Congress's Power to Restore Copyright Protection to Works That Have Entered the Public Domain: *Golan v. Holder*

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Summary

Golan v. Holder is a case that will be heard by the U.S. Supreme Court on October 5, 2011. The Court will consider whether Congress has the power to grant copyright protection to creative works that have already entered the public domain. At issue in *Golan* is the Uruguay Round Agreements Act (URAA) of 1994 that Congress passed in order to bring the United States into compliance with international agreements on intellectual property (IP). Section 514 of the URAA "restored" copyrights in certain foreign works that were previously in the public domain in the United States. After these works became protected by copyright as a result of URAA, anyone wishing to use them needs to seek prior permission from the copyright holders and also likely pay licensing fees. Although it is difficult to determine the exact number of foreign works that the URAA removed from the public domain, the former Register of Copyrights estimated that it may be in the millions.

A group of orchestra conductors, educators, performers, film archivists, and motion picture distributors, who had relied on the free and unrestricted availability of these artistic works in the public domain for their livelihoods, filed a lawsuit against the federal government challenging the constitutionality of the URAA. The U.S. Court of Appeals for the Tenth Circuit determined that § 514 of the URAA was within Congress's power under the Copyright Clause and that it did not violate the free speech and expression rights of the plaintiffs who had enjoyed freely using the foreign works that were in the U.S. public domain before the restoration of their copyright protection.

The Supreme Court's anticipated ruling in *Golan v. Holder* is expected to provide definitive answers to the following significant questions in copyright law: whether Congress is prohibited by the Copyright Clause from taking works out of the public domain, and whether § 514 of the URAA violates the First Amendment to the U.S. Constitution.

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Introduction

On October 5, 2011, the U.S. Supreme Court will hear oral argument in *Golan v. Holder,* a case considering whether Congress had the power under the Copyright Clause of the U.S. Constitution to grant copyright protection to creative works that have already entered the public domain. In 1994, Congress enacted the Uruguay Round Agreements Act (URAA) of 1994;[1] Section 514 of the URAA "restored" copyright protection to certain foreign works that had been in the U.S. public domain, in order to bring the United States into compliance with the Berne Convention for the Protection of Literary and Artistic Works of 1886, which the United States had joined in 1989. These foreign works had lost or never obtained copyright protection in the United States because their creators failed to comply with certain mandatory statutory formalities that were required by the federal Copyright Act at that time, such as filing registrations with the U.S. Copyright Office or affixing copyright notice to them (identifying the copyright owner and date of publication).

In 2001, a group of artists, performers, businesses, teachers, publishers, archivists, and movie distributors who had depended on artistic works in the public domain for their livelihoods, filed a lawsuit against the federal government challenging the constitutionality of the URAA. They argued that (1) the law's restoration of copyrights in foreign works that had been in the public domain interfered with their First Amendment rights to use, perform, and distribute them, and (2) the law exceeded the Congress's authority under the Copyright Clause. The U.S. Court of Appeals rejected these constitutional arguments in two separate rulings, holding that § 514 of the URAA was a valid exercise of Congress's power[2] and that it did not violate the plaintiffs' free speech rights because the law is a content-neutral regulation of speech that was narrowly tailored to serve a substantial or important governmental interest—securing copyright protection for American works in foreign countries, as many of the United States' trading partners (who were signatories to the Berne Convention) had made clear that they would restore American copyrights that were in their public domain only if the United States restored foreign copyrights.[3]

The U.S. Supreme Court granted the plaintiffs' petition for a writ of certiorari on March 7, 2011, in order to consider the following questions:

1. Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the public domain?
2. Does Section 514 of the URAA violate the First Amendment of the United States Constitution?

[1] P.L. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994) (codified as amended at 17 U.S.C. §§ 104A, 109).

[2] Golan v. Gonzales, 501 F.3d 1179, 1187 (10th Cir. 2007) ("Golan I").

[3] Golan v. Holder, 609 F.3d 1076, 1094 (10th Cir. 2010) ("Golan II").

