Denver Law Review

Volume 86
Issue 4 *Tenth Circuit Surveys*

Article 9

January 2009

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GOLAN V. GONZALES AND THE CHANGING BALANCE BETWEEN THE FIRST AMENDMENT, COPYRIGHT PROTECTION, AND THE REST OF THE WORLD

INTRODUCTION

Copyright lawyers and scholars all over the United States have been talking about the Tenth Circuit's decision in *Golan v. Gonzales*.[1] Lawrence Golan, a nationally recognized symphony orchestra conductor, teaches and directs at the University of Denver's Lamont School of Music.[2] He, like other plaintiffs in this case, regularly uses works found in the public domain in the course of his profession, including works created by foreign composers like Dmitri Shostakovich and Igor Stravinsky.[3]

When Congress passed section 514 of the Uruguay Round Agreements Act ("§ 514"),[4] things changed for people like Mr. Golan. The Act restored copyright protection to certain foreign works, which Mr. Golan and the other plaintiffs were either already using from the public domain or expecting to be released soon into the public domain.[5] The restored copyright protection of foreign works required plaintiffs to pay increased performance, rental and royalty fees, which in some cases were cost prohibitive.[6] For example, before the restored protection, Lawrence Golan could have purchased the sheet music for the Lamont Symphony Orchestra to perform Shostakovich's *Symphony No. 1* for only $130.[7] After § 514 restored copyright protection to this piece, the cost of renting the same music for a single performance increased to $495.[8]

So, why are scholars and lawyers so interested in the Tenth Circuit's recent decision? For the first time in decades, a federal appeals court stood in the way of laws that continue to increase copyright protections.[9] Many have been arguing that it is time for the law to check the

1. 501 F.3d 1179 (10th Cir. 2007).

2. University of Denver Lamont School of Music, Lawrence Golan Biography, http://www.du.edu/lamont/LawrenceGolanBiography.html (last visited Mar. 7, 2009).

3. *Golan*, 501 F.3d at 1182.

4. Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994) (codified as amended at 17 U.S.C.A. §§ 104A, 109 (West 2009)).

5. *Golan*, 501 F.3d at 1182.

6. *Id.*

7. Brief of Appellant at 17, *Golan*, 501 F.3d 1179 (No. 05-1259), 2005 WL 2673976.

8. *Id.*

9. David Nimmer, LexisNexis Expert Commentaries, David Nimmer on the Potential Invalidation of Portions of the Copyright Act Based on a Conflict with the First Amendment in *Golan v. Gonzales* 2-3 (Nov. 9, 2007), *available at* LEXIS, 2008 Emerging Issues 908.

progression of this property right.[10] As copyright protection increases, the valuable public domain becomes stagnant.[11] Because the goal of copyright protection is progress for the general public,[12] copyright laws that only protect individual creators no longer serve that purpose. This is the foundation for the broad claim the plaintiffs asserted in the Tenth Circuit.[13]

The *Golan* plaintiffs' most successful argument, one that was advanced in *Eldred v. Ashcroft*,[14] posits that there is a boundary for copyright protection—a line that Congress cannot cross.[15] That boundary is formed by the "traditional contours of copyright protection."[16] And the *Golan* court recognized that Congress may have crossed the line when it passed § 514 and restored copyright protection to foreign authors.[17] The Tenth Circuit's interpretation of the "traditional contours" is at odds with those of other circuits, including the Ninth and D.C. Circuits.

Many scholars claim this landmark case is a victory for all Americans.[18] It is part of a new course for copyright law, balancing the need for copyright protection with the First Amendment right to free expression.[19] What complicates this, however, is Congress's reason for passing § 514. The statute is a codification of an international agreement with over 150 nations, and an attempt to harmonize copyright law throughout the world.[20] In the agreement, American lawmakers consented to protect the works of foreign authors, primarily to secure protections for U.S. authors in the rest of the world.[21] Current technology makes global dissemination of information easy and inexpensive. Therefore, copyright protection is not easily bound by domestic laws.[22]

The Tenth Circuit's decision in *Golan* forces courts and lawmakers to consider and shape more clearly the delicate balance between copy-

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10. *See, e.g.*, A Big Victory: *Golan v. Gonzales*, http://www.lessig.org/blog/2007/09/a_big_victory_golan_v_gonzales.html (Sept. 5, 2007, 04:05 PST) [hereinafter Lessig].

11. *See id.*

12. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

13. *See* Golan v. Gonzales, 501 F.3d 1179, 1181 (10th Cir. 2007).

14. 537 U.S. 186 (2003).

15. *Golan*, 501 F.3d at 1182, (holding that the lower court must apply First Amendment scrutiny, because congressional enactment of § 514 altered the traditional contours of copyright law). *Compare id.* at 1889 ("[T]he traditional contours of copyright protection include the principle that works in the public domain remain there and that § 514 transgresses this critical boundary."), *with Eldred*, 537 U.S. at 265 (Breyer, J., dissenting) ("In my view, '[t]ext, history, and precedent,' support both the need to draw lines in general and the need to draw the line here short of [the Copyright Term Extension Act]." (first alteration in original) (citation omitted)).

16. *Eldred*, 537 U.S. at 221.

17. *Golan*, 501 F.3d at 1195.

18. *See e.g.*, Lessig, *supra* note 10.

19. *See* Nimmer, *supra* note 9, at 4.

