Golan v. Holder: Public Domain Free Use Prevails Over Copyright Restoration of Foreign Works

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I. Overview

Recent developments in U.S. copyright law reflect the tenuous nexus of international treaty obligations, the domestic implementation of foreign agreements, and the First Amendment.[1] Specifically, the current conflict between the bedrock principle that works in the public domain are subject to free use and the passage of Section 514 of the Uruguay Round Agreements Act ("URAA")[2] in 1994, which restores copyright in works by foreign authors that have fallen into the public domain in the U.S., is the focal point of the inquiry.[3]

Plaintiffs, a group of artists and businesses that rely upon the use of works in the public domain, originally brought suit in the U.S. District Court for the District of Colorado challenging Section 514 of the URAA and the Copyright Term Extension Act of 1998 ("CTEA") under both the First Amendment and the Copyright Clause of the U.S. Constitution.[4] Plaintiffs claimed that

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

[2] Pub. L. No. 103-465,108 Stat. 4809

[3] Id.

[4] Id. at 1167.

the royalty fees imposed on the use of works that were removed from the public domain by Section 514 of the URAA were essentially prohibitive and violated their First Amendment right to free expression.[5] The district court granted summary judgment for the Government on both claims, and Plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit.[6] Although the Tenth Circuit affirmed the rulings as to Plaintiffs' CTEA and URAA Copyright Clause claims, the court reversed the district court's determination as to the challenge of Section 514 of the URAA under the First Amendment, holding that the copyright restoration of foreign works interfered with the Plaintiffs' freedom of expression in using works previously in the public domain.[7]

The Tenth Circuit remanded with instructions to assess whether Plaintiffs' "reliance interest" in using foreign works that were previously in the public domain passed First Amendment scrutiny.[8] On remand, the U.S. District Court for the District of Colorado held that Section 514 of the URAA was substantially broader than necessary to achieve the Government's interest and violated the First Amendment by suppressing the right of the "reliance party" Plaintiffs to use works that were previously in the public domain. Golan v. Holder, 611 F.Supp.2d 1165 (D. Colo. 2009).

II. Background

Section 514 of the URAA, as codified at 17 U.S.C. § 104(A), restores the U.S. copyrights in the works of foreign authors who lost those rights to the public domain for any reason other

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[5] Id. at 1168.

[6] Id. at 1167.

[7] Id.

[8] Id.

than the expiration of the copyright term.[9] In order to be eligible for restoration, the "restored work" must be an original work of authorship that is still under copyright in its country of origin, but is in the public domain in the U.S. due to noncompliance with procedural formalities such as failure of renewal and lack of proper notice.[10] The statue also stipulates the effective date of restoration is January 1, 1996, and provided that the source countries of the foreign work are parties to the Berne Convention or WTO.[11]

Section 514 of the URAA vests renewed copyright protection in a foreign work in the public domain, and the statutory codification provides that the restored copyright shall subsist for the remainder of the copyright term that would otherwise have been granted in the U.S. if the work had never entered the public domain.[12] The party seeking restoration of a foreign work may file a notice of intent to enforce the copyright with the copyright office, and may also serve a notice of intent on "reliance parties" who had been freely utilizing the newly restored work when it was in the public domain.[13] With regards to derivative works created by the reliance parties before the restoration of the foreign copyright, the statue provides that the reliance party may continue to exploit the derivative work if he pays "reasonable compensation" to the owner of the restored copyright.[14]

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[9] Id.

[10] 17 U.S.C. §§ 104A(6)(B) – (C)(I).

[11] 17 U.S.C. § 104(A)((h)(2)(A).

[12] 17 U.S.C. § 104(A)(a)(1)(B).

[13] 17 U.S.C. §§ 104(A)(e)(1)-(2).

[14] 17 U.S.C. § 104(A)(d)(3)(A)(ii).