Background

Brief Overview of Copyright Law

The source of federal copyright law originates with the Copyright Clause (also referred to as the Progress Clause) of the U.S. Constitution, which authorizes Congress to "promote the Progress of Science[4] ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings."[5] Therefore, this constitutional provision indicates that the rights conferred by a copyright cannot last forever; rather, a copyright holder may exercise his/her exclusive rights only for "limited Times." At the expiration of that period of time, the copyrighted work becomes part of the public domain, available for anyone to use without payment of royalties or permission. The U.S. Supreme Court has opined that "[t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"[6]

The Copyright Act grants legal protection to the creator or owner of certain original works[7] of creative expression, including books, movies, photography, art, and music.[8] The Copyright Act refers to the creator of such works as an "author"; ownership of a copyright initially vests in the author,[9] but the author may transfer ownership of the copyright to another person or company.[10] Copyright protection does not extend to any underlying abstract idea, procedure, process, system, method of operation, concept, principle, or discovery, but rather it only protects the manner in which those ideas are expressed.[11]

A copyright holder possesses several exclusive legal entitlements under the Copyright Act, including the rights of reproduction, distribution, public performance, and public display of the protected material, that provide the holder with the power to determine whether and under what circumstances the protected work may be used by third parties.[12] If a copyright holder chooses to allow a third party to exercise one of the exclusive rights provided by the copyright, such permission is often granted in the form of a license, which is usually expressed in a written contract. [13] The terms of a licensing agreement may include certain limitations on using the copyrighted work and may require payment of a royalty fee.

[4] The Framers of the Constitution used the word "Science" to mean "learning or knowledge." Eldred v. Ashcroft, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting).

[5] U.S. CONST. art. I, § 8, cl. 8.

[6] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (*quoting* U.S. CONST. art. I, § 8, cl. 8.)

[7] "Original" means that the author must have independently created the work, as opposed to copying something from a pre-existing work. In addition, an "original work" must possess a minimal amount of creativity. Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 345 (1991).

[8] 17 U.S.C. § 102(a).

[9] 17 U.S.C. § 201(a).

[10] 17 U.S.C. § 201(d).

[11] Baker v. Selden, 101 U.S. 99 (1879); 17 U.S.C. § 102(b).

[12] 17 U.S.C. § 106. For a detailed description of the major provisions of the Copyright Act, *see* CRS Report RS22801, *General Overview of U.S. Copyright Law*, by (name redacted).

[13] 17 U.S.C. §§ 201(d), 204(a).

The Copyright Act contains several statutory limitations on the copyright monopoly. These include the "first sale doctrine"[14] that limits the copyright owner's exclusive control over distribution of the material objects in which a work is expressed. The "first sale doctrine" permits the owner of a particular copy of a copyrighted work to sell or dispose of that copy without the copyright owner's permission. Other limitations involve allowing certain reproductions by libraries and archives,[15] limited performances and displays for educational purposes or in the course of services at a place of worship,[16] and certain performances for non-profit, charitable causes.[17] The doctrine of "fair use" in copyright law recognizes the right of the public to make reasonable use of copyrighted material, under particular circumstances, without the copyright holder's consent. For example, a teacher may be able to use reasonable excerpts of copyrighted works in preparing a scholarly lecture or commentary, without obtaining permission to do so. The Copyright Act mentions fair use "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[18] However, a determination of fair use requires a federal court to engage in "case-by-case" analysis that applies several statutory factors to the factual circumstances of the use.[19]

Unauthorized use of a copyrighted work by a third party in a manner that implicates one of the copyright holder's exclusive rights constitutes infringement.[20] The copyright holder may file a lawsuit against an alleged infringer for a violation of any of the exclusive rights conferred by copyright. The Copyright Act provides several civil remedies to the copyright holder that is harmed by infringement, including the possibility of obtaining injunctive relief,[21] actual damages suffered by the copyright owner due to the infringement,[22] statutory damages,[23] and costs and attorney fees.[24]

As noted above, the rights conferred on a copyright holder do not last forever. In general, an author of a creative work may enjoy copyright protection for the work for a term lasting the entirety of his/her life plus 70 additional years.[25] At the expiration of a term, the copyrighted work becomes part of the public domain. Materials that are in the public domain are available for anyone to reproduce, display, adapt, distribute, or publicly perform, without needing to obtain prior permission of the author or creator of such work.

[14] 17 U.S.C. § 109(a).

[15] 17 U.S.C. § 108.

[16] 17 U.S.C. § 110(3).

[17] 17 U.S.C. § 110(4).

[18] 17 U.S.C. § 107.

[19] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

[20] 17 U.S.C. § 501.

