

GOLAN V. GONZALES: AN OPPORTUNITY TO REEXAMINE THE RELATIONSHIP BETWEEN FIRST AMENDMENT RIGHTS AND COPYRIGHT PROTECTION

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“There is an inherent tension between copyright laws and freedom of speech.”¹

I. INTRODUCTION

The Tenth Circuit’s recent decision in *Golan v. Gonzales*² presents an opportunity for courts to reexamine the adoption by the United States of the Uruguay Round Agreements Act (the “URAA”).³ The URAA is an international agreement restoring copyright protection to many foreign works not previously copyrighted in the United States as well as to many works already in the public domain.⁴ As discussed below, pursuant to the *Golan* decision, courts should begin analyzing copyright actions brought under the URAA for First Amendment violations.

In *Golan*, the plaintiffs represented artists, educators, publishers, and motion picture distributors.⁵ First, they challenged the Copyright Term Extension Act⁶ (“CTEA”) as violating the “limited Times” provision of the Constitu-

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¹ Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002).

² *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007). The research for this note closed in March 2009. On April 3, 2009, the District Court of Colorado decided *Golan v. Holder*, No. 01-cv-01854-LTB, 2009 WL 928327 (D. Colo. Apr. 3, 2009). The court held that “[r]emoving works from the public domain violated Plaintiffs’ vested First Amendment interests” and is consistent with this Note.

³ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976-81 (1994) (codified at 17 U.S.C. § 104A (2006)).

⁴ *Id.* § 514.

⁵ *Golan*, 501 F.3d at 1181.

⁶ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat 2827, 2827-29 (1998) (codified as amended at 17 U.S.C. §§ 301-304 (2006)). The CTEA extended the copyright protection term from the life of the author plus fifty years to the life of the author plus seventy years. *Id.* § 102. In addition, it extended protection of corporate works from seventy-five years to one-hundred twenty years after creation or ninety-five years after publication (whichever is earlier). *Id.*

tion;⁷ the Tenth Circuit reiterated the United States Supreme Court's holding in *Eldred v. Ashcroft*⁸ that the CTEA is constitutional.⁹ The plaintiffs next challenged section 514 of the URAA as shrinking the public domain in violation of congressional power as changing the traditional contours of copyright protection set forth in *Eldred*.¹⁰ They also argued that the removal of works from the public domain interfered with their First Amendment rights to free expression.¹¹ The Tenth Circuit focused on the problems the URAA poses for copyright protection and First Amendment rights.¹² The *Golan* court specifically addressed the adequacy of two built-in First Amendment protection safeguards: the fair use defense and the idea-expression dichotomy.¹³ The court further held that the safeguards did not adequately address the plaintiffs' claims against the URAA.¹⁴ In particular, the court noted that the often-used fair use defense is not a sufficient safeguard for plaintiffs' First Amendment interests and went as far as to say that "the fair use defense suggests that § 514 [of the URAA] infringes upon plaintiffs' First Amendment rights."¹⁵

The unanimous court in *Golan* agreed with the plaintiffs' argument that the *Eldred* decision set forth a test requiring First Amendment review when Congress changed the "traditional contours of copyright protection."¹⁶ On this point, Lawrence Lessig,¹⁷ attorney for the plaintiffs, stated:

The rule of *Eldred*, as interpreted by the 10th Circuit (and by us) is that Congress gets a presumption of First Amendment constitutionality when it legislates consistent with its tradition. But when it changes that tradition, its changes must be scrutinized under the First Amendment. This is an interesting constitutional argument And it also makes a great deal of sense: practices unchanged for 200 years are less likely to raise First Amendment problems . . . but whether or not immunity is justified for them, it is certainly not justified for practices that deviate from Congress' tradition.¹⁸

⁷ *Golan*, 501 F.3d at 1181.

⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

⁹ *Golan*, 501 F.3d at 1182.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1185-88.

¹³ *Id.* at 1194-95.

¹⁴ *Id.* See also Jennifer Granick, *Free Speech Sometimes Trumps Copyright*, WIRED MAGAZINE, Sept. 11, 2007, http://www.wired.com/politics/onlinerights/commentary/circuitcourt/2007/09/circuitcourt_0911. Granick explains the government's position that First Amendment review only arises "if Congress either limited fair use or began to regulate ideas rather than just modes of expressing those ideas." *Id.*

¹⁵ *Golan*, 501 F.3d at 1195. Unlike the plaintiffs in *Eldred* who were awaiting works to fall into the public domain, the works at issue in *Golan* are already being used by the plaintiffs. *Id.* at 1182.

¹⁶ Lawrence Lessig, Professor of Law, Stanford Law School, *A Big Victory: Golan v. Gonzales*, http://www.lessig.org/blog/2007/09/a_big_victory_golan_v_gonzales.html (Sept. 5, 2007, 4:05 EST) [hereinafter Lessig Posting].

¹⁷ Professor Lessig is a highly regarded constitutional law and cyberlaw scholar. See Stanford Law School, Directory: Lawrence Lessig, <http://www.law.stanford.edu/directory/profile/39/Lawrence%20Lessig/> (last visited Mar. 15, 2009). He is also the founder of the Center for Internet and Society at Stanford Law School. *Id.* He represented the plaintiffs in *Eldred* and *Golan*. See *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003); *Golan*, 501 F.3d at 1181.

¹⁸ Lessig Posting, *supra* note 16.

Although he lost in *Eldred*, Lessig successfully used the language of the *Eldred* decision to create a new test for reviewing First Amendment copyright issues.¹⁹ The test provides that if the law alters the traditional contours of copyright protection, First Amendment review may be necessary.²⁰ The *Golan* decision provides courts with the opportunity to reevaluate the type of review to apply in copyright claims arising under section 514 of the URAA according to the test set forth in *Eldred*.

In Part II of this Note, I will look at the recent development of copyright protection through the Sonny Bono Copyright Term Extension Act of 1998²¹ and the URAA, as they are both challenged in *Golan*. I will then discuss *Eldred v. Ashcroft*,²² a predecessor to *Golan*, in the evaluation of the CTEA in Part III. An in-depth look at the *Golan* decision will follow, setting forth the framework to analyze whether URAA claims should require First Amendment review. I will then argue that the *Golan* court's finding that section 514 of the URAA may violate First Amendment rights; therefore, section 514 should be scrutinized under First Amendment review.

II. DEVELOPMENT OF COPYRIGHT PROTECTION

A. Evolution of Copyright Protection Terms

The Constitution of the United States gives 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”²³ Congress has exercised its power under the Copyright Clause’s “limited Times” provision to extend the term of protection for copyrights from the original term of fourteen years to the most recent extension in the CTEA of 1998.²⁴ The CTEA enlarged the terms of existing and future copyrights to the life of the author plus seventy years for works created on or after January 1, 1978.²⁵

In 1790, Congress passed the first copyright statute, which provided a “federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term.”²⁶ The Copyright Act also allowed the renewal term to apply to existing works.²⁷ In 1831, Congress expanded the federal copyright term for existing and future works to forty-two years, with initial protection for twenty-eight years from the date of

¹⁹ *Id.*

²⁰ *Id.*

²¹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998) (codified as amended at 17 U.S.C. § 304 (2006)).

