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## Defending the Public Domain—The First Amendment, the Copyright Power, and the Potential of *Golan v. Gonzales*

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# Defending the Public Domain—The First Amendment, the Copyright Power, and the Potential of *Golan v. Gonzales*

## I. Introduction

The First Amendment to the Constitution of the United States provides unequivocally that “Congress shall make no law . . . abridging the freedom of speech or of the press”;<sup>1</sup> yet this has not been the case since Congress’s first exercise of the Progress Clause: the Copyright Act of 1790.<sup>2</sup> The Progress Clause,<sup>3</sup> which serves as the basis of United States Copyright Law, provides 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.”<sup>4</sup> On its face, the Progress Clause appears incompatible with the First Amendment, in that it “abridg[es] the freedom of speech” and “of the press”<sup>5</sup> by prohibiting all speech that is protected by the clause’s grant of “exclusive Right[s]” to “Authors and Inventors.”<sup>6</sup>

Despite the blatant conflict, courts have generally refused to recognize the First Amendment as a wholesale restraint on copyright.<sup>7</sup> Consistent with the general trend in federal courts,<sup>8</sup> in 1985 the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* held First Amendment scrutiny of copyright unnecessary because copyright itself has built-in freedom of speech protections in the form of the idea/expression dichotomy and the fair use exception.<sup>9</sup> In 2003, the Court in *Eldred v. Ashcroft* tweaked this proposition to provide that copyright is not categorically immune from challenges under the First Amendment, but that First Amendment scrutiny is necessary where

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1. U.S. CONST. amend. I.

2. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

3. Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755 n.1 (2001) (providing that “[e]arlier academics call this the ‘Copyright and Patent Clause.’ Since neither ‘copyright’ nor ‘patent’ appears in the text . . . the best name would be the ‘Progress Clause.’”).

4. U.S. CONST. art. 1, § 8, cl. 8.

5. *Id.* amend. I.

6. *Id.* art. 1, § 8, cl. 8.

7. 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 21:3 (2007).

8. *Triangle Publ’ns v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980); *Sid & Mart Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977); *Wainright Sec. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).

9. 471 U.S. 539, 556-60 (1985).

Congress “alter[s] the traditional contours of copyright protection.”<sup>10</sup> Although the Court did not find First Amendment scrutiny necessary under the facts present in *Eldred*, the Court’s recognition that copyright’s built-in First Amendment protections will not always be adequate subtly suggested the potential for increased judicial recognition of the First Amendment as an actual—rather than nominal—restraint on copyright.<sup>11</sup>

This note argues that the recent Tenth Circuit decision in *Golan v. Gonzales*<sup>12</sup> is the *Eldred* potential realized<sup>13</sup>—that *Golan* is the second step to *Eldred*’s first on the path to judicial enforcement of First Amendment protections abridged by the ever broadening grasp of copyright. Part II discusses the relevant copyright and First Amendment principles, laws, and cases, emphasizing the forces guiding the judicially struck balance between the two. Part III presents the factual and procedural history of *Golan*, including its position in the context of the broader challenges being made to the current United States copyright scheme. Part IV analyzes the unanimous opinion in *Golan*. Part V discusses the circuit split over the proper interpretation of *Eldred*, of which *Golan* is a part, and the split’s likely route to the Supreme Court. Part VI suggests that the language of *Eldred*, the purposes behind copyright and the First Amendment, and the inconsistency of the alternative approach all support the conclusion that the Tenth Circuit in *Golan* properly interpreted the Supreme Court’s guidance in *Eldred*. Part VII concludes.

## II. Background Law

### A. The United States Copyright Regime

The Progress Clause of the United States Constitution grants to 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.”<sup>14</sup> Congress first exercised this power through the Copyright Act of 1790 with the purpose of creating “[a]n Act for the encouragement of learning.”<sup>15</sup> The First United States Congress relied heavily on English law in forming the beginning of United States Copyright law with the Copyright Act of 1790.<sup>16</sup> The Act granted copyright protection

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10. 537 U.S. 186, 221 (2003).

11. *Id.*

12. 501 F.3d 1179 (10th Cir. 2007).

13. *See supra* text accompanying note 11.

14. U.S. CONST. art. I, § 8, cl. 8.

15. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (quoting the Act’s preamble).

16. Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of*

for an initial term of fourteen years conditioned on the work being registered and a copy deposited with an official repository.<sup>17</sup> The term was renewable for another fourteen-year term so long as the work was reregistered.<sup>18</sup>

The first of what would be many extensions of the copyright term came with the 1831 revision of the original act, extending the initial term of copyright protection to twenty-eight years while leaving the renewable term of fourteen years unchanged.<sup>19</sup> The Copyright Act of 1909 further extended the potential renewal period to twenty-eight years, while maintaining the initial term at twenty-eight years.<sup>20</sup> Each of these extensions applied to both existing and future copyrights; however, the extensions were not applied to copyrighted works whose terms had expired, regardless of whether the works would have been protected had the extension been in effect during their original terms.<sup>21</sup> The 1909 Act further extended the reach of copyright by codifying the concept of a derivative work, that is a work based on a pre-existing work.<sup>22</sup> Prior to that point, “the term ‘copy’ was interpreted literally—an author had the right only to prevent others from copying and selling her particular work, but had no power against modifications.”<sup>23</sup>

The Copyright Act of 1976 overhauled United States copyright law by modifying the method for calculating the term of copyright protection, abandoning a fixed term system in exchange for a variable standard.<sup>24</sup> The former standard provided for a fixed term of copyright protection with an option for a fixed renewal term; under the 1976 Act, the term of copyright protection became the life of the author plus fifty years.<sup>25</sup> This act aligned the United States copyright term with the predominate international term under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).<sup>26</sup> The 1976 Act applied not only to works published on or after

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*Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 338-39 (2006). Congress relied specifically on the Statute of Anne for the principle that copyright protection should be provided only for limited times with the purpose of incentivizing the creation of works of art and science. Copyright Act of 1709, 1710, 8 Ann., c. 19 (Eng.) (providing for copyright protection for “the Encouragement of Learning”).

17. Act of May 31, 1790, ch. 15, § 1, 1 Stat at 124.

18. *Id.* §§ 1, 3.

19. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 436, 439.

20. Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

21. *Id.*; Act of Feb. 3, 1831, §§ 1, 16, 4 Stat. at 436, 439.

22. Act of Mar. 4, 1909, 35 Stat. 1075.

23. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (2001).

24. 17 U.S.C. §§ 101-810 (2000).

25. *Id.* § 302.

26. Berne Convention for the Protection of Literary and Artistic Works art. 5(3), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1971), 828 U.N.T.S. 221 [hereinafter Berne Convention];

its effective date of January 1, 1978, but also to previously published works, to which the Act granted a fixed seventy-five year term beginning on the date of publication, thereby extending those works' previous copyright protection under the 1909 Act by nineteen years.<sup>27</sup> The 1976 Act also did away with all conditions precedent to protection. Prior to 1976, copyright protection only attached once the work was both registered with the Copyright Office and published. Under the 1976 Act, a work was protected immediately upon creation—that is, once “fixed in any tangible medium of expression”—regardless of whether it was then or ever published or registered.<sup>28</sup>

The latest term extension came in the Copyright Term Extension Act of 1998 (CTEA), also known as the Sonny Bono Act.<sup>29</sup> The CTEA lengthened the term of copyright protection to life of the author plus seventy years for works published after January 1, 1979, the effective date of the 1976 Act.<sup>30</sup> The CTEA also extended the copyright protection of works published prior to 1979 by adding another twenty years of protection, thus increasing the works' protection to a fixed term of ninety-five years from the date of publication.<sup>31</sup> This extension effectively froze the public domain. No work published in or after 1923 will enter the public domain until at least 2019, assuming no further extensions by Congress.

### *B. Justifications for Granting Copyright Protection*

Copyright protection effectively grants the right holder a monopoly over use of the work. Elementary economic theory provides that a monopoly will produce fewer goods at a higher price as compared to a competitive market.<sup>32</sup> Thus, as monopolists, copyright holders provide the public fewer of their creative works at higher prices than would be created in a competitive market. On its face, such a result is undesirable because society prefers more goods to less; therefore, granting such exclusive rights, as did the Framers of the Constitution, demands justification.

