

Iceland's actions threaten the conservation status of an endangered species and undermine multilateral efforts to ensure greater worldwide protection for whales.⁵

INTERNATIONAL ECONOMIC LAW

U.S. Supreme Court Upholds Extending Copyright to Unprotected Works to Comply with Berne Convention

In January 2012, the U.S. Supreme Court by a 6-2 vote¹ rejected constitutional challenges to U.S. legislation adopted in 1994 to bring the United States into compliance with its international copyright obligations.² The challenged legislation extends copyright protection to some works by foreign creators not previously protected in the United States, including films by Hitchcock and Fellini, books by Virginia Woolfe and C. S. Lewis, symphonies by Prokofiev and Stravinsky, and Picasso's *Guernica*.³ The plaintiffs in the case, including a symphony conductor, the ACLU, Google, and the American Library Association, contended that the legislation exceeded Congress's powers under the U.S. Constitution's Copyright and Patent Clause⁴ and interfered with their First Amendment rights.⁵

The Supreme Court's syllabus nicely summarizes the background of the case.

The Berne Convention for the Protection of Literary and Artistic Works (Berne), which took effect in 1886, is the principal accord governing international copyright relations. Berne's 164 member states agree to provide a minimum level of copyright protection and to treat authors from other member countries as well as they treat their own. Of central importance in this case, Article 18 of Berne requires countries to protect the works of other member states unless the works' copyright term has expired in either the country where protection is claimed or the country of origin. A different system of transnational copyright protection long prevailed in this country. Throughout most of the 20th century, the only foreign authors eligible for Copyright Act protection were those whose countries granted reciprocal rights to American authors and whose works were printed in the United States. Despite Article 18, when the United States joined Berne in 1989, it did not protect any foreign works lodged in the U.S. public domain, many of them works never protected here. In 1994, however, the Agreement on Trade-Related Aspects of Intellectual Property Rights mandated implementation of Berne's first 21 articles, on pain of enforcement by the World Trade Organization.

In response, Congress applied the term of protection available to U.S. works to pre-existing works from Berne member countries. Section 514 of the Uruguay Round Agreements Act (URAA) grants copyright protection to works protected in their country of origin, but lacking protection in the United States for any of three reasons: The United States

⁵ White House Press Release, Message from the President to Congress (Sept. 15, 2011), at <http://www.whitehouse.gov/the-press-office/2011/09/15/message-president-congress>.

¹ Justice Ginsburg wrote for the Court; Justice Breyer, joined by Justice Alito, dissented. Justice Kagan did not participate.

² Adam Liptak, *Public Domain Works Can Be Copyrighted Anew, Supreme Court Rules*, N.Y. TIMES, Jan. 19, 2012, at B12.

³ Adam Liptak, *Once in the Public's Hands, Now Back in Picasso's*, N.Y. TIMES, Mar. 22, 2011, at A16; Adam Liptak, *In Supreme Court Argument, A Rock Legend Plays a Role*, N.Y. TIMES, Oct. 7, 2011, at B2.

⁴ U.S. CONST. art. I, §8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.")

⁵ Robert Barnes, *Copyright Case Will Decide Fate of Millions of Once-Public Works*, WASH. POST, Oct. 5, 2011, at A3.

did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had not complied with certain U.S. statutory formalities. Works encompassed by §514 are granted the protection they would have enjoyed had the United States maintained copyright relations with the author's country or removed formalities incompatible with Berne. As a consequence of the barriers to U.S. copyright protection prior to §514's enactment, foreign works "restored" to protection by the measure had entered the public domain in this country. To cushion the impact of their placement in protected status, §514 provides ameliorating accommodations for parties who had exploited affected works before the URAA was enacted.

