

**09-1234 & 09-1261
ORAL ARGUMENT IS REQUESTED**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LAWRENCE GOLAN, ESTATE OF RICHARD KAPP,
S.A. PUBLISHING CO., INC., d/b/a ESS.A.Y. RECORDINGS,
SYMPHONY OF THE CANYONS, RON HALL d/b/a FESTIVAL FILMS,
AND JOHN McDONOUGH, d/b/a TIMELESS VIDEO ALTERNATIVES
INTERNATIONAL,
Plaintiffs-Appellees/Cross-Appellants,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of
the United States, and MARYBETH PETERS, Register of
Copyrights, Copyright Office of the United States,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the District of Colorado,
Honorable Lewis T. Babcock, Chief Judge
Case No. 1:01-cv-01854 LTB-BNB

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INTRODUCTION

On their cross-appeal, Plaintiffs contend the URAA's restoration of copyrights in more than 50,000 works that had passed into the public domain is facially unconstitutional under the First Amendment. The central question at issue is whether the public domain is subject to any constitutional protection, and whether this public property may be expropriated at will for the private benefit of U.S. and foreign copyright owners. Without a rule limiting Congress's power to remove works from the public domain, Congress can destroy the incentive to invest in the public domain, and to preserve, spread and build on its content. If the public domain can be privatized at will, then it cannot survive intact. The design of the U.S. Constitution prevents this plundering, however, because the First Amendment prohibits the Government from giving away the public's speech and expression rights in the public domain, whether on the basis of treaty obligations or any other justification.

All members of the public who build upon, preserve and disseminate materials in the public domain – whether by creating derivative works, expending significant capital resources to restore and make available public domain works, or simply supporting the availability and distribution of works in the public domain by cheaply and efficiently selling copies of those works – rely upon the expectation that the investment they make in the speech they make available will not be

expropriated arbitrarily. If the Government can simply take away their investment at any time, then the incentive to make that investment will diminish significantly, as it would with any business.

By enacting the URAA, Congress did just that. It removed works from the public domain and expropriated the financial and creative investments in the public domain made by Plaintiffs and others. In doing so, it profoundly weakened the incentives for anyone to make like investments in the broad availability of public domain works, and transferred vested speech rights from one group (the American public) to another (foreign authors and their heirs and estates) simply to confer economic benefit on yet another group (U.S. authors).

The Government claims it has the power to effect this expropriation pursuant to Berne and TRIPS. But compliance with international treaty obligations can never justify violating the U.S. Constitution. The First Amendment must limit the Government's ability to give away the public's speech and expression rights in the public domain. Neither Berne nor any other treaty can grant Congress the power to violate the "bedrock principle of copyright law that works in the public domain remain in the public domain."

The Government opposes this conclusion but does not address the fact that the URAA's restoration of copyrights in foreign works was a transfer of the public's vested speech rights to foreign authors for the benefit of preferred private

interests. Nor does the Government credibly dispute that removing works from the public domain violates basic First Amendment principles and the design and purpose of the U.S. copyright system. Instead, it tries to avoid the First Amendment implications of privatizing public speech by suggesting that First Amendment scrutiny of this issue is foreclosed by this Court's prior decision. But the Government's position ignores this Court's holding that by enacting the URAA, Congress took speech that belonged to the public and made it off-limits and in doing so, interfered with the "vested First Amendment rights" of Plaintiffs and the public. It is precisely this interference with the public's First Amendment rights that makes the URAA unconstitutional on its face.

ARGUMENT

The URAA is an invalid regulation of speech because Congress has no power consistent with the First Amendment to restore copyrights. Removing works from the public domain is not a legitimate means to any proper end, and signing a treaty cannot provide that power where it otherwise would not exist. As a result, the URAA is invalid on its face.

