their European counterparts.<sup>61</sup> The Court noted that it is the role of Congress, not the Court, to determine how to best pursue the goals of the Copyright Clause.<sup>62</sup> Perhaps most importantly, they held that conformity with those goals was to be considered in the context of the entire intellectual property regime.<sup>63</sup>

Following the Court's decision in *Eldred*, the district court dismissed the musicians' claim against the CTEA.<sup>64</sup> The musicians' remaining three claims concerned the constitutionality of § 514 of the URAA that restored copyright protection to works previously in the public domain. They first argued that Congress lacked the power to remove works from the public domain because doing so did not meet the constitutional mandate to "promote the Progress of Science and useful Arts."<sup>65</sup> They relied on both the history of copyright legislation and an earlier decision in a patent case, *Graham v. John Deere Co.*,<sup>66</sup> to support their claim that Congress lacked the necessary authority.<sup>67</sup> Their second argument was that § 514 of the URAA inhibited their right to free speech under the First Amendment because they lost the ability to freely publish works that have had their copyrights restored.<sup>68</sup> They distinguished their claim from the holding in *Eldred*, which held that First Amendment scrutiny is not necessary, by claiming that in removing works from the public domain, the URAA upset "the traditional contours of copyright protection."<sup>69</sup> Finally, the musicians

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57. *Id.* at 1217.

58. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

59. *Id.* at 196.

60. *Id.* at 204.

61. *Id.* at 205–06.

62. *Id.* at 212.

63. *Id.* at 222.

64. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1218 (D. Colo. 2004).

65. *Id.* at 1218.

66. *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

67. *Golan*, 310 F. Supp. 2d at 1219.

68. *Id.* at 1220.

69. *Id.*

claimed that their Fifth Amendment rights were violated because they were deprived of their property without due process.<sup>70</sup> They supported this claim by looking to a concurring opinion by Justice Kennedy in *Eastern Enters. v. Apfel*,<sup>71</sup> where he stated that retroactive legislation that upsets people's expectations is a violation of due process.<sup>72</sup>

The district court initially granted a summary judgment motion for the government, rejecting each argument of the musicians.<sup>73</sup> However, on appeal, the Tenth Circuit reversed the decision on the First Amendment claim, accepting the musicians' argument that First Amendment scrutiny was necessary because one of the "traditional contours" of copyright law was that works in the public domain stay there, and § 514 of the URAA upsets this principle.<sup>74</sup> The Tenth Circuit remanded the case back to the district court, which this time found in favor of the musicians, holding that while § 514 of the URAA was a content-neutral restriction, it did burden substantially more speech than was necessary to meet a legitimate government interest.<sup>75</sup> On appeal by the government, the Tenth Circuit rejected the district court's determination that the § 514 of the URAA violated the musicians' First Amendment because the provisions were narrowly tailored and did not burden more speech than was necessary.<sup>76</sup> Dissatisfied with the verdict, the musicians successfully petitioned the Supreme Court for certiorari, and oral arguments were heard on October 5, 2011.

#### B. *The Public Domain is Not Inviolable—The Supreme Court Decision*

On January 18, 2012 over a decade of litigation would end as the Supreme Court released a six to two decision in favor of the government.<sup>77</sup> Justice Ginsburg wrote the majority opinion and all the other Justices joined her opinion except Justices Stephen Breyer and Samuel Alito who dissented and Justice Elena Kagan who did not take part in the decision of the case. Ginsburg's opinion addressed both the Copyright Clause claim and the First Amendment claim of the musicians.

In rejecting the musicians' claim that § 514 of the URAA violated the Copyright Clause, Justice Ginsburg relied heavily on the court's ear-

70. *Id.*

71. *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (Kennedy, J., concurring). *Golan v. Asoft*, 2d 1215, 1217 trade agreements the results of hte ion. better protection for

72. *Golan*, 310 F. Supp. 2d at 1220.

73. *Golan v. Gonzales*, No. Civ.01-B-1854(BNB), 2005 WL 914754 (D. Colo. Sept. 4, 2007).

74. *Golan v. Gonzales*, 501 F.3d 1179, 1191–92 (10th Cir. 2007). The court noted that outside a few exceptional circumstances that occurred just following each of the two World Wars, there is little history of Congress affording copyright protection to works in the public domain. *Id.*

75. *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009) (finding that the U.S. went further than other nations that implemented the Berne Convention, and that the Act treated foreign authors more favorably than domestic authors).

76. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010) (holding that Congress intended to protect the rights of domestic authors and rationally believed that restoring copyrights for foreign authors could induce their countries to do the same for domestic authors).