²² *Eldred*, 537 U.S. 186.

²³ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

²⁴ *Eldred*, 537 U.S. at 194-96. As discussed below, the CTEA extends copyright protection to seventy years after the author’s death and a term of ninety-five years from publication or one hundred-twenty years from creation, whichever expired first. See 17 U.S.C. § 302(a), (c) (2006).

²⁵ *Id.* § 302(c).

²⁶ *Eldred*, 537 U.S. at 194 (citing Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124).

²⁷ *Id.*

publication and a fourteen-year renewal term, for existing and future works.²⁸ The Copyright Act of 1909 extended the renewal term to twenty-eight years.²⁹

In 1976, Congress changed the method of calculating the copyright term and expanded the term from twenty-eight to forty-seven years.³⁰ In particular, “[f]or works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work’s creation . . . [and] protection would last until 50 years after the author’s death.”³¹ The 1976 Act governed all works not published by the Act’s effective date and granted an initial copyright term of twenty-eight years from the date of publication with a renewal term of forty-seven years for published works with existing copyrights as of the effective date, creating a full term of seventy-five years of copyright protection if the works were timely renewed.³² The 1976 Act “aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works.”³³

B. *Copyright Term Extension Act of 1998*

In 1998, Congress once again changed the method of calculating the copyright term when it enacted the Copyright Term Extension Act (the “CTEA”).

1. *Background*

The CTEA extended the terms of existing and future copyrights by an additional twenty years.³⁴ In effect, this extension increased the term of existing and future copyrights from life plus fifty years to life plus seventy years.³⁵ In addition, the CTEA provided a copyright term of ninety-five years from the original copyright date if the copyright was in its renewal term at the time the CTEA became effective, extending the protection of the Act retroactively.³⁶

2. *Critique*

The CTEA was the subject of much criticism. For example, the plaintiffs in *Golan* denounced the CTEA, arguing that,

With the enactment of the CTEA in 1998, the average copyright term for all works expanded immediately from an estimated 32.2 years to the maximum possible term—either 95/120 years for corporate works or life of the author plus 70 years for all other works. This new term is staggeringly long when compared to the “14 + 14”

²⁸ *Id.*

²⁹ Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1080 (replaced by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541).

³⁰ Copyright Act of 1976, Pub. L. No. 94-553, § 304, 90 Stat. 2541, 2573; *Eldred*, 537 U.S. at 194.

³¹ *Eldred*, 537 U.S. at 194-95 (citing to Copyright Act § 302(a)).

³² *Id.* at 195.

³³ *Id.*

³⁴ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, sec. 102, § 304, 112 Stat. 2827, 2827 (1998).

³⁵ *Golan v. Gonzales*, 501 F.3d 1179, 1181-82 (10th Cir. 2007).

³⁶ 17 U.S.C. § 304(b) (2006) (amended by Sonny Bono Copyright Term Extension Act § 102).

year term enacted by the First Congress, and also when considered against the 200-year history of copyright protection in the United States.³⁷

Critics argued that the CTEA extension was problematic because it negatively affects the public without furthering the goal of copyright protection to enhance expression by providing incentives to authors and artists.³⁸ The late Professor Melville B. Nimmer explained: “In some degree [copyright] encroaches upon freedom of speech . . . but this is justified by the greater public good in the copyright encouragement of creative works.”³⁹ Extending the term of copyright protection wherein authors and artists no longer directly benefit from the protection (i.e. the benefit inures to family members of the author or artist) runs contrary to balancing the protection for authors or artists against the benefit of dissemination of the work as it becomes part of the public domain.⁴⁰

On this point, Professor Erwin Chemerinsky notes that “[t]he idea is that those who produce creative works deserve to be the ones to profit from them.”⁴¹ The CTEA contradicts this principle by extending copyright protection for an additional seventy years past the life of the author. Although copyright acts have consistently extended the term of protection, the CTEA impedes the advancement of the public domain by retroactively applying to works that were expected to enter the public domain much sooner.⁴²

Beneficiaries of the CTEA’s extension are most often studios and publishers who own the author or artist’s copyright.⁴³ While creators have legitimate interests in wanting to protect their work, the studio and publisher’s argument for extending the protection of copyrights to their benefit becomes attenuated and moves away from the purpose of copyright protection. Although the CTEA’s extension may mean that purchasers will be willing to pay authors and artists higher prices for their works because the monopoly on copyright ownership will last longer, the extended term does not advance the principles of copyright protection.⁴⁴ Instead, it serves business interests to the detriment of the public’s interests by keeping valuable copyrighted material from becoming part of the public domain.

C. *Uruguay Round Agreements Act*

1. *Background*

The United States enacted the URAA in 1994 in order to comply with its obligations as a member of the World Trade Organization (“WTO”).⁴⁵ *Golan*

³⁷ Appellants’ Opening Brief at 12, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259) [hereinafter Appellants’ Opening Brief].

³⁸ Chemerinsky, *supra* note 1, at 83.

³⁹ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970), *quoted in* Chemerinsky, *supra* note 1, at 84.

⁴⁰ Chemerinsky, *supra* note 1, at 84.

⁴¹ *Id.* at 95.

⁴² *See* Appellants’ Opening Brief, *supra* note 37, at 3.

⁴³ Chemerinsky, *supra* note 1, at 95.

⁴⁴ *Id.* at 96.

⁴⁵ David E. Shipley, *Congressional Authority Over Intellectual Property After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1285 (2007).

provides the following brief historical description of section 514 of the URAA and Congress's reasons for passing it into law:

[Section 514] implements Article 18 of the Berne Convention for the Protection of Literary and Artistic works. Ushered into being in 1886 at the behest of *Association Littéraire et Artistique Internationale*, an organization founded by Victor Hugo and dedicated to obtaining protection for literary and artistic works, the Berne Convention requires member countries to afford the same copyright protection to foreign authors as they provide their own authors. In this case, congressional compliance with the Berne Convention meant copyrighting some foreign works in the public domain.⁴⁶

Congress passed the URAA in order to comply with the WTO Agreement, thereby granting retroactive protection to some works already in the public domain in the United States if the works were by “foreign nationals or domiciliaries of World Trade Organization (WTO) or Berne countries”⁴⁷

2. Critique

The problem with section 514 of the URAA lies with its restoration of copyright protection to foreign works that were already in the public domain in the United States.⁴⁸ Before passage of the URAA, the three-step process of copyright protection involved: (1) creation of a work, (2) copyright, and (3) entrance into the public domain.⁴⁹ Now, under section 514 of the URAA, the ordinary copyright sequence has been altered because “a limited copyright attaches at the moment a work is created” and “no longer . . . ends with the public domain.”⁵⁰ This alteration changes the original progression by allowing works already available in the public domain to be taken out of the public domain.