20. Golan v. Gonzales, No. 01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *44 (D. Colo. Apr. 20, 2005).

21. *See id.*

22. *See* FREDERICK M. ABBOTT, THOMAS COTTIER & FRANCIS GURRY, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 1-2 (2007).

right protection, First Amendment freedom, and America's relationship to the rest of the world.[23] Now that lower courts must answer new questions and follow new instructions to apply First Amendment scrutiny to § 514,[24] many scholars have and continue to postulate what will and what should happen. This Comment concludes that, after application of intermediate First Amendment scrutiny, the district court should find § 514, when limited to restoration of certain foreign works, is within Congress's lawmaking authority.

Part I of this Comment provides a background on the current status of copyright law, including recent acts of Congress that are based on international agreements and cases that have challenged those Acts. Part II discusses the Tenth Circuit's recent decision in *Golan v. Gonzales*, which suggests a new direction for copyright law. Finally, Part III analyzes the possible implications of *Golan* and how it should be decided on remand in district court.

I. BACKGROUND

A. Copyright Protection

Core American values inform the fundamental principle that before any work is protected or privately owned, it is free and accessible to the public.[25] People are free to speak, write, or perform any thoughts, words, ideas and expressions, regardless of who has already expressed them.[26] Therefore, when Congress steps in to grant copyright protection for someone's expression, it directly infringes on the rights of others to use that expression.[27] The grant of protection to one person is, in effect, a violation of someone else's freedom of expression.[28] This concept, first articulated by Melville B. Nimmer in a 1970 law review article, is the primary way that the *Golan* plaintiffs captured the court's attention.[29]

The federal government's authority to grant a limited monopoly over a certain expression or collection of ideas comes from the Copyright Clause of the United States Constitution.[30] Congress utilized this authority when it enacted the 1790 Copyright Act, which granted federal copyright protection to a creator, at the time of creation, for a term of fourteen

23. *See* Nimmer, *supra* note 9, at 3-4.
24. Golan v. Gonzales, 501 F.3d 1179, 1196 (10th Cir. 2007).
25. *See Golan*, 2005 U.S. Dist. LEXIS 6800, at *7-8.
26. *See* MICHAEL D. BIRNHACK, 4 NIMMER ON COPYRIGHT § 19E.01[B] (2008).
27. *Id.*
28. *See id.*
29. *Id.* § 19E.01[A] (citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970)).
30. U.S. CONST. art. 1, § 8, cl. 8 (giving Congress the power "[t]o 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").

years, with the option of renewal for twenty-eight possible years of protection.[31]

Foreign works were not protected in this 1790 Act.[32] In fact, foreign works did not receive any legal copyright protection in the United States until 1891.[33] Before that time, the United States was known to be the "chief threat" of piracy in the world.[34] Because foreign works were not protected here, publishing companies in the United States could choose to publish and sell the works of those creators without permission.[35] Some argued that this unfettered access to foreign works inspired creativity and progress in the United States and other developing nations, which benefited all nations in the long term.[36] Currently developing nations sit in the same position the United States once held, with more interest in access to ideas than protection of ideas.[37] Once the United States developed, however, it had a greater interest in gaining protection from other nations. Just as European authors had experienced, American authors began to see they were "being robbed of the fruits of [their] creativity,"[38] and unfettered access to their works "would discourage [them] from continuing to create, with resultant loss to [their] own, and other, countries."[39]

In 1989, the United States finally joined the Berne Convention for the Protection of Literary and Artistic Work ("Berne Convention"), which was initiated in 1886 and now consists of 161 member nations.[40] Prior to joining the Berne Convention, the United States only provided limited protection to foreign works by federal statute, rather than any international agreement.[41] The Berne Convention, supplemented by the TRIPS Agreement,[42] set the international standards for copyright protection.[43] Through these international bodies, international copyright law sets minimum standards for copyright protection and operates under two primary principles: (1) national treatment, and (2) most favored nation

31. Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 37 (2002) (explaining the Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831)).

32. *Id.* at 40.

33. Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 847 (2007).

34. ABBOTT ET AL., *supra* note 22, at 433.

35. *See id.*

36. *Id.*

37. *See id.*

38. *Id.*

39. *Id.*

40. World Intellectual Property Org., Member States, http://www.wipo.int/members/en/ (last visited Mar. 7, 2009).

41. Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 326 (2002).

42. The Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") was a result of the 1986 Uruguay Round of trade negotiations. ABBOTT ET AL., *supra* note 22, at 3. This agreement started an important shift in international copyright law, moving it into the trade arena under the World Trade Organization. *Id.* at 3-4.

43. *See id.* at 429.

treatment.[44] Most notably here, the national treatment principle requires nations to extend the same type of protection to foreign works as it does to its own authors' works.[45]

Until the United States joined the Berne Convention, it was not obligated to extend protection, nor did it receive protection from member nations. The agreements allow for some flexibility; each nation maintains its own copyright law, agreeing to give that same protection, and nothing more, to foreign works.[46] International agreements have, however, influenced domestic American copyright law, creating tension with the United States Constitution and pushing the bounds of the First Amendment.[47]

The courts have interpreted American copyright law to include two built-in free speech accommodations: (1) the idea/expression dichotomy, and (2) the fair use defense.[48] The first accommodation is that while an author's unique expression is protected by copyright, his ideas, theories and facts are "instantly available for public exploitation at the moment of publication."[49] More specifically, copyright law does not protect "any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ."[50] Second, the fair use defense allows the public to use the author's expression "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ."[51]

Although copyright protection does protect a work's creator, and allows him to be fairly compensated for sale of his creation, courts have explained that its primary purpose is not for the benefit of the individual creators, but rather "to promote the progress of science and the useful arts."[52] In this way, the restriction on free expression is intended to be an "engine of free expression."[53] That engine is further fueled, theoretically, by a work's release into the public domain when the copyright term expires.[54]