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

lier decision in *Eldred*. She noted that *Eldred* established, for purposes of the Copyright Clause, that “limited” is to be interpreted as “confin[e] within certain bounds.”<sup>78</sup> Under that definition, the restored copyrights were sufficiently limited because they would eventually end.<sup>79</sup> Additionally, the majority opinion also cites several statutes from the original Copyright Act of 1790 to late nineteenth century statutes to mid twentieth century statutes that Justice Ginsburg argued granted copyrights to works in the public domain.<sup>80</sup> Expanding on the holding in *Eldred*, Justice Ginsburg argued that the Copyright Clause is not confined to simply incentivizing new creation, but rather extends to efforts to encourage dissemination of information.<sup>81</sup> With dissemination considered an appropriate goal of copyright laws, she further argued that it is rational to consider that Congress believed strict adherence to the Berne Convention would result in achieving that end.<sup>82</sup> Indeed, in the last section of the opinion, the Court noted that they are not ruling on the wisdom of the URAA, but rather that the law is within the power of Congress.<sup>83</sup>

Unlike the Tenth Circuit, the Supreme Court rejected the idea that § 514 of the URAA warranted heightened scrutiny under the First Amendment, noting that the “traditional contours” of copyright protection, only protecting expressions, not facts, and preserving the fair use of works, are not affected by § 514 of the URAA.<sup>84</sup> The Court took particular issue with the argument of the musicians and the portion of the Tenth Circuit’s holding that the public’s right to a work vests when it enters the public domain. Citing 17 U.S.C § 201(a), which governs the initial ownership of copyrights, Justice Ginsburg noted that under statutory law, rights vest initially with the author of a work.<sup>85</sup> She noted that rights do not vest in the public following the expiration of the copyright term; the work “simply lapse[s] into the public domain” and no one has any ownership rights to it anymore.<sup>86</sup> Despite the loss of free, unrestricted access to the affected works, the Court held that Congress did not violate the musicians’ First Amendment rights because they still have access to the works through either fair use or obtaining a license through the marketplace.<sup>87</sup>

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78. *Id.* at 884.

79. The Court additionally noted that foreign authors would receive fewer years of exclusivity than domestic authors because they receive no credit for the time in which their works were not protected by copyright. *Id.* at 878.

80. *Id.* at 885–87.

81. *Id.* at 888.

82. *Id.* at 889.

83. *Id.* at 894.

84. *Id.* at 890–91.

85. *Id.* at 892.

86. *Id.*

87. *Id.* at 892–93. The Court noted that the net effect of the URAA is to place foreign works on the same level as domestic works. In particular, it noted that works of Aaron Copland and Leonard Bernstein were always subject to copyright protection in the United States, but the works of their contemporary, Sergei Prokofiev, were not protected until the URAA. *Id.*

### III. HOW THE COURT'S RULING FITS INTO HISTORY AND PRACTICE

#### A. *Utilitarian, Yet Grounded in Natural Rights*

One of the most interesting aspects of the *Golan* opinion was how the Court addressed the various competing theoretical justifications for copyright law. Both opinions attempt to justify their conclusion as being consistent with utilitarian theory. This theory of copyright law posits that it exists because the public benefits by receiving access to creative works.<sup>88</sup> The utilitarian theory was supported by the majority of the Founding Fathers and is reflected in the text and the dissent's historical interpretation of the Copyright Clause.<sup>89</sup>

Where the two opinions diverge is on what exactly qualifies as a valid utilitarian end. Justice Breyer's opinion takes the position that the Copyright Clause mandates new copyright laws to provide some possible incentive for the creation of new work.<sup>90</sup> Justice Ginsburg, on the other hand, believes that history suggests encouraging dissemination is a valid end to copyright law, even in the absence of promoting the creation of new works.<sup>91</sup> In particular, she cites the fact that until the Copyright Act of 1796, federal statutory copyright required publication of the work.<sup>92</sup>

A close textual comparison of the Statute of Anne, the Copyright Clause, and the Copyright Act of 1790 supports Justice Ginsburg's position. The text of the Statute of Anne plainly states Parliament passed it for "the encouragement of learned men to compose and write useful books."<sup>93</sup> Despite their strong influence on early American copyright law,<sup>94</sup> both the Copyright Clause and the Copyright Act of 1790 speak only to "promot[ing] the Progress of Science and the useful Arts"<sup>95</sup> and the "encouragement of learning."<sup>96</sup> Neither text, unlike the Statute of Anne, directly mentions encouraging the composition or creation of new works. Indeed, the Copyright Act of 1790 extended copyright protection to existing works, conditioned upon filing copies with the federal government for recording and preservation.<sup>97</sup>

Although both Justice Ginsburg and Justice Breyer base their opinions on their understanding of utilitarian theory, Justice Ginsburg also makes several arguments that are highly influenced by the competing

88. Thomas M. Byron, *As Long As There's Another Way: Pivot Point v. Charlene Products as an Accidental Template for Creativity-Driven Useful Articles Analysis*, 49 IDEA 147, 154–55 (2009).

89. *Golan*, 132 S. Ct. at 901–02 (Breyer, J. dissenting).

