Golan v. Gonzales: How Copyright Restoration Alters the Ordinary Copyright Sequence and Invites First Amendment Review

I. OVERVIEW

The plaintiffs, symphony conductors, music educators, and niche film archivists and distributors, all rely on works existing in the public domain for their livelihoods.[1] They have performed symphonies, created and performed derivative works, and built businesses around the use of works that were once considered firmly established in the public domain.[2] However, in 1994, section 514 of the Uruguay Round Agreements Act (URAA) gave copyright protection to many public domain works, making it difficult or impossible for the plaintiffs to continue using these works.[3] Additionally, the Sonny Bono Copyright Term Extension Act (CTEA) increased the copyright duration of existing works, some of which would have passed into the public domain in the near future.[4]

Plaintiffs filed suit in the United States District Court for the District of Colorado against the United States alleging, inter alia, that the CTEA and the URAA violate the Copyright Clause and that copyright restoration violates plaintiffs' First Amendment rights.[5] The district court found for the defendant on all claims, and plaintiffs appealed.[6] The

1. *See* Golan v. Gonzales, No. 05-1259, 2007 WL 2547974, at *1 (10th Cir. Sept. 4, 2007).

2. *See* Appellants' Opening Brief at 12-20, *Golan*, 2007 WL 2547974 (No. 05-1259). *See generally* Festival Films, http://www.fesfilms.com (last visited Nov. 3, 2007) (advertising the sale of public domain films); Timeless Video Alternatives International, Inc., http://tvaifargo.com (last visited Nov. 3, 2007) (advertising the sale of public domain television programs and movies to television stations).

3. *See Golan*, 2007 WL 2547974, at *1; Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994) (codified at 17 U.S.C. § 104A (2000)).

4. *See Golan*, 2007 WL 2547974, at *1; Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-28 (1998) (amending 17 U.S.C. §§ 302, 304).

5. *See Golan*, 2007 WL 2547974, at *1; Golan v. Gonzales, No. Civ. 01-B-1854, 2005 WL 914754, at *1 (D. Colo. Apr. 20, 2005).

6. *See Golan*, 2005 WL 914754, at *19.

United States Court of Appeals for the Tenth Circuit *held* that although neither the CTEA nor the URAA exceed the limitations of the Copyright Clause, there exists "sufficient free expression interests in works removed from the public domain to require First Amendment scrutiny of" the URAA. *Golan v. Gonzales*, No. 05-1259, 2007 WL 2547974, at *1 (10th Cir. Sept. 4, 2007).

II. BACKGROUND

On March 1, 1989, the United States joined much of the rest of the world in becoming a party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[7] Subsequently, Congress altered copyright law in several notable ways. First, although U.S. copyright duration was within the standards set forth by the Berne Convention, Congress, by means of the CTEA, extended U.S. copyright duration to match European laws.[8] Second, as required by the Berne Convention, Congress altered the requirements for obtaining U.S. copyright protection,[9] most notably by removing formalities involving copyright registration and renewal.[10] Additionally, in keeping with a requirement of the Berne Convention, Congress restored copyright protection to many works that had fallen into the public domain due to lack of compliance with the now-abolished formalities.[11] In certain ways, the law now treats these works as though they had never fallen into the public domain.[12]

Constitutional justification for U.S. copyright laws can be found in the Copyright Clause of the United States Constitution, which states that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

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7. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (effective Mar. 1, 1989).

8. *See* Sonny Bono Copyright Term Extension Act, *supra* note 4, at 2827-28; Berne Convention for the Protection of Literary and Artistic Works art. 7, July 24, 1971, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P82_10336 (requiring copyright protection for the life of the author plus fifty years after the author's death).

9. *See* Uruguay Round Agreements Act, *supra* note 3, at 4976-81; Berne Convention for the Protection of Literary and Artistic Works, *supra* note 8, art. 18 (implementing the retroactive protection for certain copyrights).

10. *See* Berne Convention Implementation Act of 1988, *supra* note 7, §§ 7-9, at 2857-59.

11. *See* 17 U.S.C. § 104A(h)(6) (2000) (defining a restored work as being, inter alia, currently under copyright in an eligible foreign country and in the public domain in the United States due to "noncompliance with formalities").

