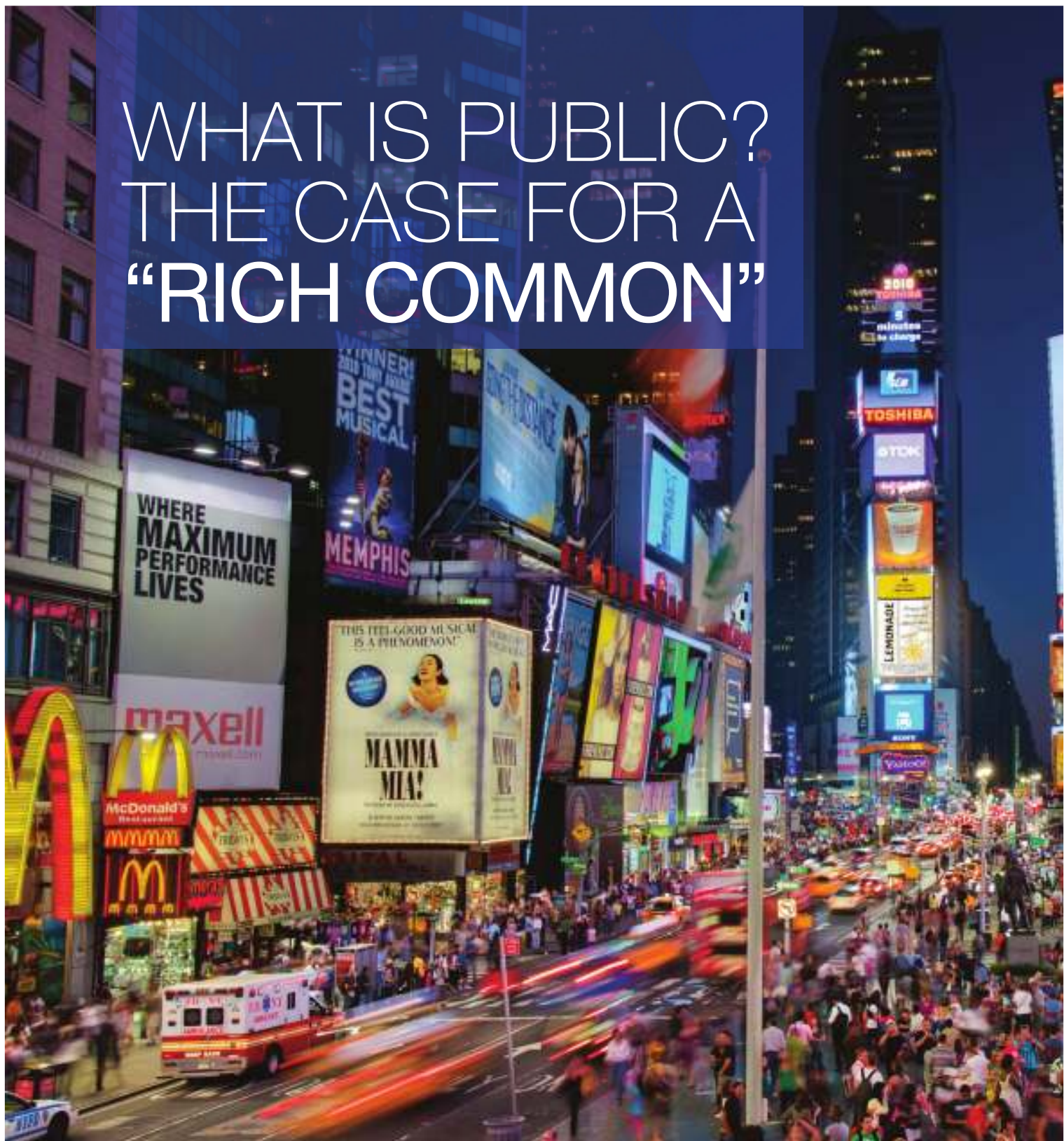


WHAT IS PUBLIC? THE CASE FOR A “RICH COMMON”



Alongside the UK publication of his provocative book, *Common as Air*, Lewis Hyde takes a look at *Golan v Holder*, a copyright case recently decided by the US Supreme Court.



On January 18 of this year the US Supreme Court decided a copyright case, *Golan v Holder*, in which the key question was whether Congress is ever allowed to 'restore' copyrights for works that, for one reason or another, have fallen into the public domain. The court decided that yes indeed, Congress may do so. Nothing in the US Constitution, neither the Copyright Clause nor the First Amendment, they ruled, "makes the

public domain, in any and all cases, a territory that works may never exit".

In October 2011, just before this case was argued, I sought to frame the historical rationale by which the opposite opinion might be argued. I here reproduce a version of that argument and follow it with a comment on the court's contrary ruling.

