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GOLAN V. HOLDER: A STEP IN THE INTERNATIONAL DIRECTION FOR UNITED STATES COPYRIGHT LAW

Nicole Maciejunes*

I. INTRODUCTION

Today a person can download a hit song from an Indian group named Punk Rock India, order a print of his or her favorite painting by Chinese painter Du Xinjian, and purchase a book by Peruvian author Mario Vargas Llosa within minutes of opening a laptop and connecting to the internet. Artists are no longer limited to their domestic markets when selling their goods. Because of technological advances and the shrinking of the world, the possible consumers for a creation of any artist, in any country, is truly worldwide. In order for Punk Rock India, Du Xinjian, Mario Vargas Llosa, and other artists of the world, to fully capitalize on the value of their creations, their copyrights in their works must be protected. Before the globalization of the economy and the creation of the internet, this would have been left up to the artist's own country. Today this is no longer the case. All the countries of the world must band together to ensure that every artist is protected in this global market.

U.S. copyright law has been domestically oriented for most of our nation’s history, giving little value to the rights of foreign authors within the United States. This viewpoint has been forced to change. U.S. copyright lawmakers are realizing in order to protect U.S. copyright holders' interests abroad they must afford foreign authors the same courtesy they would expect their authors to receive. In 1996, Congress passed the Uruguay Round Agreements Act (U.R.A.A.), which finally brought U.S. copyright law into compliance with its international copyright obligations. As a result of this Act, copyrights were restored to any foreign work in the public domain that was placed there due to certain restrictions the United States had put on obtaining and maintaining copyrights for foreign works. Although this brought the U.S. into compliance with its responsibilities to the global community of intellectual property owners, some felt this Act went against the bedrock principles contained in U.S. copyright law concerning the public domain.

The U.R.A.A. was soon challenged on First Amendment grounds by the people who had been utilizing the newly restored foreign works. In Golan v. Holder, the plaintiffs argued that Congress could not remove works from the public domain without harming their First Amendment rights. The government argued that Congress had a substantial interest in ensuring that the rights of U.S. copyright owners were protected abroad, and this legislation would help effectuate that goal. The court ultimately sided with the government, recognizing the substantial interest that Congress had in protecting American copyright interests abroad. With this decision, the court reinforced Congress's determination that U.S. copyright interests could no longer be protected through domestic legislation alone and more global considerations needed to be put in place.

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This note examines how the globalization of the economy has forced the United States to shift their bedrock principles concerning copyright law to take into account foreign authors rights. Section II provides a background of some bedrock principles of copyright law and a timeline of the United States’ entry into the realm of international intellectual property law. Both the Berne Convention, the precursor to the U.R.A.A., and U.R.A.A. itself, are discussed in this section. This section explains the United States’ reluctance to fully implement the Berne Convention and reaction from the world which lead to the U.R.A.A. The U.R.A.A. finally accomplished the goals that the Berne Convention could not. Section III discusses how the globalization of the economy has changed the field copyright law, making the U.R.A.A. vital for the protection of foreign and U.S. copyright holders alike. This section also addresses how certain technologies have made it easier to violate copyrights, which was a contributing factor to the need for international copyright law.

Section IV is an in depth summary of the procedural history and ultimate decision in the landmark case of Golan v. Holder. This section outlines the challenges brought against the U.R.A.A. and the reasons that the government gave for its implementation. Also included is an analysis of the 10th Circuit’s reasoning in ultimately deciding that Congress has a compelling government interest in protecting U.S. copyright holders’ interest abroad, and that the U.R.A.A. is a narrowly tailored way to accomplish this goal. This case signifies a recognized shift in copyright law where the United States can no longer protect its own copyright holders’ interest with only strict domestic standards, but must cooperate with the world in establishing a unified system of copyright protection.

Section V of this note takes a brief look at how the United States may create some of this new international copyright law. Because the United States is going to have to rely more on international agreements, it will want to be involved with as many international avenues as possible in order to shape the new international copyright law. International institutions are being restructured to deal with changes in intellectual property law more efficiently. Intellectual property rights are now being linked to trade agreements so harsher penalties can be assessed for violation of rights. There is also a new movement for national courts to add to the growing body of international copyright case law for other countries to rely on and compare to. Although this would not be binding on other nations’ courts, this international intellectual property case law could prove a valuable guide for all judiciaries of the world.