D. *Eldred v. Ashcroft*

1. CTEA and “limited Times”

The lead plaintiff in *Eldred v. Ashcroft*⁵¹ was an Internet publisher who depended on copyrighted works that entered the public domain prior to the enactment of the CTEA as part of his business.⁵² The *Eldred* plaintiffs challenged the constitutionality of the CTEA as violative of the First Amendment and the Constitution's Copyright Clause under the “limited Times” restriction.⁵³ The plaintiffs argued that the CTEA fails heightened judicial scrutiny as a content-neutral regulation.⁵⁴ The Court rejected this argument as discussed in

⁴⁶ *Golan v. Gonzales*, 501 F.3d 1179, 1182 (10th Cir. 2007).

⁴⁷ Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act, 62 Fed. Reg. 66,765 (Dec. 19, 1997).

⁴⁸ Appellants' Opening Brief, *supra* note 37, at 9.

⁴⁹ *Golan*, 501 F.3d at 1189.

⁵⁰ *Id.*

⁵¹ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁵² *Id.* at 193. *Eldred* was joined by several other publishers, authors, and businesses who also depended on copyrighted works entering the public domain. *Id.*

⁵³ *Id.* at 193, 196.

⁵⁴ *Id.* at 218.

more detail below.⁵⁵ The plaintiffs also argued that the CTEA's twenty-year extension created a perpetual copyright that violated the "limited Times"⁵⁶ and that the retroactivity of the CTEA failed to "promote the Progress of Science and useful Arts."⁵⁷

The Supreme Court ultimately rejected this argument by focusing on copyright protection extensions in previous Congressional acts prior to the CTEA.⁵⁸ The Court explained that although it did not believe that twenty additional years for new and existing works was wise, Congress did not exceed its authority in extending the protection.⁵⁹ In addition, the Court held that the CTEA's retroactive application did not violate the Copyright Clause because Congress consistently protected authors who received protection both before and after the enactment of the law.⁶⁰ The Court explained Congress's judgment that protection should apply equally to an author selling his work a day after the passing of the act as someone who sells his work the week before.⁶¹

The Supreme Court additionally held that the CTEA is a valid exercise of Congressional power because the extension, lasting for a set term of years, comports with the "limited Times" restriction.⁶² The Court stated:

[W]e find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress' power under the Copyright Clause.⁶³

Furthermore, the Court noted the Berne Convention provided a valid rationale for Congress to pass the CTEA.⁶⁴ Under the Berne Implementation Act of 1988, the United States must adhere to the Berne Convention by recognizing the copyright of foreign works from other Berne Convention members.⁶⁵ The Court reasoned, "[b]y extending the baseline United States copyright term . . . , Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts."⁶⁶

2. CTEA and the First Amendment

Courts review "laws passed under the authority of the Copyright Clause . . . only for rationality."⁶⁷ The Supreme Court rejected the *Eldred* plaintiffs'

⁵⁵ See *infra* Part II.D.2.

⁵⁶ *Eldred*, 537 U.S. at 199.

⁵⁷ U.S. CONST. art. I, § 8, cl. 8; *Eldred*, 537 U.S. at 211.

⁵⁸ *Eldred*, 537 U.S. at 200.

⁵⁹ William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639 (2004).

⁶⁰ *Eldred*, 537 U.S. at 204.

⁶¹ *Id.*

⁶² *Id.* at 208-09.

⁶³ *Id.* at 208.

⁶⁴ *Id.* at 205.

⁶⁵ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

⁶⁶ *Eldred*, 537 U.S. at 205-06.

⁶⁷ J. Matthew Miller, *Golan v. Gonzales: How Copyright Restoration Alters the Ordinary Copyright Sequence and Invites First Amendment Review*, 10 TUL. J. TECH. & INTELL. PROP. 353, 353-55 (2007).

claims that the CTEA violates First Amendment principles because the First Amendment and Copyright Clause were adopted close in time, indicating the Framers' view that free speech principles and copyright protection are compatible.⁶⁸ Therefore, the Court found that the First Amendment and the Copyright Clause do not conflict and "limited Times" is a valid exercise of Congressional power that is not does not violate of the First Amendment.

The Court also discussed the built-in safeguards of copyright law that accommodate First Amendment rights:

First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection⁶⁹ As we said in *Harper & Row*, this 'idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.' Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances The fair use defense affords considerable "latitude for scholarship and comment" ⁷⁰

The Supreme Court concluded by acknowledging that the District of Columbia Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment."⁷¹ The Court explained that when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."⁷² As discussed *infra*, the Tenth Circuit later examined this language in *Golan*.⁷³

The Court also observed that the CTEA supplemented built-in First Amendment safeguards of copyright law by providing provisions to protect First Amendment rights.⁷⁴ The CTEA "allows libraries, archives, and similar institutions to 'reproduce' and 'distribute, display, or perform . . .' copies of certain published works 'during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research'" ⁷⁵ In addition, another provision of the CTEA, known as the Fairness in Music Licensing Act of 1998, "exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities."⁷⁶

⁶⁸ *Eldred*, 537 U.S. at 190.

⁶⁹ 17 U.S.C. § 102(b) (2006) provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

⁷⁰ *Eldred*, 537 U.S. at 219-20 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 560 (1985)).

⁷¹ *Id.* at 221.

⁷² *Id.*

⁷³ See *infra* Part III.C.2 and accompanying text.

⁷⁴ *Eldred*, 537 U.S. at 220.

⁷⁵ *Id.* (quoting 17 U.S.C. § 108(h) (2006)).

⁷⁶ *Id.* It seems this is a stretch for the Court; simply providing additional protective provisions for small groups of people or businesses (i.e., allowing certain entities to use the works) does not seem to warrant allowing an extension of twenty years.

3. *Justice Breyer's Dissent*

Contrary to the majority's opinion that the CTEA easily passed the "limited Times" restriction of the Copyright Clause, Justice Breyer argued that the CTEA extension violated the "limited Times" restriction.⁷⁷ Justice Breyer further noted that the twenty-year extension created a "virtually perpetual" copyright.⁷⁸ Justice Breyer agreed with the plaintiffs' arguments and stated that the "primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science'"⁷⁹

Justice Breyer further argued that as a nation dedicated to free speech, ". . . where line-drawing among constitutional interests is at issue, [he] would look harder than . . . the majority at the statute's rationality—though less hard than precedent might justify."⁸⁰ Consequently, he noted that upholding the validity of extending the duration of copyright protection would cause "serious expression-related harm" by restricting traditional dissemination of copyrighted works and inhibiting new forms of dissemination through new technology.⁸¹

Justice Breyer concluded that the "statute cannot be understood rationally to advance a constitutionally legitimate interest" because the CTEA "falls outside the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress."⁸² Accordingly, Justice Breyer would have found the statute unconstitutional.⁸³

III. PRINCIPAL CASE: *GOLAN V. GONZALES*

A. *Facts*

The plaintiffs in *Golan v. Gonzales*⁸⁴ challenged the CTEA and section 514 of the URAA.⁸⁵ The plaintiffs represented various groups, ranging from educators and performers to publishers and motion picture distributors.⁸⁶ All of the plaintiffs depended on copyrighted works already available in the public domain.⁸⁷ For example, plaintiff Lawrence Golan performed and taught foreign works as a Director of Orchestral Studies and as a Professor of Conducting

⁷⁷ *Id.* at 244 (Breyer, J., dissenting). Justice Breyer stated, "[t]he Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information." *Id.*

⁷⁸ *Id.* at 243.