In drafting the Progress Clause, the Framers limited the purpose for which Congress may grant a copyright protection. Congress's copyright power

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*see infra* notes 79-98 and accompanying text.

27. 17 U.S.C. § 408.

28. *Id.* § 102.

29. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

30. 17 U.S.C. § 302.

31. *Id.* § 304.

32. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 57 (5th ed. 2003).

reaches only to the extent necessary to promote “the Progress of Science and useful Arts.”<sup>33</sup> This “[p]rogress” was to be achieved through the creation of and public access to a large base of knowledge.<sup>34</sup> The Framers steadfastly rejected the notion that an author has a natural or moral right to exclusive control of his work.<sup>35</sup> The Framers instead were instrumentalists, recognizing copyright as a monopoly, and thus an evil allowed only as necessary for the promotion of learning.<sup>36</sup> James Madison recognized monopolies as “justly classed among the greatest nuisances in government;” yet, his belief in the importance of “literary works and ingenious discoveries” to the health of a nation led him to find copyright “too valuable to be [wholly] renounced.”<sup>37</sup>

The Constitution not only limits the purpose for which Congress may grant copyright, but also limits the term for which Congress may grant such protection to “limited Times.”<sup>38</sup> The restriction of copyright protection to “limited Times” is further evidence of the Framers’ view that copyright should be granted only as an instrument for the promotion of progress and not as a right of its own accord. Limiting the term of protection would be inconsistent with the view that copyright is a natural right, but is wholly appropriate where copyright is viewed as a mere instrument for a greater good. The Supreme Court has consistently accepted this construction of the Progress Clause, recognizing that “the primary objective of copyright is not to reward the labor of authors,”<sup>39</sup> finding instead that the “sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”<sup>40</sup>

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33. U.S. CONST. art. I, § 8, cl. 8 (“to Promote the Progress of Science and useful Arts”).

34. *E.g.*, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (“for the encouragement of learning”); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay*, 52 EMORY L.J. 909, 947 (2003) (quoting George Washington’s January 8, 1790 address to Congress, “Knowledge is, in every country, the surest basis of public happiness.”).

35. 1 WILLIAM PATRY, PATRY ON COPYRIGHT § 1:1 (2007) (recognizing copyright in the United States as a “positive law for utilitarian purposes” and “not a property right, much less a natural right”).

36. U.S. CONST. art. I, § 8, cl. 8 (“to Promote the Progress of Science and useful Arts”); Act of May 31, 1790, 1 Stat. at 124 (“for the encouragement of learning”); Patterson & Joyce, *supra* note 34, at 947 (quoting President George Washington, Address to Congress (Jan. 8, 1790)).

37. Andrew M. Hetherington, *Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH. L. REV. 457, 468 (2003) (citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)).

38. *Id.*

39. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

40. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *accord Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

### C. Justifications for Protecting the Freedom of Speech

Traditionally, three rationales have been put forth to justify the freedom of speech.<sup>41</sup> In his powerful concurrence in *Whitney v. California*, Justice Brandeis discussed these three justifications.<sup>42</sup> First, the freedom of speech was seen by the Framers as essential to the health of free democracy; as Brandeis recognized, the Framers “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”<sup>43</sup> Renowned copyright and First Amendment scholar Melville Nimmer describes this function of the freedom of speech as necessary for the enlightenment of the voters in order to ensure wise decisions of governance.<sup>44</sup> Thus, the freedom of speech operates in intimate symbiosis with the democratic process such that the corruption of one is the corruption of both.

The second justification provided by Brandeis is described by Nimmer as free speech “as an end in itself because the very nature of man is such that he can realize self-fulfillment only if he is free to express himself.”<sup>45</sup>

The final justification, Brandeis provides, is to forego the dangers created by not guaranteeing free speech.<sup>46</sup> Brandeis’s *Whitney* concurrence warns “that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”<sup>47</sup> Nimmer describes this as the “safety valve” factor.<sup>48</sup> Thus, the three justifications for the freedom of speech are the enlightenment function, the self-fulfillment function, and the safety-valve function.

### D. A Conflict and a Judicially Struck Balance

The First Amendment prohibits the abridgment of the freedom of speech.<sup>49</sup> Copyright law passed under the Progress Clause abridges speech by prohibiting unauthorized use of copyright protected speech.<sup>50</sup> Under a strict

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41. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1186 (1970).

42. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

43. *Id.*

44. Nimmer, *supra* note 41, at 1187-88 (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948)).

45. *Id.* at 1188.

46. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

47. *Id.*

48. Nimmer, *supra* note 41, at 1188.

49. U.S. CONST. amend. I.

50. *Id.* art. I, § 8, cl. 8.

reading of the First Amendment, “it is difficult to see how any copyright law can be regarded as constitutional”;<sup>51</sup> yet, the Supreme Court has held that “the Framers intended copyright itself to be *the engine of free expression*.”<sup>52</sup>

Although “intuitively in conflict,” the Progress Clause and the First Amendment “were drafted to work together.”<sup>53</sup> The Supreme Court recently recognized the significance of the contemporaneous adoption of the Progress Clause and the First Amendment, providing: “This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression.”<sup>54</sup> Yet, concluding that the two are theoretically compatible is far from understanding how copyright and the First Amendment actually coexist.

Courts have generally struck the balance between First Amendment protections and copyright on the premise that copyright has built-in First Amendment accommodations in the form of two doctrines limiting the scope of copyright: the idea/expression dichotomy and the fair use doctrine.<sup>55</sup> Each safeguard arguably contours the reach of copyright to avoid unconstitutional infringement on the freedom of speech.

Copyright law in the United States distinguishes between ideas and expressions and affords copyright protection only to the latter.<sup>56</sup> The idea/expression dichotomy addresses “the danger . . . that an individual might gain monopoly privileges over an idea,” a result that would be antithetical to the interest of the First Amendment.<sup>57</sup> The Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* recognized that “no author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.”<sup>58</sup> The Supreme Court went on to rule that the “idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and [copyright] by permitting free communication of facts while still protecting an author’s expression.’”<sup>59</sup> The Supreme Court further recognized in *Eldred v. Ashcroft* that the result of this limitation on copyright is that “every idea,

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51. 2 SMOLLA, *supra* note 7, § 21:2.

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

53. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (2001).

54. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

55. *Harper & Row*, 471 U.S. at 558; *see* SMOLLA, *supra* note 7, § 21:3.

56. *See* 17 U.S.C. § 102(b) (2000).

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

58. *Harper & Row*, 471 U.S. at 547 (citation omitted).

59. *Id.* at 556 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).



theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.”<sup>60</sup> Thus, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work.”<sup>61</sup> Where the freedom of speech seeks to guarantee the enlightenment of people through the free-flow of ideas,<sup>62</sup> courts accept the idea/expression dichotomy as a means of permitting such flow of ideas and thus avoiding conflict with the First Amendment.

The second safeguard, the fair use doctrine, affords a privilege for the limited use of both the idea and expression of copyrighted material without permission from the rights holders where the use is “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”<sup>63</sup> Although now codified, the fair use doctrine originated as a “judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values.”<sup>64</sup>

#### *E. The Eldred Decision*

For proponents of copyright reform, the Supreme Court’s decision in *Eldred v. Ashcroft* initially seemed a crushing blow.<sup>65</sup> The *Eldred* petitioners made two claims regarding the Copyright Term Extension Act (CTEA).<sup>66</sup> first, they challenged the CTEA as a violation of the “limited Times” provision of the Progress Clause, and second, they challenged the CTEA as a content-neutral regulation of speech failing the heightened judicial scrutiny required by the First Amendment.<sup>67</sup> In a 7-2 decision, the Court rejected both arguments, yet explicitly recognized that copyright would not be immune from First Amendment scrutiny in all cases.<sup>68</sup>

The petitioners claimed that although the new copyright term under the CTEA—the life of the author plus seventy years—was valid, the application of that new standard to extend the protection of already published and copyrighted works violated the “limited Times” provision of the Progress

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60. 537 U.S. 186, 219 (2003).

61. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

62. *See supra* text accompanying notes 41-48.

63. 17 U.S.C. § 107 (2000).

64. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).

65. 537 U.S. 186.

66. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); *see supra* text accompanying notes 29-31.

67. *Eldred*, 537 U.S. at 193-94.

68. *Id.* at 218, 221.

Clause.<sup>69</sup> The petitioners premised this argument on the contention that an initial term that could be extended was by definition not “limited”; that is, once set a term is “fixed” and “unalterable.”<sup>70</sup> The Court rejected this reading of the term “limited,” holding instead that “limited” only requires that the term be initially confined within certain bounds, not that it be forever fixed.<sup>71</sup>

Second, the petitioners claimed that, as a content-neutral regulation of speech, the CTEA should be subjected to strict judicial scrutiny under the First Amendment.<sup>72</sup> Rejecting this argument, the Court found that strict scrutiny review is unnecessary, not only because copyright law has built-in safeguards, but also because the CTEA itself includes additional protections.<sup>73</sup> The Court recognized support for its holding in the long history of similar congressional extensions of the term of copyright protection.<sup>74</sup> However, most importantly, the *Eldred* Court found that where Congress does not act in accordance with history, but instead “alter[s] the traditional contours of copyright protection,” a more searching First Amendment scrutiny must be conducted.<sup>75</sup>

In virtually all subsequent cases, *Eldred* has been read to set the standard for First Amendment review of both new copyright legislation and changes to existing copyright legislation.<sup>76</sup> Although the *Eldred* “traditional contours” standard has been widely adopted, a clear split has developed among several circuits over its interpretation.<sup>77</sup>

#### *F. The Berne Convention*

In *Golan v. Gonzales*, the Tenth Circuit considered a challenge to the Uruguay Round Agreement Act (URAA),<sup>78</sup> an act to bring United States Copyright law into compliance with the principal multi-national treaty controlling copyright law, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).<sup>79</sup> As of April 2007, 163 countries

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69. *Id.* at 199.

70. *Id.*

71. *Id.*

72. *Id.* at 218.

73. *Id.* at 219.

74. *Id.*

75. *Id.* at 221.

76. *See Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 958 (2008); *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004), *aff’d on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

77. *See infra* notes 176-97 and accompanying text.

78. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).

79. Berne Convention, *supra* note 26.

were signatories to the Berne Convention.<sup>80</sup> There are three general requirements to membership: (1) member-states must grant works originating in other member-states the same copyright protections granted to works created by its own nationals;<sup>81</sup> (2) copyright protection cannot be contingent on formalities (i.e., protection must attach automatically);<sup>82</sup> and (3) member-states must grant a minimum term for copyright protection amounting to life of the author plus fifty years.<sup>83</sup>

Article 1 of the treaty illustrates the moral rights perspective taken by the Berne Convention, providing that the Convention forms a “Union for the protection of the rights of authors in their literary and artistic works.”<sup>84</sup> This moral justification for copyright protection stands in clear contrast to the instrumental view adopted by the Framers of the United States Constitution.<sup>85</sup> Because joining the Berne Convention would have required major changes to the United States copyright regime, especially with regard to the moral rights standards imposed by the treaty, the United States initially refused to join; however, with the enactment of the Berne Convention Implementation Act of 1988, the United States became a party to the treaty.<sup>86</sup> Despite signing, the United States refused to comply with Article 18 of the Convention, which required signatory countries to extend copyright protection to any work still protected in the work’s home country.<sup>87</sup> Article 18 would have required the United States to grant protection to many foreign works that were in the public domain. Because of this, the United States refused to apply the treaty retroactively and applied the provision only with regard to works published after March 1, 1989.<sup>88</sup>

### G. The Uruguay Round Agreement Act

Following harsh international criticism for its unilateral refusal to comply with Article 18 of the Berne Convention, the United States eventually agreed to full compliance at the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT).<sup>89</sup> Congress subsequently adopted

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80. U.S. COPYRIGHT OFFICE, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES, CIRCULAR 38A (2007), available at <http://www.copyright.gov/circs/circ38a.pdf>.

81. Berne Convention, *supra* note 26, art. 5(3).

82. *Id.* art. 5(2).

83. *Id.* art. 6(1), (6).

84. *Id.* art. 1.

85. *See supra* notes 32-40 and accompanying text.

86. *See* 17 U.S.C. § 101 (2000); *see also* Berne Convention, *supra* note 26.

87. Berne Convention, *supra* note 26, art. 18.

88. Olivia Regnier, *Who Framed Article 18? The Protection of Pre-1989 Works in the USA Under the Berne Convention*, 15 EUR. INTELL. PROP. REV. 400, 400 (1993).

89. *See, e.g., id.*

the URAA, which implemented the provisions agreed upon at the Uruguay Round negotiations.<sup>90</sup> In 1993, during the Uruguay Round, GATT was updated as GATT 1994, which established the World Trade Organization (WTO).<sup>91</sup> Title V of the URAA implements the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires WTO members to comply with Article 18 of the Berne Convention.<sup>92</sup>

Article 18 of the Berne Convention requires that member-nations provide copyright protection to those foreign works whose protection has not yet expired in their country of origin.<sup>93</sup> Article 18 applies retroactively such that although the United States did not join the Berne Convention until 1988, Article 18 required it to extend protection to all works that were still protected by copyright in their country of origin, regardless of whether that work had already passed into the public domain within the United States.<sup>94</sup> In order to comply with Article 18's requirement of retroactive application,<sup>95</sup> protection had to be restored to many foreign works still protected in their country of origin that had fallen into the public domain in the United States.<sup>96</sup> Section 514 of the URAA amended United States' copyright law to restore copyright protection to such foreign works.<sup>97</sup> The plaintiffs in *Golan* challenged the URAA's removal of works from the public domain as a violation of their right to free expression under the First Amendment.<sup>98</sup>

### III. Statement of the Case: *Golan v. Gonzales*

#### A. The Plaintiffs

The *Golan* plaintiffs, in different ways, all relied on works in the public domain for their livelihood.<sup>99</sup> Section 514 of the URAA injured each plaintiff

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90. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).

91. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

92. See S. REP. NO. 103-412, at 225 (1994).

93. Berne Convention, *supra* note 26, art. 18.

94. *Id.*

95. *Id.*

96. *Id.* art. 5(2). Many of these foreign works had already fallen into the public domain for failure to meet the formal requirements of United States copyright law, such as to register the work, to renew protection, or to include satisfactory copyright notice. Article 5(2) of the Berne Convention prohibits protection being subject to formalities. *Id.* Thus, for these works protection would have had to be restored not only under Article 18, but also under Article 5(2). *Id.*

97. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).

98. *Golan v. Gonzales*, 501 F.3d 1179, 1182-83 (10th Cir. 2007).

99. *Id.* at 1182.

by removing those works from the public domain and reinstating copyright protection.<sup>100</sup> For example, Lawrence Golan is a professional symphony, opera, and ballet conductor as well as the director of the orchestral studies program at the University of Denver's Lamont School of Music.<sup>101</sup> As a university director, he is "obligated to teach works by important classical and contemporary foreign composers including composers from the 20th century" to students who "depend on these public domain works for a well-rounded education."<sup>102</sup> Unfortunately, many of these standard works are no longer freely available in the public domain because of the URAA. As a result, students are unable to learn much of the "industry's 'standard repertoire' for auditions, competitions, and public performances."<sup>103</sup>

Another plaintiff, the late Richard Kapp, was an accomplished pianist and an internationally renowned conductor.<sup>104</sup> Kapp testified that he "depended on the availability of musical works in the public domain for performances and recordings for over thirty-five years."<sup>105</sup> Kapp went on to explain that "copyrighted works impose significant performance fees and much higher sheet music rental costs than public domain works . . . Thus, given budget constraints, the vast majority of the works his orchestras perform[ed] [had to] come from the public domain."<sup>106</sup> Other plaintiffs, Luck's Music Library and Edwin F. Kalmus, distributed orchestral sheet music from the public domain to orchestras, symphonies, universities, and schools.<sup>107</sup> Similarly, plaintiffs Ron Hall and John McDonough distributed films that had passed into the public domain.<sup>108</sup> Luck's Music Library, Kalmus, Hall, and McDonough have all had to eliminate much of their catalog because of the URAA.<sup>109</sup> Each plaintiff in their own way furthered the dissemination of cultural works to the public, and each has been forced by the URAA to stop or substantially curtail this dissemination.