[21] 17 U.S.C. § 502.

[22] 17 U.S.C. § 504(b).

[23] 17 U.S.C. § 504(c)(1).

[24] 17 U.S.C. § 505.

[25] 17 U.S.C. § 302. Other terms have been established for different works and different periods of time. For a concise chart explaining the different terms, *see* http://www.copyright.cornell.edu/resources/publicdomain.cfm.

Intellectual Property Treaties: Berne Convention and TRIPS

A widely cited author of a copyright treatise, David Nimmer, has explained that "[f]or decades, the outstanding feature distinguishing United States copyright law from that of the rest of the world has been its emphasis on formalities."[26] Historically, federal copyright law required creators of works to satisfy certain statutory formalities in order to obtain and maintain copyright protection, including providing notice on the published work (affixing to the work the © symbol, the word "Copyright," and the name of the owner of the copyright and the first year of the work's publication), depositing copies of the work with the U.S. Copyright Office (thus expanding the collection of the Library of Congress), and filing a registration form with the Copyright Office. If a creator of a work failed to meet the formalities, it could result in either a loss of copyright (the work thus falling into the public domain), preclude copyright protection, or restrict certain remedies under the copyright.[27]

In 1989, the United States became signatory to the Berne Convention for the Protection of Literary and Artistic Works of 1886. The Berne Convention sets certain minimum standards for copyright protection in member countries and requires each signatory country to afford the same copyright protections to authors in other member countries that it provides to its own authors. Article 5(2) of the Convention prohibits signatory countries from subjecting the "enjoyment and exercise" of copyright rights "to any formality."[28] In order to satisfy this requirement, the United States eliminated all the formalities in the Copyright Act that acted as conditions to copyright protection[29] by enacting the Berne Convention Implementation Act (BCIA) of 1988.[30]

In addition, article 18 of the Berne Convention specifies that "[t]his Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."[31] Thus, the United States appeared to be obliged by Berne to provide copyright protection for works authored by nationals of signatory countries that were in the U.S. public domain not on account of their expired copyright term, but because they had not satisfied the procedural formalities to secure copyright protection that the Copyright Act had required at that time. However, the BCIA did not extend copyrights to any of these foreign works.[32]

In April 1994, the United States and 123 other countries negotiated various agreements in the Uruguay Round of Multilateral Trade Negotiations, that concluded with the signing of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).[33] One of the agreements included in the Uruguay Round was the Agreement on Trade-Related Aspects of

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[26] 2-7 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 7.01 (2011).

[27] *Id.*

[28] Berne Convention for the Protection of Literary and Artistic Works of 1886, art. 5(2), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834.

[29] 4-17 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 17.01 (2011).

[30] P.L. 100-568, 102 Stat. 2853 (1988).

[31] Berne Convention for the Protection of Literary and Artistic Works of 1886, art. 18, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P205_40480.

[32] *See* P.L. 100-568, § 12, 102 Stat. 2853, 2860 (1988) ("Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.").

[33] For more information about the WTO, *see* CRS Report RS22154, *World Trade Organization (WTO) Decisions and Their Effect in U.S. Law*, by (name redacted).

Intellectual Property Rights ("TRIPS Agreement"), which establishes minimum standards of protection for patents, copyrights, trademarks, and trade secrets that each WTO signatory state must give to the intellectual property of fellow WTO members.[34] Article 9(1) of TRIPS specifies that "Members shall comply with Articles 1 through 21 of the Berne Convention"[35] which includes article 18, the requirement to restore copyright protection for certain foreign works. Unlike the Berne Convention, the TRIPS Agreement provides for dispute resolution proceedings before the WTO, meaning that a WTO member found not to be in compliance with the TRIPS Agreement could be subject to trade sanctions.[36]

Section 514 of the Uruguay Round Agreements Act of 1994

To implement the agreements that the United States signed in the Uruguay Round, Congress enacted the Uruguay Round Agreements Act (URAA) in 1994.[37] Section 514 of URAA satisfies the United States' treaty obligations under article 18 of Berne and article 9(1) of TRIPS by granting copyright protection to foreign works that were formerly in the U.S. public domain because, among other things, their creators never obtained copyright protection in the United States or they lost such protection due to a failure to comply with statutory formalities.[38] However, § 514 of URAA did not restore copyrights in foreign works that entered the public domain due to an expiration of their term of protection.[39] The restored copyrights "subsist for the remainder of the term of copyright that the work would have otherwise been granted ... if the work never entered the public domain."[40] According to the former Register of Copyrights Marybeth Peters, the effect of § 514 of the URAA was to remove millions of foreign works from the public domain.[41]