A. The First Amendment Prohibits The Government From Removing Works From The Public Domain

The URAA transferred a liberty interest from the American public to foreign copyright owners. That liberty interest was the freedom to copy, share, and build upon certain works that were unquestionably in the public domain. The

Government tries to diminish the importance of this interest by suggesting it is nothing more than a supposed right to make “other people’s speeches,” *see* Combined Reply And Responsive Brief For The Appellants/Cross-Appellees (“Gov’t Reply”) at 4, n.2, and it suggests that “Plaintiffs present no legal or equitable argument as to why non-reliance parties ... should have a First Amendment right” to use works that have been removed from the public domain. Gov’t Reply at 25.

In trying to brush aside the speech and expression interests at stake here, the Government ignores critical components of this Court’s prior decision in this case. First, this Court expressly rejected the suggestion that nothing more than “other people’s speeches” are at issue here. It held the “speeches” in question here “belonged to [P]laintiffs” and the rest of the public when they passed into the public domain. *See Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007). Everyone had liberty to “make” these “speeches” just as everyone today has the liberty to “make” the “speeches” of Abraham Lincoln or William Shakespeare. *See id.* at 1192 (“works in the public domain belong to the public”). Second, this Court made clear the First Amendment interests at stake are not limited to reliance parties. It observed that the First Amendment protects the *public’s* right to use public domain works and prohibits the state’s attempts to censor that right. *See id.* at 1192-93. It therefore concluded that both Plaintiffs and “the public in general . .

. have a First Amendment interest in using works in the public domain.” *See id.* at 1193.

The Government goes on to assert there is no support for Plaintiffs’ “abstract” view that once speech enters the public domain, it must remain there. Gov’t Reply at 25. On the contrary, it was this very Court that identified the “bedrock principle of copyright law that works in the public domain remain in the public domain” and affirmed the corollary of this bedrock principle: “no individual may copyright a work in the public domain.” *Golan*, 501 F.3d at 1189, 1192. It did so only after considering the history, design and purpose of our copyright system, and recognizing what should be obvious to all: the removal of works from the public domain “hampers free expression and undermines the values the public domain is designed to protect.” *Id.* at 1194.

Plaintiffs’ argument, far from unsupported by legal or equitable reasoning as the Government complains, is based upon a method of reasoning as central as any to constitutional law – and one most prominently demonstrated by the Supreme Court’s decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a case the Government neither mentions nor discusses. In *Bolling*, the Supreme Court acknowledged the Equal Protection Clause of the Fourteenth Amendment did not apply to the federal government. Nonetheless, *Bolling* held the equal protection principles articulated by the Court in *Brown v. Board of Education*, 347 U.S. 483

(1954), constrained the federal government under the Due Process Clause. *See Bolling*, 346 U.S. at 498-500. Since Due Process requires that every law be a “legitimate means to a proper governmental end,” a judgment about the legitimacy of segregation could indirectly affect the scope of federal government power, by restricting the range of “legitimate means” that the Government could use for purposes of the Due Process Clause. Whatever else Due Process meant, the Court held, it could not mean that the federal government could act in ways that violated Equal Protection.

The Government responds to Plaintiffs’ argument by suggesting Plaintiffs are dressing a Copyright Clause challenge in First Amendment garb. Gov’t Reply at 26. But Plaintiffs are no more disguising an argument than the Supreme Court was in *Bolling* when it held that even though the Equal Protection Clause did not apply to the federal government, its norms would constrain the federal government under the Due Process Clause.