The value of the public domain is critical to the *Golan* plaintiffs' argument because works that enter the public domain no longer belong to

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44. *Id.* at 19.
45. *Id.*
46. *See id.*
47. *See* Perlmutter, *supra* note 41, at 324-25; *id.* at 325-30 (describing the role of international agreements in American copyright law and the importance of the United States' continued involvement).
48. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).
49. *Id.*
50. 17 U.S.C.A. § 102(b) (West 2009).
51. *Id.* § 107.
52. Golan v. Gonzales, No. Civ.01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *7 (D. Colo. Apr. 20, 2005) (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)).
53. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).
54. *See* Golan v. Gonzales, 501 F.3d 1179, 1183 (10th Cir. 2007).

the original creator.[55] At the point of entry, they belong to the public. The public is then free to utilize and even publish those works, fostering new creativity and general progress.[56]

B. The Public Domain

According to Black's Law Dictionary, the public domain is defined as: "[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. . . . [and which] can be appropriated by anyone without liability for infringement."[57] This concise definition, however, does not reflect the dynamic scholarly discussions surrounding the public domain. As Professor James Boyle asks: "What is the nature of . . . 'individual rights in the public domain?' Who holds them? Indeed, what *is* the public domain?"[58]

Despite the inexactness of the definition of the public domain, it is highly valued by many as a source of creativity and development.[59] Songs, literary works, symphonic compositions, historic films, and software programs in the public domain inspire further creative expression and ingenuity.[60] When the limited protection of a copyright ends, a work enters the public domain and takes on new life.[61]

Many scholars, including the *Golan* plaintiffs' lawyers, argue that intellectual property laws have stunted the public domain's growth to the detriment of the general public and societal progress.[62] Others maintain that the digital age and general accessibility of information necessitate greater intellectual property protection.[63] Whether more protection or greater dissemination of information is the most effective engine for progress and development is not clear.[64] But American laws, mostly in response to European Union laws and international agreements, have been moving in the direction of greater copyright protection.[65] Two of the most recent Acts of Congress—the Copyright Term Extension Act and § 514—reflect that trend.

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55. *Id.* at 1192-93.

56. *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37-38 (2003).

57. BLACK'S LAW DICTIONARY 1265 (8th ed. 2004).

58. Boyle, *supra* note 56, at 59 (quoting David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 147 (1981)). Boyle's contemporary, David Lange, explains: "the term 'public domain' is elastic and inexact. A definition can be but one of many definitions, each surely a function of perspective and agenda . . . ." David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 463 (2003).

59. *See, e.g.*, ABBOTT ET AL., *supra* note 22, at 6.

60. *See Golan*, 501 F.3d at 1188, 1193.

61. *Id.* at 1189.

62. *See, e.g., id.* at 1194.

63. *See e.g.*, Perlmutter, *supra* note 41, at 324.

64. *See* ABBOTT ET AL., *supra* note 22, at 9.

65. *See* Nimmer, *supra* note 9, at 1-3 (explaining the general progression of copyright laws leading up to *Golan*).

C. Recent Acts of Congress

1. Copyright Term Extension Act (CTEA)

Congress passed the "Sonny Bono Copyright Term Extension Act" ("CTEA") on October 27, 1998.[66] As the title suggests, the CTEA extended the term of copyright protection for existing and future works.[67] In the two hundred years prior to the CTEA, the term of protection had increased from the original fourteen years to a term either of life-plus-fifty-years, or the earlier of seventy-five years from publication or one hundred years from creation by an unknown author.[68] The CTEA added twenty years to the term of protection, increasing most copyrights to life-plus-seventy-years.[69]

Congress approved this extension in response to the European Union's extension of its copyright protections, to life-plus-seventy-years, through the European Union Term of Protection Directive.[70] Although Sonny Bono and other artists would have liked to see the term of protection last even longer,[71] many people believed this new term came awfully close to violating the Copyright Clause's "limited Times" provision.[72] The *Golan* plaintiffs challenged Congress's authority to extend copyright terms in the CTEA, as well as the constitutionality of the next act—Section 514 of the Uruguay Round Agreements Act.[73]

2. Section 514 of the Uruguay Round Agreements Act

President Bill Clinton signed the Uruguay Round Agreements Act ("URAA") into law on December 8, 1994.[74] The Act incorporates foreign trade and treaty agreements into American law, and part of the Act amends United States copyright law in 17 U.S.C. § 104A.[75] Specifically,

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66. Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified as amended at 17 U.S.C.A. § 302 (West 2009)).

67. *Id.* (extending protection for works created on or after January 1, 1978).

68. Eldred v. Ashcroft, 537 U.S. 186, 194-95 (2003).

69. § 102(b) (codified as amended at 17 U.S.C. § 302 (2008)).

70. Keith Glaser, Comment, *A Tune-Up on the Engine of Free Expression: The Traditional Contours of Copyright in* Golan, 18 DEPAUL J. ART TECH. & INTELL. PROP. L. 185, 186 (2007).

71. Nimmer, *supra* note 9, at 1; *see also* 144 CONG. REC. H9946, 9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono) ("Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.").

72. The "limited Times" provision explains that copyright protection is intended to be temporary and last only for a limited amount of time. U.S. CONST. art. 1, § 8, cl. 8; Nimmer, *supra* note 9, at 2.