#### *B. At the District Court*

The plaintiffs filed the complaint on September 19, 2001, in the United States District Court for the District of Colorado alleging that both the CTEA

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100. *Id.*

101. Appellants' Opening Brief at 13, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259), 2005 WL 2673976.

102. *Id.* at 14.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 15.

108. *Id.*

109. *Id.*

and the URAA were unconstitutional for their violation of the Progress Clause, the First Amendment, and the Due Process Clause.<sup>110</sup> Soon after, on August 23, 2002, the district court put the case on administrative retirement subject to the United States Supreme Court's ruling in *Eldred*.<sup>111</sup> Following the decision in *Eldred* on January 15, 2003,<sup>112</sup> the plaintiffs filed an amended complaint modifying their claims based on the *Eldred* decision.<sup>113</sup> The Government immediately filed a motion to dismiss all claims, asserting that *Eldred* "affirmed the constitutionality of the CTEA" and "articulated in great detail the Supreme Court's view of the scope and meaning of the Copyright Clause in a way that discredit[ed] [the] Plaintiffs' challenges to the URAA."<sup>114</sup> The district court granted the Government's motion as to the plaintiffs' claim that the CTEA violated the Progress Clause's "limited times" provision, but denied the motion as to all other claims.<sup>115</sup>

Following discovery, the parties filed cross-motions for summary judgment.<sup>116</sup> The Government's motion<sup>117</sup> urged the Court to follow a decision handed down during the *Golan* discovery period by the United States District Court for the District of Columbia in *Luck's Music Library Inc. v. Gonzales*, which held that the URAA is constitutional and not subject to First Amendment review.<sup>118</sup> The plaintiffs' motion for summary judgment reinforced their two arguments: (1) that the URAA extends beyond the power granted Congress under the Progress Clause, and (2) that the URAA altered the "traditional contours of copyright protection" and thus required First Amendment review.<sup>119</sup> The district court granted the Government's motion for

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110. Complaint at 1, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyber.law.harvard.edu/openlaw/golanvashcroft/complaint.pdf>.

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

112. *Id.*

113. First Amended Complaint, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyberlaw.stanford.edu/attachments/Amended%20Complaint.pdf>.

114. Memorandum in Support of Defendant's Renewed Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 3, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyberlaw.stanford.edu/attachments/Renewed%20Motion%20to%20dismiss-4-30-03.pdf>.

115. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004).

116. *Golan v. Gonzales*, No. 01B-1854, 2005 WL 914754, at \*1 (D. Colo. Apr. 20, 2005).

117. Memorandum in Support of Defendant's Motion for Summary Judgment, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (No. 01B-1854 (D. Colo. 2004), available at <http://cyberlaw.stanford.edu/attachments/MSJ6-23-04.pdf>.

118. 321 F. Supp. 2d 107 (D.D.C. 2004), *aff'd* 407 F.3d 1262 (D.C. Cir. 2005) (holding that § 514 of the URAA does not exceed Congress's power under the Progress Clause, nor does it violate the First Amendment).

119. Plaintiff's Opposition to Defendant John Ashcroft's Motion for Summary Judgment at

summary judgment and denied the plaintiffs', finding that Congress had not overstepped the bounds of the Progress Clause in passing the URAA.<sup>120</sup>

### C. Appeal to the Tenth Circuit

On July 18, 2005, the plaintiffs filed an appeal to the United States Court of Appeals for the Tenth Circuit. The plaintiffs made three primary contentions: (1) the URAA's removal of works from the public domain abridges the First Amendment right to free expression; (2) the restoration of copyright protection to works in the public domain exceeds Congress's power under the Progress Clause; and (3) the current term of copyright as extended by the CTEA has become so long as to violate the "limited Times" requirement of the Progress Clause.<sup>121</sup> In an opinion by Judge Robert Henry, the Tenth Circuit vacated the district court's First Amendment ruling, affirmed all else, and remanded with orders for the district court to subject Section 514 of the URAA to First Amendment scrutiny.<sup>122</sup>

The Tenth Circuit's decision was a result of its careful interpretation of *Eldred v. Ashcroft*.<sup>123</sup> In *Eldred*, the Supreme Court established a standard of review for use when copyright also regulates speech, providing that where copyright legislation "alter[s] the traditional contours of copyright protection" it must be subjected to First Amendment scrutiny.<sup>124</sup> The *Golan* plaintiffs argued that the district court erred by failing to apply the *Eldred* standard, claiming specifically that the URAA "disrupted the traditional contours of copyright protection" by removing works from the public domain.<sup>125</sup> The plaintiffs further argued, through thorough discussion, that historical precedent does not support Congress's removal of works from the public domain; thus, the URAA alters "tradition" under the *Eldred* standard, thereby requiring First Amendment scrutiny.<sup>126</sup> In response, the Government argued that the "traditional contours of copyright protection" are limited to copyright's built-in First Amendment safeguards—the idea/expression dichotomy and the fair use doctrine; therefore, First Amendment review is unnecessary because the URAA alters neither safeguard.<sup>127</sup>

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4, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (No. 01B-1854) (D. Colo. 2004), available at <http://cyberlaw.stanford.edu/attachments/PlaintiffsSJOppBrief.pdf>.

120. *Golan*, 2005 WL 914754.

121. Appellants' Opening Brief, *supra* note 101, at 20.

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

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

124. *Id.* at 221.

125. *Golan*, 501 F.3d at 1185-86.

126. *Id.* at 1189-92.

127. Brief for the Appellees at 23, *Golan v. Gonzales*, 501 F.3d 1179 (No. 05-1259) (10th Cir. 2005), available at [http://cyberlaw.stanford.edu/system/files/govt\\_response.pdf](http://cyberlaw.stanford.edu/system/files/govt_response.pdf).

Although *Eldred* provides the standard for considering the free speech implications of a copyright law, it provides little guidance regarding its application. Therefore, the Tenth Circuit began its review by refining this standard through consideration of what the phrase “traditional contours” entails. The court recognized that “the term [traditional contours] seems to refer to something broader than copyright’s built-in free speech accommodations.”<sup>128</sup> The court rejected the Government’s argument that “traditional contours” is limited to the idea/expression dichotomy and the fair use doctrine.<sup>129</sup> With this conclusion, a split formed, as the Ninth Circuit<sup>130</sup> and the District Court for the District of Columbia<sup>131</sup> have, to the contrary of the Tenth Circuit, agreed with the limited view of “traditional contours” proposed by the Government.

*1. The Tenth Circuit’s Framework for “Traditional Contours” Analysis*

The Tenth Circuit separated the “traditional contours” analysis into a functional and a historical component. The functional component, represented by “contour,” encompasses the general form or structure of copyright law.<sup>132</sup> Under it, the court reviews whether “the ordinary *procedure* of copyright protection” has been altered by Congress.<sup>133</sup> This procedure includes the way in which the reach of copyright protection is bounded by the public domain.<sup>134</sup> Considering the historical component, Judge Henry provided that the *Eldred* Court’s qualification of the “contours” as “traditional” suggests “that Congress’s historical practice with respect to copyright and the public domain must inform our inquiry.”<sup>135</sup>

*a) The Functional Component*

The Tenth Circuit, considering the functional component, recognized as a “contour” the *sequence* in which a work moves through copyright, and thus considered whether the URAA altered that sequence.<sup>136</sup> Until Section 514 of the URAA, every statutory scheme maintained the same sequence. The sequence begins with an author’s creation of an original expression. Copyright

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128. *Golan*, 501 F.3d at 1189-92.

129. *Id.*

130. *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 958 (2008).

131. *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2007), *aff’d on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005).

132. *Golan*, 501 F.3d at 1189.

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.*

136. *Id.*



law then grants the expression a limited period of copyright protection and, upon expiration, the work passes permanently into the public domain.<sup>137</sup> The URAA distorts this sequence such that the public domain is not always the end, and may sometimes even be the beginning.<sup>138</sup> Thus, the Tenth Circuit concluded that “by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence,”<sup>139</sup> a “traditional contour[] of copyright protection,” and must be subjected to First Amendment scrutiny.