90. *Id.* at 899–900.

91. *Id.* at 888–89.

92. *Id.*

93. The Statute of Anne, 8 Anne, c. 19 (1710). It should be noted, however, that the Statute did convey the same benefits to existing, but unpublished works as it did to works yet to be created and also mandated that copies of texts be deposited in various libraries in England and Scotland.

94. See *supra* Part I.

95. U.S. CONST. art. I, § 8, cl. 8.

96. Copyright Act of 1790, ch. 15, 1 Stat. 124.

97. *Id.*

natural rights justifications for copyright law. The natural rights theory suggests that copyrights should exist because man has a property interest in the fruit of his labor and that property interest should trump societal concerns.<sup>98</sup> In rejecting the musicians' claim that their First Amendment rights were violated by the restoration of copyrights to certain materials in the public domain, Justice Ginsburg used a fairness argument, noting that the URAA simply treated foreign composers in the same manner as their domestic contemporaries.<sup>99</sup> Specifically, her opinion speaks of authors being "deprived of protection" and "spared" further deprivation and makes comparisons between the rights enjoyed by foreign and domestic authors.<sup>100</sup>

The influence of natural rights theory on copyrights in the Anglo-sphere is hardly new. The utilitarian Statute of Anne notes the "Detriment" and "Ruin" authors faced when others published their works without their consent.<sup>101</sup> While the Copyright Clause is unquestionably utilitarian, for much of American history, natural rights concerns have also been part of the debate surrounding copyright law.<sup>102</sup>

Both utilitarian and natural rights arguments were put forth during the debate of the Copyright Act of 1831, which provided for the first term extension following the initial Copyright Act of 1790.<sup>103</sup> Indeed, while utilitarian concerns were raised, one of the primary motivations behind the law's lengthening of the copyright term was to place American authors on a more equal footing with their counterparts in Europe.<sup>104</sup> This law, in many ways, was highly influenced by both utilitarian and natural rights concerns.<sup>105</sup>

At the turn of the twentieth century, during the debates surrounding what would become the Copyright Act of 1909, both natural rights and utilitarian arguments were made to recommend expansion of the copyright term.<sup>106</sup> One scholar, however, argues that utilitarian arguments were controlling because the text of the final House Report as

98. Orit Fischman Afori, Note, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 497, 502–04 (2004).

99. Golan v. Holder, 132 S. Ct. 873, 893 (2012).

100. *Id.*

101. Statute of Anne, 8 Anne, c. 19 (1710).

102. Afori, *supra* note 98, at 505.

103. Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 *J. COPYRIGHT SOC'Y U.S.A.* 19, 30–31 (2001).

104. *Id.* Notably, at that time France had already adopted a copyright term of the life of the author plus fifty years. *Id.* at 31 n.59. The United States would later adopt this term in 1976. Copyright Act of 1976, ch. 3, § 302(a), 90 Stat. 2541.

105. See Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 *U. CIN. L. REV.* 651, 656 (2002) (noting that the renewal provision of the 1831 Act granted authors a lengthened term and granted their family the right to renew in the event they died before renewal came up, but also noting that where the author or his decedents declined to renew, the public received access to the work after the initial term expired).

106. S. REP. NO. 6187, at 6 (1907). The natural rights arguments included providing for the author for old age and his children until they are able to support themselves. The utilitarian arguments encouraged the author to revise his works and only set the term as long as necessary. H.R. REP. NO. 2222, at 14 (1909) (suggesting that the copyright

well as statements on the floor by Rep. Frank Currier, Chairman of the House Committee on Patents, plainly reject the natural rights justifications for copyright law in the United States.<sup>107</sup> Despite this language in the report accompanying the final bill, just two years earlier a Senate report clearly invoking the natural rights justification for copyrights argued the Statute of Anne was passed to grant authors a “more definite remedy” for the infringement of their right to their work and that the U.S. Constitution did not authorize Congress to “grant” copyrights, but rather to “secure” them.<sup>108</sup> Similarly, both in a preliminary report in 1907 and in their final report, the House included comments made by President Roosevelt in an address to Congress in 1905 urging a revision of the then existing copyright laws because certain unprotected classes of works were “entitled” to receive copyright protection and “hardships” that unduly burden content producers and serve no public interest function should be eliminated.<sup>109</sup>

The influence of the natural rights theory on American copyright law is even more apparent with the debate surrounding the two most recent term extensions, the Copyright Act of 1976 and the Copyright Term Extension Act (CTEA) in 1998. As with the earlier 1909 Act, in justifying the 1976 Act, Congress again professed a utilitarian motive.<sup>110</sup> Indeed, one congressman campaigned against a series of interim term extensions passed while the 1976 Act was debated because he could not find any public benefit in the extensions.<sup>111</sup> Despite this sentiment, natural rights arguments again were plentiful. Both houses justified the need for the increased term of the 1976 Act in part because of increases in life expectancy, the perceived unfairness in depriving authors of available economic benefits from their work, the increase in the commercial life of works, and the possibility of further benefiting authors by joining the Berne Convention.<sup>112</sup>

Twenty-two years later, when Congress again extended copyrights by passing the CTEA, natural rights arguments so predominated the discussion that one scholar classified the constitutionally mandated utilitarian justification as merely “an apparent afterthought.”<sup>113</sup> Indeed, the House noted that the CTEA ensured that the United States (and its authors and rights holders) would not lose out on potential export revenue, placed European and American authors on equal footing, and ensured that authors’ children and grandchildren could benefit eco-

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terms should be long enough to provide for authors at old age when the author “needs it the most.”).