Eldred v. Ashcroft

In 1998, Congress passed the Sony Bono Copyright Term Extension Act (CTEA)[42] that added 20 years to the term of copyright for both subsisting and future copyrights, in order to bring U.S. copyright terms more closely into conformance with those governed by the European Union. Hence, the law currently provides that an author of a creative work may enjoy copyright protection for the work for a term lasting the entirety of his/her life plus 70 additional years.

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[34] World Trade Organization, Understanding the WTO - Intellectual Property: Protection and Enforcement, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm. Compliance with TRIPS is a prerequisite for WTO membership.

[35] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm.

[36] For more information on this topic, *see* CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted).

[37] P.L. 103-465, 108 Stat. 4809.

[38] Golan v. Holder, 609 F.3d 1076, 1081 (10th Cir. 2010) ("Golan II").

[39] 17 U.S.C. § 104A(h)(6)(B).

[40] 17 U.S.C. § 104A(a)(1)(B).

[41] Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office,* 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 31 (1996).

[42] P.L. 105-298, 112 Stat. 2827.

Plaintiffs representing individuals and businesses that rely upon and utilize materials in the public domain filed a lawsuit against the U.S. Attorney General to obtain a declaration that the CTEA was unconstitutional. Among other things, the plaintiffs argued that in extending the term of subsisting copyrights, the CTEA violated the "limited Times" requirement of the Copyright Clause. The lower court held in favor of the Attorney General, finding no constitutional problems.[43] The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court.[44]

Justice Ginsburg wrote the majority opinion in *Eldred v. Ashcroft*,[45] in which the Court upheld the CTEA by a vote of 7-2.[46] She stated that "[h]istory reveals an unbroken congressional practice of granting to authors the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."[47] She rejected the plaintiffs' argument that the "limited Times" requirement requires a forever "fixed" or "inalterable" copyright term.[48] Ultimately, the Court found that the unbroken congressional practice for over two centuries of applying adjustments to copyright term to both existing and future works "is almost conclusive."[49]

However, the *Eldred* Court appeared to leave open the door to a future First Amendment challenge brought against an act of Congress that "alter[s] the traditional contours of copyright protection":

> The First Amendment securely protects the freedom to make—or decline to make – one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D. C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.[50]

Legal Analysis of *Golan v. Holder*

Factual Background

Similar to the plaintiffs in *Eldred,* the plaintiffs in *Golan v. Holder* are orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors who rely on the free availability of artistic works in the public domain for their livelihoods.[51] One of the plaintiffs,

[43] Eldred v. Reno, 74 F. Supp.2d 1 (D.D.C. 1999).

[44] Eldred v. Reno, 239 F.3d 372, 373 (D.C.Cir. 2001).

[45] 537 U.S. 186 (2003).

[46] For a more thorough analysis of this case, *see* CRS Report RS21179, *Copyright Term Extension: Eldred v. Ashcroft*, by (name redacted).

[47] *Eldred,* 537 U.S. at 200.

[48] *Id.* at 199.

[49] *Id.* (citation omitted).

[50] *Id.* at 221 (citation omitted).

[51] *Golan II,* 609 F.3d at 1081-82.

Lawrence Golan, performs and teaches works by foreign composers including Dmitri Shostakovich and Igor Stravinsky. Prior to the enactment of the URAA, the plaintiffs used or performed works by foreign artists in the public domain such as Sergei Prokofiev's "Peter and the Wolf."[52] Because § 514 of the URAA restored copyright protection to these foreign works and many others that had previously been in the public domain, the "plaintiffs are either prevented from using these works or are required to pay licensing fees to the copyright holders—fees that are often cost-prohibitive for plaintiffs."[53]

In 2001, the plaintiffs filed a lawsuit challenging the constitutionality of § 514 of the URAA as well as the Copyright Term Extension Act, arguing that both exceed Congress's powers under the Copyright Clause and that both violate the First Amendment.