Congressional implementation of Section 514 of the URAA was in compliance with Article 18 of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), an international agreement that obligates member countries to afford the same copyright protection to foreign authors as they provide their own domestic authors.[15] The Berne Convention consists of 88 member countries, and requires its members to establish minimum standards for copyright protection, originally defined as the author's life plus 50 years, by implementing national implementation.[16] The Berne Convention also provides that member states may determine the "conditions of application" of the minimum standards principle and other obligations.[17] Although the Berne Convention was drafted in 1886, the U.S. did not accede

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[15] Golan v. Gonzales, 501 F.3d 1179, 1182 (10th Cir. 2007). Article 18 of the Berne Convention provides, in pertinent part:

> (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 the protection is claimed, that work shall not be protected anew[.].

Berne Convention for the Protection of Literary and Artistic Works art. 18(1)-(2), May 4, 1896, CITATION.

[16] Martin D.H. Woodward, TRIPS and NAFTA'S Chapter 17: How Will Trade-Related Multilateral Agreements Affect International Copyright?, 31 TEX. INT'L L.J. 269, 271 (1996).

[17] Berne Convention At. 18(3) Provides:

> (3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

to the agreement until over 100 years later, when Congress passed the Berne Convention Implementation Act[18] in 1988.[19] The URAA was drafted by the negotiators of the General Agreement on Tariffs and Trade (GATT) in 1993, which included an agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs).[20] The TRIPs Agreement was an annex to the agreement creating the World Trade Organization (WTO), and obligates all WTO members to comply with the substantive obligations of the Berne Convention.[21] President Clinton signed on to the WTO in 1994, and the URAA was introduced soon afterward to bring the U.S. in compliance with the Berne Convention.[22]

In the noted case, each Plaintiff performed or used works by foreign artists in the public domain, such as Sergei Prokofiev's "Peter and the Wolf," for his or her livelihood.[23] The named Plaintiff, Lawrence Golan, performs and teaches work by the Russian composers Dmitri Shostakovich and Igor Stravinski.[24] Plaintiff John Blackburn had specifically created a derivative work based on Shostakovitch's *Symphony No. 5* for a high school band to perform at an event

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[18] Pub. L. No. 100-568, 102 Stat. 2853.

[19] GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 540 (2nd ed. 2008).

[20] Id.

[21] Trade-Related Aspects of Intellectual Property Rights Art. 9(1).

[22] Volume 60, Number 27 of the Federal Register for Thursday, February 9, 1995 (pp. 7793-7795).

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

[24] Id.

commemorating the events of September 11, 2001.[25] Plaintiffs originally brought suit in the U.S. District Court for the District of Colorado in 2004, claiming that Section 514 of the URAA and the CTEA, which extended the copyright protection term from 50 years to 70 years after the death of the author, violated both the First Amendment and the Copyright Clause of the U.S. Constitution.[26] Plaintiffs essentially claimed that the passage of the URAA, in conjunction with the automatic extension of copyright duration for foreign authors granted by the CTEA, imposed prohibitive performance fees, sheet music rentals, and royalties that implicated their First Amendment interest in using works that were previously in the public domain.[27]

First, the district court held that the copyright term extension under the CTEA did not violate the "limited times" provision of the Copyright Clause[28] or the Plaintiffs' First Amendment rights, stating that the Supreme Court's landmark decision in Eldred v. Ashcroft precluded the Plaintiffs' claims.[29] In Eldred, the Court held that the "limited times" provision did not restrict Congress from extending copyright terms under the CTEA and dismissed Plaintiffs' claim that the extension created "perpetual copyrights."[30] The Court stated that a key factor in

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[25] Id. at 1193.

[26] Golan v. Ashcroft, 310 F.Supp.2d 1215, 1216-1221 (D.Colo. 2004).

[27] Golan v. Gonzales, 501 F.3d at 1182.

[28] U.S. Const. Art. 1, §8, cl. 8 empowers Congress "To promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (emphasis added).

[29] Golan v. Ashcroft, 310 F.Supp.2d at 1218.