73. Golan v. Gonzales, 501 F.3d 1179, 1181 (10th Cir. 2007).

74. U.S. COPYRIGHT OFFICE, CIRCULAR 38B: HIGHLIGHTS OF COPYRIGHT AMENDMENTS CONTAINED IN THE URAA 1 (2006), *available at* http://www.copyright.gov/circs/circ38b.pdf [hereinafter CIRCULAR 38B].

75. *Id.*

§ 514 restores copyright protection to certain foreign works.[76] This section automatically restored copyright protection to certain eligible foreign works, which were already in the public domain in the United States.[77] To be eligible, the work must meet four requirements: (1) "[a]t the time the work was created, at least one author . . . must have been a national or domiciliary of an eligible country. . . . ;"[78] (2) "[t]he work is not in the public domain in its source country through expiration of the term of protection;"[79] (3) "[t]he work is in the public domain in the United States because the work did not comply with formalities imposed at any time by the U.S. law . . . . ;"[80] and (4) "[i]f published, the work must have first been published in an eligible country and must not have been published in the United States during the 30-day period following its first publication in that eligible country."[81]

Under § 514, the work is treated as if it had never entered the public domain in the United States, and the copyright term will last for the remainder of the term it should have received.[82] For example, "[a] Chinese play from 1983 [that has been in the public domain in the United States] will be protected until December 31 of the seventieth year after the year in which its author dies."[83] Although all eligible works are automatically restored, any copyright holder must notify any reliance party of his intent to enforce the copyright, either directly or indirectly by filing notice with the United States Copyright Office.[84] Additionally, the Act allows for a 12-month grace period, wherein reliance parties may freely continue utilizing the work.[85]

Agreements like the URAA help create uniformity in copyright law around the world.[86] An author's work is protected through his own nation's copyright law, but is only respected in other countries through agreements like the Uruguay Round Agreements.[87] And, because today's technology allows for quick and cheap access to worldwide sources of information, it is more important than ever that Congress

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76. Carrie Lee, Recent Development, Golan v. Gonzales*: Capitalizing on* Eldred's *Defeat*, 16 TUL. J. INT'L & COMP. L. 505, 505 (2008).

77. *See* CIRCULAR 38B, *supra* note 74, at 2.

78. *Id.* Eligible countries are those, other than the United States, which are members of the Berne Convention for the Protection of Literary and Artistic Works, the World Trade Organization, or are subject to a presidential proclamation extending copyright protection based on reciprocal treatment for U.S. authors. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 3. Reliance parties are businesses or individuals who have relied on the work's availability in the public domain by using it before enactment of the URAA on December 8, 1994. *Id.* at 2.

86. ABBOTT ET AL., *supra* note 22, at 2-3.

87. *See id.* at 19.

question how effective American copyright law would be without international agreements.[88]

Section 514 created controversy, because it restored copyright protection to foreign works that Americans have already accessed through the public domain.[89] Likewise, principles of free expression establish that once a work is in the public domain, it no longer belongs to the copyright holder.[90] By allowing the government to take these works out of the public's hands, the Act deprived the public of something it owned.[91] The public's right to the information implicates the First Amendment, and this agreement, along with the CTEA, inspired litigation challenging Congress's authority to pass such an act.[92]

D. Challenges in the Courts

1. The Supreme Court: *Eldred v. Ashcroft*[93]

In *Eldred*, individuals and businesses using public domain works for their products and services challenged Congress's authority to pass the CTEA. The plaintiffs claimed Congress had no authority to extend the copyright protection of already existing works, although they did not challenge Congress's right, under the Copyright Clause, to increase protection for new and future works.[94] The extension of existing copyrights by twenty years, they argued, violated both the Clause's "limited Times"[95] provision and the plaintiffs' free speech rights under the First Amendment.[96]

The Court held that Congress's passage of the CTEA violated neither the "limited Times" provision nor the First Amendment free speech rights of the plaintiffs.[97] First, the Court reasoned that text, history, and precedent all established Congress's power to extend the term of an existing copyright.[98] The Court disagreed with the plaintiffs' argument that the extension of twenty years made a term virtually unlimited, and that a limited copyright must remain "fixed" or unchanged.[99] In fact, the Court explained, history shows that Congress is empowered to give current

88. *See id.* at 1.
89. Golan v. Gonzales, 501 F.3d 1179, 1194 (10th Cir. 2007) (addressing the plaintiffs' challenge because the law actually pulls works from the public domain).
90. *See* Nimmer, *supra* note 9, at 3.
91. *See id.* at 3-4.
92. Lee, *supra* note 76, at 506-07.
93. Eldred v. Ashcroft, 537 U.S. 186 (2003).
94. *Id.* at 193.
95. U.S. CONST. art. 1, § 8, cl. 8. This term comes from the original Copyright Act of 1790, declaring that protection would only be for a limited time, rather than permanent or perpetual.
96. *Eldred*, 537 U.S. at 192-93.
97. *Id.* at 198.
98. *Id.* at 200-05.
99. *Id.* at 199-200.

authors the benefit of future term extensions "so that all under copyright protection will be governed evenhandedly under the same regime."[100]

Next, the Court rejected the plaintiffs' claim that the CTEA violated First Amendment rights, noting that the proximity of the framers' passage of the Copyright Clause and the First Amendment demonstrates their compatibility.[101] For additional support, the Court pointed out the two previously mentioned free speech safeguards developed in copyright law.[102] Although the Court clarified that copyright laws are not "categorically immune from challenges under the First Amendment,"[103] it explained why the *Eldred* facts did not give rise to First Amendment scrutiny.[104] First, the speech most securely protected by the First Amendment is one's own speech, whereas the plaintiffs in *Eldred* were asserting their right to utilize the speech of others.[105] Second, the Court found that passage of the CTEA did not alter "the traditional contours of copyright protection . . . ."[106]

What the Court did not say in *Eldred* is what those "traditional contours" are, and what exactly would constitute an alteration of them.[107] To the legal scholars pushing for more public access and less copyright protection, this phrase opened a pathway for new legal challenges. Those challenges, brought in the D.C., Ninth, and Tenth Circuits, started a new discourse about what the "traditional contours" of copyright law are.