Ultimately this note hopes to highlight the direction that copyright law is heading. The United States is finally recognizing their need to be a leader in this field and the courts have legitimized this need. Over the next decade, the field of U.S. copyright law will be completely different from what it is today and this note is a just brief glimpse of where U.S. copyright law has been and where it is going.

II. BACKGROUND

A. The Domestic Copyright Bargain and the Public Domain

U.S. copyright law originated in Article I, Section 8, Clause 8 of the U.S. Constitution which grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective
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Writing and Discoveries. This clause creates a need for balance in the world of copyright. The offer of a limited monopoly through copyright is the side of equation that encourages creation. In return for this limited monopoly, the author's creation is eventually given to the public and placed into the public domain. The Supreme Court's explanation of the intent of the Copyright Clause is "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." It is the goal of copyright to maintain this delicate balance between the author's interest in the creation of their work and the public's interest in having access to these materials that are essential to the development of society.

The second half of the bargain entails creating a rich public domain. The public domain is defined as "a domain of creative works from which the public is free to draw." Once a work enters the public domain it no longer belongs to its author, but to all of society. The purpose of the communal body of works is to serve as inspiration for a new work, creating a cycle of creativity that will never end.

The existence of a public domain is common knowledge among society. The belief in this idea dates back to the Founding Fathers and their contemplation of our most sacred document, the Constitution. Some historians suggest that the most important reason for including the Copyright Clause in the Constitution was to protect the public domain. The Founding Fathers "viewed the value of a vibrant public domain as inextricably intertwined with the value of granting copyright protection."

The court itself also has a long history of analyzing and upholding the inherent qualities of the public domain. One of the most fundamental ideas within the copyright scheme is that once a work enters the public domain no one may copyright it. The availability of a work to the public that has fallen into the public domain is essential to the continued creativity of the arts and therefore a work should not be removed. The Supreme Court has guarded the public domain against legislative intrusion and has advanced a strong policy for keeping the pool of free information quite large. The Supreme Court, through their case law, has decided that works within the public domain belong to the public, the public has a federal right to use those works, and Congress should not remove works from the public.

1 U.S. Const. art. 1, § 8, cl. 8.
4 Id. at 469.
6 Pelanda, supra note 2, at 563.
7 Gallagher, supra note 3, at 462.
8 Segal, supra note 5, at 72.
9 Pelanda, supra note 2 at 567.
10 Id.
11 Id. at 566.
12 Id. at 562.
13 Gallagher, supra note 3, at 46.
14 Pelanda, supra note 2, at 567.
domain because it could be harmful to public welfare.15 Because of the important role the public domain serves to the advancement of society, there have been few instances of Congress granting copyrights to works within the public domain.16

B. U.S Resistance to International Copyright

In the beginning, the limited monopoly granted to authors from the United States government could only be enjoyed by American authors. From 1791 to 1891, the United States did not provide copyright protection for foreign works first published abroad.17 The world did not look kindly on this lack of protection and the United States gained a reputation as literary pirates.18 In 1891, after 100 years of pirating, the United States entered its first bilateral copyright agreements with France, Great Britain, and Germany.19 Although these bilateral treaties offered some protection, they were laden with requirements that severely limited the authors’ scope of protection. For foreign authors to enjoy protection in the United States, their country had to be a signatory to the agreement that provided reciprocity to the United States, they had to comply with all formalities of U.S. law, and the foreign works had to be printed within the United States.20 Although the United States had begun to protect foreign authors, it also had formalities in place that seemingly aimed to throw foreign works into the public domain.21

The United States resistance to international copyright agreements was unique from the rest of the world. As early as 1886, the countries of the world recognized the necessity of international copyright protection and they produced the Berne Convention.22 The Berne Convention was at odds with U.S. formalities. Instead of altering U.S. law to join the Berne Convention, the United States held fast to their rigorous formalities.23 Up until 1955, the United States had only committed to bilateral treaties and remained largely isolated in the field of international copyright.24 The United States considered it a source of pride that they were the only major country in the world not conforming to the Berne Convention.25 The fact that other European countries had already adhered was not persuasive.26