[30] Eldred v. Ashcroft, 537 U.S. 186, 189 (2002).

the passage of the CTEA was a 1993 European Union Directive[31] instructing EU members to establish a baseline copyright term of author's life plus 70 years, and to deny this extended protection to any non-EU country whose laws did not secure this term.[32] The Court held that the passage of the CTEA was within the legislative authority conferred by the Copyright Clause, stating that Congress sought to ensure that U.S. authors secured equal copyright protection in Europe by conforming to the EU Directive's baseline term.[33] The Court further held that the CTEA did not violate the Plaintiffs' First Amendment rights, stating that the fair use defense[34] and the subject matter restrictions on copyrightable material[35] are "built-in" statutory accommodations in copyright law that sufficiently protect free speech expression.[36]

In addition, the district court held that the implementation of the foreign works copyright restoration under Section 514 of the URAA brought domestic U.S. law in compliance with Article 18 of the Berne Convention, and was rationally related to the Congress' constitutional authority to "Promote the Progress of Science and the Useful Arts" under the Copyright Clause.[37] The court also granted summary judgment for the Government on the Plaintiff's First

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[31] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, Official Journal L 290 , 24/11/1993 P. 0009 – 0013.

[32] Id. at 188.

[33] Id.

[34] 17 U.S.C. § 107.

[35] 17 U.S.C. § 102(b). Insert idea/expression dichotomy.

[36] Eldred, 537 U.S. at 190.

[37] Golan v. Gonzales, 2005 WL 914754 at *15 (D.Colo. 2005).

Amendment challenge to the URAA.[38] The court rejected the Plaintiffs' claims that the royalty fees imposed on use of the restored works were prohibitive of free expression, reasoning that that the Plaintiffs could contract with the copyright owners for permission to use the restored works.[39]

On appeal, the Tenth Circuit affirmed the district court's dismissal of Plaintiffs' CTEA claims and the grant of summary judgment for the Government on the challenge to the Section 514 of the URAA under the Copyright Clause.[40] However, the Tenth Circuit reversed the district court's determination that Plaintiffs did not have a First Amendment interesting in using works in the public domain, stating that Section 514 of the URAA "arguably hampers free expression and undermines the values the public domain is designed to protect."[41]

First, the Tenth Circuit stated that Section 514 of the URAA contravened the "bedrock" principle that works in the public domain belong to the public and may be freely used without attribution.[42] Citing the Eldred decision, which stated that First Amendment review is necessary when Congress has "altered the traditional contours of copyright protection," the Tenth Circuit held that the right of any individual to freely use work in the public domain was a traditional

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[38] Id. at *16-17.

[39] Id.

[40] Golan v. Gonzales, 501 F.3d at 1197.

[41] Id. at 1194-94.

[42] Id. at 1192. (citing Dastar Corp. v. Twentieth Century Fox Film Corp, 539 U.S. 23, 33-34 (2003) "[O]nce the...copyright monopoly has expired, the public may use the ...work at will and without attribution.").

contour of copyright that was fundamentally altered by the restoration provisions of the URAA.[43] Essentially, the court held that each member of the public is vested with an interest in the expressive use of material in the public domain, and that the restoration of copyrights to foreign authors under Section 514 of the URAA interfered with Plaintiffs' First Amendment rights.[44] The court noted that the Plaintiffs had performed, created derivative works, and planned future performances of the newly copyrighted foreign works in reliance of their rights to freely use material in the public domain.[45]

The Tenth Circuit also held that the "built in" safeguards for free expression in copyright law, the restrictions on copyrightable subject matter and the fair use defense, did not sufficiently protect the Plaintiffs' First Amendment interests.[46] The court reasoned that the subject matter limitation protected free speech interests by requiring that only original expressive material, and not facts, are eligible for copyright protection, thereby preventing a copyright holder from gaining a limited monopoly over an idea.[47] The Tenth Circuit held that this protection was not applicable because the threat to free expression in the Plaintiffs' case was not dependant upon the content of the works, but instead the fact that the URAA removed works from the public domain.[48]

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[43] Id. at 1192-94.

[44] Id. at 1194.

[45] Id. at 1193.

[46] Id. at 1194-96.

[47] Id. at 1194.

[48] Id.