2. The Circuit Courts

a. The D.C. Circuit (2005): *Luck's Music Library, Inc. v. Gonzales*[108]

In *Luck's Music Library,* the plaintiffs consisted of a corporation selling classical orchestral sheet music and a film archivist.[109] Some works that the plaintiffs utilized were foreign works in the public domain.[110] They challenged Congress's passage of § 514, claiming it overstepped copyright limitations by removing works from the public domain.[111] The plaintiffs advanced a policy argument that Congress does not create any incentive for creativity and progress (the goal of the Copy-

100. *Id.* at 200.
101. *Id.* at 218-19.
102. *Id.* at 219; *See supra* note 48 (explaining the two recognized "free-speech safeguards").
103. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *questioned in Eldred,* 537 U.S. at 221.
104. *Eldred,* 537 U.S. at 221.
105. *Id.*
106. *Id.*
107. *See id.*
108. 407 F.3d 1262 (D.C. Cir. 2005).
109. *Id.* at 1263.
110. *Id.*
111. *See id.*

right Clause) by removing works from the public domain.[112] The court relied on *Eldred* to dismiss the plaintiffs' claims and held that Congress does have authority to remove works from the public domain for copyright protection.[113] This decision stands in direct contrast to the Tenth Circuit's decision, two years later, in *Golan.*

b. The Ninth Circuit (2007): *Kahle v. Gonzales*[114]

In *Kahle,* the plaintiffs operated an Internet service that offered free access to films, books, software and other digital information generally found in the public domain.[115] The plaintiffs claimed the CTEA unnecessarily extended copyright protection to these works, specifically alleging that its "opt-out" system "altered a traditional contour of copyright . . . ."[116] The court rejected plaintiffs' challenge, based on the *Eldred* finding that the Act was a valid exercise of Congress's power.[117] The CTEA's elimination of the renewal requirements, the court asserted, only brought existing copyright protection "in parity with those of future works."[118] The court also rejected the plaintiffs' suggestion that First Amendment scrutiny was required, because here, as in *Eldred,* the free speech safeguards of copyright law adequately protected the plaintiffs' First Amendment interests.[119]

The decisions in *Kahle* and *Luck's Music Library* fell in step with the deferential trend, which confirmed Congress's broad power to extend copyright protections. Similarly, the District Court for the District of Colorado looked to *Eldred* and the general precedent to affirm Congress's authority to pass both the CTEA and § 514.[120]

II. THE TENTH CIRCUIT: *GOLAN V. GONZALES*[121]

Lawrence Golan was joined by other plaintiffs including a publishing company, a motion picture distributor, and a film archivist.[122] Each of the plaintiffs relied to some degree on works in the public domain that were re-protected under § 514.[123] Additionally, the CTEA extended the copyright protection of other works these performers and artists had expected to find in the public domain.[124] The plaintiffs filed suit against the

112. *Id.*
113. *Id.* at 1266.
114. 474 F.3d 665 (9th Cir. 2007).
115. *See id.* at 666.
116. *Id.*
117. *Id.* at 667-68.
118. *Id.* at 668.
119. *Id.* at 668-69.
120. Golan v. Gonzales, No. Civ.01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *42-43 (D. Colo. Apr. 20, 2005)
121. 501 F.3d 1179 (10th Cir. 2007).
122. *Id.* at 1181.
123. *Id.* at 1182.
124. *Id.*

government in the United States District Court for the District of Colorado, claiming that Congress's passage of the URAA and the CTEA was unconstitutional.[125]

A. Procedural Posture—The District Court Decision

The plaintiffs' challenge included three basic claims.[126] First, they argued that the CTEA's extension of copyright protection from life-plus-fifty-years to life-plus-seventy-years essentially created a perpetual copyright and violated the "limited Times" provision of the Copyright Clause.[127] The district court dismissed this claim based on the Supreme Court's decision in *Eldred* and granted the government's motion for summary judgment.[128]

Second, the plaintiffs argued that Congress exceeded its inherently limited Copyright Clause power when it passed § 514.[129] This limited power, they argued, does not authorize Congress to remove works from the public domain.[130] The district court addressed this challenge with a historical analysis of Congress's Copyright Clause authority.[131] In reviewing the Copyright Act of 1790, the 1832 Patent Act, Supreme Court cases *Wheaton v. Peters* and *Eldred v. Ashcroft*, the court concluded that Congress does have authority to remove works from the public domain.[132] The court explained: "that the public domain is indeed public does not mandate that the threshold across which works pass into it cannot be traversed in both directions."[133]

To address the plaintiffs' third claim that § 514 violated the plaintiffs' First Amendment rights, the court explained that because the works are still available to the plaintiffs through contract with copyright holders, the plaintiffs could not accurately claim that their "participation in speech is prohibited."[134] The remaining question, then, was whether the restored copyright protection places too great a burden on the plaintiffs' free expression of ideas.[135] The court relied on established precedent to conclude that a First Amendment analysis is not triggered by these legitimate limits on free expression of ideas.[136] Thus, the district court found that Congress did not exceed its Copyright Clause authority nor violate