That is precisely the argument Plaintiffs advance here. Even if there is no independent Progress Clause bar to removing work from the public domain, this Court should hold that for purposes of the First Amendment, restoring a *copyright* (as distinct from a patent) is an illegitimate means to an important governmental end. The norm articulated by the Progress Clause, and recognized by the Court in *Eldred*, demonstrates there must be a “bright line” drawn around

the public domain – a line which protects the public’s “vested First Amendment interests” and which the government cannot cross. *Golan*, 501 F.3d at 1194. That norm should inform this Court’s analysis under the First Amendment.¹

One of the basic aims of the Progress Clause, in addition to creating incentives to produce original works, is to support the spread of culture for the benefit of the public. U.S. CONST., art. I § 8, cl. 8.² This Court recognized the

¹ The reason the First Amendment accounts for and protects the public domain even if the Progress Clause does not do so directly is that the speech interests raised by the two monopolies secured in the Progress Clause are radically different. If Congress restores a patent, that does not necessarily affect any speech interests. If Congress restores a copyright, it necessarily removes a liberty to speak that the public once enjoyed. Speech liberties are more protected in our Constitution than the liberty to practice an invention, and the First Amendment is the primary vehicle for protecting them.

² Although the words “copyright” and “patent” do not appear anywhere in the U.S. Constitution, the Government quibbles with Plaintiffs’ use of the label “Progress Clause,” and instead uses the label “Copyright Clause” to describe Article I, section 8, clause 8 of the Constitution. Far from a “rechristening” or a term of Plaintiffs’ “own devising” as the Government would have it, *see* Gov’t Reply at 26 n.12, the label “Progress Clause” accurately reflects the words and intention of the Framers of the Constitution and it is one numerous other authors have adopted. *See, e.g.*, ROBERT A. GOLDWIN, *WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS* 40-41 (1990); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 *PEPP. L. REV.* 427 (2009); Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 *BERKELEY TECH. L.J.* 1363 (2006); Joseph Scott Miller, *Hoisting Originality*, 31 *CARDOZO L. REV.* 451 (2009); David S. Olson, *Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter*, 82 *TEMP. L. REV.* 181 (2009); Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the*

Progress Clause is intended to both incentivize the creation of new works, and to ensure the wide availability of these works once their limited period of protection has expired. *See Golan*, 501 F.3d at 1183 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). It acknowledged both are essential to making “copyright ‘the engine of free expression.’” *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

The need to ensure widespread access and free availability is what gives rise to what this Court called the “bedrock principle of copyright law” that “works in the public domain remain there” and the “time-honored tradition of allowing works in the public domain to stay there.” *Golan*, 501 F.3d at 1187, 1192. It also explains why the Government recognized in *Eldred* the “bright line” that is crossed when works are removed from the public domain. *See* Transcript of Oral Argument at 44, lines 8-12, *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *see also Golan*, 501 F.3d at 1193 n.4.

The Progress Clause is not the only constitutional provision that protects and ensures the availability of creative works. The First Amendment shares these goals. Indeed, the right to disseminate and receive information is central to First Amendment freedoms. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (First Amendment

United States Constitution, or Introducing the Progress Clause, 80 NEB. L. REV. 754 (2001).

protects the right to receive information and ideas as well as provide them). Thus, contrary to the Government's suggestion that Progress Clause values do not bear on any First Amendment analysis, *see* Gov't Reply at 28, it is clear these constitutional provisions work in parallel to demand the free flow of speech, culture and expression for the benefit of the public.

Recognizing a power in Congress to remove works from the public domain would profoundly threaten the "Progress" the Constitution – both in the Progress Clause and the First Amendment – demands we promote. Removing works from the public domain weakens the incentives of Plaintiffs and any others who invest in the public domain in order to spread creative works broadly – whether by creating derivative works, expending significant capital resources to restore and make available public domain works, or simply supporting the availability and distribution of works in the public domain by cheaply and efficiently selling copies of those works. They rely upon the expectation that the investment they make in public domain works will not be expropriated arbitrarily. The URAA has a particularly corrosive effect on the public's incentives to invest in this market because it applies generally to all eligible works, no matter how long a work has been in the public domain. The public cannot trust that even long-vested rights to use, distribute and build upon public domain works will continue to exist in the future. If at any time the Government can simply take away their

investment, then the incentive to make that investment will diminish significantly, as it would with any business. The most certain way to destroy the incentives necessary to support a market is to make resources within that market subject to arbitrary expropriation.