Further, in consideration of the functional component, the court in *Golan* identified a second “contour” of copyright—the *character* of works in the public domain.<sup>140</sup> With abundant citation, the court established the great judicial weight behind the proposition that works within the public domain cannot be copyrighted.<sup>141</sup> The court concluded that, by copyrighting works in the public domain, the URAA “extend[ed] a limited monopoly to expressions historically beyond the pale of such privileges,” and thus “contravened a bedrock principle of copyright law” altering its “traditional contours.”<sup>142</sup>

*b) The Historical Component*

Turning to the historical component, the *Golan* court concluded that “[t]he history of American copyright law reveals no tradition of copyrighting works in the public domain.”<sup>143</sup> The Tenth Circuit’s inquiry looked to whether removal of works from the public domain is consistent with the Framers’ view of copyright law and Congress’s historical practices. Regarding the Framers’ view, the court recognized, as has a consensus of scholars, that the Framers’ view on copyrighting works in the public domain is “probably not just unclear but also unknowable”<sup>144</sup> because the common law of the United States at the time the states ratified the Constitution “was in a highly uncertain state on the subject of copyrights.”<sup>145</sup> Further, other standard sources of the Framers’ intent, such as the Federalist Papers and Madison’s notes from the Constitutional Convention, give little attention to the subject.<sup>146</sup> Because of the scarcity of supporting evidence, the court refused to conclude that the

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1189-90.

141. *Id.*

142. *Id.* at 1192.

143. *Id.* at 1190.

144. *Id.* at 1191 (citing Walterscheid, *supra* note 16, at 332).

145. *Id.* at 1190 (quoting 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953)).

146. *Id.*

Framers viewed removal of works from the public domain as consistent with the copyright scheme.<sup>147</sup>

Regarding congressional practice, the court considered certain war time acts that “may have had the effect of removing a very small number of works from the public domain,” concluding that such limited actions under unusual and non-traditional circumstances are not sufficient to establish removal of works from the public domain as a “traditional contour,” especially where the passing of the acts was not necessarily even constitutional.<sup>148</sup> Thus, the court held that “under both the functional and historical components of our inquiry, Section 514 has altered the traditional contours of copyright protection.”<sup>149</sup>

## 2. Applying Eldred’s Three Factors

The *Golan* court next considered Section 514 of the URAA in light of the three factors that led the *Eldred* Court to find the CTEA is consistent with copyright’s “traditional contours.”<sup>150</sup> First, the *Eldred* Court concluded that the speech interests at issue involved the right to repeat the speech of others, which is entitled to less protection under the First Amendment than one’s own speech.<sup>151</sup> Second, the *Eldred* Court found that copyright law’s “built-in First Amendment accommodations—the idea/expression dichotomy and fair use defense” adequately protected the First Amendment interests at stake in the case.<sup>152</sup> Finally, the *Eldred* Court noted that Congress included additional protections in the CTEA beyond copyright’s own built-in safeguards in order to ensure the public’s access to protected expression.<sup>153</sup> Thus, the Tenth Circuit applied these three factors to the URAA: (1) the nature of the speech involved and the relative amount of First Amendment protection it is afforded, (2) the adequacy of copyright’s built-in protections, and (3) the additional protection of First Amendment interests within the legislation at issue.<sup>154</sup>

### a) *The Nature of the Speech at Issue*

Regarding the first factor, the Tenth Circuit began by characterizing the nature of the free speech interests at issue. The court acknowledged that, at the

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147. *Id.*

148. *Id.* at 1192 (citing 3 NIMMER ON COPYRIGHT § 9A.07[A], 9A-79 to -80 (2007) and arguing that with regard to the wartime acts Congress was “simply [] sweep[ing] the constitutional issues under the rug”).

149. *Id.*

150. *Id.* at 1189 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003)).

151. *Id.*

152. *Id.* at 1184 (citing *Eldred*, 537 U.S. at 219-20).

153. *Id.* (citing *Eldred*, 537 U.S. at 220).

154. *Id.* at 1193.

time the works at issue passed into the public domain, the plaintiffs possessed a non-exclusive, unrestrained right to use the works.<sup>155</sup> Consequently, the Tenth Circuit recognized that the First Amendment protects such a right.<sup>156</sup> Further, the manner in which the plaintiffs used the works guaranteed them especially strong protection because “[t]he Supreme Court has emphasized that the right to artistic expression is near the core of the First Amendment.”<sup>157</sup> The court considered the situation of Plaintiff John Blackburn, a high school band director who, relying on the principle work passing into the public domain, arranged a derivative work based on Dmitri Shostakovich’s *Symphony No. 5* to be played at an event commemorating September 11. Because the Shostakovich work had passed into the public domain, the court found that Mr. Blackburn had the right to create his derivative piece and that Section 514 of the URAA interfered with his right to use his own legally created work by making the cost of performing such work prohibitive due to licensing.<sup>158</sup> Therefore, regarding the nature of the speech at issue, the court found that the plaintiffs’ First Amendment interests in public domain works were stronger than that of the *Eldred* plaintiffs who did not, nor had they ever, possessed unrestricted access to any works at issue.<sup>159</sup> While the *Eldred* plaintiffs’ First Amendment interests were in “making other people’s speeches,” for example in distributing books from the public domain,<sup>160</sup> the plaintiffs in *Golan* used “publically available works to create their own artistic productions,” thus the speech at issue in *Golan* belonged to the plaintiffs themselves.<sup>161</sup>

*b) Copyright’s Built-In Free Speech Protections*

The Tenth Circuit determined that, unlike in *Eldred*, copyright’s built-in free speech safeguards—the idea/expression dichotomy and the fair use doctrine—are not adequate to address the threat to First Amendment interests posed by URAA’s removal of works from the public domain.<sup>162</sup> The court reached this conclusion on the grounds that the danger addressed by the idea/expression dichotomy, monopolies over ideas, is not the danger threatened by the URAA, the removal of works from the public domain.<sup>163</sup>

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155. *Id.*

156. *Id.*

157. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)).

158. *Id.*

159. *Id.* at 1194.

160. *Id.* at 1193 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)).

161. *Id.*

162. *Id.* at 1193-94.

163. *Id.*

The Tenth Circuit also found that the fair use doctrine was not adequate to address the First Amendment interests threatened by Section 514.<sup>164</sup> The plaintiffs had a right to unrestricted use of the works at issue before the URAA removed those works from the public domain.<sup>165</sup> Where applicable, the fair use doctrine provides limited use for limited purposes in situations where no use would otherwise be allowed. Applying the fair use doctrine to the present case would allow only limited use where unrestricted use had previously been allowed, thereby infringing on the plaintiffs' First Amendment rights.<sup>166</sup> Thus, the Tenth Circuit held that limited use in limited circumstances does not serve as "an adequate substitute for the unlimited access enjoyed before the URAA was enacted."<sup>167</sup>

In broadly discussing the finding that copyright's built-in safeguards are not sufficient in the present case, the court explained that such safeguards are "designed to govern the distribution of rights between authors and the public from the moment a work is created and copyrighted until the copyright expires."<sup>168</sup> Accordingly, the court recognized that once a work reaches the public domain no such need for distribution of rights is necessary as all enjoy unrestricted access.<sup>169</sup>

*c) Additional Protections in the Legislation at Issue*

The URAA includes none of the supplemental First Amendment protections found in the CTEA. In *Eldred*, the Supreme Court found that First Amendment review of the CTEA was not necessary, in part, because the CTEA provides additional protections beyond those built in to copyright, including exceptions for libraries and exemptions from licensing-fees for small businesses.<sup>170</sup> The URAA, on the other hand, provides only a safe harbor provision that allows a party receiving notice of the restoration of the copyright to continue use of the work for a limited time.<sup>171</sup>

The Tenth Circuit thus held that Section 514 of the URAA alters the "traditional contours" of copyright law by removing works from the public domain.<sup>172</sup> Further, the factors that led the Supreme Court in *Eldred* to determine that the CTEA did not infringe upon the First Amendment were not

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164. *Id.* at 1195.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Eldred v. Ashcroft*, 537 U.S. 186, 220-21 (2003).

171. 17 U.S.C. § 104A(d)(2) (2000).