The United States’ first foray into multilateral treaties came in December 1955, when they signed the Universal Copyright Convention (U.C.C.), which established multilateral copyright relations between Berne signatories and other nations.27 The United States joining the U.C.C. did not mean that the United States was willing to remove their harsh

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15 Id. at 574.
16 Id. at 565; see also Gallagher, supra note 3, at 466.
18 Patry, supra note 17, at 750.
19 Christopher Sprigman, Reform(alizing) Copyright, 57 STAN. L. REV. 485, 540 (2004); Segal, supra note 5, at 76.
20 Segal, supra note 5, at 76.
21 Hansen, supra note 17, at 586-87.
22 Sprigman, supra note 19, at 540.
23 Patry, supra 17, at 750.
24 Id. at 750-51.
25 Id. at 750.
26 Id.
27 Sprigman, supra note 19, at 540; see also Patry, supra note 17, at 750-51.
formalities that were not permitted by the Berne Convention. In fact, the U.C.C. was specially drafted to allow the United States to be a party to the convention without having to alter their laws because the U.C.C. allowed formalities to be a pre-requisite to protection. The U.C.C. was thought of as the "poor stepchild" of the Berne Convention and was used mostly for the purpose of reaching the stubborn United States.

The 1976 reformation of U.S. copyright law brought the United States closer to the predominant international standards. Harsh formalities were no longer a requirement for protection but simply a recommendation. Finally on March 1, 1989, the United States gave up the fight to keep their formalities and signed the Berne Convention.

C. The Berne Convention

The United States adherence to the Berne Convention marked the first time that the United States had entered the forum of international copyright in a multilateral, less than nominal way. The purpose of the Berne Convention is to set minimum standards of protection that all Berne signatories must afford each other. Included in these standards are the principle of national treatment for all authors of Berne signatory countries and a minimum term of copyright protection. The principle of national treatment is a fundamental tenet of this Convention and shades all the articles requirements. The basic concept is that a Berne signatory country must afford authors of any other Berne signatory county the same benefits and protections that its own authors enjoy.

One such Article that is shaped by the national treatment principle is Article 18. Article 18 of the Berne Convention requires copyright protection for "all works which, at the moment of [the Treaty's] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." This article required the United States, as a new signatory, to retroactively protect works that had fallen into the public domain in the United States due to expiration of protection if the works were still protected in their home country as of the date that the Convention was signed. If the work had fallen into the public domain for other reasons than expiration of protection term, such as failing to complete formalities, the work must also be retroactively protected. Because of the harsh requirements that had been in place in the United States, the number of works that fit this category was immense.

28 Id. at 750-751.
29 Id.; Sprigman, supra note 19, at 540.
30 Patry, supra note 17, at 751.
31 Gallagher, supra note 2, at 456.
32 Patry, supra note 17, at 751; Sprigman, supra note 19, at 540.
34 Id. at 587.
35 Id. at 588.
36 Id.
37 Pelanda, supra note 2, at 553.
38 Brownlee, supra note 33, at 592.
39 Id. at 592-93.
40 Id. at 623.
All the provisions contained in the Berne Convention, including Article 18, need to be adopted individually and introduced into domestic law by each country's legislature because the Berne Convention is not self-executing. The non-self-executing nature of the Berne Convention served as an escape hatch for the United States when it came to the issue of retroactive protection. When attempting to implement the retroactive principle, Congress labeled the problem as too difficult and needing more study, essentially opting out of complying with this provision. Although the United States became a member of the Berne Convention in 1988, they did not address the problem of retroactivity contained in Article 18 until 1994, with the passage of section 514 of the U.R.A.A.