To hold that Congress has the power to transfer vested speech rights of the American public to foreign authors and their heirs and estates simply to confer economic benefit on other U.S. authors makes no sense of the Constitution's design. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”); *Citizens United v. Federal Election Commission*, 558 U. S. ___, 2010 WL 183856, *19 (Jan. 21, 2010) (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”). Our Constitution explicitly limits the terms of copyright protection and that can only be understood as an express support for the free flow of culture once it passes out of the copyright's reach. Unlike the legislatures of the Nations that crafted the Berne Convention, the U.S. Congress has a limited grant of copyright power – power bestowed by a constitutional provision that specifically delineates the purposes for which Congress is to use that power – and that limited grant of

power is further restricted by the First Amendment.³ Given these restrictions, it should be no surprise then that the law of other nations unrestrained by such constitutional limitations might permit greater copyright regulations than the law of the United States does.

B. Congress Cannot Do By Treaty That Which The Constitution Forbids

Despite these constitutional restraints on its power, the Government premises its authority to expropriate the vested speech rights of the American public on the notion that it had no choice but to restore copyrights in order to achieve its only proffered interest – compliance with the Berne Convention. But the Government cannot use a treaty to circumvent constitutional limitations on its powers. *See Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16 (1957); *In re Aircrash in Bali*, 684 F.2d 1301, 1308-09 (9th Cir. 1982). While the Government makes the naked assertion that it could “conceivably” restore copyrights through a statute unconnected to any treaty, it makes no attempt to justify the URAA independently of Berne and TRIPS, and instead rests on the contention that the “Berne Convention furnishes a wholly adequate justification” for restoring copyrights. Gov’t Reply at 30. The Government thus claims the

³ See David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393 (2009) (arguing that under *Eldred*, increased First Amendment scrutiny must be applied in many copyright cases because the centuries-long traditional contour of copyright that provided a rich public domain has been drastically altered in the last three decades by term extensions as well as the elimination of registration requirements and formalities).

power to do in the name of complying with international law what it presumably could not do absent it.

Moreover the Government asks for additional “deference” on the ground a treaty is involved. The Government continues to leave unanswered Plaintiffs’ constitutional objections and has not posited an important interest beyond complying with or implementing a treaty in order to justify its interference with Plaintiffs’ core speech rights. The Government claims to create an important interest simply by signing a treaty, and then demands deference to its judgment in how to implement that treaty, in order to shield itself from constitutional scrutiny.

Instead of coming to grips with the flaws in its position, the Government tries to sidestep Plaintiffs’ facial challenge by seeking still more deference. It contends that a facial challenge is too demanding and pushes “the judiciary toward the edge of its traditional purview and expertise.” Gov’t Reply at 24. But the reasons underlying the ordinary skepticism of facial challenges are inapplicable here. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184 (2008), the Supreme Court articulated the three basic reasons claims of facial invalidity are viewed skeptically. First, some facial challenges may rest on speculation and therefore raise the risk of “premature interpretation of statutes on the basis of factually barebones records.” *Id.* at 1191 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Facial challenges are

disfavored insofar as they run contrary to the fundamental principle of judicial restraint by asking the court to anticipate a question of constitutional law in advance of the necessity of deciding or to formulate a rule broader than is necessary. *Id.* (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Finally, some facial challenges may threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. *Id.* (citing *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006)).

None of these concerns applies here. After nine years of litigation producing a record running to thousands of pages detailing the impact of the URAA, this case poses little risk of a speculative ruling based on a “factually barebones record.” And Plaintiffs’ facial challenge seeks a rule no broader than is dictated by the need to protect the public’s First Amendment interests in the public domain. Further, it is the URAA and the Government’s arguments in support of it, not Plaintiffs’ facial challenge, that threatens to frustrate the will of the people. The Government asks the Court to give extreme deference to a statutory provision that takes away speech rights from the American public in favor of foreign private stakeholders – all for the sake of “unquestionable compliance” with a treaty crafted by a private international body unaccountable to the U.S. electorate. In this context, invalidation of the law on its face would only “short-circuit” a

transnational circumvention of First Amendment protection in order to ensure compliance with the U.S. Constitution.