Procedural History

In March 2004, the U.S. District Court for the District of Colorado granted the government's motion to dismiss the plaintiffs' challenge to the CTEA as it had been subsequently foreclosed by the Supreme Court's opinion in *Eldred v. Ashcroft.*[54] The district court also granted summary judgment to the government on the plaintiffs' two URAA claims, ruling that Congress had the power to enact § 514 of the URAA under the Copyright Clause and that the plaintiffs "had no protected interest in the now-copyrighted works."[55]

In 2007, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of the CTEA claims and upheld the district court's conclusion that § 514 of the URAA did not exceed Congress's power under the Copyright Clause.[56] However, the Tenth Circuit Court of Appeals ruled that the plaintiffs "have shown sufficient free expression interests in works removed from the public domain to require First Amendment scrutiny of § 514."[57] The appellate court explained that "[b]ased on the *Eldred* Court's analysis, we examine the bedrock principle of copyright law that works in the public domain remain there and conclude that § 514 alters the traditional contours of copyright protection by deviating from this principle."[58] The appellate court then remanded the case to the district court to conduct a First Amendment review of the CTEA, to determine "whether § 514 is content-based or content-neutral," and to apply the appropriate level of constitutional scrutiny.[59]

On remand, the government and plaintiffs agreed that § 514 is a content-neutral regulation of speech that should be subject to intermediate scrutiny.[60] The district court granted the plaintiffs'

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[52] Golan v. Gonzales, 501 F.3d 1179, 1182 (10th Cir. 2007) ("Golan I").

[53] *Golan II,* 609 F.3d at 1082.

[54] Golan v. Ashcroft, 310 F. Supp. 2d 1215, 1218 (D. Colo. 2004).

[55] *Golan I,* 501 F.3d at 1183.

[56] *Id.* at 1182.

[57] *Id.*

[58] *Id.* at 1187-88.

[59] *Id.* at 1196.

[60] *Golan II,* 609 F.3d at 1082; for more information on the standards that courts apply in a First Amendment analysis of a government regulation of speech, *see* CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by (name redacted) ("If the government limits speech, but its purpose in doing so is not based on the content of the speech, then the limitation on speech may still violate the First Amendment, but it is less likely than a content-based restriction to do so. This is because the Supreme Court applies less than 'strict scrutiny' to non-content-
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motion for summary judgment, ruling that "to the extent Section 514 suppresses the right of reliance parties to use works they exploited while the works were in the public domain—Section 514 is substantially broader than necessary to achieve the Government's interest" in complying with the terms of the Berne Convention and is thus unconstitutional.[61]

In 2010, the U.S. Court of Appeals for the Tenth Circuit reversed the district court's judgment, finding that § 514 does not violate the First Amendment because it advances an important governmental interest and that it is not substantially broader than necessary to advance that interest.[62] The court explained that in order for an act of Congress to survive intermediate scrutiny, "the statute must be directed at an important or substantial governmental interest unrelated to the suppression of free expression."[63] The important governmental interest that the federal appellate court identified in this case was "protecting American copyright holders' interests abroad."[64] The court cited congressional testimony that described how "billions of dollars were being lost each year because foreign countries were not providing copyright protections to American works that were in the public domain abroad."[65] As the appellate court noted, § 514 of the URAA would alleviate these economic harms to U.S. copyright holders because, according to congressional testimony, "the United States' trading partners had represented that they would restore American copyrights only if the United States restored foreign copyrights."[66] The appellate court also ruled that § 514 is narrowly tailored to further this legitimate government interest.[67]

Arguments Before the Supreme Court

The Supreme Court will hear oral argument in *Golan v. Holder* on October 5, 2011. Justice Kagan has recused herself from *Golan*.[68] Her recusal means that only eight justices will consider the case; thus, it raises the possibility of a 4-4 tie vote, in which event the Tenth Circuit's three rulings regarding the constitutionality of § 514 would stand—(1) § 514 of the URAA did not exceed Congress's power under the Copyright Clause, (2) § 514 "alters the traditional contours of copyright protection" to require First Amendment scrutiny, and (3) § 514 does not violate the First Amendment because it advances an important governmental interest in securing greater protections for American authors abroad.