12. *See* 17 U.S.C. § 104A(a). *But see id.* § 104A(c)-(e) (providing, inter alia, a one-year sell-off period for reliance parties, mandatory licensing for reliance parties who have created derivative works, and allowing continued use when the restored copyright owner fails to file a notice of intent to enforce).

exclusive Right to their respective Writings and Discoveries."[13] The Founders recognized that the country would benefit from "broad public availability of literature, music, and the other arts."[14] It is for this reason that they placed the Copyright Clause into the Constitution.[15] Finally, laws passed under the authority of the Copyright Clause generally will be reviewed only for rationality.[16]

The Copyright Act of 1976 is the largest statutory enactment of this constitutional right, and it provides for the constitutionally mandated "exclusive Right[s]" to "Writings."[17] 17 U.S.C. § 102 defines "Writings," in the context of the Copyright Clause, to include, inter alia, literary, musical, dramatic, pictorial, audiovisual, and architectural works.[18] Additionally, 17 U.S.C. § 106 generally defines the exclusive rights of the Copyright Clause, providing copyright holders the sole ability "to do and to authorize" the reproduction, public performance or display, and production of derivative works from their copyrighted works.[19]

Although Congress has the authority to create copyright laws, this power is limited in two major ways. First, a copyright may only be granted to original works.[20] To satisfy this requirement, works must be both "independently created by the author" and "possess[] at least some minimal degree of creativity."[21] Second, the Copyright Clause allows protection only for "limited Times."[22] For this reason, the United States Supreme Court found a system of perpetual copyright to be unconstitutional.[23] In other words, constitutionally authorized limited monopolies granted through the Copyright Clause provide incentives for authors to create and publish, while the limited duration of these monopolies ensures that the public will ultimately benefit.[24] These

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13. U.S. CONST. art. I, § 8, cl. 8.
14. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
15. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984).
16. *See* Eldred v. Ashcroft, 537 U.S. 186, 204, 208 (2003).
17. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976); U.S. CONST. art. I, § 8, cl. 8.
18. *See* 17 U.S.C. § 102 (2000).
19. *Id.* § 106.
20. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).
21. *Id.* (citations omitted); *see In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879) (deriving textually an originality requirement from the word "Writings"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (deriving textually an originality requirement from the word "Authors").
22. *See* U.S. CONST. art. I, § 8, cl. 8.
23. *See* Eldred v. Ashcroft, 537 U.S. 186, 196-200 (2003).
24. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Dastar Corp. v Twentieth Century Fox Film Co., 539 U.S. 23, 33-34 (2003).

opposing forces are part of a "carefully crafted bargain" that allows free public use of works after the copyright monopoly expires.[25]

Congress has broad legislative power under the Copyright Clause, though those "powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle 'that they may not be exercised in a way that violates other specific provisions of the Constitution.'"[26] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[27] However, in certain circumstances, restriction of speech may be allowed, and the character of the restriction determines the level of scrutiny a law must pass.[28] If a law "impose[s] differential burdens upon speech because of its content," courts apply a high level of scrutiny, looking at whether less restrictive means are available.[29] On the other hand, courts apply an intermediate level of scrutiny to laws that restrict speech without regard to the content, allowing "narrowly tailored" restrictions.[30] Discussing the First Amendment in the context of copyright law, the Supreme Court stated that "[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth."[31] To this end, "the Framers intended copyright itself to be the engine of free expression."[32] In other words, copyright incentivizes the creation and distribution of the ideas that are so important for a free society to thrive.[33]

Although the property rights created by copyright law indeed promote the exchange of ideas, those rights "contain built-in First

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25. *See Dastar*, 539 U.S. at 33-34 (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1989)).

26. Saenz v. Roe, 526 U.S. 489, 508 (1999) (citing Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

27. U.S. CONST. amend. I.

28. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

29. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 657 (10th Cir. 2006) (quoting Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 686 (10th Cir. 1998)).

30. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. O'Brien, 391 U.S. 367, 377 (1968).

31. Roth v. United States, 354 U.S. 476, 488 (1957); *see also* James Madison, *Report on the Virginia Resolutions*, *in* 5 THE FOUNDERS' CONSTITUTION 141 (Philip B. Kurland & Ralph Lerner eds., 2000), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

32. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (Brennan, J., concurring).