107. Dallon, *supra* note 25, at 434–35.

108. S. REP. NO. 6187, at 8 (1907).

109. H.R. REP. NO. 7083, at 1 (1907); H.R. REP. NO. 2222, at 1–2 (1909) (Message to Congress, December 1905 by President Roosevelt).

110. Dallon, *supra* note 25, at 436 (discussing statements made by Sen. John Little McClellan, Chairman of the Senate Subcommittee on Patents, Trademarks, and Copyrights that his “sole objective” was to “encourage creativity” and promote public interest).

111. Ochoa, *supra* note 103, at 41–42 (noting that Robert Kastenmeir found it “impossible” to find a public benefit to an interim term extension.)

112. H.R. REP. NO. 94-1476, at 134–35 (1976); S. REP. NO. 94-473, at 116–18 (1976).

113. Dallon, *supra* note 25, at 438.

nomically from the work.<sup>114</sup> Similarly, the Senate considering a comparable bill two years earlier noted that authors “deserve[d] to benefit fully” from their works, and extending the term of protection an additional twenty years would help ensure that would happen.<sup>115</sup>

Given the prominence of natural rights arguments during the various copyright law extensions of the last century, it is hardly surprising that the URAA, which restored copyrights for certain foreign works and was the statute at issue in *Golan*, shows a similar influence. One of the primary justifications for passing the law, echoed by everyone from senators and executive branch officials to the heads of industry groups, was that American rights holders stood to benefit economically from granting retroactive copyrights.<sup>116</sup> Another justification for the law was that it was good policy because it rectified an unfair situation where foreign authors were deprived something that was theirs.<sup>117</sup> However, it was also recognized that the Constitution mandates that copyright law taken as a whole have a utilitarian end.<sup>118</sup> One law professor, testifying before Congress, noted that this constitutional requirement was satisfied because passing the URAA would strengthen the international copyright system and indirectly provide incentives to create new works.<sup>119</sup> Much of the concern about the constitutionality of this legislation was not over whether it satisfied the utilitarian mandate of the Copyright Clause, but rather whether the legislation violated the Takings Clause.<sup>120</sup>

Considered historically, it is hardly surprising that Justice Ginsburg uses both natural rights and utilitarian arguments to support her conclusion. While commonly present alongside utilitarian justifications for much of American history, they have taken on an increased promi-

114. H.R. REP. NO. 105-452, at 4 (1998). They did also mention a utilitarian argument suggesting that the lengthened term of the CTEA would encourage further creation.

115. S. REP. NO. 104-315, at 3 (1996). The Senate also suggested that this term extension would enhance the public domain through stimulating the creation of new works, however, given the length of copyright terms with that extension (the life of the author plus seventy years), it is likely that few if any living today will be able to fully reap the benefits of this “enhanced” public domain. *Id.*

116. *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearings on S. 2368 and H.R. 4894 Before the Subcommittee on Intellectual Property and Judicial Administration of House Committee on the Judiciary and Subcommittee on Patent and Trademarks of the Senate Committee of the Judiciary*, 103d Cong. 81 (1994) [hereinafter *GATT*] (statement of Sen. Deconcini) (“The conventional wisdom . . . is . . . we will get more than we give because U.S. authors will be able to retrieve far more works in foreign countries than foreign authors will retrieve here in the United States.”). *See also id.* at 171–72 (statement of Ira Shapiro, Office of the U.S. Trade Representative). *See also id.* at 255–57 (statement of Jack Valenti, President and CEO of the MPAA).

117. *Id.* at 190–92 (statement of Prof. Shira Perlmutter).

118. *Id.* at 207.

119. *Id.* at 207–08. Justice Ginsburg cites several of Prof. Perlmutter’s arguments that claim the URAA satisfies the utilitarian mandate in her *Golan* opinion. Golan v. Holder, 132 S. Ct. 873, 888–89 (2012).

120. *GATT*, *supra* note 116, at 145, 150–62 (Statement and prepared testimony of Christopher Schroeder, Office of Legal Counsel, Dept. of Justice). Justice Ginsberg noted this in her opinion in *Golan*. *Golan*, 132 S. Ct. at 892 n.33.

nence in the debates over our most recent copyright and intellectual property legislation. Indeed, her understanding of utilitarianism, though supported by history, almost invites such debates.