⁷⁹ *Id.*

⁸⁰ *Id.* at 244-45 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-50 (1985); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-38 (1973)).

⁸¹ *Id.* at 266.

⁸² *Id.* at 266-67.

⁸³ *Id.* at 267.

⁸⁴ *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

⁸⁵ *Id.* at 1181.

⁸⁶ *Id.*

⁸⁷ Appellants' Opening Brief, *supra* note 37, at 3.

at the University of Denver.⁸⁸ He relied on foreign works that became available in the public domain for performances and in teaching his students.⁸⁹

The *Golan* plaintiffs made arguments similar to those of the plaintiffs' in *Eldred*.⁹⁰ In particular, the *Golan* plaintiffs argued that the CTEA violated the "limited Times" provision of the Copyright Clause.⁹¹ The Tenth Circuit upheld the district court's dismissal of this claim as foreclosed by the Supreme Court's *Eldred* decision.⁹² The plaintiffs next argued that "[section] 514 shrinks the public domain and thereby violates the limitations on congressional power inherent in the Copyright Clause . . . [and] that [section] 514's removal of works from the public domain interferes with their First Amendment right to free expression."⁹³ On this point, the plaintiffs argued that *Eldred* "requires First Amendment review when Congress changes the 'traditional contours of copyright protection.'"⁹⁴

B. Tenth Circuit's Foundation

In *Golan*, the Tenth Circuit began its evaluation by examining the validity of the URAA under the Copyright Clause of the Constitution.⁹⁵ The court noted the Supreme Court's explanation that the intent of the Copyright Clause is "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."⁹⁶ The Tenth Circuit further noted that providing limited monopolies to authors and artists encourages creative expression, thereby "promot[ing] broad public availability of literature, music, and the other arts."⁹⁷ Once the copyright protection term has expired, the work goes into the public domain where people can use it at will.⁹⁸ The copyright cycle then continues with new works inspired by the available works that have fallen into the public domain, making copyright "the engine of free expression."⁹⁹

The court recognized Congress' broad power to regulate copyrights but noted limitations built into the Copyright Clause.¹⁰⁰ Specifically, copyrightable works must be original, and the duration of protection is restricted to "lim-

⁸⁸ *Golan*, 501 F.3d at 1182.

⁸⁹ Appellants' Opening Brief, *supra* note 37, at 13-14.

⁹⁰ *Golan*, 501 F.3d at 1182.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Lessig Posting, *supra* note 16.

⁹⁵ *Golan*, 501 F.3d at 1183.

⁹⁶ *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (internal quotation marks omitted).

⁹⁷ *Id.* (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)) (internal quotation marks omitted).

⁹⁸ *Id.* (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003)).

⁹⁹ *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

¹⁰⁰ *Id.* at 1184. See also *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

ited Times.”¹⁰¹ The court also held that the “First Amendment can limit Congress’ power under the Copyright Clause,” as recognized in *Eldred*.¹⁰²

The court began its review of the principal case by affirming the district court’s dismissal of the CTEA claim as foreclosed by the Supreme Court’s decision in *Eldred*.¹⁰³ The court also found section 514 of the URAA did not exceed “the limitations inherent in the Copyright Clause.”¹⁰⁴ The court instead focused on the First Amendment issues that could arise under section 514 of the URAA.

1. Plaintiffs’ Arguments Challenging the URAA

The *Golan* plaintiffs raised two main challenges to the URAA on appeal. First, the plaintiffs asserted that the URAA exceeded the authority granted to Congress in the Copyright Clause by removing works from the public domain.¹⁰⁵ Second, plaintiffs argued that section 514 of the URAA “disrupt[s] the traditional contours of copyright protection and . . . demands First Amendment scrutiny.”¹⁰⁶

In support of their first challenge, the *Golan* plaintiffs argued that “[t]he effect of this unprecedented ‘copyright restoration’ is the wholesale removal of vast numbers of existing works—including thousands of books, paintings, drawings, music, films, photographs, and other artistic works—from the public domain.”¹⁰⁷ Plaintiffs emphasized that they depend on works in the public domain for their livelihoods and restoring copyrights to works that have passed into the public domain burdens their creative expression.¹⁰⁸ The plaintiffs offered an example of the burden they faced because of the URAA:

Golan discovered that the cost for a single performance of Shostakovich’s *Symphony No. 1* by the Lamont Symphony Orchestra went from a one-time cost of approximately \$130 to purchase sheet music for the entire symphony and unlimited performances to \$495 to merely rent the same music for a single performance.¹⁰⁹

In addition, the plaintiffs asserted that the URAA significantly raised the fees on works, costs that are often prohibitive to the plaintiffs.¹¹⁰ Plaintiffs reasoned that this fee increase demonstrates that the “URAA’s substantial harms to speech interests mirror the importance of the public domain in powering creativity.”¹¹¹

The plaintiffs compared Congress’s authority to issue patents and the importance of the public domain in the patent field to that of copyrights.¹¹² Citing *Graham v. John Deere Co.*¹¹³ for the proposition that “Congress may

¹⁰¹ *Golan*, 501 F.3d at 1184.

¹⁰² *Id.* (citing *Eldred*, 537 U.S. at 219-22).

¹⁰³ *Id.* at 1182.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1185-86; Appellants’ Opening Brief, *supra* note 37, at 3.

¹⁰⁶ *Golan*, 501 F.3d at 1185-86.

¹⁰⁷ Appellants’ Opening Brief, *supra* note 37, at 9.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 17.

¹¹⁰ *Golan*, 501 F.3d at 1182.

¹¹¹ Appellants’ Opening Brief, *supra* note 37, at 16.

¹¹² *Id.* at 21.