The court also held the fair use defense was insufficient to protect Plaintiffs' First Amendment interest because the doctrine only allows limited use of copyrighted works, and does not address works that have entered into the public domain and are subject to unrestricted public use.[49] The Tenth Circuit noted that the distribution of rights between the author and the public exists only during the duration of the copyright term, and that once a work has passed into the public domain, neither the author nor his estate possesses any more right to the work than a member of the general public.[50] The court stated that Section 514 of the URAA withdrew foreign works from the public domain, and that the limited access allowed now afforded to the Plaintiffs under the fair use doctrine may not be an "adequate substitute" for the unlimited access enjoyed before the passage of the URAA.[51]

The Tenth Circuit informed this analysis by discussing the implementation of Article 18 of the Berne Convention in other signatory states, and acknowledging that other countries had made specific accommodations for "reliance party" plaintiffs to continue using restored works despite the renewed copyrights provided under the convention.[52] Specifically, the court stated the copyright statutes in the U.K., Australia, Canada, India, and New Zealand explicitly define a "reliance party" as any person who "incurs or has incurred any expenditure or liability in connection, or the purpose of or with a view to doing of an act which at the time is not or was not an act restricted by any copyright in the work."[53] The Tenth Circuit also noted that the British,

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[49] Id. at 1195.

[50] Id.

[51] Id.

[52] Id. at 1197, fn.5.

[53] Id.

Canadian, Australian, and Indian copyright regimes allowed the reliance party to continue using the works that it had made or incurred commitments to make before the copyright is restored, provided that the newly restored copyright owner may "buy out" the reliance party's rights in an amount to be determined by negotiation or arbitration.[54]

In contrast, the domestic implementation of Article 18 of the Berne Convention in the U.S. by the passage of the URAA provides that the reliance party may only use the work for one year after receiving notice of the restored copyright, and a party may not continue to use a work if notice is not given.[55] The Tenth Circuit stated that the survey of other country's implementations of Article 18 of the Berne Convention suggests that the United States could comply with the Berne Convention through less restrictive means, namely by taking account of parties who had relied on the public domain status of the newly restored works under the URAA.[56]

The Tenth Circuit remanded, instructing the district court to assess whether the Section 514 of the URAA was a content-based or content-neutral restriction on Plaintiffs' First Amendment "reliance interest" in using foreign works that were previously in the public domain.[57] If the district court found the restoration provision was content-based, the court must assess whether the passing of the URAA served a "compelling" legislative interest, and if the government could achieve the same ends through less restrictive means.[58] Alternatively, if the

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[54] Id.

[55] See 17 U.S.C. § 104(A)(d)(2), Luck's Music

[56] Golan v. Gonzales, 501 F.3d at 1197, fn. 5.

[57] Id. at 1196.

[58] Id. (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000)).

district court found Section 514 of the URAA to be a content-neutral, the court must determine whether the foreign copyright restoration provision enacted by Congress in compliance was narrowly tailored to serve a significant government interest of complying with Article 18 of the Berne Convention.[59]

III. The Court's Decision

In the noted case, the U.S. District Court for the District of Colorado held Section 514 of the URAA was an unconstitutional content-neutral restriction on Plaintiffs' First Amendment rights because the copyright restoration of foreign works was substantially broader than necessary to achieve the government's interest in complying with Article 18 of the Berne Convention.[60]

The district court began the First Amendment analysis by addressing the Government's contentions that Section 514 of the URAA was narrowly tailored to advance three significant interests.[61] First, the Government claimed that Section 514 brings the U.S. in compliance with its international treaty obligations under the Berne convention.[62] Second, the Government claimed that Section 514 protects the copyright interests of U.S. authors abroad.[63] The third justification the Government advanced for Section 514 was the correction of "historic inequities" imposed on foreign authors who had lost U.S. copyright protection through no fault of their own.[64]

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[59] Id. at 1196-97 (quoting Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[60] Golan v. Holder, 622 F.Supp.2d at 1174-75.

[61] Id. at 1172.

[62] Id.

[63] Id.

[64] Id.