B. *Removing Works From the Public Domain—Unprecedented,  
But Not Unheard Of*

Although there was much public outcry about the effects of the URAA, what is groundbreaking about the law is not the idea of removing works from the public domain, but rather the fact that Congress actually did so on such a large scale, and the Court deemed doing so constitutional. Justice Breyer's dissent noted that until the URAA there was a "virtually unbroken string of legislation preventing the withdrawal of works from the public domain."<sup>121</sup> Indeed, the Tenth Circuit in one of the intermediary appeals of the case held that it is a "bedrock principle of copyright law that works in the public domain remain there" and that "§ 514 [of the URAA] alters the traditional contours of copyright protection by deviating from this principle."<sup>122</sup> The fact that the public domain exists at all is not a matter of legislative grace, but rather is constitutionally mandated. Although not expressly prescribed in the document, its existence can be inferred because by restricting the monopoly granted to content creators to "limited Times," the Constitution ensures that eventually one day the public will have free access to works.<sup>123</sup> Even ardent supporters of personal property rights, such as John Locke, recognized that there had to be a limit to the protection of intellectual property because one can hardly have any legitimate claim to property rights in a work written by someone who lived over a thousand years ago.<sup>124</sup>

As Justice Ginsburg's opinion claims and Justice Breyer grudgingly accepts,<sup>125</sup> the removal of works from the public domain is not completely without precedent. Her opinion cites the original Copyright Act of 1790, several private letter laws, and statutes passed following the First and Second World Wars as proof of this precedent.<sup>126</sup> She argues that the United States' joining of the Berne Convention is an exceptional event that is on par with these other occasions where works were taken out of the public domain.<sup>127</sup> However, examining both the historical context and the scope of prior copyright restorations demonstrates, as Justice Breyer argues, just how exceptional the URAA is.<sup>128</sup>

121. *Golan*, 132 S. Ct. at 909 (Breyer, J., dissenting).

122. *Golan v. Gonzales*, 501 F.3d. 1179, 1187–88 (10th Cir. 2007).

123. U.S. CONST. art. I, § 8.

124. BENJAMIN RAND, *THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 177* (1975) (*cited in* Dallan, *supra* note 25, at 400–01). To Locke, a laborer's right to the fruits of his labor finds justification not in the laws of man, but in the law of God. He believed that through using one's labor to transform something from the state of nature, we become forever joined with the target of our labor and have near unlimited rights over it unless others are in need. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 27 (1690).

125. *Golan*, 132 S. Ct. at 908–09 (Breyer, J., dissenting).

126. *Id.* at 885–87.

127. *Id.* at 887.

128. *Id.* at 908–09 (Breyer, J., dissenting).

The nation's first federal copyright statute, the Copyright Act of 1790 was passed a mere one year following the ratification of the Constitution.<sup>129</sup> Prior to this, copyright was a state matter which required obtaining separate copyrights in each of the states that recognized it.<sup>130</sup> In ratifying the Constitution, the States ceded elements of sovereignty to the new federal government. Their fundamental existence was forever changed. New federal laws that harmonized the patchwork of state laws were expected. The statutes passed following the World Wars only applied to nationals of countries where U.S. copyright interests were protected on a reciprocal basis.<sup>131</sup> Further, they merely allowed authors the opportunity to comply with the required American formalities if they were unable to do so because of the war.<sup>132</sup>

The context and scope of the URAA could hardly be any more different than the Copyright Act of 1790 or the wartime restorations. First, unlike the wartime restorations, the URAA applies to works created in any Berne signatory country, even if at the time of a work's creation there were no reciprocal copyright arrangements or any expectation of copyright protection in the United States.<sup>133</sup> Second, the Act in some cases impacts works created over eighty years ago and applies to works created over several decades, rather than just a few short years.<sup>134</sup> Last, while joining the Berne Convention may have been a seminal event for copyright scholars and rights holders, it is hardly the wholesale revolution that accompanied the adoption of the U.S. Constitution.

Much weight should be given to Breyer's argument that among other acts, the Copyright Acts of 1831,<sup>135</sup> 1909,<sup>136</sup> and 1976,<sup>137</sup>

129. The First United States Congress passed the Act during its second session on May 31, 1790. Copyright Act of 1790, ch. 15, 1 Stat. 142.

130. Kevin D. Galbraith, Note, *Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1119, 1136–37 (2002) (Delaware did not enact copyright legislation.).

131. See ch. 11, 41 Stat. 368 (1919) (“When the foreign State . . . grants . . . to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens”); ch. 421, 55 Stat. 732 (1941) (“who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States”).