¹¹³ *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available,”¹¹⁴ the plaintiffs tried to persuade the court that Congress should similarly not be authorized to remove copyrighted work from the public domain.¹¹⁵ They argued that

[t]he rule of *Graham* applies equally to copyrights and patents by the express terms of the Progress Clause, which concerns the grant of any “exclusive right” by Congress. . . . [T]he text of the Constitution prohibits Congress from restricting free access to materials already available in the public domain, or subjecting works in the public domain to exclusive rights.¹¹⁶

The court rejected this analogy and found that Congress had not exceeded its power.¹¹⁷ However, the court used the plaintiffs’ arguments regarding the public domain in evaluating their second argument—that the URAA disrupts the “traditional contours of copyright protection” and demands First Amendment scrutiny.¹¹⁸ Plaintiffs argued that deviations from those “traditional contours cannot *automatically* be presumed constitutional without an opportunity to weigh their speech restrictive effects according to the principles of ordinary First Amendment review.”¹¹⁹

C. Evaluation

The *Golan* court began its evaluation by looking at “‘copyright’s built-in First Amendment accommodations’” that generally protect the public’s First Amendment interest in copyrighted works.¹²⁰ Next, the court evaluated the plaintiffs’ challenges to the URAA.¹²¹ The court then applied the *Eldred* test set forth in terms of “traditional contours of copyright protection”¹²²

1. First Amendment Built-in Safeguards

The first built-in safeguard for copyright protection in the First Amendment is the idea/expression dichotomy.¹²³ The CTEA denies copyright protection, “to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [a copyrighted] work.”¹²⁴ In other words, “ideas are free but their particular expression can be copyrighted.”¹²⁵

The *Golan* court stated that the utility of the idea/expression dichotomy safeguard is “as a definitional mechanism . . . limited to determining whether a proposed work is an idea or whether the work displays sufficient originality to

¹¹⁴ *Id.* at 6.

¹¹⁵ Appellants’ Opening Brief, *supra* note 37, at 21.

¹¹⁶ *Id.*

¹¹⁷ *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007).

¹¹⁸ *Id.* at 1187-88.

¹¹⁹ Appellants’ Opening Brief, *supra* note 37, at 26-27.

¹²⁰ *Golan*, 501 F.3d at 1184.

¹²¹ *Id.* at 1185.

¹²² *Id.* at 1187-88.

¹²³ *Id.* at 1184.

¹²⁴ 17 U.S.C. § 102(b) (2006).

¹²⁵ *Chemerinsky*, *supra* note 1, at 89 (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989)).

constitute an expression.”¹²⁶ The court announced that the idea/expression dichotomy “is simply not designed to determine whether Congress’s grant of a limited monopoly over an expression in the public domain runs afoul of the First Amendment.”¹²⁷ The court emphasized that the works at issue in this case were undoubtedly expressions threatened by being removed from the public domain. Therefore, the idea/expression dichotomy safeguard did not help determine the URAA’s constitutionality because the safeguard does not apply under these circumstances.¹²⁸ Although removing these expressions still left people free to articulate their own ideas, the court stated that the true threat lies “in the fact that the works are being removed from the public domain.”¹²⁹

The second built-in safeguard in the First Amendment is the fair use defense, which allows the public to utilize a copyrighted work for certain purposes.¹³⁰ Section 107 of title 17 to the United States Code explains the fair use of a copyright work:

[S]uch use by reproduction in copies or phonorecords or by any other means specified by that section [106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.¹³¹

The fair use defense protects First Amendment interests in a copyrighted work by “afford[ing] considerable latitude for scholarship and comment, and even for parody.”¹³² The *Golan* court determined that the fair use defense did not sufficiently safeguard the plaintiffs’ First Amendment interests because the defense does not address works that have already fallen into the public domain and are available for unlimited use.¹³³ In addition, the court stressed that the defense suggested that section 514 infringed upon the plaintiffs’ First Amendment interests because fair use allows for limited use, whereas section 514 removes access to works already available.¹³⁴

Ordinarily, these two built-in safeguards insulate legislation from First Amendment review; however,

[T]he *Eldred* Court indicated that such [First Amendment] review is warranted when an act of Congress has “altered the traditional contours of copyright protection.” The Court did not define the “traditional contours of copyright protection.” However, as we discuss in detail below, 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.¹³⁵

The Tenth Circuit ultimately found that the built-in safeguards did not protect the plaintiffs, reasoning that section 514 “bestows copyrights upon works in the public domain [and] these built-in safeguards are not adequate to

¹²⁶ *Golan*, 501 F.3d at 1194.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1184.

¹³¹ 17 U.S.C. § 107 (2006).

¹³² *Golan*, 501 F.3d at 1184 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003)).

¹³³ *Id.* at 1195.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1184 (citation omitted).

protect plaintiffs' First Amendment interests."¹³⁶ The built-in safeguards are inadequate because they do not account for works that have already entered the public domain.¹³⁷ Accordingly, on remand, the district court must conduct a First Amendment analysis of section 514.¹³⁸

2. *Traditional Contours of Copyright Protection*

The court then discussed the First Amendment analysis by applying the traditional contours of the copyright protection test set forth in *Eldred*.¹³⁹ The court found that section 514 "alter[s] the traditional contours of copyright protection" because the "*bedrock* principle of copyright law [is] that works in the public domain remain there"¹⁴⁰ The court reiterated that the incentive of copyright protection is "to stimulate artistic creativity for the general public good."¹⁴¹ According to the court, the removal of works from the public domain through section 514 did not further this goal and, in fact, hindered it. Section 514 altered the copyright sequence by removing works from the public domain when the normal sequence allowed copyrighted works to enter the public domain after the protection term expired.¹⁴² In addition, the court noted that the history of American copyright law did not reveal a tradition of copyrighting works already in the public domain.¹⁴³

The court examined how the alteration of traditional contours affected plaintiffs' First Amendment interests.¹⁴⁴ "[C]opyright law bears out the rather obvious—but significant—point that works in the public domain belong to the public."¹⁴⁵ The court explained that members of the public had a "non-exclusive right" to use material in the public domain.¹⁴⁶ Accordingly, the court reasoned, "the First Amendment protects plaintiffs' right to unrestrained artistic use of these works."¹⁴⁷ The court found that by removing the works from the public domain, section 514 "arguably hampers free expression and undermines the values the public domain is designed to protect."¹⁴⁸ Therefore, section 514 is subject to First Amendment scrutiny because section 514 interfered with the plaintiffs' "vested First Amendment interests in the expressions."¹⁴⁹

Additionally, the court determined that unlike the CTEA, section 514 of the URAA did not contain any supplemental First Amendment protections.¹⁵⁰ Unlike the CTEA, "[r]ather than excepting parties, such as plaintiffs, who have relied upon works in the public domain, the URAA provides only a safe harbor

¹³⁶ *Id.* at 1195.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1196.

¹³⁹ *Id.* at 1188.

¹⁴⁰ *Id.* at 1187 (emphasis added).

¹⁴¹ *Id.* at 1188.

