

The Burger Court Opinion Writing Database

Goldstein v. California

412 U.S. 546 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice 113Mr. Justice 114Mr. Justice 115Mr. Justice 116Mr. Justice 117Mr. Justice 118Mr. Justice 119Mr. Justice 120Mr. Justice 121Mr. Justice 122Mr. Justice 123Mr. Justice 124Mr. Justice 125Mr. Justice 126Mr. Justice 127Mr. Justice 128Mr. Justice 129Mr. Justice 130Mr. Justice 131Mr. Justice 132Mr. Justice 133Mr. Justice 134Mr. Justice 135Mr. Justice 136Mr. Justice 137Mr. Justice 138Mr. Justice 139Mr. Justice 140Mr. Justice 141Mr. Justice 142Mr. Justice 143Mr. Justice 144Mr. Justice 145Mr. Justice 146Mr. Justice 147Mr. Justice 148Mr. Justice 149Mr. Justice 150Mr. Justice 151Mr. Justice 152Mr. Justice 153Mr. Justice 154Mr. Justice 155Mr. Justice 156Mr. Justice 157Mr. Justice 158Mr. Justice 159Mr. Justice 160Mr. Justice 161Mr. Justice 162Mr. Justice 163Mr. Justice 164Mr. Justice 165Mr. Justice 166Mr. Justice 167Mr. Justice 168Mr. Justice 169Mr. Justice 170Mr. Justice 171Mr. Justice 172Mr. Justice 173Mr. Justice 174Mr. Justice 175

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1192

Circulated: JUN 6 1973

Recirculated: _____

Donald Goldstein, Ruth Koven,
and Donald Koven,
Petitioners.

v.
State of California.

On Writ of Certiorari
to the Appellate De-
partment of the Su-
perior Court of Cali-
fornia for the County
of Los Angeles.

June 6, 1973

Memorandum to the Conference from MR. CHIEF
JUSTICE BURGER.

This case did not seem easy when we considered it at Conference and the longer I worked on it the more difficult it became. The vote was close, certainly very tentative as to some, and I confess I have not felt sure-footed on the subject at any time.

I suspect that those favoring reversal were concerned about *Sears* and *Compcos*. The memorandum that follows undertakes an analysis and treatment that preserves the core of those two holdings. It also "puts the ball in the Congressional court." When, as and if Congress wants to "take over" nothing in an affirmance of the California holding will be the slightest barrier. Federal power can be as pervasive as Congress desires.

This case has taken an inordinate amount of time, perhaps in part because I underestimated the difficulties. I suspect no one will find it easy. The lateness of the date impels me to send this memorandum before I really have it in the form I prefer for circulation. Rough as it is it will reflect my "tilt" on what should be done.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1973

Re: No. 71-1192 - Goldstein v. California

MEMORANDUM TO THE CONFERENCE:

Enclosed is second draft with no changes of any substance.

The first circulation was rough, as my cover memorandum indicated, and it needed some "honing." All areas of change are marginally noted.

Regards,

WRS

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 1, 3, 5, 10, 12

14, 15, 17-18, 23, 24-25
2nd DRAFT

2nd DRAFT

To: Mr. John Douglas
Mr. John Moran
Mr. John Mart
Mr. John P. Morris
Mr. John P. Morris
Mr. John P. Morris
Mr. John P. Morris
Mr. John P. Morris

Front.

SUPREME COURT OF THE UNITED STATES

No. 71-1192

Recirculated: JUN 14 1973

Donald Goldstein, Ruth Koven,
and Donald Koven,
Petitioners,
v.
State of California. } On Writ of Certiorari
to the Appellate Department of the Superior Court of California for the County of Los Angeles.

[June —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review petitioners' conviction under a California statute making it a criminal offense to "pirate" recordings produced by others.

In 1971, an information was filed by the State of California, charging petitioners in 140 counts with violating § 653h of the California Penal Code. The information charged that, between April 1970, and March 1971, petitioners had copied several musical performances from commercially sold recordings without the permission of the owner of the master record or tape.¹ Petitioners

¹ In pertinent part, the California statute provides:

"(a) Every person is guilty of a misdemeanor who:

"(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, . . . tape, . . . or other article on which sounds are recorded, with intent to sell or cause to be sold, . . . such article on which such sounds are so transferred, without the consent of the owner.

“(2) . . .

“(b) As used in this section, ‘person’ means any individual, partnership, corporation or association; and ‘owner’ means the person

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You have a dissent

1st DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 71-1192

From: Douglas, J.

Circulated:

6-11

Donald Goldstein, Ruth Koven,
and Donald Koven,
Petitioners,
" "
State of California.

On Writ of Certiorari
to the Appellee
Rec'd
partment of the Su-
perior Court of Cali-
fornia for the County
of Los Angeles.

[June —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Article I, § 8, cl. 8 of the Constitution provides:

"Congress shall have power . . . to promote the progress of science and useful arts, by reserving for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Madison made a brief comment on this provision governing both patents and copyrights:

"The States cannot separately make effectual provisions for either of these cases and most of them have anticipated the decision of this point by laws passed at the instance of Congress."¹

We have been faithful to that admonition. In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 230-231, we said:

"Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, ex-

¹ Federalist No. 43.

