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A Good and Bad Week for Free Speech

By Christopher Jon Sprigman

On Wednesday thousands of scholars joined millions of people around the world in online protest of two proposed laws, the [Stop Online Piracy Act \(SOPA\)](#) and the [Protect IP Act \(PIPA\)](#). SOPA and PIPA would, in the view of many observers, authorize wide-ranging online censorship in the guise of stopping copyright infringement. So far, the protest appears to have been a success: Congressional support for the proposed laws is crumbling.

On that same day, the U.S. Supreme Court issued an opinion in a copyright case that may be just as important as SOPA and PIPA—and potentially just as harmful to the interests of scholars, librarians, and archivists. In *Golan v. Holder*, a group of conductors, educators, film distributors, and others challenged the constitutionality of Congress's decision in 1994 to remove millions of books, films, songs, and other creative works, mostly foreign, from the public domain and "restore" their copyrights. It did so to conform to an international agreement, although it is far from clear that the move was required to put the United States in conformity. Some of the works taken from the public domain and put back under copyright are very famous; they include Prokofiev's "Peter and the Wolf," the symphonies of Shostakovich, Picasso's "Guernica," and the English films of Alfred Hitchcock.

The *Golan* plaintiffs argued that Congress lacked the power under the Constitution's Copyright and Patent Clause to re-copyright those works, and also that the move violated the First Amendment. How? By imposing copyright burdens on free speech where none had existed before.

In a 6-2 opinion written by Justice Ruth Bader Ginsburg (with Justices Stephen G. Breyer and Samuel A. Alito Jr. dissenting), the court found that "[n]either the Copyright and Patent Clause nor the First Amendment ... makes the public domain, in any and all cases, a territory that works may never exit."

I should make clear that I have no claim to objectivity in this case. I was one of the lawyers who represented the plaintiffs in *Golan*, and,

more to the point, I have long believed that copyright restoration is both unlawful and bad policy. The court's opinion in *Golan* hasn't convinced me otherwise.

Let's take the Copyright and Patent Clause argument first. That part of the Constitution authorizes Congress to make patent and copyright laws, but requires that if Congress does so, it must restrict authors' and inventors' ownership of ideas and creative expression to "limited Times." That is, there can be no copyright or patent that lasts forever. And that makes good sense—copyright's purpose is to encourage the creation of new artistic and literary works by offering creators ownership of those works. But encouraging new works does not require perpetual ownership. And there are, moreover, important public interests in the widest possible access to creative works: to help spread learning, and to encourage new creators to build on what's been produced before. The Constitution sensibly balances those goals by providing for private rights, but limiting them, and thereby creating a constitutionally mandated public domain.

The *Golan* plaintiffs argued that pulling works like "Peter and the Wolf" out of the public domain and putting them back under private ownership violated the "limited Times" restriction. And that argument is not abstract, but very practical. A copyright term that can expire but then can be reactivated at any time isn't "limited." If Congress can restore expired copyrights, then no one can rely on the public-domain status of any particular work. Indeed, Congress could auction off the public domain to the highest bidder. And that destroys much of the public domain's value, because now any use of a public-domain work—either as part of a new work (say, another modern retelling of a Jane Austen novel) or as part of an archived collection in a library—can later be subject to revived copyright claims and demands for licensing payments. That loss of certainty will chill use of the public domain, and therefore is inconsistent with the purposes of the "limited Times" requirement.

The court rejected that argument, holding instead that "limited Times" simply means "not forever." The term of restored copyright, the court noted, is not perpetual, and therefore Congress acted within its power. And as for the possibility that Congress would enact more restorations to achieve perpetual copyright on the installment plan, the court held that the possibility of this "hypothetical legislative misbehavior" was not worth considering.

The *Golan* plaintiffs' First Amendment claim fared even worse. It was built on something the Supreme Court said almost a decade ago

in *Eldred v. Ashcroft*. *Eldred* was the case in which the Supreme Court affirmed Congress's 20-year extension of already-existing copyrights. The court rejected a First Amendment challenge to that change, holding that a long history of prior copyright extensions meant that the latest was constitutional. But the court issued an important caveat. Where Congress does not act in accordance with history, but instead alters copyright's "traditional contours," courts must conduct a more searching First Amendment review to ensure that whatever Congress has done does not burden speech in ways that cannot be justified.

Until today, we haven't known much about what the "traditional contours" test meant. After *Golan* we know that it means almost nothing.

There's no question that copyright restoration burdens speech; before Congress acted, we were all free to copy "Peter and the Wolf," to perform it, or to use its melodies in our own compositions. After restoration we can't do any of that without permission—which costs money. And there is no history of copyright restoration comparable to the history of copyright term extensions in *Eldred*. That doesn't matter, the court said in *Golan*, because Congress is free to restore copyrights without First Amendment review so long as doing so doesn't erase copyright's fair-use doctrine (a limited exception to copyright for teaching, criticism, and some other purposes) or its distinction between expression (copyrightable) and pure ideas (not copyrightable). The fair-use doctrine and the idea-expression distinction are the only "traditional contours" of copyright that Congress cannot disturb.