132. *Id.* Justice Ginsberg also noted that this was one of the arguments of the musicians, but rejected it as she believed that the World Wars were on par with creating the nation's first copyright system and joining the Berne Convention. *Golan*, 132 S. Ct. at 887 n.24.

133. 17 U.S.C. § 104A(h)(6)(C) (2006).

134. Dale Nelson, *Golan Restoration: Small Burden, Big Gains*, 64 VAND. L. REV. EN BANC 165, 170 (2011) (noting that the act affects works from certain countries produced after 1923 but before 1955, 1964, or 1972 depending on the subject matter).

135. Copyright Act of 1831, ch. 16, 4 Stat. 436, 439. (“Provided, That this section shall not extend to any copyright heretofore secured, the term of which has already expired.”).

136. Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1077. (“That no copyright shall subsist in the original text of any work which is in the public domain.”).

137. Copyright Act of 1976, Pub. L. 94–553, § 303, 90 Stat. 2541, 2573 (“[B]ut not theretofore in the public domain . . .”).

expressly preclude applicability of the term extension contained therein to works in the public domain.<sup>138</sup> Indeed, while Congress was working on a wholesale revision of copyright law that would ultimately become the 1976 Act, they passed a series of short-term term extensions to ensure that the works would receive the benefit of the long-term term extension they were contemplating.<sup>139</sup> Some felt that this demonstrated that Congress believed they lacked the power to restore copyrights to works in the public domain.<sup>140</sup>

While after the first federal copyright statute, Congress never removed works from the public domain on the scale that they did in the URAA, the idea of doing so and granting foreign authors retroactive copyright protection is hardly news. In 1946, the United States signed the Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works.<sup>141</sup> This was a treaty with Latin American nations that provided for retroactive copyrights for foreign works that entered into the public domain due to a failure to comply with the required U.S. copyright formalities.<sup>142</sup> Despite the fact that the Convention was signed in Washington, D.C. by twenty-one member states of the Pan American Union,<sup>143</sup> the Senate never ratified the treaty, in part due to concerns over retroactivity.<sup>144</sup>

Similarly, membership in the Berne Convention was under serious consideration for most of the twentieth century. In 1935, the Senate approved the U.S. joining the Convention, but later withdrew their approval until copyright law could be amended to comply with the Convention's requirements.<sup>145</sup> Four decades later, when Congress significantly revised copyright law with the Copyright Act of 1976, the possibility of future membership in the Berne Convention was cited by Congress as one of the reasons for the extension of the copyright term.<sup>146</sup> Although the issue of retroactive copyrights was initially not addressed when the United States ultimately joined the Berne Convention in 1988, the Congressional working group set up to study U.S. adherence to the Convention noted that addressing it was necessary for U.S. rights holders to gain the protection of the Convention, but that it also raised practical, legal, and constitutional issues.<sup>147</sup> Indeed, in a prepared statement before a congressional committee considering the

138. *Golan v. Holder*, 132 S. Ct. 873, 909 (2012) (Breyer, J., dissenting).

139. Ochoa, *supra* note 103, at 40-41.

140. *Id.* at 42.

141. Note, *The Inter-American Copyright Convention: Its Place in United States Copyright Law*, 60 HARV. L. REV. 1329, 1329 n.1 (1947).

142. *Id.* at 1333.

143. *Id.* at 1329 n.1.

144. Comment, *International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law*, 62 YALE L.J. 1065, 1072 (1953).

145. Melville Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 548 (1967).

146. H.R. REP. NO. 94-1476, at 135 (1976).

147. *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 587 (1986) (cited in Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 174 (1993)).

URAA, a representative of the Office of Legal Counsel noted that passing a law affording retroactive copyright protection to foreign authors was inevitable.<sup>148</sup>

In a sense, both Justices Ginsburg and Breyer are correct in their interpretation of the historical precedent in removing works from the public domain. While no statute since the initial federal copyright statute had removed works from the public domain on the scale of the URAA, the idea of doing so has existed for most of the twentieth century. The actions were without precedent, but any party closely following developments in copyright law would have been placed on notice that this was a real possibility.

#### IV. THE STATUS OF THE PUBLIC DOMAIN FOLLOWING *GOLAN V. HOLDER*

The Supreme Court first used the phrase “public domain” to describe intellectual property in 1896.<sup>149</sup> Prior to this, terms used to describe real property, such as “public property” or “common property,” were commonly used to refer to the same body of works.<sup>150</sup> Although the change in the terms used may appear to be merely superficial, it is potentially significant. As one scholar noted, the first edition of *Black’s Law Dictionary*, released in 1891 (before the application of the term “public domain” to intellectual property), defines public property as that which is “considered as being *owned* by ‘the public.’”<sup>151</sup> Today, however there is much debate over the exact meaning of the phrase “public domain.” Some scholars argue that applying the term to a work can signify a lack of private ownership to the work, a right of public use, or both.<sup>152</sup> Although in most situations, the answer to this question has little impact on those that use the public domain, the URAA and cases like *Golan* demonstrate why the answer is important.