¹⁴² *Id.* at 1189.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1192.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1193.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1194.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1196.

allowing a party to use a restored work for one year after receiving notice of the restored copyright protection.”¹⁵¹ Further, in contrast to the supplemental safeguards in the CTEA (which allowed educational institutions rights to use and distribute protected work and exemptions for smaller businesses),¹⁵² the URAA did not offer a “guarantee of breathing space.”¹⁵³ Therefore, the court held that section 514 of the URAA must be subject to First Amendment review and remanded to the lower court for further proceedings.¹⁵⁴

IV. PROTECTING THE PUBLIC’S FIRST AMENDMENT INTERESTS

As the law now stands, section 514 of the URAA is a valid Congressional use of authority in governing copyright law, subject to First Amendment review. The enactment of section 514 is important because it brought the United States into compliance with the Berne Convention and ensured the same protection for American copyrighted works in the one hundred other countries that are parties to the Berne Convention.¹⁵⁵ The exercise of Congressional authority was proper because Congress has a valid interest in protecting the copyrighted work of Americans in other countries. However, section 514 creates potential First Amendment violations that must be evaluated differently than the CTEA because, unlike under the CTEA, works are taken directly out of the public domain under section 514.

Regardless of the reasoning behind the passage of section 514, the *Golan* court is correct in finding that section 514 has the potential to violate First Amendment rights and should be subjected to First Amendment review. As Professor Chemerinsky states, “[c]opyright protections are tolerated under the First Amendment because they encourage speech. Extending copyright protections *after* the speech has occurred does not serve this purpose. Therefore, such extensions should not be tolerated under the First Amendment.”¹⁵⁶ Although Professor Chemerinsky made this statement in opposition to the CTEA (before *Eldred* was decided), the argument is still persuasive and helps illustrate why *Golan* was properly decided.

Section 514 of the URAA is distinguishable from the CTEA because it changes the “traditional contours of copyright protection.”¹⁵⁷ Rather than simply extending the term of protection, section 514 removes from the public domain works that are currently used.¹⁵⁸ *Golan* changed the “traditional contours of copyright protection” because, unlike the *Eldred* plaintiffs who were awaiting works to enter into the public domain for their use, the *Golan* plaintiffs were already using works in the public domain that section 514 would remove. In light of the Tenth Circuit’s decision, courts will need to determine

¹⁵¹ *Id.* (citing 17 U.S.C. § 104A(d)(2) (2006)).

¹⁵² *Id.* at 1195-96.

¹⁵³ *Id.* at 1196.

¹⁵⁴ *Id.* at 1197.

¹⁵⁵ See 17 U.S.C. § 104A (2006); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. A list of Berne Convention members is available at <http://www.wipo.int/members/en>.

¹⁵⁶ Chemerinsky, *supra* note 1, at 85.

¹⁵⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

¹⁵⁸ See *supra* Part III.C.2 and accompanying text.

and apply the appropriate level of First Amendment review, and whether a valid governmental interest justifies removing works from the public domain.

A. *Section 514 Changes the Traditional Contours of Copyright Protection*

Section 514 of the URAA alters the “traditional contours of copyright protection,”¹⁵⁹ because it deviates from the principle that “works in the public domain remain there”¹⁶⁰ and creates a “depredation of the public domain” by removing currently available works from the public.¹⁶¹ The *Eldred* court failed to define the traditional contours of copyright protection, allowing the Tenth Circuit to distinguish *Eldred*’s holding for the CTEA from section 514 of the URAA.¹⁶²

The government failed to persuasively convince the *Golan* court that the traditional safeguards of copyright protection are limited to the idea/expression dichotomy and fair use defense in terms of First Amendment challenges.¹⁶³ The plaintiffs were correct in asserting that those two limits were “not the only ways in which traditional copyright law harmonizes with constitutional free speech protections.”¹⁶⁴ Further, David Nimmer, a leading copyright scholar, critiques the *Eldred* position that these two safeguards are the only factors used in determining the traditional contours of copyright law, calling the *Eldred* court’s position “inadequate, insofar as it implicitly limited the ‘traditional contours’ of copyright law” too narrowly.¹⁶⁵

Due to this narrow interpretation of the “traditional contours of copyright protection,”¹⁶⁶ the *Golan* plaintiffs were able to successfully show that section 514 of the URAA does not fall within the narrow interpretation because taking foreign works out of the public domain does not fit within the traditional copyright framework.¹⁶⁷ *Golan* represents a positive step towards reigning in the judiciary’s deference to Congress and promoting the notion that the judiciary should protect the public domain and its important function to spark creative work by making works more accessible.

B. *Section 514 Raises Different Constitutional Issues than the CTEA*

Even though the Supreme Court ultimately held the CTEA to be constitutional in *Eldred*, the differing facts of *Golan* are persuasive in illustrating why section 514 of the URAA, unlike the CTEA, raises potential First Amendment issues.¹⁶⁸ Restoring copyrights of works already in the public domain has the potential to stifle creative progress. As Professor David Shipley stated, “[t]he

¹⁵⁹ *Eldred*, 537 U.S. at 221.

¹⁶⁰ *Golan v. Gonzales*, 501 F.3d 1179, 1188 (10th Cir. 2007).

¹⁶¹ Granick, *supra* note 14.

¹⁶² *Golan*, 501 F.3d at 1196.

¹⁶³ *See generally id.* at 1190-97.

¹⁶⁴ Granick, *supra* note 14.

¹⁶⁵ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.06 (2008).

¹⁶⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

¹⁶⁷ *Golan*, 501 F.3d at 1192.

¹⁶⁸ In *Eldred*, plaintiff’s products and services built on copyrighted works in the public domain, *Eldred*, 537 U.S. at 186, whereas the plaintiffs in *Golan* were using works already in the public domain, *Golan*, 501 F.3d at 1182.

public domain is essential to . . . creative efforts . . . and the Supreme Court has held that the public has a constitutional right to copy articles, designs, and other works of authorship and inventions that have entered the public domain.”¹⁶⁹ When a copyright term ends, the availability of that work in the public domain is important to continued creativity in the arts. Another commentator, Jessica Litman, notes that using works in the public domain is “the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.”¹⁷⁰

Unlike the *Eldred* plaintiffs, who did not have “unfettered access to any of the works at issue,” the *Golan* plaintiffs brought suit to continue using works that were already available in the public domain.¹⁷¹ The effect of the URAA on the *Golan* plaintiffs was the loss of access to relied-on works. Under traditional copyright principles, once works are available in the public domain, the plaintiffs would have unlimited access to the copyrighted works. As Justice Stevens discussed in his *Eldred* dissent, retroactively extending copyright terms would be “manifestly unfair” because the government would modify bargains and grant extended protection at the expense of reliant parties.¹⁷²

Justice Stevens’ logic extends to section 514 of the URAA and is persuasive because the URAA takes works out of the public domain that were already accessible. Rather than removing expectations of future availability, as is the case with the CTEA, the URAA strips away the rights of current users. As the Tenth Circuit stated, “[i]t is clear that the Copyright Clause is meant to foster values enshrined in the First Amendment.”¹⁷³ Instead of fostering free speech and the use of available foreign works, section 514 threatens to stifle the creativity of current users of these works.