33. *See id.*; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

Amendment accommodations."[34] First, copyright law does not apply to ideas; it protects only the expression of ideas.[35] This limitation, labeled the idea/expression dichotomy, provides for the free exchange of ideas while incentivizing the creation of new works.[36] Second, the fair use doctrine provides that a copyrighted work may be used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[37] Together, these provisions provide significant protection of First Amendment rights, but they do not completely shield copyright law from First Amendment review.[38]

Recently, both the CTEA and the URAA have been challenged as violating the Copyright Clause.[39] In *Eldred v. Ashcroft*, the Supreme Court dismissed the plaintiff's argument against the CTEA that "limited Times" implied a fixed duration, and that once granted, the duration of a work's copyright protection should never change.[40] The Court also rejected the argument that extending the duration of protection for existing copyrighted works hinders the progress of science, and this holding has also been directly applied to the URAA.[41] In challenges to both the CTEA and the URAA, courts have noted that the expectation of additional copyright protections would be enough incentive to satisfy the Copyright Clause.[42]

Additionally, in *Eldred*, the Supreme Court provided guidance on the issue of whether laws passed under the Copyright Clause should be subject to First Amendment review.[43] There, the Court held that in most

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34. Eldred v. Ashcroft, 537 U.S. 186, 190 (2003); *see also Harper & Row*, 471 U.S. at 560.

35. *See Mazer*, 347 U.S. at 217; 17 U.S.C. § 102(b) (2000); *cf.* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (establishing the merger doctrine, which states that expressions inseparable from ideas are not protected).

36. *See Eldred*, 537 U.S. at 219-20 (citing *Harper & Row*, 471 U.S. at 556).

37. 17 U.S.C. § 107; *see* Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135, 141-42 (1984), *noted in Harper & Row*, 471 U.S. at 559 (discussing copyright and the First Amendment and noting that section 107 of the Copyright Act of 1976 adopts the common law fair use doctrine originally conceived by Justice Story as an equitable rule).

38. *See Harper & Row*, 471 U.S. at 560; *Eldred*, 537 U.S. at 221.

39. *See Eldred*, 537 U.S. at 186; Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262, 1262-63 (D.C. Cir. 2005).

40. *See Eldred*, 537 U.S. at 199-200.

41. *See id.* at 205-06; *Luck's Music*, 407 F.3d at 1264.

42. *See Eldred*, 537 U.S. at 205-06; *Luck's Music*, 407 F.3d at 1263-64. The preamble to the Copyright Clause, "[t]o promote the Progress of Science and useful Arts," has been interpreted as being the constitutional end for which a congressional means must merely have a rational basis. *Eldred*, 537 U.S. at 212-13.

43. *See Eldred*, 537 U.S. at 221.

cases, the built-in protections of the idea/expression dichotomy and the fair use doctrine prevent the need for additional review.[44] However, judicial review is required where "Congress has . . . altered the traditional contours of copyright protection."[45]

III. THE COURT'S DECISION

In the noted case, the Tenth Circuit followed the holdings of *Eldred* and *Luck's Music Library, Inc. v. Gonzales*, and analyzed whether the URAA altered the traditional contours of copyright protection.[46] The Tenth Circuit held that neither the CTEA nor the URAA violate the Copyright Clause.[47] Additionally, the court found that the URAA altered the traditional contours of copyright protection, holding that additional First Amendment scrutiny should be applied.[48] Finally, the court remanded the case to the district court to analyze the character of the restriction of speech and apply the appropriate level of scrutiny to the URAA.[49]

First, the court determined that neither the CTEA nor the URAA violate the Copyright Clause.[50] In regard to the CTEA, the court held, consistent with *Eldred*, that a copyright duration of "life-plus-70-years" does not violate the "limited Times" provision of the Copyright Clause.[51] More generally, the court held that Congress determines the duration of copyright, and that the courts review those decisions merely for rationality.[52] Furthermore, in regard to the URAA, the court found that the legislation was not part of a scheme of limitless copyright duration.[53] Consistent with both *Eldred* and *Luck's Music*, the court held that the decision of Congress to secure international copyright protection for American works is a rational exercise of the Copyright Clause power.[54]

After rejecting the Copyright Clause challenges to the CTEA and the URAA, the Tenth Circuit discussed whether the URAA should be

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44. *See id.* at 219-21 (citations omitted).
45. *Id.* at 221.
46. *See* Golan v. Gonzales, No. 05-1259, 2007 WL 2547974, at *6 (10th Cir. Sept. 4, 2007).
47. *See id.* at *1.
48. *See id.*
49. *See id.*
50. *See id.* at *5-6.
51. *See id.* at *4-5; *see also* Kahle v. Gonzales, 487 F.3d 697, 700-01 (9th Cir. 2007).
52. *See Golan*, 2007 WL 2547974, at *4.
53. *See id.* at *5-7. The D.C. Circuit previously rejected an identical argument. Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262, 1262-63 (D.C. Cir. 2005).
54. *See Golan*, 2007 WL 2547974, at *6.