During the debate surrounding the URAA, Congress operated under the assumption that no one had a property right to works in the public domain.<sup>153</sup> As one scholar noted, however, not all courts necessarily share this view and instead, strongly imply that everyone rather

148. *GATT* *supra* note 116, at 157 (Prepared Statement of Christopher Schroder, Office of Legal Counsel) (“[I]t should have been apparent . . . that something very similar to draft section 104A would be passed to provide more vigorous implementation of the Berne Convention.”)

149. Vincenzo Vinciguerra, *Contribution to the Understanding of the Public Domain*, 24 J. MARSHALL J. COMPUTER & INFO. L. 411, 424 (2006).

150. *Id.* at 414.

151. Tyler Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 236–37 (2002) (emphasis added).

152. Mary Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 789 (2009). See also Vinciguerra, *supra* note 149, at 416 (noting that this term has been defined as the opposite of copyright).

153. *GATT*, *supra* note 116, at 151 (prepared statement of Christopher Schroder, Office of Legal Counsel).

than no one owns the public domain.<sup>154</sup> Indeed, in this case the district court in addressing the musicians' claim that the URAA violated the Copyright Clause held that ideas remain "public property," even if the rights to fully express those ideas are vested solely in the creator.<sup>155</sup>

Justice Ginsburg's opinion in *Golan* firmly rejects any idea of ownership rights to works in the public domain without any reference to the ongoing dispute.<sup>156</sup> The only sources that she cites to support this proposition are ambiguous and do not directly speak to any ownership or lack of ownership by the public in the work.<sup>157</sup> While she cites the Copyright Act of 1976 to argue that rights only vest in authors at the time of creation,<sup>158</sup> the Act itself is silent as to the status of works whose copyright term has expired and uses the phrase "public domain" only twice in the entire act and does so in reference to works excluded from the scope of copyright protection.<sup>159</sup> Likewise, she cites Article 18 of the Berne Convention to claim that rights to works do not re-vest in the general public, but rather that upon expiration of the copyright term, works "fall[ ] into the public domain."<sup>160</sup> Again, this language fails to state anything concerning property rights, and it is hard to see how a treaty the United States joined in 1988 should be used to construe nearly two centuries of common law precedent and a statute passed in 1976. Indeed, this phrase exists nowhere in the Copyright Act of 1976<sup>161</sup> or in the URAA.<sup>162</sup>

The dissenting opinion also uses the phrase "fallen into the public domain" in its discussion of copyrights, but does not make the same claim about property rights that the majority opinion did.<sup>163</sup> Instead, it recognizes that the public had some belief that they had ownership rights to works in the public domain and implies that those rights may exist, but are less "well-established" than other property rights.<sup>164</sup> Justice Breyer makes no reference to Justice Ginsburg's statement about a lack of ownership rights at any place in his opinion.

Despite the shaky foundation, Justice Ginsburg's opinion could not be clearer: the Supreme Court does not recognize property rights in the public domain. The parties most impacted by this are those who have created derivative works using source material that was at the time in the public domain, but is no longer. The URAA takes away their

154. Ochoa, *supra* note 151, at 260 (noting that recent court decisions have used the terms "public property" or "common property" along with other language that implies public ownership).

155. *Golan v. Gonzalez*, No. Civ.01-B-1854(BNB), 2005 WL 914754, at \*14 (D. Colo. Sept. 4, 2007).

156. *Golan v. Holder*, 132 S. Ct. 873, 892 (2012) ("[N]o one, after the copyright term has expired, acquires ownership rights in the once-protected works.").

157. *Id.*

158. *Id.*

159. Copyright Act of 1976, Pub. L. 94-533, 90 Stat. 2541.

160. *Golan*, 132 S. Ct. at 892.

161. Copyright Act of 1976, Pub. L. 94-533, 90 Stat. 2541.

162. Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994).

163. *Golan*, 132 S. Ct. at 903.

164. *Id.* at 906.

right to exploit their own work without paying for the right to use to the underlying source material.<sup>165</sup> This was one of Congress's biggest concerns with passing the URAA and one of the primary reasons behind the inclusion of accommodations for parties who had previously used the work.<sup>166</sup> It should be noted that the musicians never argued about losing access to a derivative work they created,<sup>167</sup> and did not challenge the district court granting summary judgment, rejecting their due process claims.<sup>168</sup> Time will tell if any creators of a derivative work try to argue a takings claim, as Congress feared.