The petitioners (the plaintiffs in the case) argue that "[f]or two hundred years, copyright legislation was consistent with a simple command: what enters the public domain remains in the

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based restrictions. With respect to non-content-based restrictions, the Court requires that the governmental interest be 'significant' or 'substantial' or 'important,' but not necessarily, as with content-based restrictions, 'compelling.' And, in the case of non-content-based restrictions, the Court requires that the restriction be narrowly tailored, but not, as with content-based restrictions, that it be the least restrictive means to advance the governmental interest.").

[61] Golan v. Holder, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009).

[62] *Golan II,* 609 F.3d at 1080, 1083.

[63] *Id.* at 1083, *citing* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) ("Turner I").

[64] *Id.* at 1083.

[65] *Id.* at 1086 (citations omitted).

[66] *Id.* at 1087 (citations omitted).

[67] *Id.* at 1090-91.

[68] Lyle Denniston, *A Major Test of Copyright Power,* SCOTUSBLOG.COM, March 7, 2011.

public domain," and that Congress, in enacting the Berne Convention Implementation Act, followed this tradition.[69] However, when Congress enacted the URAA, it "marked a startling and dramatic departure from the traditions of U.S. copyright law."[70] According to the petitioners, by removing works from the public domain, the URAA has violated the "limited Times" restriction of the Copyright Clause "by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires."[71] Furthermore, the URAA violates the First Amendment, the petitioners argue, because it "places substantial burdens on core speech and expression rights that once belonged to petitioners and other members of the American public."[72] Such burdens on the petitioners' speech rights are not justified by any important government interest, the petitioners assert.[73]

The U.S. Solicitor General submitted the government brief on the merits defending the constitutionality of § 514 of the URAA, arguing that Congress had the power to restore copyright protection to certain foreign works in the public domain and that the statute did not violate the First Amendment.[74]The government brief claims that § 514 is consistent with the text of the Copyright Clause that required copyrights to be issued for "limited times" because the term of protection for restored copyrights is limited.[75] In addition, the government asserts that historically, Congress has "granted copyright protection to a substantial range of pre-existing works that had previously been open to public exploitation,[76] citing, for example, the first federal copyright statute enacted by the First Congress in 1790 that had conferred copyright protection to "any map, chart, book or books already printed within these United States."[77]

The government also defends § 514 as consistent with the First Amendment and argues that § 514 "should be reviewed under the deferential rational-basis standard that generally applies to Copyright Clause legislation."[78] On this point, the government refutes the Tenth Circuit's holding (in its ruling on the initial appeal of this case) that the statute alters the "traditional contours of copyright protection" and thus deserves heightened First Amendment scrutiny:[79]

> [T]he Tenth Circuit misread that statement [by the Supreme Court in *Eldred*] to mandate a freestanding inquiry into whether particular copyright legislation alters any "traditional contour[]" or "timehonored tradition" of copyright protection. It also misread the historical record to find that "one of these traditional contours is the principle that once a work enters the public domain, no individual—not even the creator—may copyright it." That reading is inconsistent with *Eldred*, irreconcilable with established First Amendment doctrine, and unworkable in practice.[80]

[69] Brief for the Petitioners at 3, Golan v. Holder, No. 10-545.

[70] *Id.* at 14-15.

[71] *Id.* at 15-16.

[72] *Id.* at 17.

[73] *Id.* ("[T]here is no legitimate interest in giving away public speech rights in the hope of creating private economic windfalls.").

[74] Brief for the Respondents, Golan v. Holder, No. 10-545.

[75] *Id.* at 10-11.

[76] *Id.* at 11.

[77] *Id.* at 18 (citation omitted).

[78] *Id.* at 42.

[79] *Id.* at 12.

[80] *Id.* at 35.

The government brief claims that "[b]ecause Section 514 is a rational exercise of authority conferred on Congress by the Copyright Clause, and because the restrictions of which petitioners complain are simply inherent and traditional features of copyright protection, 'further First Amendment scrutiny is unnecessary.'"[81] Even if the Supreme Court finds that intermediate scrutiny is warranted for § 514, however, the government argues that § 514 furthers "at least three" important governmental interests unrelated to the suppression of free speech: (1) it ensures compliance with international obligations; (2) it secures greater protections for American authors abroad; and (3) it remedies historical inequalities in the copyright system.[82]

A decision in *Golan v. Holder* is expected by the end of the Supreme Court's October 2011 term.

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[81] *Id.* at 34, *quoting Eldred,* 537 U.S. at 221.

[82] *Id.* at 42-43.