172. *Golan*, 501 F.3d at 1187-88.

present with the URAA and the *Golan* plaintiffs.<sup>173</sup> The Tenth Circuit remanded for First Amendment scrutiny of Section 514 by the district court.<sup>174</sup> The Tenth Circuit summarily rejected the Government's petition for rehearing en banc on January 4, 2008.<sup>175</sup>

#### IV. Discussion

##### A. The Circuit Split

Since the Supreme Court's decision in *Eldred*, courts have widely accepted that new copyright legislation and changes to existing copyright legislation are subject to First Amendment scrutiny where they fall within copyright's "traditional contours."<sup>176</sup> Nonetheless, two conflicting readings of the *Eldred* "traditional contours" standard have arisen among the circuit courts. In cases involving First Amendment challenges to copyright laws based on *Eldred*, those challenging the law have consistently asserted that "traditional contours" means just that—the longstanding, established form of copyright law.<sup>177</sup> In opposition, the government consistently argues that "traditional contours" includes only copyright's two built-in First Amendment safeguards, and thus, *Eldred* requires First Amendment review of copyright legislation if *and only if* it alters either the idea/expression dichotomy or the fair use doctrine.<sup>178</sup>

The Tenth Circuit in *Golan* agreed with the interpretation of the challengers, finding that "the term [traditional contours] seems to refer to something broader than copyright's built-in free speech accommodations."<sup>179</sup> The Tenth Circuit defined the term to include the "bedrock principle[s]" founded upon the general form or structure of copyright protection from both a functional and historical perspective.<sup>180</sup>

In contrast, the Ninth Circuit accepted the government's position in *Kahle v. Gonzales*.<sup>181</sup> The *Kahle* plaintiffs challenged the Copyright Renewal Act of

173. *Id.* at 1188.

174. *Id.* at 1196.

175. *Golan v. Mukasey*, No. 05-1259 (10th Cir. Jan. 4, 2008), available at <http://lessig.org/blog/Rehearing-denied.pdf>.

176. See *Golan*, 501 F.3d at 1184; *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007), cert. denied, 128 S. Ct. 958 (2008); *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004), *aff'd on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

177. See Reply to Brief in Opposition at 4, *Kahle v. Mukasey*, 128 S. Ct. 958 (No. 07-189), 2007 WL 4340897.

178. E.g., Brief for the Appellees, *supra* note 127, at 23-27.

179. *Golan*, 501 F.3d at 1189.

180. *Id.* at 1187, 1189.

181. 487 F.3d 697; see also *Luck's Music Library*, 321 F. Supp. 2d at 119 (accepting the

1992 (CRA),<sup>182</sup> which eliminated the renewal requirement for the extended protection afforded to works created between 1964 and 1977.<sup>183</sup> The plaintiffs asserted that the change from discretionary to automatic renewal of copyrights—from an opt-in to an opt-out system—altered the “traditional contours of copyright [protection]” and thus requires First Amendment review.<sup>184</sup> The *Kahle* court, however, rejected the characterization of the CRA as a change from an opt-in to an opt-out system.<sup>185</sup> Instead, taking a more liberal approach, the Ninth Circuit characterized the CRA as merely a tool for bringing the protection afforded to older works into parity with the protection afforded to newer works under the CTEA.<sup>186</sup> In doing so, the court was able to frame the challenge in *Kahle* to bring it under the purview of its own interpretation of *Eldred*, and it held that copyright laws intending to bring older works into parity with newer works are permissible without First Amendment review. In so holding, the Ninth Circuit accepted the government’s position that *Eldred* requires First Amendment scrutiny only where the traditional First Amendment safeguards are altered. The Tenth Circuit’s holding in *Golan* came in direct contrast to this decision.

#### B. The Route to Resolution

On January 4, 2008, two separate decisions of importance were handed down. Most directly, the Tenth Circuit in *Golan v. Mukasey* denied the Government’s motion for rehearing en banc.<sup>187</sup> In the motion, the Government relied on its position that *Eldred* calls for First Amendment review only where Congress alters either the idea/expression dichotomy or the fair use doctrine, and asserted that the panel decision was in error in finding otherwise.<sup>188</sup> This motion is the most thorough exposition of the government’s interpretation of the *Eldred* standard to date.

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Government’s position that *Eldred*’s “traditional contours” include only the idea/expression dichotomy and the fair use doctrine).

182. Pub. L. No. 102-307, 1992 U.S.C.C.A.N. (106 Stat. 264) 756 (altering the copyright system to eliminate the renewal requirement for works created between 1964 and 1977).

183. *Kahle*, 487 F.3d at 699.

184. *Id.*

185. *Id.* at 700.

186. *Id.*

187. No. 05-1259 (10th Cir. Jan. 4, 2008), available at <http://lessig.org/blog/Rehearing.denied.pdf>.

188. Appellees’ Petition for Rehearing and Rehearing En Banc, *Golan v. Mukasey*, No. 05-1259 (10th Cir. 2007), available at <http://cyberlaw.stanford.edu/system/files/Golan+Response+to+Govt+Petition+for+Rehearing.pdf>.

On the same day, in *Kahle v. Mukasey*, the United States Supreme Court denied the plaintiffs' petition for writ of certiorari.<sup>189</sup> The petitioners framed the appeal around the circuit split created by *Golan* on the issue of whether *Eldred*'s "traditional contours" include more than just copyright's built-in First Amendment safeguards.<sup>190</sup> The Government offered two arguments in response.<sup>191</sup> First, it argued that although *Golan* created a "tension" among the circuits, the panel misinterpreted *Eldred* and the split would be resolved upon rehearing en banc.<sup>192</sup> Second, the Government argued that "[w]hile the results and reasoning of the two decisions are in tension, there is no actual conflict" because the courts were reviewing two separate laws, the URAA and the CRA.<sup>193</sup> Thus, in essence, the Government argued that although the circuits provided conflicting and incompatible definitions of "traditional contours," there was no conflict, and it is acceptable to apply *Eldred* in a new way in every situation. The latter argument is unconvincing, and would likely carry little weight with the Supreme Court, as it is beyond question that the *Eldred* standard, like any judicial standard, should be applied consistently. In response, the *Kahle* petitioners asked the Court, at a minimum, to hold the petition for certiorari until the Tenth Circuit resolved whether to grant a petition for rehearing.<sup>194</sup> Somewhat ironically, the Supreme Court denied certiorari on the same day the Tenth Circuit denied rehearing.

These decisions set the stage for Supreme Court review of the decision in *Golan*. Although the challenge in *Kahle* examining the change from an opt-in to an opt-out system certainly provided a clearer framing of the issue, the Tenth Circuit's refusal of rehearing en banc entrenches the issue and removes the obstacle argued by the Government in opposition to certiorari in *Kahle*.

Two potential paths exist for the split to reach the Supreme Court. First, the Tenth Circuit's remand could proceed from a decision by the district court to an inevitable appeal to the Tenth Circuit and finally to the Supreme Court to resolve the issue. Alternatively, the Government could directly appeal the decision of the Tenth Circuit by arguing that removal of works from the public domain is an alteration of the "traditional contours" of copyright protection.

For the plaintiffs, the most desirable outcome would naturally be for the decision in their favor at the Tenth Circuit to stand and for the case to proceed to the district court for First Amendment review. Nonetheless, the alternative

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189. 128 S. Ct. 958 (2008).

190. Reply to Brief in Opposition, *supra* note 177, at 1.

191. Brief for the Respondent in Opposition, *Kahle v. Mukasey*, 128 S. Ct. 958 (No. 07-189), 2007 WL 4218439.

192. *Id.* at 12-13.

193. *Id.* at 13.

194. Reply to Brief in Opposition, *supra* note 177, at 8-9.

result of a direct appeal to the Supreme Court of the Tenth Circuit's interpretation of the *Eldred* "traditional contours" standard has its own advantages. Although Supreme Court review would be somewhat undesirable to the plaintiffs themselves because in the short run it places the ground gained in jeopardy, direct review would have advantages for the proponents of copyright reform whom the plaintiffs represent. A decision by the Supreme Court affirming the *Golan* challengers' interpretation of *Eldred* would pave the way for further challenges to existing copyright laws and place a real limitation on Congress's future legislation.

