



District Court Rules That Copyright Act Violates First Amendment

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In copyright litigation in the District of Colorado, the district court ruled that Section 514 of the Copyright Act violates the First Amendment because the First Amendment right to freely use works in the public domain outweighs the government's interest in complying with an international treaty. Section 514 restores U.S. copyright protection to foreign works that entered the public domain because the foreign owner failed to observe copyright formalities. The government claimed that Section 514 was necessary for U.S. compliance with the Berne Convention, a copyright treaty to which the U.S. is a party. The plaintiffs, who all made use of foreign works that had fallen into the public domain, claimed that restoring copyright protection violated both the First Amendment and the Copyright Clause of the Constitution.

Initially, the district court ruled against the plaintiff on both the First Amendment and Copyright Clause claims. The Tenth Circuit affirmed dismissal on the Copyright Clause claim, citing *Eldred v. Ashcroft*, a Supreme Court decision which held that Congress has power under the Copyright Clause to extend the duration of copyright for both new and previously created copyrighted work. However, the Tenth Circuit ordered the district court to reconsider the First Amendment claim.

On remand, the district court inquired whether the regulation advanced an important governmental interest unrelated to the suppression of speech, without burdening substantially more speech than necessary to further the government's interest.

The district court found that because the plaintiffs had used the public domain works in creating their own expressive works, restoring copyright protection to the public domain works restricted the plaintiffs' "vested First Amendment interests" in the public domain works. The District Court found that the government's stated interest in enacting Section 514 failed to justify this restraint on free speech.

The district court rejected the assertion that Section 514 was required to comply with the Berne Convention, because other countries implemented the treaty without going as far as Section 514 in



restoring copyright protection. Thus, Congress could have used a less-restrictive means to meet its purported interest. The district court also found insufficient provisions that Congress included in Section 514 that allowed parties like the plaintiffs limited continuing access to the foreign works.

The district court also rejected the government's argument that Section 514 was necessary to protect the rights of U.S. authors abroad, because the government failed to demonstrate that Congress had substantial evidence from which to draw reasonable inferences regarding the harm to U.S. authors. The plaintiffs offered into evidence testimony given before Congress that protecting the First Amendment rights of individuals using foreign works in the public domain was "unlikely to lead to suppression of U.S. authors' rights in foreign countries." The district court concluded that foreign signatories to Berne could not retroactively punish U.S. authors, because the United States was a protected member of the union of Berne states.

Finally, the District Court concluded that Section 514 created inequities by allowing foreign authors to recover copyright protection for foreign works that fell into the public domain due to failure to comply with copyright formalities, without extending similar privileges to U.S. authors.

On one hand, the decision in *Golan* is surprising. As the Supreme Court observed in *Turner Broad. Sys., Inc. v. FCC*, courts applying First Amendment analysis to content-neutral provisions apply "an intermediate level of scrutiny." In light of the *Eldred* decision, one might expect a reviewing court to defer to the government and reject a challenge to Section 514 on First Amendment grounds. Courts have been content to find in multiple instances that the "traditional contours of copyright law," including the fair use provisions codified in Section 107 and the idea-expression dichotomy codified in Section 102, provide sufficient First Amendment protections.

Here, however, the district court found that the exceptions built into Section 514 were insufficient to protect the plaintiffs' First Amendment rights because the plaintiffs' unrestricted use of those public domain works established their "vested First Amendment rights" to continue using the foreign works without the limitations Section 514 imposed. This First Amendment challenge succeeded because, instead of asserting the right to make other people's speech, the *Golan* plaintiffs persuaded the district court that their unrestricted use of public domain works deserved First Amendment protection because the expression in those works had become part of their own protectable speech.

On another level, the *Golan* decision is completely unsurprising. The Supreme Court stated in *Eldred* that a First Amendment challenge could be sustained when a provision of the Copyright Act altered the traditional contours of copyright law. There may be nothing quite so jarring to those traditional contours than the notion, embodied in Section 514, that Congress may restore copyright protection to works once those works have entered the public domain.

[Golan v. Holder, No. 01cv01854-LTB \(D. Colo. Apr. 3, 2009\)](#)

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