That's cold comfort to the artist who wishes to use a re-copyrighted work, or the archivist who wishes to digitize it and is now restricted to using whatever little snippet might qualify as "fair." As for the idea-expression distinction, in many cases that's no use at all. Major metropolitan orchestras will be able to afford to license the Shostakovich's symphonies that were once in the public domain. But less well-heeled regional orchestras or high schools won't. And it matters little that those orchestras remain free to communicate the "ideas" behind Shostakovich's work. What matters is the music, and that's back under copyright.

So, what's next? For teachers, scholars, artists, librarians, and others concerned with Congress's incessant expansion of the scope and duration of copyright, *Golan* makes clear that we can expect no help from the Supreme Court. Which brings me back to where I started—Wednesday's huge, and thus far effective, protests against

SOPA and PIPA. Those protests demonstrated that the tech industry, allied with the online grass roots, could overcome Hollywood's pro-copyright lobbying muscle. It's too early to say for sure, but it's possible that those protests marked the end of Hollywood's and the publishing and music industries' lock on copyright policy. Someone might test that by proposing that legislation be offered to return to the public domain all the works that the Supreme Court says Congress had the right to take out in 1994. Those works belong to all of us. And I, for one, want them back.

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22067030 2 days ago

I am disappointed by the position of the alleged originalists on this issue. When the constitutional language was written, writers and inventors were largely individual people, and patents were given largely to individuals. During the Nineteenth century, copyrights were given largely to individuals. The entrance of near immortal corporations into the licensing world, with consequent pressure on pliable politicians to extend copyrights indefinitely, is a 20th century phenomenon. One would think that a sincere originalist would see nothing in the constitution to justify a perpetual copyright of Mickey Mouse (and that, as far as corporations are concerned, is the bottom line) since the founding fathers did not envision immortal people. But of course, now that a working majority of this court says that immortal people exist...

-----GLMcColm


6 people liked this. [Like](#)



Ben Hemmens 1 day ago in reply to 22067030

Where I live (Austria), the *Urheberrecht*, the basis of all intellectual property, is a right of natural persons only, and it is inalienable. In other words, there is a fundamental element that cannot be transferred from natural persons to corporations. They can only acquire usage rights. This is the basic logic in Germany also.

13 people liked this. [Like](#)



sand6432 2 days ago


I am disappointed that The Chronicle sees fit to provide a platform for a plaintiff's lawyer to argue his case. How about offering equal time for the defendant's lawyer? Doesn't The Chronicle want to present a balanced view anymore, or is it just selling out to the loudest voices, as seems to be the case in the coverage of the SOPA/PIPA protests?


I do NOT represent the defendant, but allow me to inject some more balance into this argument. Prof.

Sprigman totally ignores the wider international context in his diatribe here against the URAA and the Sonny Bono Copyright Term Extension Act. Both were responses to international copyright harmonization developments: URAA to the Berne Convention, which upon joining required the U.S. to cease requiring that certain "formalities" (like use of a copyright notice and registration of a work) be made a condition of obtaining copyright protection; the Extension Act to a European Directive that extended the duration of copyright to life of the author plus 70 years. The URAA in fact corrected an inequity in the treatment of foreign compared with domestic authors: foreign authors did not enjoy copyright protection in the U.S. unless they complied with our formalities whereas U.S. authors enjoyed protection in foreign countries that had no such formalities in place. In allowing foreign authors to benefit from new protection of the kind they still enjoyed in their own countries, the U.S. was making amends for its unjust past treatment of foreign authors. It did not do so, however, without providing a mechanism for those in the U.S. who had relied on the public-domain status of these foreign works in the U.S. to continue using them for a period of time without penalty and for using derivative works based on them. These provisions Prof. Sprigman conveniently ignores in his advocate's brief here. He also neglects to point out how disadvantaged U.S. authors would have been with their works in foreign countries had the U.S. not joined Europe in extending the duration of copyright. It was not just all about Mickey Mouse, folks! To suggest that Congress is going to set about restoring all sorts of works to copyright status that are in the public domain smacks of the worst kind of scare-mongering. One might have expected that of a politician, but one hopes a college professor would be more concerned for the truth--and act less like a litigant's advocate in writing such a piece.

--- Sandy Thatcher (former President, Association of American University Press, 2007/8)

3 people liked this.