125. *Id.*
126. *Id.* at 1183.
127. U.S. CONST. art. 1, § 8, cl. 8; *Golan*, 501 F.3d at 1185.
128. *Golan*, 501 F.3d at 1182.
129. *Id.* at 1186.
130. *Id.*
131. Golan v. Gonzales, No. 01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *15-43 (D. Colo. Apr. 20, 2005).
132. *Id.* at *42-43.
133. *Id.* at *9.
134. *Id.* at *48.
135. *Id.*
136. *Id.*

the plaintiffs' First Amendment rights in passing § 514, and it granted summary judgment in favor of the government.[137]

B. The Tenth Circuit Court of Appeals Opinion

The plaintiffs appealed the district court's decision, and the United States Court of Appeals for the Tenth Circuit addressed the plaintiffs' three claims.[138] The court agreed with the lower court on the first two claims.[139] The court disagreed, however, with the district court and with the Ninth and D.C. circuits on whether Congress's removal of works from the public domain interfered with the plaintiffs' First Amendment right to free expression, thus triggering First Amendment scrutiny.[140]

Although *Eldred* foreclosed the plaintiffs' challenge to the CTEA, it created an opening for a First Amendment challenge.[141] The court explained that even when Congress has not exceeded its Constitutional authority through the Copyright Clause it must remain within the boundaries of other constitutional limits like the First Amendment.[142] Here, the *Golan* court used both a functional and historical analysis to discern whether Congress had overstepped its boundaries by altering "traditional contours of copyright law."[143]

1. Functional Analysis

To get to the meaning of the *Eldred* Court's phrase, "traditional contours of copyright law,"[144] the court first looked to the dictionary to define "a contour as 'an outline' or 'general form or structure of something.'"[145] The court then proceeded with an examination of the procedure or general form of copyright law in America.[146] It concluded that copyright structure is based on the principle that a limited monopoly over an expression, which attaches at the moment of creation, will encourage authors, composers, designers, and all types of creators to create and share their ideas.[147] The process, therefore, is that a work is first created, then protected, and finally, after the term of copyright protection expires, released into the public domain for public benefit.[148]

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137. Golan v. Gonzales, 501 F.3d 1179, 1182-83 (10th Cir. 2007).
138. *Id.* at 1183.
139. *Id.* at 1197.
140. *Id.*
141. *Id.* at 1184.
142. *Id.* at 1187.
143. *Id.* at 1188-89.
144. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).
145. *Golan*, 501 F.3d at 1189 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 284 (9th ed. 1984)).
146. *Id.*
147. *Id.* at 1188.
148. *Id.* at 1189.

According to this court, § 514 changes the copyright sequence by adding a fourth step after a work has entered the public domain.[149] This fourth step, copyright protection after the work has entered the public domain, *alters* the ordinary copyright procedure.[150]

2. Historical Analysis

The *Eldred* Court's use of the term "traditional"[151] prompted an analysis of copyright law's contours throughout U.S. history.[152] The court revisited the original Copyright Act of 1790 and the context in which the framers passed it.[153] In contrast to the lower court's historical investigation into whether Congress possessed the authority to take works out of the public domain, the Tenth Circuit looked at not only what is allowed, but also what is *traditional* or customary within copyright law.[154]

Although it is uncertain whether the original Copyright Act protected works already in the public domain, various private bills and wartime acts did restore copyright to works in the public domain.[155] Rather than demonstrating a tradition of restoring copyright to works in the public domain, the court concluded that these special acts of Congress revealed a historical practice of treating works in the public domain as permanently public.[156] The court explained that "the fact that individuals were forced to resort to the uncommon tactic of petitioning Congress demonstrates that this practice was *outside* the normal practice."[157]

The court concluded that, both historically and functionally, works in the public domain are meant to remain in the public domain.[158] Thus, § 514 "altered the traditional contours of copyright protection."[159] Following the *Eldred* decision, the court explained that the alteration prompts a First Amendment analysis.[160]

3. First Amendment Analysis

In conducting a First Amendment analysis, the court explained what the plaintiffs' First Amendment interests were.[161] Because works in the public domain belong to the public, the court reasoned that the plaintiffs

149. *See id.*
150. *Id.*
151. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).
152. *Golan*, 501 F.3d at 1189.
153. *Id.* at 1190.
154. *Id.* at 1191.
155. *Id.*
156. *Id.* at 1191-92.
157. *Id.* at 1191.
158. *Id.* at 1192.
159. *Id.*
160. *Id.*
161. *Id.* at 1192-93.

had a "right to unrestrained artistic use of these works."[162] Although the works and expressions once belonged to the creator, the creator's limited monopoly no longer exists.[163] Once protection expires, the court acknowledged that the works or speech belong to the public.[164] The works' removal from the public domain then infringes on the public's right to use the works, thus infringing on its freedom of expression.[165] In contrast to the *Eldred* plaintiffs, the *Golan* plaintiffs could claim a right to protection of *their own* words, rather than the less-valued right to express others' words.[166]

After establishing that the plaintiffs' had a valid interest in the works, the court then looked to the Copyright Clause's free speech safeguards to determine if those interests were already sufficiently guarded.[167] The court found that the two built-in safeguards did protect the public's First Amendment rights during the term of the works' copyright protection, but did not address the public's interest in works already released into the public domain.[168]

Furthermore, the court found that § 514 did not sufficiently address the plaintiffs' First Amendment interests.[169] Unlike the CTEA, § 514 does not provide relief from royalties and fees for libraries, restaurants, and other small businesses.[170] If § 514 had included protections like those found in the CTEA, First Amendment scrutiny may be unnecessary.[171] However, the court found that § 514's provision of a one-year grace period for those using the works, as well as its notice requirement, were not sufficient.[172] Therefore, the court concluded First Amendment scrutiny must be applied to Congress's passage of § 514.[173]