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1
/

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1192

Circulated:

6-15

Donald Goldstein, Ruth Koven,
and Donald Koven,
Petitioners,
State of California.

On Writ of Certiorari
to the Appellate Department of the Superior Court of California for the County of Los Angeles.

[June 1, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN concur, dissenting

Article I, § 8, cl. 8 of the Constitution provides:

"Congress shall have power . . . to promote the progress of science and useful arts, by reserving for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Madison made a brief comment on this provision governing both patents and copyrights

"The States cannot separately make effectual provisions for either of these cases and most of them have anticipated the decision of this point by laws passed at the instance of Congress."

We have been faithful to that admonition. In *Sears Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225, 230-231, we said:

"Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, ex-

¹ Federalist No. 43.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1973

RE: No. 71-1192 - Goldstein v. California

Dear Bill:

Please join me in your dissenting
opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. June 11, 1973

RE: No. 71-1192 Goldstein v. California

Dear Thurgood:

Please join me in your dissenting
opinion in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1973

Re: No. 71-1192, Goldstein v. California

Dear Chief,

I think this is an excellent job and would
be glad to join it as an opinion for the Court.

Sincerely,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

RON R. WHITE

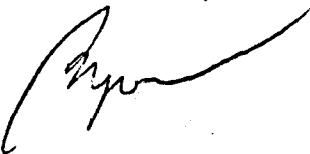
June 7, 1973

Re: No. 71-1192 - Goldstein v. California

Dear Chief:

Your memorandum would be satisfactory
to me as an opinion for the Court.

Sincerely,



The Chief Justice

Copies to Conference

13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES: Marshall, J.

No. 71-1192

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and Donald Koven,
Petitioners,
v.
State of California.

On Writ of Certiorari
to the Appellate De-
partment of the Su-
perior Court of Cali-
fornia for the County
of Los Angeles.

[June --, 1973]

MR. JUSTICE MARSHALL, dissenting.

The argument of the Court, as I understand it, is this: Art. I, § 8, cl. 8, of the Constitution gives Congress the power "to 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." The Framers recognized that individual States might have peculiarly local interests that Congress might not consider worthy of attention. Thus, the constitutional provision does not, of its own force, bar States from promoting those local interests. However, as the Court noted in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225 (1964), with respect to every particular item within general classes enumerated in the relevant statutes, Congress had balanced the need to promote invention against the desire to preserve free competition, and had concluded that it was in the national interest to preserve competition as to every item that could not be patented. That is, the fact that some item could not be patented demonstrated that, in the judgment of Congress, it was best to let competition in the production of that item go unrestricted. The situation with regard to copyrights is said to be similar. There Congress enumerated certain classes of works for which a

WD

13-4

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES From: Marshall, J.

No. 71-1192

Circulated:

Recirculated: JUN 12 197

Donald Goldstein, Ruth Koven,
 and Donald Koven,
 Petitioners,
 v.
 State of California.

On Writ of Certiorari
 to the Appellate De-
 partment of the Su-
 perior Court of Cali-
 fornia for the County
 of Los Angeles.

[June —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE /
 BRENNAN joins, dissenting.

The argument of the Court, as I understand it, is this: Art. I, § 8, cl. 8, of the Constitution gives Congress the power "to 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." The Framers recognized that individual States might have peculiarly local interests that Congress might not consider worthy of attention. Thus, the constitutional provision does not, of its own force, bar States from promoting those local interests. However, as the Court noted in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225 (1964), with respect to every particular item within general classes enumerated in the relevant statutes, Congress had balanced the need to promote invention against the desire to preserve free competition, and had concluded that it was in the national interest to preserve competition as to every item that could not be patented. That is, the fact that some item could not be patented demonstrated that, in the judgment of Congress, it was best to let competition in the production of that item go unrestricted. The situation with regard to copyrights is said to be similar. There Congress enumerated certain classes of works for which a

WJ

June 14, 1973

Re: No. 71-1192 - Goldstein, et al. v. California

Dear Chief:

This case for me, as it apparently was for you, is a very difficult and close one. In addition, the equities are all on one side.

You have written a strong opinion. I am, however, adhering to my conference vote and am joining both dissents. This note is just to let you know that your opinion is a good one and that I remain uneasy in my vote just as I was at Conference.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1973

Re: No. 71-1192 - Goldstein, et al. v. California

Dear Bill:

Please join me in your dissent.

Sincerely,

H. A. B.

Mr. Justice Douglas

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1973

Re: No. 71-1192 - Goldstein, et al. v. California

Dear Thurgood:

Please join me in your dissent.

Sincerely,

H.A.B.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1973

No. 71-1192 Goldstein v. California

Dear Chief:

I will be happy to join you when your fine memorandum is converted into an opinion for the Court.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1973

Re: No. 71-1192 - Goldstein v. California

Dear Chief:

I agree with the memorandum you have prepared in this case.

Sincerely,

W.W.

The Chief Justice

Copies to the Conference