subject to First Amendment review.[55] First, the court looked to the Supreme Court's reasoning in *Eldred*, that such review should be applied when a law modifies the "traditional contours of copyright protection."[56] Failing to find authority discussing the "traditional contours of copyright protection," the court analyzed the URAA in terms of both the overall copyright procedure and the historical practice of Congress.[57] In performing the first part of this analysis, the court found that the URAA "altered the ordinary copyright sequence" because "the copyright sequence no longer necessarily ends with the public domain."[58] The court reasoned that because works in the public domain may not be granted copyright protection, "works in the public domain stay there."[59] In the second part of its analysis, the court reviewed the history of copyright law by looking at the Framers' views and historical congressional practice.[60] The court concluded that, although the Copyright Act of 1790 may have given protection to some public domain works, a lack of knowledge of the Framers' intent, coupled with the preexisting state of common law copyright laws, prevented a finding that the removal of works from the public domain was consistent with original intent.[61] Furthermore, after looking at the few times in which Congress has removed works from the public domain, the court found no tradition of such removal to exist.[62] For these reasons, the court held that the URAA indeed altered the traditional contours of copyright protection and therefore should be subject to First Amendment review.

The court performed this review and determined that the plaintiffs' First Amendment interests were implicated, that the existing safeguards were not adequate to protect those interests, and that the URAA did not provide any supplemental safeguards.[63] First, the court held that the First Amendment protects "unrestrained artistic use" of works in the public domain and that the removal of such works "undermines the values the public domain is designed to protect."[64] Then, the court found that the

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55. *See id.* at *7; *see also* Saenz v. Roe, 526 U.S. 489, 508 (1999) (noting that legislation must not violate Constitutional provisions).

56. *Golan*, 2007 WL 2547974, at *7 (quoting Eldred v. Ashcroft, 537 U.S. 186, 221 (2003)).

57. *See id.* at *7-12.

58. *Id.* at *9.

59. *Id.*

60. *See id.* at *10-12.

61. *See id.* at *10-11.

62. *See id.* at *11-12 (examining private copyright bills and a wartime copyright provision and noting that mere passage does not imply constitutionality).

63. *See id.* at *12-15.

64. *Id.* at *13.

idea/expression dichotomy did not protect this interest because restriction of expression, not ideas, was at issue in the noted case.[65] Next, the court found that the fair use doctrine did not protect plaintiffs' interests because those interests were in full, not limited, use.[66] Finally, the court found that nothing in the URAA supplemented these safeguards, noting that the URAA only provides a one-year safe harbor period and allows for continued use only in the absence of a notice of intent to enforce.[67]

Although the court determined that the URAA implicated First Amendment interests, the court remanded the case to the district court for review.[68] The Tenth Circuit, providing guidance, instructed the district court to determine whether the URAA is a content-based restriction or a content-neutral restriction.[69] If the district court determines that the URAA restricts speech based on content, the Tenth Circuit instructed it to apply strict scrutiny.[70] In the alternative, the court should apply an intermediate level of scrutiny.[71]

IV. ANALYSIS

The Tenth Circuit followed significant precedent in holding that the CTEA and the URAA are valid under the Copyright Clause. However, the court's treatment of the First Amendment issues has been both applauded and questioned. On one hand, the holding may be an appropriate application of *Eldred*.[72] On the other hand, the entire First Amendment analysis may have been unnecessary.[73] Additionally, the noted case differs from a holding of the United States Court of Appeals for the Ninth Circuit, potentially creating a circuit split.[74]