4. Remand to the District Court

The Tenth Circuit remanded the case to district court with detailed instructions.[174] First, on remand, the court must determine if the § 514 restrictions on plaintiffs' free expression are content-based or content-neutral.[175] The court must then apply the appropriate level of scrutiny to determine whether Congress's passage of § 514 violated plaintiffs' First

162. *Id.* at 1193.
163. *See id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1194.
168. *Id.* at 1195.
169. *Id.*
170. *Id.* at 1195-96.
171. *See id.* at 1195.
172. *See id.* at 1196.
173. *Id.*
174. *Id.*
175. *Id.*

Amendment right to freedom of expression.[176] The district court should balance the First Amendment implications of the law against the intent of Congress, including its reason for entering into important international agreements.[177]

III. ANALYSIS

A. Content-Neutral or Content-Based Restriction?

On remand, the district court will have to determine whether the restrictions imposed by § 514 are content-neutral or content-based.[178] Content-based restrictions, which trigger the strictest level of scrutiny, "are those which 'suppress, disadvantage, or impose differential burdens upon speech because of its content.'"[179] Content-neutral restrictions, on the other hand, serve "purposes unrelated to the content of expression . . . even if [they had] an incidental effect on some speakers or messages but not others."[180] The heart of the question the court must answer is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[181]

Under § 514, speakers are restricted from using foreign works that have fallen into the public domain in the United States, not because of the works' content, but because of certain procedural failings.[182] Section 514 does not restore protection to works in the public domain created by American authors or those foreign works previously in the public domain if their copyright terms had legitimately expired.[183] Thus, the works are not protected because of their subject matter or because of some disagreement the government has with the material being distributed in the United States. The only element that is remotely content-oriented is the works' so-called "foreignness."[184] This, however, should not lead the court to deem the restrictions as content-based. "Foreignness" relates to procedural considerations; the subject matter is irrelevant in determining whether the work will be resurrected from the public domain.[185]

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176. *Id.*
177. *See id.*
178. *Id.*
179. *Id.* (quoting Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 657 (10th Cir. 2006)).
180. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), *quoted in Golan*, 501 F.3d at 1196.
181. *Ward*, 491 U.S. at 791 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).
182. *See* CIRCULAR 38B, *supra* note 74, at 2.
183. *See id.*
184. *Cf. Golan*, 501 F.3d at 1196 (explaining that a rule is content-based if it treats works differently based on their content or substance).
185. *See* CIRCULAR 38B, *supra* note 74, at 2.

B. Application of Intermediate Scrutiny

Therefore, the district court should find § 514 to be a content-neutral infringement on free speech, and it should apply intermediate scrutiny.[186] Intermediate scrutiny requires the restrictive law to be "narrowly tailored to serve a significant governmental interest"[187] and "leave open ample alternative channels for communication of the information."[188] Although courts have interpreted this level of scrutiny differently, intermediate scrutiny is somewhere between strict scrutiny and rational basis review.[189]

Accordingly, the district court must determine if Congress had a significant governmental interest. Congress's primary purpose in enacting § 514 was to protect American creators by securing their copyrights throughout the world.[190] Only through some level of agreement with the other nations in the World Trade Organization could Congress secure mutual copyright respect for U.S. authors in those countries.[191] However, if Congress's interest was nothing more than looking out for American authors' money-making ability, albeit an important goal, it may not satisfy the first part of the intermediate scrutiny test.[192]

If Congress's interest was the public good, it is more likely the court will deem it significant.[193] As stated above, American copyright law is not focused on the rights of the individual creators, but rather the broader concern for the public good.[194] If enactment of § 514 meant that authors would continue to write, experiment, create, and share their ideas through publication—knowing their works will not be exploited in other parts of the world—then § 514 serves a greater good than merely authors' rights.[195] Notably, the House Committee on Ways and Means supported § 514 by explaining that its enactment is "vital to our national interest and to economic growth, job creation, and an improved standard of living for all Americans."[196]

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186. *See Golan*, 501 F.3d at 1196 (explaining that intermediate scrutiny is the appropriate test for content-neutral restrictions, while not making a conclusion on whether it should be applied); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 788 (2007).

187. *Golan*, 501 F.3d at 1196.

188. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see also* Bhagwat, *supra* note 186, at 789.

189. Bhagwat, *supra* note 186, at 788.

190. Lee, *supra* note 76, at 510.

191. *See* Eldred v. Ashcroft, 537 U.S. 186, 205-06 (2003).

192. *See Cmty. for Creative Non-Violence*, 468 U.S. at 293.

193. *See* Daniel Choi, Recent Development, Golan v. Gonzales*: The Stalemate Between the First Amendment and Copyright Continues*, 9 N.C. J.L. & TECH. 219, 238 (2008).

194. Golan v. Gonzales, No. 01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *8 (D. Colo. Apr. 20, 2005).

195. *See* Austin, *supra* note 31, at 25.