As the Government would have it, it could assert power to restrict any number of constitutional rights in whatever manner it deems fit, simply because other nations agreed to like restrictions. Congress's power to so legislate would go largely unchecked by the judiciary because of the "special deference" to matters of foreign affairs. The Government dismisses Plaintiffs' concerns regarding this laundering of unconstitutional legislation through international treaties as nothing more than a series of "far-fetched hypotheticals" this Court should not worry about because in most cases Congress will possess numerous means of accomplishing its various goals. Gov't Reply at 29. The Government differentiates this case, however, by relying on the false suggestion that Congress had but one choice in the matter of complying with Berne. But the choice to enact the URAA was the last step in a series of decisions that Congress made, all perhaps insufficiently protective of First Amendment interests. At any step along that path, Congress could have taken measures to assure that the United States was not obligating itself to something unconstitutional.⁴

⁴ As it has done elsewhere, the Government could well have negotiated in the treaty an exemption from liability for any act or omission deemed required by the Constitution — a sensible exemption for any government committed, as ours is, to respecting the Constitution. *See, e.g.,* Curtis Bradley and Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 417-22

This Court should find that regardless of the importance of complying with a treaty, there are certain means that are inconsistent with the First Amendment, as informed by the design and purpose of the Progress Clause, and in light of copyright's effect on speech rights protected by the First Amendment. No treaty, not Berne or TRIPS or any other gives Congress the power to do what the First Amendment otherwise prohibits. Removing a right to speak freely held in common by everyone, and assigning it to some currently favored individual, or group, is an illegitimate means in every case.

This Court has already observed that the free and continued availability of the public domain is part of the very "engine of free expression" that both the Progress Clause and the First Amendment protect. The Government itself acknowledged years ago that restoring copyrights in public domain material crosses a "bright line." This Court should reaffirm the importance of that line and what this Court called the "bedrock principle of copyright law that works in the

(2000) (noting that "First Amendment concerns led the United States to decline to agree to restrictions on hate speech in the Race Convention 'to the extent that [such speech is] protected by the Constitution and laws of the United States,'" that the U.S. attached a reservation to its ratification of the International Covenant on Civil and Political Rights to address concerns regarding Constitutional rights of free speech and free association, and that the U.S. attached a broad reservation to the Genocide Convention stating that nothing in that treaty requires or authorizes action by the U.S. prohibited by the Constitution). Indeed, Berne itself expressly allows "special conventions" among countries to qualify the retroactivity. *See* Berne Article 18(3). Moreover, the U.S. protected itself this way when it negotiated Article 9 of TRIPS to carve out the moral rights obligations imposed by Berne Article 6*bis*. *See* TRIPS Article 9, paragraph 1.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order filed March 18, 2009, I hereby certify that:

1. All required privacy redactions have been made and, with the exception of those redactions every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and
2. The digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

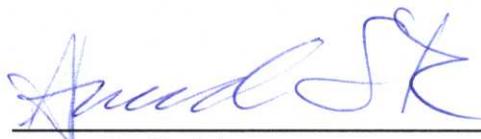
Program: Sophos Anti-Virus
Version: 7.6.15
Last Updated: January 25, 2010

 /s/
JULIE A. AHRENS
Attorney for Plaintiffs-Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2010, I filed and served the foregoing “REPLY BRIEF FOR THE APPELLEES/CROSS-APPELLANTS” by submitting a digital copy via the ECF system and causing the original and 7 hard copies to be dispatched to the Clerk of this Court by Federal Express, overnight delivery, and by effecting service via the ECF system and causing one hard copy to be served upon the following by Federal Express, overnight delivery:

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