Addressing the Government's first contention, the district court stated that although compliance with international treaty obligations serves an important governmental interest, it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of the Government, which is free from the restraints of the Constitution."[65] The court noted that the Berne Convention does not provide any reference to the "reliance party" individuals who had a vested interest in public domain works that were previously subject to free use, but does reserve the right of member states to determine the "conditions of application" of the restoration principle under Article 18(3).[66] Drawing from the Tenth Circuit opinion, the court stated that Germany, Hungary, the U.K., Australia, and New Zealand provide accommodations for reliance parties, and also reasoned that Congress acknowledged the discretion afforded by Article 18(3) by allowing reliance parties limited exceptions when implementing Section 514 of the URAA, such as unlimited use until the owner files a notice to enforce the restored copyright.[67] The district court held that Section 514 of the URAA was not narrowly tailored because Congress could have complied with the Berne Convention without substantially burdening the "reliance party" Plaintiffs' First Amendment interest. Essentially, the Court held that Congress could have alternatively protected Plaintiffs' First Amendment interest by simply "excepting parties, such as plaintiffs, who had relied upon works in the public domain" from Section 514 of the URAA by virtue of "conditions of application" provision in Article 18(3) and granted summary judgment for the Plaintiffs.[68]

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[65] Id. (quoting Reid v. Covert, 354 U.S. 1, 16 (1957)).

[66] Id. at 1174.

[67] Id.

[68] Id.

The Court then addressed the Government's claim that Section 514 serves the significant interest of protecting the copyrights of U.S. authors abroad.[69] Essentially, the Government claimed that compliance with the Berne Convention through Section 514 would protect the work of American authors that had entered the public domain in other countries from being exploited by foreign reliance parties, assuming that other countries will also limit the rights of reliance parties.[70] The Government supported this claim by providing evidence of the economic impact caused by foreign piracy of U.S. works before the implementation of Article 18 of the Berne Convention, but did not provide any evidence as to how the suppression of reliance party rights in the U.S. may affect the rights of U.S. authors abroad.[71]

The Court stated that the Government did not present any evidence showing that the suppression of reliance parties in the U.S. will lead to a reciprocal repression reliance parties using U.S. works abroad.[72] In their motion for summary judgment, Plaintiffs submitted testimony before Congress addressing foreign reliance parties stating that the suppression of Plaintiffs' First Amendment rights were unlikely to increase protection or cause a "direct and material" benefit to U.S. authors abroad.[73] The Court also granted summary judgment for the Plaintiffs on this issue, basing its decision largely on the Government's lack of specific factual evidence

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[69] Id. at 1175.

[70] Id.

[71] Id. at 1175-76.

[72] Id.

[73] Id. at 1175-76.

supporting the contention that Section 514 of the URAA advanced a significant interest by limiting the Plaintiffs' speech.[74]

The Court also granted summary judgment for the Plaintiffs on the Government's third justification of Section 514, rejecting the claim that the statute served the significant interest of correcting the "historic inequities" of foreign authors who had lost their copyright protection for failure to comply with U.S. copyright formalities.[75] The Court recognized an inherent inconsistency with the Government's proffered interest, stating that Section 514 actually operated to extend copyright protections to foreign authors that are not available to U.S. authors and "appears to create an inequity where one formerly did not exist."[76] The Court further held that the "historic inequities" justification of Section 514 did not serve a significant government interest because it was inconsistent with the Government's "overarching" argument that extending copyright protection for foreign works will afford U.S. authors more copyright protection abroad.[77]

In the noted case, the Court held that Section 514 of the URAA did not pass First Amendment scrutiny because it was substantially broader than necessary to achieve the legitimate governmental interest of complying with the Berne Convention.[78] The Court, drawing from the "conditions of application" clause in Article 18(3), stated that each member nation is afforded the discretion to restore copyrights in accordance with their respective domestic

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[74] Id. at 1176.

[75] Id. at 1177.

[76] Id.

[77] Id.