For the Government, the manner in which the case proceeds is significantly more critical. Although the Government would hope to successfully defend the constitutionality of the URAA in its present form, its arguably more pressing concern lies in the precedent established by *Golan*. The definition of "traditional contours" provided by *Golan* calls into question the constitutionality of other copyright legislation and thus encourages further challenges. For example, the unsuccessful challenge to the Copyright Renewal Act of 1992 made in *Kahle* would be given a new life in the Tenth Circuit,<sup>195</sup> as the opt-in nature of the system was a defining characteristic of the United States copyright regime for 186 years, from the first Copyright Act of 1790 through the Copyright Act of 1976. The opt-in system would almost certainly be deemed a "traditional contour." This is especially likely in light of the same finding in *Golan* with regard to the relatively less central principle that works in the public domain cannot be copyrighted.<sup>196</sup> Thus, the goal of the Government must be not just to win the case, but to win the case in a way that overturns the precedent of the Tenth Circuit's opinion in *Golan*.

The Government's delicate objective makes it a dangerous proposition for the case to reach the district court. If the Government were to win at the district court level—that is if the URAA were to survive First Amendment scrutiny—then the Government would lack standing to appeal, and although the URAA survives, so does the precedent of the Tenth Circuit's opinion.<sup>197</sup> If the Government was to lose at the district court, it would have the opportunity to argue on appeal that the Tenth Circuit interpreted the *Eldred* standard incorrectly and that First Amendment review was unnecessary. Yet, in such circumstances, the issue they would seek to appeal, whether First

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195. *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007).

196. *Golan v. Gonzales*, 501 F.3d 1179, 1192.

197. In this scenario, the possibility exists that the plaintiffs could appeal a loss at the district court level through to the Supreme Court, where the Government would have the opportunity to argue in the alternative that, even if the Court finds the URAA does not withstand First Amendment scrutiny, under the *Eldred* standard First Amendment review was nonetheless not appropriate. This argument however is both awkward and unlikely to be successful.



Amendment review was even necessary, would be seriously muddled. The Tenth Circuit would be asked to find that First Amendment scrutiny was not proper for a piece of legislation that had already been found to unconstitutionally infringe on the First Amendment.

Instead, the Government will likely, and most prudently, appeal the decision of the Tenth Circuit directly. Such action preserves the issue for the Government as a pure *de novo* review of an isolated legal issue—whether the “traditional contours of copyright protection” include more than the built-in First Amendment safeguards. Although the Government will certainly argue in the alternative that even under the *Golan* court’s definition of “traditional contours” First Amendment review is unnecessary, this argument is likely to fail and the Government’s case hinges victory on the former issue.

A Government petition for certiorari to the Tenth Circuit’s decision would likely be successful. The arguments made in support of the grant of certiorari by the petitioners in *Kahle*<sup>198</sup> remain equally applicable to *Golan*.<sup>199</sup> As Congress repeatedly acts to rebalance the interests at play in copyright law in order to facilitate the rapid changes of a digital world, proper application of the *Eldred* rule is vital to ensure that Congress can effectively operate within the boundaries of the Constitution.<sup>200</sup> Further, what the Government characterizes as merely “tension” among the circuits at the time of the *Kahle* petition has matured in to a complete circuit split. Thus, as similar copyright challenges will continue to be made to different statutes, further guidance from the Supreme Court is needed.

#### V. A Suggestion on the Proper Resolution of the Circuit Split

The “traditional contours of copyright protection” include not only the idea/expression dichotomy and the fair use doctrine, but also all other “contours” within the historical structure of copyright law. This conclusion becomes clear for four reasons: (1) the interpretation is clearly supported by the language of *Eldred*; (2) the alternative interpretation is incompatible with the plain language of *Eldred*; (3) adoption of the alternative position advanced by the Government would produce absurd results; and (4) the Supreme Court explicitly rejected the alternative interpretation as adopted by the D.C. Circuit Court in *Eldred* below.

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198. Petition for Writ of Certiorari, *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (No. 07-189), 2007 WL 2323450.

199. *Golan*, 501 F.3d 1179.

200. Petition for Writ of Certiorari, *supra* note 198.

*A. The Plain Language of Eldred Supports the Tenth Circuit's Interpretation*

The language of the *Eldred* decision is the most apparent support for the view that the “traditional contours” include more than just copyright’s two built-in First Amendment safeguards. A clear reading of the standard provided in *Eldred* can be accomplished by breaking it down into its components. First, the purpose of *Eldred* is to ensure an effective balance between protection of the First Amendment from copyright and appropriate deference to Congress in exercising its copyright power. *Eldred* achieves this by identifying the dangers faced by the First Amendment and addressing them with an appropriate level of protection in proportion to the level of risk involved.<sup>201</sup>

*Eldred* recognizes two levels of danger that the First Amendment may face from copyright—a relatively high level of danger and a relatively low level of danger. To determine what level of danger is faced from a particular copyright law, the Supreme Court provided that where Congress alters the “traditional contours of copyright protection” the First Amendment faces a relatively high level of danger; otherwise, copyright’s built-in safeguards are “generally adequate,” and the First Amendment faces a relatively low level of danger.<sup>202</sup> In providing that copyright’s built-in First Amendment safeguards are “*generally adequate*” to address the concerns faced, the *Eldred* Court creates the clear inference that normally the First Amendment will face a relatively low level of danger.<sup>203</sup> Yet, “*generally adequate*” also implies that in certain situations the built-in safeguards will not be sufficient on their own to protect the First Amendment. In these situations, the First Amendment faces a relatively high level of danger from copyright. This division makes sense; in light of the longstanding historical balance between First Amendment and copyright interests, congressional action within that traditional balance raises no real alarms, but once Congress transgresses that balance, the assurances of tradition are no longer present.

In order to ensure both proper deference to Congress and sufficient protection of the First Amendment, *Eldred* provides for two separate levels of protection corresponding to the two levels of danger potentially faced.<sup>204</sup> The first level of protection is copyright’s historical structural balance, including the built-in First Amendment safeguards.<sup>205</sup> The Court recognized this safeguard as generally adequate to address the relatively low level of danger

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

202. *Id.* at 221.

203. *Id.* (emphasis added).

204. *Eldred*, 537 U.S. 186.

205. *Id.* at 219-20.

when Congress works within the bounds of tradition.<sup>206</sup> The second level of protection comes in the form of First Amendment judicial scrutiny. The court finds this safeguard necessary to address the relatively high level of danger when Congress disrupts copyright's historical balance—that is, alters the “traditional contours of copyright protection.”<sup>207</sup>

This explanation illustrates the system set forth by the *Eldred* court; however, neither the Government, nor the collective plaintiffs dispute that First Amendment review is necessary where Congress alters the “traditional contours” of copyright protection. The conflict arising initially between the Government and the plaintiffs, and now between United States circuit courts, is over what the definition of “traditional contours” includes. Nevertheless, an understanding of the system remains valuable because a proper understanding of the details of the *Eldred* process leaves only one coherent definition of “traditional contours.”

The confusion in interpreting the standard set forth in *Eldred* seems to stem from the Government's ignorance of—and the collective plaintiffs' failure to emphasize—the fact that the built-in First Amendment safeguards serve two independent roles. The built-in First Amendment safeguards serve as “traditional contours of copyright protection,” as they are certainly a part of the structure of copyright law; however, in the *Eldred* standard, the role of the safeguards as a part of the “traditional contours” is only secondary. First and foremost, the idea/expression dichotomy and the fair use doctrine serve within the *Eldred* system as the First Amendment's front-line, and where the dangers are low, the only line of protection. This recognition—that the built-in First Amendment safeguards' primary role is as a protective measure—is vital to a proper interpretation of the language of *Eldred*. Recognizing that the Government fails to see both facets reveals how it came to the erroneous determination that the safeguards alone constitute the “traditional contours.” That is, the Government seems to read the issue in *Eldred* as whether the protection of First Amendment review of the CTEA is necessary. Recognition of the real question answered by the *Eldred* Court—not whether, but how much protection is necessary to guard First Amendment interests—reveals the error of the Government's interpretation. That the latter is the proper characterization of the issue is clear from the language of the *Eldred* Court itself. In fact, the Court based its conclusion that First Amendment review is unnecessary on its finding that copyright's built-in First Amendment safeguards, functioning in their role as a protective measure, provided

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206. *Id.* at 221.