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65. *See id.* at *14.
66. *See id.* at *14-15.
67. *See id.* at *15.
68. *See id.* at *16.
69. *See id.*
70. *See id.* (instructing a review of whether such a restriction serves a compelling interest and whether less restrictive means might be available).
71. *See id.* (instructing that such a restriction must be "narrowly tailored to serve a significant governmental interest").
72. *See* Posting of Jack M. Balkin to Balkinization, http://balkin.blogspot.com/2007/09/golan-v-gonzales-how-first-amendment.html (Sept. 5, 2007, 17:13 PST).
73. *See* The Patry Copyright Blog, http://williampatry.blogspot.com/2007/09/golans-copyright-lows.html (Sept. 4, 2007, 18:05 PST) (suggesting that the Tenth Circuit should have dismissed the plaintiffs' First Amendment argument because it was based on the failed copyright argument).
74. *See* Lessig Blog, http://lessig.org/blog/2007/09/a_big_victory_golan_v_gonzales.html (Sept. 5, 2007 04:05 PST) (suggesting that the change from an opt-in to an opt-out copyright system should invoke First Amendment review as a change in the traditional contour of copyright law). *But see* Kahle v. Gonzales, 487 F.3d 697, 699-700 (9th Cir. 2007) (holding that *Eldred* itself precluded such review despite the plaintiff's argument that the removal of the renewal period is a

One commentator contends that First Amendment arguments based on Copyright Clause arguments cannot stand when the latter fail.[75] In other words, valid copyright laws cannot violate the Constitution if there is no independent First Amendment issue.[76] The oral argument in *Eldred* could be interpreted this way, as there are no examples of laws validly enacted under the Copyright Clause that have been found invalid under the First Amendment.[77] Furthermore, because the Copyright Clause and the First Amendment were enacted close in time, this might preclude such an argument.[78] However, *Eldred* explicitly rejected the position adopted by the United States Court of Appeals for the District of Columbia, finding instead that copyright laws are *not* "categorically immune from challenges under the First Amendment."[79]

Although it has been criticized, the decision in the noted case has merit. For example, during oral argument in *Eldred*, the Supreme Court paid special attention to the grant of copyright to works in the public domain, suggesting that this might require a higher level of scrutiny.[80] A reasonable interpretation of the subsequent opinion leads to the conclusion that, at the very least, higher scrutiny should apply when a law grants copyright to works that have been afforded the entirety of their allowed protection. The URAA lies somewhere in the middle, granting copyright to only those public domain works that have passed into the public domain due to a lack of compliance with formalities.[81] The URAA, a law passed under the Copyright Clause and normally subject to a rational basis review, implicates the plaintiffs' rights to perform and distribute works, acts that would have been unrestricted but for the URAA. For this reason, the holding in the noted case is appropriate.

The noted case is significant because it subjects at least some laws passed under the Copyright Clause to a higher standard than simply the rational basis standard. For this reason, copyright laws such as the Digital Millennium Copyright Act (DMCA) could possibly be subject to

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distinct act from the term extension at issue in *Eldred* and should have been independently analyzed as an alteration of the "traditional contour" of copyright law).

75. Patry Copyright Blog, *supra* note 73.

76. *See id.* (citing Transcript of Oral Argument at *13, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618)).

77. *See* Transcript of Oral Argument at *13, *supra* note 76 (O'Connor, J.).

78. *See id.* at *13-14.

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

80. *See* Transcript of Oral Argument, *supra* note 76, at *32-33 (Souter, J.) (suggesting that there may be a "bright line" limiting the rational exercise of congressional power when public domain works are granted copyright).

81. *See* Uruguay Round Agreements Act, *supra* note 3, at 4976-81.

higher review standards.[82] However, there are two pitfalls. First, laws involving modern technology may be exempt from higher scrutiny because modern technology has no history.[83] Second, arguing against "differences only in degree rather than kind" may be difficult against a tradition-based standard.[84]

Because "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech,'" the URAA will likely be held content-neutral.[85] This would require the district court to determine whether the URAA is "narrowly tailored to serve a significant governmental interest."[86] Securing copyright protection abroad most likely constitutes a significant government interest. The real question, left to be determined, is whether the courts will consider the URAA narrowly tailored.[87] Finally, outside of the arguments and the holding of the noted case, "Congress's treaty, commerce, and takings powers may provide Congress with the authority to enact" the URAA.[88]

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82. *See* Posting of Jack M. Balkin to Balkinization, *supra* note 72.

83. *See id.*

84. *Id.*

85. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

86. *Id.* (quoting *Clark*, 468 U.S. at 293).

87. *See* Golan v. Gonzales, No. 05-1259, 2007 WL 2547974, at *16 n.5 (10th Cir. Sept. 4, 2007) (noting that other countries treat differently those impacted by copyright restoration). *See generally* Irwin Karp, *Final Report, Berne Article 18 Study on Retroactive United States Copyright Protection for Berne and Other Works*, 20 COLUM.-VLA J.L. & ARTS 157 (1995).

88. *Golan*, 2007 WL 2547974, at *16 n.5.

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