[78] Id.

copyright laws.[79] The Court held the principle that works in the public domain are subject to free use is an inherent part of the domestic U.S. copyright law, and ultimately reasoned that Section 514 was unconstitutional because Congress could have complied with the Berne Convention without violating the First Amendment rights of the "reliance party" Plaintiffs.[80]

IV. Analysis

The Court's decision in the noted case reflects the tenuous nexus of international treaty obligations, Congressional implementation of foreign agreements, the bedrock principle of public domain free use, and the First Amendment. The Court's narrow holding that implementation of Section 514 of the URAA was substantially broader than necessary to serve the government's interest in complying with the Berne Convention poses several theoretical and practical points for consideration.

First, the statutory codification of Section 514 of the URAA in 17 U.S.C. § 104(A) restores foreign copyrights for works in the public domain in the U.S. provided that the works are still under protection in their source country.[81] The statute conditions U.S. copyright restoration of foreign work on whether the work is still under the term of protection in the source country, which essentially imports the respective copyright laws of every member state of the Berne Convention into U.S. copyright law. Only works created in foreign countries before March 1, 1989 (the effective date of U.S. compliance with the Berne Convention) are eligible for

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[79] Id.

[80] Id.

[81] 17 U.S.C. §§ 104A(6)(B) – (C)(I).

copyright restoration, and the application of foreign law coupled with discovery difficulties could impose strenuous evidentiary burdens on parties litigating restoration claims.[82]

Second, although the Court acknowledged the First Amendment rights of these particular "reliance party" Plaintiffs, the decision in the noted case did not delineate any criteria for determining future reliance party plaintiffs. The effective date for automatic copyright restoration of foreign works under 17 U.S.C. § 104(A) that was held unconstitutional in the noted case is January 1, 1996.[83] Assuming that Congress will implement new legislation to bring the U.S. into compliance with the Berne Convention, the question remains whether the new restoration statute would apply only to those plaintiffs who were reliance parties prior to the date of the initial restoration, or whether individuals may establish reliance party status in the interim period between the initial restoration and the new statute.[84] If it appeared Congress would enact a new restoration date, the practical effect could be that individuals hoping to use foreign works currently in the public domain in the U.S. may have an incentive to begin utilizing those works immediately to establish reliance party status before the Government's appeal to the Tenth Circuit or further Congressional action.

Finally, the Court's holding that domestic implementation of Section 514 of the URAA was unconstitutional may put the U.S. in the precarious position of not honoring treaty obligations under the Berne Convention in contravention of the TRIPs agreement. Originally, the Berne Convention provided that disputes regarding non-compliance were referred to the

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[82] See William Gable, Restoration of Copyrights: Dueling Trolls and Other Oddities Under Section 104A of the Copyright Act, 29 COLUM. J.L. & ARTS. 181, 222 (2005).

[83] 17 U.S.C. § 104(A)(h)(2)(A).

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International Court of Justice.[85] However, with the incorporation of the Berne Convention provisions into the TRIPs Agreement, the mechanism for enforcing international copyright protection rests with the WTO, which provides for the imposition of trade sanctions against non-compliant member states.[86] Theoretically, any member-state of the TRIPs agreement could bring an action against the U.S. for non-compliance before the WTO panel, and could possibly impose retaliatory sanctions against the U.S. in light of the Court's decision that Section 514 of the URAA is unconstitutional.

Despite these implications of the Court's decision, the noted case represents a novel development in constitutional law because it is the first time a court has held that any part of the Copyright Act violates the First Amendment.[87] By protecting the rights of the reliance party Plaintiffs in the noted case, the Court held the First Amendment right to free use of works in the public domain prevailed over the Government's contentions that the restoration of foreign copyrights was necessary to comply with our international treaty obligations.[88] According to Plaintiffs' counsel, which included Anthony Falzone, the director of the Stanford Law School's Fair Use Project and Professor Lawrence Lessig, the noted case represents the first time that a

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[85] Berne Convention, Art. 33.

[86] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Oct. 28, 2009).

[87] U.S. District Judge Rules Provision of Copyright Act Violates First Amendment, available at http://www.law.stanford.edu/news/pr/114/U.S.%20District%20Court%20Judge%20Rules%20Provision%20of%20Copyright%20Act%20Violates%20First%20Amendment/ (last visited Oct. 28, 2009).