In evaluating section 514 of the URAA, the Nimmer treatise posits that section 514 extends much wider protection than the Berne Convention by protecting works that would not otherwise be eligible for protection in their home countries.¹⁷⁴ Professor Nimmer further notes that the “limited Times” of the Copyright Clause strikes a balance between two interests—the authors’ interest in “the fruits of their labor” and the public’s interest in gaining free access to “materials essential to the development of society.”¹⁷⁵ Section 514 throws off this balance by giving more weight to the author’s proprietary interest at the expense of the public’s interest.

Scholar William Patry and Judge Richard Posner, in their evaluation of *Eldred*, assert that the retroactive nature of CTEA keeps many works from falling into the public domain.¹⁷⁶ The passage of the URAA “mandate[ed] greater protection for foreign works than domestic works, and [revived] copyright protection for works that were already in the public domain under United

¹⁶⁹ Shipley, *supra* note 45, at 1261-62.

¹⁷⁰ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990).

¹⁷¹ *Golan*, 501 F.3d at 1193.

¹⁷² *Eldred*, 537 U.S. at 226.

¹⁷³ *Golan*, 501 F.3d at 1188.

¹⁷⁴ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.05 (2008).

¹⁷⁵ *Id.*

¹⁷⁶ Patry & Posner, *supra* note 59, at 1639.

States law.”¹⁷⁷ Section 514 of the URAA goes further than just retroactively keeping works from falling into the public domain as the CTEA does; it takes works out of the public domain that are already in use by unsuspecting artists and restores copyright protection, regardless of reliance on use of those works. Section 514’s only safe harbor allows the reliant “party to use a restored work for one year after receiving notice of the restored copyright protection.”¹⁷⁸ This safe harbor is insufficient to protect the First Amendment rights of the user.

In *Graham v. John Deere Co.*,¹⁷⁹ the Supreme Court held “Congress may not authorize the issuance of patents whose effects are to remove *existent knowledge from the public domain*, or to restrict free access to materials already available.”¹⁸⁰ While patents and copyrights are different, courts often analogize the two.¹⁸¹ The comparison between patents and copyrights shows the Supreme Court’s belief that Congress should not take works out of the public domain.

Professor Shipley notes that the majority in *Eldred*, in distinguishing the patent and copyright monopolies, “seemed to forget . . . it ‘had consistently viewed [the Copyright Clause] as authorizing Congress to strike an economic bargain with authors on the public’s behalf.’”¹⁸² Rather than focusing on the public’s benefit in the release of copyrighted material, as previous courts have, the *Eldred* majority focused on the reward to the copyright owner.¹⁸³ While copyright owners have legitimate interests in protecting their work, the “limited Times” language in the Copyright Clause shows the Framers’ intent to protect the public’s interest in gaining access to copyrighted work for the benefit of the public at large.¹⁸⁴ Following the precedent set in earlier Supreme Court cases,¹⁸⁵ the *Golan* court properly recognized “the public’s constitutionally supported right to copy and use works from the public domain”¹⁸⁶ by holding that section 514 of the URAA is subject to First Amendment review because it takes works out of the public domain.¹⁸⁷

Section 514 of the URAA poses a valid constitutional concern because unlike the CTEA, it removes works from current users. As Professor Shipley

¹⁷⁷ Shipley, *supra* note 45, at 1285-86.

¹⁷⁸ *Golan*, 501 F.3d at 1196 (section 514 permits continued use if no notice is given). Section 514 also allows a person using a derivative work based on a restored work to continue using it in exchange for reasonable compensation to the owner of the restored work; however, this does not affect the plaintiffs in *Golan* and does not warrant discussion in this paper. See 17 U.S.C. § 104A(d)(2), (d)(3) (2006).

¹⁷⁹ *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

¹⁸⁰ *Id.* at 6 (emphasis added).

¹⁸¹ See generally discussion in *Eldred v. Ashcroft*, 537 U.S. 186, 201-18 (2003) (majority opinion); *Id.* 222-32 (Stevens, J., dissenting).

¹⁸² Shipley, *supra* note 45, at 1265.

¹⁸³ *Id.*

¹⁸⁴ U.S. CONST. art. I, § 8, cl. 8.

¹⁸⁵ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

¹⁸⁶ Shipley, *supra* note 45, at 1266.

¹⁸⁷ *Golan v. Gonzales*, 501 F.3d 1179, 1194 (10th Cir. 2007).

states, “the Copyright Clause should be read to prevent removing or burdening free access to materials already in the public domain.”¹⁸⁸ The plaintiffs in *Golan* had a legitimate interest in their continued use of work available in the public domain. Accordingly, First Amendment review is appropriate to section 514 challenges.

C. *What Level of First Amendment Review is Appropriate?*

In a traditional First Amendment review, the court must first determine whether the regulation imposes a content-based or content-neutral burden on speech.¹⁸⁹ Based on this initial determination, the court will then apply the proper level of scrutiny—content-neutral regulations receive intermediate scrutiny and content-based regulations receive strict scrutiny.¹⁹⁰ According to this framework, courts will first have to determine whether the URAA is content-based or content-neutral.¹⁹¹ As *Golan* provides, “[i]f § 514 is a content-based restriction, then the district court will need to consider whether the government’s interest in promulgating legislation is truly ‘compelling’ and whether the government might achieve the same ends through alternative means that have less of an effect on protected expression.”¹⁹² Importantly, “[c]ontent-based regulations are presumptively invalid.”¹⁹³

Alternatively, if courts determine that the legislation is content-neutral, it “‘must be narrowly tailored to serve a significant governmental interest.’”¹⁹⁴ As Professor Chemerinsky points out, “regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny,”¹⁹⁵ which will make it easier for section 514 to pass constitutional muster if it falls into the content-neutral category.

Professor Chemerinsky explains the importance of the distinction between content-based and content-neutral laws: “[T]he very core of the First Amendment is that the government cannot regulate speech based on its content.”¹⁹⁶ The Supreme Court has said, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”¹⁹⁷ The government must treat all speech in the same manner.¹⁹⁸

¹⁸⁸ Shipley, *supra* note 45, at 1294.

¹⁸⁹ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 932-33 (3rd ed. 2006).

¹⁹⁰ 16A AM. JUR. 2D *Constitutional Law* § 460 (1998) (Under strict scrutiny, most speech regulation will be held unconstitutional if it is not “narrowly tailored to serve an overriding state interest.”).

¹⁹¹ *See, e.g.*, *Carey v. Brown*, 447 U.S. 455 (1980).

¹⁹² *Golan*, 501 F.3d at 1196 (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)).

¹⁹³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹⁹⁴ *Golan*, 501 F.3d at 1196 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹⁹⁵ Chemerinsky, *supra* note 1, at 90.

¹⁹⁶ CHEMERINSKY, *supra* note 189, at 932.

¹⁹⁷ *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972).

¹⁹⁸ CHEMERINSKY, *supra* note 189, at 936.