 **joud3084** 2 days ago in reply to sand6432
Corrected reply below.


 **joud3084** 2 days ago in reply to sand6432

With due respect, Thatcher's reply is overwrought. The original essay presents a viewpoint, to be sure, but it is a reasoned view on an issue of considerable importance to the readers of the Chronicle's "opinion" section. Moreover, as posted here, Sprigman's essay appears in a forum structurally designed to allow a similarly cogent and passionately asserted argument to be made to the contrary. I found, actually, that the long second paragraph from Thatcher, which would never have seen the light of day here absent the original provocation, added important contextualizing information which, paired with the original essay, makes for an informative interaction.

Should every attorney with an ax to grind or a case to make be granted access to the pages of the CHE? No, of course not, and so judgment calls have to be made. But I don't think it's fair to blast the CHE editors (and I'm not one, by the way) for choosing to post this. Sprigman fully discloses his professional investment in the matter. And I don't see how articulating a perspective compelling enough to have successfully made it up the appeals process and to find some agreement (if only a minority) on the Supreme Court itself can be dismissed as the equivalent of "selling out." On an issue of such central significance to the academic enterprise I welcome the debate, and believe it would be impoverished by excluding those who are professionally connected to it.

Sometimes the "loudest voices" are hacks. But sometimes they present a case that ought to be heard, even if not finally accepted or published without challenge.


3 people liked this.

 **ellenhunt** 10 minutes ago in reply to sand6432

Thanks. I think that should have been in the article, which left me with the impression that this act by congress had created perpetual copyrights. There was just a hint of the reason for it in the reference to international agreement. One would think that if the author really wanted to be fair that he would have at least named the agreement so that it would be reasonable for those not versed in the area to look it up.


For what it's worth, I tend to think that the world would be just fine with some works having perpetual copyright. Cartoon characters seem to me to of that kind. Mickey Mouse was created by a business, and a corporation has continued to develop it for decades. It's iconic. Most works are not like that. For those limited kinds of works it seems fair to me to give that business perpetual copyright. What could possibly be gained by denying it?

Like

 **racmonti** 2 days ago

Great illustration!!

Like

 **Christopher Jon Sprigman** 2 days ago


I'll briefly reply to Sandy Thatcher's comment. I've written about the international context of Berne, and the removal of formalities from U.S. copyright law, in Reform(aliz)ing Copyright, which you can find here: <http://papers.ssrn.com/sol3/pa...>

Suffice to say I disagree with you about the importance and meaning of the international aspects of the URAA, Berne, and the removal of formalities from U.S. law. Far from being "unfair", formalities were a virtue in U.S. copyright law, and I've long thought we should have them back (and that there's a way to do that without offending Berne). Also, re: copyright harmonization, unlike you, I don't believe it's inevitably desirable to harmonize U.S. with European copyright law. Especially in recent cases, where content industries have used longer terms granted in EU law to argue for changes to U.S. law that are not in our interest.

Finally, as for the URAA, it is true, as you say, that it contains a provision dealing with the reliance interests of those who were using works restored to copyright. But those reliance provisions are incredibly feeble -- weaker by far than the reliance provisions in analogous U.K. law, for example -- and again, in my view, they illustrate how little regard Congress had for users' speech rights when it framed its copyright restoration act.

Enough said. Thanks. CJS

4 people liked this. Like

 **jranelli** 1 day ago

for all the complexities of commodification and argument there-to and -from, there is no reason why a work of art is any less a property than an invention, mineral rights or brand names and no reasonable way to decide if "stimulating new work" is best done by giving the artist his/her due or providing his/her heirs with the means to pursue their own creative interests or establish institutions for support of the arts and/or arts education...that said heirs may also choose other lines of work seeded or subsidized by royalty income should go without saying and would, if said revenues came from a candy bar, cruise missile navigation system, or golden-arch type enterprise.

no easy solutions but lots of room for discussion toward protecting good-faith access to scholars, (you may, for example, show a film to registered students in a class that has graded critical response to it on the syllabus, but you can't expect a pass if you want to show it to the campus film society subscribers), and reasonable fees to schools and amateur groups (much like play-production fees these days).

Like

 **Ben Hemmens** 1 day ago

What is the international agreement referred to?

I'm afraid we do not live in a world of absolutely sovereign states. It is necessary to subordinate national to international law; there's no way out of this now that the world is as interconnected as it has become. The US need to get down off their high horse. I mean, if you want a system that works reasonably well worldwide, who are your allies going to be? Would you prefer this to be more like Europe or more like China? That first.

Second, US intellectual property law is highly deficient and has facilitated a lot of outrageous theft of intellectual property. One example are the ridiculous positions on the designs of typefaces, which have allowed massive ripoffs at the expense of the creators of the type designs all of us have relied on for our written communication in the postwar period. Zapf and Frutiger, thank goodness, seem to be comfortably well-off in their old age; but they deserve to be multimillionaires at the expense of the US software industry.