Petitioners are orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works §514 removed from the public domain. They maintain that Congress, in passing §514, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations.⁶

The initial pages of Justice Ginsburg's scholarly majority opinion survey the United States' checkered history in international copyright protection, including its failure to protect foreign works for many years and its eventual grudging acceptance of the Berne Convention. The opinion then rejects the first of the petitioners' two arguments:

The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain. Symposium, *Congressional Power and Limitations Inherent in the Copyright Clause*, 30 Colum. J. L. & Arts 259, 266 (2007). Petitioners' contrary argument relies primarily on the Constitution's confinement of a copyright's lifespan to a "limited Tim[e]." "Removing works from the public domain," they contend, "violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires." Brief for Petitioners 22.

Our decision in [*Eldred v. Ashcroft*, 537 U.S. 186 (2003)] is largely dispositive of petitioners' limited-time argument. There we addressed the question whether Congress violated the Copyright Clause when it extended, by 20 years, the terms of existing copyrights. 537 U.S., at 192–193 (upholding Copyright Term Extension Act (CTEA)). Ruling that Congress acted within constitutional bounds, we declined to infer from the text of the Copyright Clause "the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.* at 199.⁷

The petitioners' First Amendment arguments also failed to impress the majority.

However spun, these contentions depend on an argument we considered and rejected above, namely, that the Constitution renders the public domain largely untouchable by Congress. Petitioners here attempt to achieve under the banner of the First Amendment what they could not win under the Copyright Clause: On their view of the Copyright Clause, the public domain is inviolable; as they read the First Amendment, the public domain is policed through heightened judicial scrutiny of Congress' means and ends. As we have already shown, see *supra*, at 13–19, the text of the Copyright Clause and the historical record scarcely establish that "once a work enters the public domain," Congress cannot permit anyone "not even the creator—[to] copyright it," 501 F.3d, at 1184. And nothing in the historical record, congressional practice, or our own jurisprudence warrants

⁶ *Golan v. Holder*, 132 S.Ct. 873, 875 (2012).

⁷ *Id.* at 884 (parallel citations omitted).

exceptional First Amendment solicitude for copyrighted works that were once in the public domain. Neither this challenge nor that raised in *Eldred*, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author's viewpoint.⁸

United States Imposes Sanctions on Iranian Financial Institutions and Banks Doing Business with Them

Section 1245 of the National Defense Authorization Act for Fiscal Year 2012¹ directs the president to add heavy new financial sanctions to the existing array of U.S. economic sanctions against Iran. The new sanctions include freezing of Iranian financial assets in the United States or in the control of U.S. persons, and prohibiting transactions with third-country financial institutions that do business with Iran's central bank or major Iranian banks.² Excerpts from Section 1245 follow:

(1) . . . (c) FREEZING OF ASSETS OF IRANIAN FINANCIAL INSTITUTIONS.—The President shall, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

(d) IMPOSITION OF SANCTIONS WITH RESPECT TO THE CENTRAL BANK OF IRAN AND OTHER IRANIAN FINANCIAL INSTITUTIONS.—

(1) IN GENERAL.—Except as specifically provided in this subsection, beginning on the date that is 60 days after the date of the enactment of this Act, the President—

(A) shall prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury for the imposition of sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); and

(B) may impose sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) with respect to the Central Bank of Iran.

(2) EXCEPTION FOR SALES OF FOOD, MEDICINE, AND MEDICAL DEVICES.—The President may not impose sanctions under paragraph (1) with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran.

(3) APPLICABILITY OF SANCTIONS WITH RESPECT TO FOREIGN CENTRAL BANKS.—Except as provided in paragraph (4), sanctions imposed under paragraph (1)(A) shall apply with respect to a foreign financial institution owned or controlled by

⁸ *Id.* at 891–92 (footnotes omitted).

¹ See section above: *President's Signing Statement Objects to Detention Provisions in Defense Legislation*.

² Mark Landler, *U.S. and Its Allies Expand Sanctions Against Iran*, N.Y. TIMES, Nov. 22, 2011, at A6; Rick Gladstone & Nicholas Kulish, *West Tightens Iran Sanctions After Embassy Attack*, N.Y. TIMES, Dec. 2, 2011, at A10; Rick Gladstone, *Penalties May Send Oil Prices Soaring, Iran Warns*, N.Y. TIMES, Dec. 6, 2011, at A9.