In order to find section 514 of the URAA content-neutral, courts will have to conclude that the government's regulation is both viewpoint neutral and subject matter neutral.¹⁹⁹ The regulation is viewpoint neutral when the government is not regulating speech "based on the ideology of the message."²⁰⁰ Regulation is considered subject matter neutral when the government is not regulating speech "based on the topic of the speech."²⁰¹ Professor Neil Netanel makes the persuasive argument that "[c]opyright law stands outside [the] content-based rubric Its target is not the viewpoint, subject matter, or even communicative impact of the infringer's speech, but rather the infringement's deleterious impact on the copyright incentive."²⁰²

Section 514 "applies to all speech regardless of the message," and is therefore, content-neutral.²⁰³ Accordingly, and in light of Professor Netanel's argument, courts likely will view section 514 of the URAA as content-neutral.

D. *Is There a Valid Governmental Interest?*

Assuming that the speech is content-neutral, the next step in the First Amendment analysis is to determine what the important interest is, and whether it withstands intermediate scrutiny.²⁰⁴ In a First Amendment challenge to section 514 of the URAA, the government would have to show a valid governmental interest in retroactively granting protection to foreign works already in the public domain. With respect to copyright law, "encouraging the creation of new works" is well regarded as an important purpose.²⁰⁵ Under intermediate scrutiny, the court must determine "whether the statute will likely have the effect of increasing the creation and distribution of speech."²⁰⁶ By taking work out of the public domain, section 514 of the URAA hinders both the creation and the distribution of speech because the regulation removes works from the public domain that are being utilized to create new works.

Professor Chemerinsky's criticisms of the CTEA are instructive to an analysis of section 514, as both raise similar issues. He contends the URAA should fail intermediate scrutiny because "[r]etroactively extending the term for copyrights does not offer an incentive for creating or distributing speech."²⁰⁷ As the *Golan* court held, section 514 of the URAA causes work to be taken from the public domain, hampering free expression.²⁰⁸ The important interest to be protected under copyright law is "the engine of free expression,"²⁰⁹ and although not explicitly stated by the court, removing work from the public that is already using it obstructs the engine. On remand in *Golan*, section 514 of

¹⁹⁹ Chemerinsky, *supra* note 1, at 91.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 93 (quoting Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 49 (2001)).

²⁰³ *Id.* at 92.

²⁰⁴ *Id.* at 94.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 95.

²⁰⁸ *Golan v. Gonzales*, 501 F.3d 1179, 1193-94 (10th Cir. 2007).

²⁰⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

the URAA should fail intermediate scrutiny particularly because the Tenth Circuit plainly stated, “the fair use doctrine is not a sufficient safeguard”²¹⁰

In addition to undertaking First Amendment review as set forth in *Golan*, subsequent courts addressing the constitutionality of section 514 should reconsider the deference they have given Congress in authorizing copyright term extensions. Courts have given Congress too much deference by upholding term extensions when it has a detrimental effect on the public domain. In particular, courts should be more critical of Congress’ willingness to remove works from the public domain to grant foreign works more copyright protection. Although adopting section 514 of the URAA brought the United States into compliance with the Berne Convention and the WTO Agreement, taking works out of the public domain conflicts with the goal of copyright law to encourage more creative work. Much as the *Golan* plaintiffs came to rely on certain works, other members of the public may also face similarly prohibitive costs that keep them from utilizing a work already in the public domain as inspiration for their own work.

Golan’s holding that section 514 of the URAA must be subjected to First Amendment review shows that there is legitimate concern that the section threatens First Amendment rights. Accordingly, Congress should reevaluate section 514 to find a way to comply with the Berne Convention while protecting the public’s right to use works already in the public domain.

For example, Article 18 of the Berne Convention provides:

- (1) This 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.
- (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.²¹¹

This language seems to show that the Berne Convention does not require the restoration of copyright protection to works already in the public domain *if* those works have fallen into the public domain in its country of origin. Congress should look at why the legislation it passed to comply with the Berne Convention goes beyond the Convention’s strictures. The legislation provides copyright protection to works that do not comply with the formalities required by the United States²¹² and extends protection in likely violation of our Constitutional rights under the First Amendment.²¹³

²¹⁰ *Golan*, 501 F.3d at 1195.

²¹¹ Berne Convention for the Protection of Literary and Artistic Works, art. 18, Sept. 9 1886, as revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P205_40480.

²¹² 17 U.S.C. § 104A(h)(6)(C) (2006).

²¹³ Although it might not be fair, I do not think that our First Amendment rights should be extended to foreign authors because there are already enough First Amendment issues being raised by Americans and policing the rights of foreign authors would likely be extremely taxing on our system. However, this is an entirely different topic that probably deserves its own article!

V. CONCLUSION

At a minimum, all section 514 copyright claims should require First Amendment review. While the CTEA has already been upheld by the Supreme Court as a valid exercise of Congressional authority,²¹⁴ section 514 of the URAA creates First Amendment issues by taking works out of the public domain. Rather than looking at whether Congress is authorized to extend the term of protection for copyrighted works, courts will need to determine whether section 514 violates the First Amendment, and if it does, what level of First Amendment review courts should use. The likelihood that the URAA violates the First Amendment requires more than just the judicial branch's attention in evaluating cases that arise under section 514. Congress must reevaluate section 514 to bring the United States into compliance with the Berne Convention through less restrictive means.

As attorney Lawrence Lessig successfully argued in *Golan*, in addition to the "traditional contours of copyright protection" set forth in *Eldred*, courts must look at the two widely accepted built-in safeguards—fair use and idea-expression dichotomy—as triggering First Amendment review.²¹⁵ A precedent should be set that claims arising from section 514 warrant First Amendment review because the Tenth Circuit decided that section 514 of the URAA alters the traditional contours of copyright protection (by taking works out of the public domain). The burden should fall on copyright owners asserting copyright interests in a restored work to overcome First Amendment concerns.²¹⁶

In addition, Congress should reevaluate its adoption of section 514 because it allows works to be taken from the public domain that are not required under Article 18 of the Berne Convention.²¹⁷ *Golan* presents a situation with sympathetic plaintiffs (mainly teachers and artists) and shows why taking works out of the public domain can be injurious to the Constitutional rights of the public. Traditionally, courts have deferred to Congress when it comes to copyright protection, but with First Amendment rights at issue, *Golan* demonstrates that sometimes, courts need to intervene in order to get Congress to take notice. By following the Tenth Circuit's lead, other courts should challenge the notion that Congress should be given blanket deference in copyright terms. In turn, Congress will pay more attention to the various section 514 claims and make appropriate amendments to protect the public's First Amendment rights.

²¹⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²¹⁵ Lessig Posting, *supra* note 16.

²¹⁶ I think the burden is more fairly placed on a copyright owner than an unsuspecting user who believed he/she was rightfully using material (that had fallen into the public domain).

²¹⁷ The statute takes works out of the public domain that are not in compliance with the copyright laws of the United States. *See* 17 U.S.C. §104A(h)(6)(C) (2006).