In 1948, Twentieth-Century Fox released one of the Cold War's first anti-communist films, *Iron Curtain*, the soundtrack of which featured music by Russian composer Dmitri Shostakovich. Shostakovich himself probably never saw the film, so it was presumably under orders from Stalin's regime that his name soon appeared on a copyright infringement suit filed in the US. Had the suit succeeded it would have effectively prevented moviegoers in America from seeing *Iron Curtain*. But it did not succeed: Shostakovich's music then lay in our public domain and, once there, its rights holders had no say in how it could be used.

The public domain is a valuable guarantor of both free trade and free expression, which is why there was much at stake in the *Golan* case. The plaintiffs in this litigation were challenging a 1994 law that has allowed foreign authors to revive their copyrights, removing from the public domain hundreds of thousands of works. Lawyers call this 'copyright restoration' but it might better be called 'copyright rendition': Congress has taken work that once lived freely among us and returned it to foreign masters.

The plaintiffs in *Golan* included orchestra conductors, educators, performers and film archivists who have relied on a stable, clearly-defined public domain for both business and creative practice. Now they can't. Low budget orchestras that once offered Prokofiev, Stravinsky, and Shostakovich can no longer do so; distributors that listed the early films of Federico Fellini, Fritz Lang, and Alfred Hitchcock have had to delete them from their catalogues; bookstores that offered cheap editions of Joseph Conrad, George Orwell, HG Wells, and Virginia Woolf no longer stock them.

The public's unfettered use of such works is not the only thing that Congress compromised. Important freedoms were, and are, also threatened. Copyright law in its earliest days was designed not just to give authors their due but also to assure public access to what had previously been a decidedly un-free press. When printing first arose in Europe it was almost always controlled by the state. In 17th-century England, for example, licensing laws stood in the way of all supposedly offensive books and the Crown gave publishing monopolies to favoured printers who then dutifully provided a second ring of censorship.

This system began to break down late in the century under pressure from Protestant intellectuals. In 1694, when a new licensing act was being debated in parliament, John Locke wrote to oppose both the act and the Crown

monopolies. These together, he complained, destroyed the free market in books and were thus injurious to learning. Without any competition, printing in London was “very bad and yet ... very dear”, controlled by “a lazy, ignorant” press that did little more than assure the Mother Church that she’d never be “disturbed in her opinions”.

Locke never questioned the idea that publishers should have copyrights; rather, he worried about their longevity. It certainly made no sense for any printer to have a corner on the work of Cicero, say, written a good 1,700 years ago. As for the publishers of modern authors, Locke proposed that the law “limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, 50 or 70 years”.

The founding generation in the US was direct heir to this British distaste for print monopolies. As the Constitution was being written, Thomas Jefferson wrote to James Madison to say the Bill of Rights ought to forbid “even ... limited monopolies” outright, their benefit being “too doubtful to be opposed to that of their general suppression”. Madison disagreed but even so, when revisiting the subject late in life, he advised that “Monopolies ... ought to be granted with caution, and guarded with strictness against abuse.” Noting that the Constitution had in fact allowed monopolies for “the authors of Books and of useful inventions”, he nonetheless underscored the Constitution’s demand that the grant be “limited”. “A temporary monopoly ... ought to be temporary ... Perpetual monopolies of every sort are forbidden ... by the genius of free governments.”

Since its beginnings in the US and elsewhere, then, copyright law has always limited the privileges it settles on authors. By so doing it simultaneously secures two good, but potentially conflicting, ends. Most obvious and commendable, authors get ownership of their work and thus entry into the market and freedom from patronage. Less obvious, perhaps, but equally commendable, the limit on ownership gives birth to the public domain, that vast realm of expression to which we all have equal access.

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Person who hath the smallest tenement in Parnassus hath a free right to fatten his Muse.” Limited term copyright smartly enlarges that common so that all muses may browse closer to us in time. It gives all citizens fuller access to their inheritance.

That said, cases still arise in which the conflict between private control and public access must be revisited. How it would be settled in the *Golan* case was hard to predict last October, though it could at least be noted that the court had, in the past, regularly taken the side of access. “The primary goal of copyright is not to reward authors,” Justice Sandra Day O’Connor once wrote, but rather to promote the progress of knowledge. Justice William Rehnquist made a similar point in words echoing Jefferson and Madison: “We have often recognized the monopoly privileges that Congress has authorized ... are limited in nature and must ultimately serve the public good ...”

Congress has, typically, not shared that recognition, invariably extending existing monopolies when petitioned by rights holders. The law being challenged in *Golan* was largely the fruit of lobbying by US copyright-based industries. Software, film, television, movie, and recording companies petitioned Congress with the long-term goal of getting other nations to restore the copyrights of US works that had fallen into the public domain abroad. Having no control over foreign law, however, the somewhat wishful strategy was to restore the copyrights of foreign authors in the US, in the hope that other nations would reciprocate.

In giving these industries what they wanted, Congress not only unsettled established business

and creative practices, it revived the problem that Locke and America’s founders worried about centuries ago. It is ever the case that monopolies can as easily be used to suppress as to encourage both speech and trade.