However harsh this decision may appear, the Court earlier took an even harder line to those who created derivative works under the Copyright Act of 1909. Under that Act, because copyrights were granted for two separate terms subject to renewal, it was necessary to secure the right to make a derivative work separately during both terms.<sup>169</sup> In *Stewart v. Abend*, an author granted the petitioner the right to create a derivative work during the first term and promised to do so again in the second term, but died before he could grant the right during the renewal term.<sup>170</sup> The Court declined to follow an earlier Second Circuit decision based off of similar facts, where the court determined that equitable reasons allowed the creator of the derivative work the right to continue exploiting the derivative work.<sup>171</sup> Instead, they rigidly applied property and copyright law and noted that a party who relies on an expectation of renewal does so at the risk the renewal may not occur.<sup>172</sup>

From *Golan* and *Stewart*, one principle emerges: those who choose to create derivative works do so at their own peril. It matters not what the creator's reasonable expectations of free access to the work were at the time their derivative work was created. The Court is willing to ignore equity and strictly apply statutory copyright law so as not to deprive the creator of the source work their rights under law.

## CONCLUSION

Following oral arguments, there was much speculation as to how the Court would rule in *Golan*. Court watchers were prepared for every possible outcome including a four-to-four tie.<sup>173</sup> What the Court ultimately decided, however, is perhaps best described as a continuation

165. Uruguay Round Agreements Act, Pub. L. 103-465, § 514, 108 Stat. 4809, 4976 (1994).

166. *Golan*, 132 S. Ct. at 892 n.33.

167. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1220 (2004). The musicians' claim was based upon loss of access to works that were once in the public domain.

168. *Golan*, 132 S. Ct. at 883 n.15.

169. Copyright Act of 1909, ch. 320, 35 Stat. 1075. This is no longer the case today under the Copyright Act of 1976 as amended by the CTEA which grants a single term of protection with no renewal provisions.

170. *Stewart v. Abend*, 495 U.S. 207, 212 (1990).

171. *Id.* at 221-23.

172. *Id.* at 219-21.

173. Justice Kagan worked on this case as Solicitor General and did not take part in the proceedings. See Adam Liptak, *In Supreme Court Argument, a Rock Legend Plays a Role*, N.Y. TIMES, Oct. 5, 2011, at B2.

and expansion of their earlier decision in *Eldred*. Indeed, Justice Ginsburg wrote both opinions and frequently cites *Eldred* in her *Golan* opinion. Her opinion is faithful to precedent, yet disrupts established expectations concerning access to works in the public domain.

Undoubtedly one effect of *Eldred* and *Golan* is an increase in the power and deference given to Congress when enacting legislation subject to the Copyright Clause. The Court has made it clear that they will continue to consider copyright laws as a whole in determining their constitutionality.<sup>174</sup> In many ways, this can be considered to be a virtual evisceration of the utilitarian mandate of the Copyright Clause. It is hard to conceive of a copyright regime that could not be said to encourage the creation of new works or the dissemination of existing ones.

This evisceration of the utilitarian mandate in many ways reflects the growing influence of the natural rights theory over the twentieth century. This change is perhaps best seen in the United States joining the Berne Convention, an international copyright regime grounded in the natural rights philosophy. Despite this, it is unlikely that Congress would be so bold as to test the waters and try and pass a new copyright statute without making some claim of it serving a utilitarian end. Even so, the Court has shown that they will give Congress tremendous deference in interpreting such claim.

After this opinion, the only real limitation that appears on Congress's power is that any copyright law must provide for a fixed expiration date at some point in the future. It is of no consequence if that expiration date had been extended multiple times, it would have resulted in some cases from an author expecting to secure only fifty-six years of protection following publication (if they exercised their renewal right) to a copyright that persists not just during their entire lifetime, but also during their grandchildren's entire lifetimes. If recent history is any indication, authors can expect to receive yet another term extension, and the Court will uphold it.<sup>175</sup>

While *Golan* stood for the proposition that Congress could grant copyrights to works in the public domain, it only applied to a large but discrete number of works. *Golan* merely gave these works the term of protection they could have expected had they been eligible for copyright protection in the U.S. at the time of creation and complied with all the necessary formalities. This opinion should not be interpreted as standing for the idea that Congress has the power to remove *anything* from the public domain. The utilitarian and natural rights theories that underlie *Golan* seem to imply that there has to be some limit to this authority after the right holder becomes too attenuated from the creator.

Finally, it is notable that due to turnover on the Court, only five Justices heard both *Golan* and *Eldred*, but in both cases only one other

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174. *Golan v. Holder*, 132 S. Ct. 873, 888 (2012).

175. Indeed, Mary Bono argued (perhaps jokingly) for a copyright term of "forever less one day." Ochoa, *supra* note 103, at 45.

Justice in dissent joined Justice Breyer.<sup>176</sup> Both decisions had the support of the majority of the Court's "conservative" wing and a plurality of the "liberal" wing. In short, barring some massive shift over the next decade as four of the Justices currently over seventy decide to retire, it is unlikely the Court will back off of their holding. This new era of copyright law appears to be around for quite some time.

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176. Justice Stevens, who filed a separate dissenting opinion in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), retired prior to *Golan*. Justice Alito joined the court after *Eldred*.