207. *Id.*

adequate protection with regard to the CTEA, thus making the further protection of judicial scrutiny unnecessary.<sup>208</sup>

The Government's interpretation of "traditional contours" is based on an improper assumption. The Government erroneously contends that the Supreme Court's thorough discussion of copyright's built-in safeguards in the three pages prior to setting forth the "traditional contours" standard suggests that the "traditional contours" include only these safeguards. The assumption that the Court's discussion is an exposition of the "traditional contours" standard, however, is improper. In light of the real question faced by the Court—how much protection is necessary—the Court's thorough discussion of the built-in safeguards becomes visible for what it is: a discussion of why the built-in safeguards offer sufficient protection in the case of the CTEA such that First Amendment judicial review is unnecessary. The "traditional contours" language that follows the Court's discussion of the safeguards is in fact used to express a different proposition all together. That is, the discussion of copyright's built-in safeguards is offered to show that those safeguards are sufficient in the present case. In contrast, the "traditional contours" language is used not to resolve the *Eldred* case itself, but instead to recognize that although not necessary in the present case, First Amendment review could be necessary in other cases.

*B. The Ninth Circuit's Interpretation Would Frustrate the Purpose Behind Eldred*

The purpose of the *Eldred* Court, in establishing the "traditional contours" standard, would be frustrated under the Government's interpretation of "traditional contours." The Court's purpose was to ensure that Congress is accorded the appropriate level of deference with regard to copyright law while still providing the First Amendment sufficient protection against infringement.

The *Eldred* Court achieves this purpose by recognizing that the traditional structure of copyright law creates a balance between the interests of copyright and the interests of the First Amendment, and that this balance generally provides an adequate level of protection to the First Amendment such that intrusive judicial review can often be avoided. This balance operates in the *Eldred* Court's standard to justify not requiring First Amendment scrutiny. If the balance was disrupted, one would expect that First Amendment scrutiny would then be required. This is precisely what the *Eldred* Court provides by holding that the balance is disrupted and thus First Amendment scrutiny is required whenever Congress alters the "traditional contours of copyright

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208. *Id.*

protection.”<sup>209</sup> Because the Court’s intention for the “traditional contours” standard is to define when the balance between copyright and the First Amendment is disrupted, it follows that any definition of “traditional contours” would have to be broad enough to effectuate this purpose. That is, any change in copyright law that displaces the balance must necessarily be one that alters the “traditional contours of copyright protection.” If this was not the case, situations would exist where Congress could change copyright in a way that disrupted the balance of interests, thereby eliminating the Court’s original justification for not requiring First Amendment review, yet still not be subject to First Amendment review. Such an interpretation could not be the intention of the *Eldred* Court, yet this is precisely what the Government argues and the Ninth Circuit has accepted.

For example, prior to the Copyright Act of 1976, a work had to be published to be eligible for copyright protection. This requirement certainly played a role in ensuring the balance between copyright and the First Amendment. The requirement of publication functioned to “guarantee that new ideas, or new expressions of old ideas, would be accessible to the public” and thus free expression would be encouraged with more content to express.<sup>210</sup> The Copyright Act of 1976 eliminated this requirement.<sup>211</sup> Because the balance of interests was disrupted, the guarantees of tradition are no longer present and the logic of *Eldred* requires First Amendment review. Therefore, in order to fulfill the purpose of *Eldred*, the definition given to “traditional contours” should produce this result. This is precisely the result produced by the interpretation of *Eldred* by the Tenth Circuit, as the publication requirement would certainly be found to be a “traditional contour.” In contrast, the interpretation accepted by the Ninth Circuit would frustrate the purpose of *Eldred* as the publication requirement, although a vital part of the definitional balance, would not be found to be a “traditional contour” as it is not one of the two built-in First Amendment safeguards. Despite upsetting the First Amendment copyright balance, the law would not be subject to First Amendment review under the Government’s interpretation of *Eldred*.

*C. The Eldred Court Expressly Rejected the Government’s Position as Held by the D.C. Circuit Court Below*

Not only does the plain language and purpose of *Eldred* reveal that the Government’s interpretation is incorrect, but the Supreme Court has also expressly rejected the same proposition made by the D.C. Circuit in deciding

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209. *Id.*

210. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).

211. Copyright Act of 1976, 17 U.S.C. § 104 (2000).

*Eldred* below. The D.C. Circuit found that “copyrights are categorically immune from challenges under the First Amendment.”<sup>212</sup> Although this language suggests the D.C. Circuit thought copyright completely immune, the court went on to clarify that this immunity protects Congress in those instances where the copyright legislation regulates “works on the latter half of the ‘idea/expression dichotomy’ [i.e., expressions] and makes them subject to fair use . . . [as] [t]his obviates further inquiry under the First Amendment.”<sup>213</sup> In other words, the D.C. Circuit found that copyright legislation must not undergo First Amendment review so long as the traditional built-in safeguards are not changed. The Supreme Court expressly rejected this position on review, writing: “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.”<sup>214</sup> Thus, the D.C. Circuit held that First Amendment review is only necessary when copyright’s built-in safeguards are changed, and the Supreme Court rejected that holding as limiting First Amendment review to too narrow of circumstances. Not only does the Government in *Golan* now argue a position firmly rejected by the *Eldred* Court—that First Amendment review is only necessary for changes to copyright’s built-in safeguards—but it also asserts that argument in reliance on the precise language that the Supreme Court previously used to reject it in *Eldred*—“the traditional contours of copyright protection.” In essence, the Government’s argument is that, although the Supreme Court previously rejected this position, the proposition they replace it with means the same thing.

*D. The Interpretation of Eldred Accepted by the Ninth Circuit Produces Absurd Results*

Under the Government’s interpretation of *Eldred*, where the only grounds giving rise to First Amendment scrutiny are alterations to the idea/expression dichotomy or the fair use doctrine, copyright law would be immunized from First Amendment review in many irrational situations. The Government’s interpretation of *Eldred* would effectively permit Congress to censor at will by couching its action as copyright law. For example, suppose Congress passed a law removing from copyright protection all works expressing partisan political ideas. Congress could provide the rationale that partisan ideas create conflict and that discouraging such works would lead to a more peaceful

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212. *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001).

213. *Id.* at 376.

214. *Eldred*, 537 U.S. at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).

society. Under the *Golan* court's interpretation of *Eldred*, such a law would certainly alter the "traditional contours of copyright protection." Yet, despite the law's blatant chilling of political speech, the law would not be subject to First Amendment review under the Government's interpretation of *Eldred*, as it alters neither the idea/expression dichotomy nor the fair use doctrine. The *Golan* plaintiffs themselves made similar arguments in opposition to rehearing en banc, providing the example of Congress passing a law prohibiting copyright protection for hate speech or removing copyright protection from works by convicted criminals.<sup>215</sup> No court would exempt such a law from First Amendment review,<sup>216</sup> yet such a law would not be subject to scrutiny under the Government's interpretation of *Eldred* because neither alters the built-in safeguards. Clearly, such outrageous results could not be the intention of the Supreme Court.

#### VI. Conclusion

Two-hundred and twenty years ago, the Framers feared copyright as a dangerous monopoly, accepted only as necessary for the development of a rich public domain. Today, not fear, but fondness motivates Congress in the area of copyright. Little pretense remains that copyright is but a means to the enrichment of the public domain; instead, copyright appears to exist as an end in itself. It is thus appropriate that free expression, the right with the most to lose, stands as the greatest defense against neglect of the public domain. Where copyright is "the engine of free expression,"<sup>217</sup> the public domain is its fuel. As Congress's copyright policy continues to press at the public domain, *Golan v. Gonzales* is a signal that the First Amendment has begun to press back.

*J. Blake Pinard*

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215. Appellants' Response to Appellees' Petition for Rehearing and Rehearing En Banc at 7-8, *Golan v. Mukasey*, No. 05-1259 (10th Cir. 2007), available at <http://cyberlaw.stanford.edu/system/files/Golan+Response+to+Govt+Petition+for+Rehearing.pdf>.

216. Cf. *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377 (1992) (striking hate speech statute); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating law that regulated an accused or convicted criminal's income from works describing the crime).

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