To give just a few of many recent examples: during the 2008 Presidential campaign, Fox News demanded that John McCain remove his YouTube commercials because they infringed Fox’s copyrights; the estate of poet Countee Cullen refused to let Poet Laureate Robert Pinsky use Cullen’s work in a documentary after learning that the context hinted at Cullen’s homosexuality; the Church of Scientology has regularly sought to silence critics with claims that they infringe the church’s copyrights, such as when they sued *The Washington Post* in 1995 for quoting church documents.

It is true that in such cases US copyright’s ‘fair use’ doctrine offers a way for users to defend themselves, and fair use should certainly be more widely claimed. At the same time, few speakers have the time or money to engage in litigation. A recent fair use case brought against the estate of James Joyce took years to resolve and cost almost a quarter of a million dollars. Even when a use is patently fair, most speakers will fall silent when threatened with a lawsuit; unless, of course, what they use lies in the public domain.

Fair use, the Supreme Court has said, is one of the “traditional First Amendment safeguards”—so it is, but the strongest safeguard of all is the bright line drawn by the limited term.

That bright line was originally drawn to harmonise with several others. Samuel Johnson’s 1755 *Dictionary*, the one that the Founders would have known, illustrates its definition of “limited” with the phrase “limited monarchy” and, in so doing, reminds us that limiting monopolies was a key way in which British jurists checked the powers of their king. Transported to the American context, then, the limit of copyright should be understood as one way in which the framers checked the powers of Congress and squared copyright with the First Amendment’s prohibition on laws “abridging the freedom of speech”.



“LAWYERS CALL THIS ‘COPYRIGHT RESTORATION’ BUT IT MIGHT BETTER BE CALLED ‘COPYRIGHT RENDITION’: CONGRESS HAS TAKEN WORK THAT ONCE LIVED FREELY AMONG US AND RETURNED IT TO FOREIGN MASTERS.”

Which brings me back to that 1948 movie. If you teach the Cold War and want to show *Iron Curtain* to your students, good luck. As one unintended consequence of copyright rendition, that film has now disappeared from domestic distribution, Congress having managed to do what Stalin never could. The limits the Founders built into copyright were meant not only to engender a public domain but, by the same token, to curb Congress’s power to do favours for its friends and to soften the fact that expressive monopolies are easily abused. “Limited monarch”, “limited times”, “limited powers”—by such phrases do we nominate the constraints that are the preconditions of liberty.

Such, in any event, was my argument in favour of the *Golan* plaintiffs last October. And although much of what I had to say is echoed in the dissent by Justice Stephen Breyer, in January the majority of the court took a different view, concerning themselves more with harmonising international law than with the evils of monopoly privilege or the benefits of a clear and stable public domain.

There is much to say about the court’s decision, but I will here confine myself to a single observation. It has always been a bit of a mystery how we are to categorise the public domain. Is it something the public ‘owns’, and if so, in what sense? Or is it a kind of no-man’s land with free access but no governance? Is it a ‘commons’, managed and preserved by law and custom? Or is it an open pool resource with no constraints as to use and appropriation?

In the recent past there have been cases in which it appeared to be the last of these. The 1998 US law that added 20 years to the term of copyright is a good example: it appropriated (retroactively

as well as proactively) a large sector of the public domain simply by legislative *fiat*.

Many of us had presumed that such copyright term extension might be a unique case and that there remained constitutional constraints on other kinds of takings. We pinned our hopes not only on the First Amendment but also on the “limited times” phrasing of the Copyright Clause. Surely the word “limited” indicates that what lies on the far side of copyright is a commons, not a wilderness.

Apparently not. In the *Golan* ruling, the public domain turns out to be an area analogous to the oceans before there was a Law of the Sea, or to the atmosphere before there were laws governing pollution.

The old categories into which Roman law sorted kinds of property may help us think through what that means. *Res nullius* was the name the Romans gave to things that can be exclusively owned, but are not yet because no one has taken them. Examples would be fish and game animals, or abandoned property. *Res communes*, on the other hand, referred to things whose size and range make them difficult to capture for private ownership. Examples would be the oceans or the atmosphere. In an article on these categories, Carol Rose once wrote that when it comes the “intellectual space”, one might say “that the function of intellectual property is to turn *res communes*, things by their nature incapable of ownership, into *res nullius*, things not yet owned but capable of appropriation”. After *Golan*, the public domain is “intellectual space” of exactly that order. It is an open pool resource, a territory that works may henceforth exit whenever someone figures out a way to get Congress to authorise their capture.

To close these reflections on a more optimistic note, perhaps the larger lesson of the *Golan* case is that we need to think of protecting the cultural commons not by law but by norms and customs. To give one example of success in this line, the current ‘open access’ movement in institutions of higher learning shows great promise. Open access regimes work in consort with copyright law, but within that framework they are more rightly described as norms-based interventions. Where they succeed, they are slowly converting academic research into a rich common where, to echo Henry Fielding: “every Person who hath the smallest tenement in the Academy hath a free right to fatten his Muse”. ■



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