196. H.R. REP. NO. 103-826(I), at 16 (1994), *quoted in Golan*, 2005 U.S. Dist. LEXIS 6800, at *45.

The Committee's support, along with Congress's stated purpose and the lower court's previous finding, translates into a significant governmental interest. Moreover, it would be difficult to isolate a more narrow or precise interest, other than one incorporating the international context of copyright law.[197] Congress's enactment of § 514 and willingness to negotiate with other nations "enhance[ed] our credibility" in the world and "[made] the U.S. market [more] inviting, providing incentives to both nationals and foreigners to create and disseminate their works here."[198]

Additionally, the Supreme Court lent some insight to the weight of the international context in *Eldred* when it discussed Congress's authority to enact the Copyright Term Extension Act.[199] The Court explained that Congress passed the CTEA primarily in response to a European Union (EU) directive.[200] Per the Berne Convention, EU members were directed to "deny this longer term to the works of any non-EU country whose laws did not secure the same extended term."[201] The Court legitimized the theory that Congress's broad purpose to promote the progress of science through copyright law depends upon international copyright protection.[202] Specifically, the Court noted that "[t]he CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States."[203] Consequently, Congress had two reasons for enacting § 514: (1) to protect the copyrights of American authors throughout the world, and (2) to promote progress in the United States. For this reason, the court should find that Congress had a significant governmental interest in passing § 514.

Next, the court will have to determine if § 514 is narrowly tailored to achieving the above interests.[204] This step requires determining whether the restrictive law is not "substantially broader than necessary to achieve the government's interest."[205] At the same time, courts have not gone so far as to say the law need be the "least restrictive means" available to achieve a governmental interest.[206]

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197. *See* Perlmutter, *supra* note 41, at 329.

198. *Id.* at 330.

199. *See* Eldred v. Ashcroft, 537 U.S. 186, 205-06 (2003).

200. *Id.* at 205.

201. *Id.*

202. *See id.* at 206.

203. *Id.* (citing Perlmutter, *supra* note 41, at 330) (summarizing the persuasive comments of author and former Associate Register for Policy and International Affairs in the United States Copyright Office, Shira Perlmutter).

204. *See* Golan v. Gonzales, 501 F.3d 1179, 1196 (10th Cir. 2007) ("A content-neutral restriction must be 'narrowly tailored to serve a significant governmental interest.'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

205. *Rock Against Racism*, 491 U.S. at 800; *see also* Bhagwat, *supra* note 186, at 789 (discussing the quoted language).

206. Bhagwat, *supra* note 186, at 789.

In order to determine whether the means are overbroad or narrowly-tailored, the court must evaluate the First Amendment right being infringed.[207] In this way, intermediate scrutiny is a type of balancing test, weighing a private First Amendment right against a social or community interest advanced by the government.[208] The First Amendment right in this case is freedom of speech.[209] Although First Amendment protection is not absolute, free speech is afforded great protection as a fundamental right in our society. Speech includes valuable forms of expression like literature, musical compositions, and films.[210]

Here, Congress agreed to restore copyright to a relatively specific segment of works in the public domain—those foreign-created works that entered the public domain through a procedural failing.[211] Under § 514, rights to such works are taken out of the public's possession and restored to the copyright owner only for the duration of the original copyright, had they not "mistakenly" entered the public domain.[212] This restriction on speech is quite limited and not overbroad. Because intermediate scrutiny does not require the least restrictive means available, § 514 should be deemed to be narrowly tailored to the government's interest.

Finally, the court will need to determine if § 514 "leave[s] open ample alternative channels for communication of the information."[213] Here, the court must consider that the privilege to use these works is not completely removed. The freedom to contract with foreign copyright holders still exists.[214] Although this fact does not alleviate the First Amendment concern altogether, it weighs against a view that § 514 closes off alternative channels of communication. The works, in the hands of some copyright holders, will be available for a price. For other works, the copyright will not even be enforced.[215] While access to information may be less widely and freely available, channels of communication remain open. As a result, the court should find that § 514 satisfies First Amendment intermediate scrutiny.

CONCLUSION

Last year, the Tenth Circuit made a critically important decision in *Golan v. Gonzales*. The *Golan* court seriously acknowledged the tension between copyright monopolies and First Amendment freedoms. And the

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207. *See id.* at 788.
208. *Id.* at 788-89.
209. *See Golan*, 501 F.3d at 1193.
210. *Id.*
211. *See* CIRCULAR 38B, *supra* note 74, at 2.
212. *See id.*
213. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).
214. Golan v. Gonzales, No. 01-B-1854(BNB), 2005 U.S. Dist. LEXIS 6800, at *48 (D. Colo. Apr. 20, 2005).
215. *See* CIRCULAR 38B, *supra* note 74, at 3.

Golan plaintiffs achieved a fundamental goal by establishing that First Amendment boundaries exist in copyright law.[216]

In addition, the *Golan* decision has significant international implications. To influence international copyright law, the United States must be at the negotiating table with other nations.[217] If it is not flexible, America may be forced to withdraw from the international arena of copyright protection. The resulting isolation could expose American creators to significant exploitation and piracy.[218]

Two equally important elements—free speech and international relations—weigh heavily against each other in American copyright law. Up to this point, lawmakers have prioritized international relations and increased protections for American creators. Going forward, however, lawmakers will need to seriously consider the role of the public domain and free speech within copyright law. For their part, courts should require concrete evidence that increased protection through international agreements is in fact aiding progress and advancing the public good. And although, ultimately, § 514 should satisfy intermediate scrutiny, *Golan* will be a landmark in setting a new direction for United States copyright law, and shaping the delicate balance between free expression, copyright protection, and our relationship to the rest of the world.

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216. *See* Nimmer, *supra* note 9, at 6.
217. *See* Perlmutter, *supra* note 41, at 325.
218. *See id.* at 327.

* I would like to thank Professor Viva Moffat for all her suggestions and the *Denver University Law Review* editors for their thoughtful revisions. And thanks to my family, especially Mark and Olive Claiborne for their patience and encouragement.