[88] Golan v. Holder, 611 F.Supp.2d at 1177.

Court has put any constitutional limitations on Congress' power to "erode" the public domain, and represents a balance of copyright protection and the principle of public domain free use.[89]

However, the Court's holding did not state that Congress could not implement a more narrowly tailored statute that both respected the Plaintiffs' First Amendment interests and complied with the Berne Convention. The Court specifically cited the implementation of the Berne Convention in other countries, including Germany, Hungary, the U.K., Australia, and New Zealand, stating that although these countries limited the rights of reliance parties, none vested restored works with the equivalent copyright duration or protection provided for works that had never entered the public domain.[90] Furthermore, the Tenth Circuit provided examples of how the British, Canadian, Australian, and Indian implementation of the Berne Convention include an express definition of reliance parties and provisions allowing for the continued use of works that the parties had made or incurred commitments to make before the copyright is restored, provided that the newly restored copyright owner may "buy out" the reliance party's rights in an amount to be determined by negotiation or arbitration.[91]

From an international perspective, the Court informed its finding that Congress had the discretion under the "conditions of applications" in Article 18(3) to accommodate Plaintiffs' First Amendment interest by acknowledging the more limited implementation of the Berne Convention with respect to reliance parties in other member states. Perhaps Congress will also take account of the respective implementation of the Berne Convention in other member states in formulating a more narrowly tailored statute to satisfy both our international obligations under

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[89] Supra note 87.

[90] Id. at 1174.

[91] Golan v. Gonzales, 501 F.3d at 1197, fn. 5.

TRIPs and the bedrock domestic principle that works in the public domain are subject to free use by virtue of the First Amendment.

V. Conclusion

The noted case reflects the tenuous nexus of international treaty obligations, the domestic implementation of foreign agreements, and the First Amendment that could have far-reaching implications for the copyright of foreign works in the U.S. The Court's decision in the noted case specifically addressed the Plaintiffs' rights to use works of various Russian composers, including Prokofiev, Shostakovich, and Stravinski, for the creation of derivative works and performance purposes.[92] A survey of other cases involving the statutory codification of Section 514 of the URAA in 17 U.S.C. 104(A) animates an idiosyncratic list of foreign works that have been subject to copyright restoration.[93] Examples of works that have been subject to copyright restoration include the works of the British author J.R.R. Tolkien, woodblock prints by German artist M.C. Escher[94], the theme song, musical composition, and artwork from the classic Japanese Godzilla movies[95], and the pointed-hair "Troll Dolls" originally from Denmark.[96] Additionally, notices of intent to enforce restored copyright protections have been filed by disparate parties

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[92] Golan v. Gonzales, 501 F.3d at 1182, 1193.

[93] See Gable, supra note 82 at 182-83.

[94] See Cordon Holding C.B. v. Nw. Publ'g Corp., 2005 U.S. Dist. LEXIS 3860, at *4 (S.D.N.Y. 2005).

[95] See Toho Co. v. Priority Records, 2002 U.S. Dist. LEXIS 14093 (C.D. Cal. 2002); Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206 (C.D. Cal. 1998).

[96] See Dam Things From Den. v. Russ Berrie & Co., 290 F.3d 548 (3d Cir. 2002)

such as the rights holders for Bruce Lee, Federico Fellini, and Apple Corps, which seeks to enforce protection on photographs on the Beatles which were previously in the public domain.[97]

Given the variety and breadth of these claims, it is evident that the Court's decision in the noted case will have serious implications for the copyright of myriad foreign works currently in the public domain in the U.S. It is likely that the Government will appeal the decision in the noted case will to the Tenth Circuit, which then will determine whether the district court's reading of the "conditions of applications" provision in Article 18(3) of the Berne Convention allows for the protection of First Amendment free use interests. If upheld on appeal, the holding in the noted case ultimately establishes that the status of prospective restoration claims is dependent upon Congress' discretion to enact a new statute implementing the copyright restoration of Section 514 of the URAA that safeguards the First Amendment rights of reliance parties to use foreign works in the public domain.

[97] See Gable, supra note 82, fn.11.