I come from Ireland, a common-law country with probably more similar copyright traditions to the US than to continental European countries, certainly with regard to the "formalities", and now live and work in Austria.

It's here that I've had to read up on copyright law as background to my work as a translator, and I have to say I find the Austrian law a very harmonious and logical pursuit of fair regulation of these issues (in fact I have come to appreciate the code-civil tradition all round; it seems to me that it make it easier for ordinary oeples to underatsnd and get their rights than the common-law systems). Formalities are not possible presumably not because somebody dreamed this up as a special feature of this area of law, but most likely because here, the whole basis of contract law is in establishing a concurrence of intentions of the parties, however this can be proven: i.e. verbal contracts are fully binding; written contracts have their value as one kind - the most usual kind - of evidence of the real agreement arrived at. Equally the creation of a work brings the copyright in that work into existence; and the *Urheberrecht*, the right of the creator to their work, is inalienable. All that can be sold or transferred are rights of use of the work. Apart from being simply logical, it also – interestingly for a country with a tradition of generally strong public administration of all kind of things – makes public registers of copyrights unnecessary and leaves the business of documenting authorship up to the creators; which for written works is as simple as mailing yourself a copy with recorded delivery.

Lifetime plus 70 years quite simply means that the creator and their children can profit from a valuable work. This seems eminently fair to me, especially since important works are often produced at some cost to the children and also quite often produce their profits late in the life of the creator or after their death.

1 person liked this.



joppe 4 hours ago

The way these authors are paid has to change, Forbidding entrance to the internet or closing down sites is not a smart way to solve the problem of payments to authors. And threatening people outside USA with USA law suites is not the right way to solve this serious problem. (My website in Europe, being a .com site could be closed by US law if someone I even do not know does violate a US law on copyright.)

1 person liked this.



deirdreray 4 hours ago

I, too, am very disappointed. This will make it even more difficult for faculty to incorporate foreign films and other cultural artifacts into their courses, particularly those in hybrid or online formats. Copyright that extends and extends ensures that students will have to continue spending far too much on course materials—or worse, faculty who understand the costs involved will either cut many materials from their courses or run the risk of being lawbreakers. This is a terrible decision.

1 person liked this.



rjudd 3 hours ago in reply to deirdreray

With all due respect, I think this reaction may not be accurate. "Fair use" for instructional purposes may well apply in using copyrighted material for teaching purposes. The American Musicological Society has thought about these issues, and has encouraged those who use media in their teaching to continue to use them under this principle. We've published a guideline, http://www.ams-net.org/AMS_Fai..., that may be of interest.

Bob Judd, ExDir, AMS



paulderb 2 hours ago

Untrained in this discipline, but a teacher and administrator responsible for my school's balance sheet, I see in this discussion an agony over our culture's shift from material work to knowledge work. For a while there, property could be securely locked in a box or bounded by a hedge. No more.

Cash-strapped and maybe myopic universities that want to defend their traditional revenue streams, and squeeze more from new ones, can not see how they profit from the release of intellectual property to the public domain. But this behavior results from their urgent wish to hold themselves apart, as branded institutions, in their still-medieval model.

The struggle begs for a more agile model: a redefinition of legal identities, corporations, and the corporate identities we call universities. A low bar for information-sharing is simply healthy: it has the longest pedigree of any biological meme. But it does come at the price of having to yield one's cherished sense of identity, one's family, one's patrimonial right to control the semantic value of the words "mine" and "ours."

Literary lights like Mikhail Bakhtin (*The Dialogic Imagination*) and mathematical prodigies like Douglas Hofstadter (*I Am a Strange Loop*) show that an utterance is by definition "out there," and that to the degree that our shared knowledge infrastructures lack a capacity for empathy, we find our identities--and our properties--are over leveraged, and we collapse from inability to repay the debt. Maybe that's why Andrew Carnegie decided to share his wealth rather than keep it in-house. He loved his kids that much.

From viruses to Free Speech, the fittest information-sharers have survived to become something new. So I agree with Sprigman.

The SOPA debate has clarified that knowledge is worth more and has a greater marginal utility when information is shared than when it is constrained. Other values than money--respect, trust, influence--accrue not only from consistently providing good formulations of ideas, but also from being able to graft those ideas efficiently onto other ideas, without the processing cost of citation--to say nothing of royalties. There's motivation besides money to invent and express new ideas. Those values make life worth living.

And regardless of philosophy, we are seeing in the biome the limits of a resource-intensive way of living. Everything--everything--will have to be redesigned around sharing if we are to avoid resurgences of nationalism and tribalism, confiscatory wars and sieges, to say nothing of the erosion and collapse of institutions--including schools, universities, and the Constitution--that we erected to defend our right to evolve and adapt.

Paul Erb
Charlottesville, Virginia

Like

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