D. Uruguay Round Agreements Act

The General Agreement on Tariff's and Trade's (GATT) Trade-Related Aspects of Intellectual Property Rights (TRIPs) was passed in 1994, and the United States' implementing legislation, the Uruguay Round Agreements Act (U.R.A.A.) was passed in 1996. The main goal of the TRIPs agreement is to stop discrimination against foreign authors concerning their intellectual property rights. To accomplish this goal, the TRIPs agreement features a most favored nation provision which prevents one member country from offering a better intellectual property deal to one member country and then denying those advantages to other member countries. All member countries must also accord nationals of other member states the international minimum standards concerning intellectual property protection of past Conventions and those embodied in the TRIPs agreement itself. The TRIPs Agreement holds nations accountable to these standards by requiring its members to weigh the costs and benefits of non-reciprocity before implementing unilateral measures to protect intellectual property rights with respect to other WTO member countries.

Section 514 of the U.R.A.A. finally required the United States to implement Section 18 of the Berne Convention into U.S. domestic law. Many foreign works still under copyright in their home country had fallen into the public domain in the United States because they failed to comply with the strict requirements under U.S. copyright law required prior to 1989. The U.R.A.A. corrected this issue by reviving the copyrights for those works that fell into the public domain. Congress, in implementing the U.R.A.A., restored copyright protection to these foreign works as long as they fit certain criteria. To qualify as a work that will be removed from the public domain a work must: (1) be of foreign origin, (2) be in the public domain in the United States because of failure to comply with formalities, (3) still be pro-

41 Id. at 595.
42 Patry, supra note 17, at 752.
43 Pelanda, supra note 2, at 552-53.
44 Brownlee, supra note 33, at 583.
46 Id. at 348.
47 Id. at 351.
48 Id. at 349.
49 Pelanda, supra note 2, at 552.
50 Id. at 553.
51 Brownlee, supra note 33, at 619.
52 Pelanda, supra note 2, at 553.
tected in its origin country, and (4) originate in an eligible country, meaning a member of the WTO, a signatory of the Berne Convention, or one that the President deems eligible.53

Once the copyrights were restored to these works, Congress chose to distinguish between reliance parties54 and non-reliance parties55, when evaluating infringement claims.56 In order to enforce a restored copyright against a reliance party, the copyright holder is required by section 104A of the Copyright Act57 to file a claim of restoration with the U.S. Copyright Office or send actual notice to the reliance party within 24 months of restoration.58 Unless notice is received or notice is filed with the Copyright Office, a reliance party can continue to use the work without liability.59 After receiving notice or the notification is published that the copyright holder is enforcing his rights, reliance parties have a 12 month grace period where no additional copies may be made but they can continue to exploit the work.60 After this twelve month grace period, any infringing action incurs full liability under copyright law.61 Non-reliance parties are dealt with like any other violator of copyright and there is no grace period.62

Before the U.R.A.A., the U.S. copyright law was in direct conflict with its obligations under the Berne convention because of the formalities it imposed. After the formalities were removed, the repercussions of those previously enforced formalities still kept the United States out of compliance because it left many foreign works unprotected.63 The U.R.A.A. amended Section 104A of the Copyright Act to finally bring the U.S. in compliance with its Berne Convention obligations.64

III. GLOBALIZATION OF THE ECONOMY AND WORLD RELATIONS

A. Economy during the Founding Fathers’ Time

When the United States created a document that was to serve as the basis for all laws throughout the country, they elected to include a provision that established copyrights. It was not an accident that foreign authors were not afforded the same property rights as native authors by the Constitution. For the first century of its existence the United States was a substantial net importer of literary works, particularly English books.65 By not affording the English authors any intellectual property rights or royalties privileges, Americans were easily provided with inexpensive editions of the most popular and prestigious English works.66 The

53 Id. at 553-54; Brownlee, supra note 33, at 620-21.
54 Reliance parties are defined as people using the public domain works prior to the rightful copyright owners asserting his or her rights. Brownlee, supra note 33, at 622.
55 Non-reliance parties are people who never exploited the works targeted for restoration while they were in the public domain, therefore have no claim of hardship concerning their removal. Pelanda, supra note 2, at 554.
56 Id.
58 Brownlee, supra note 33, at 623.
59 Pelanda, supra note 2, at 555.
60 Brownlee, supra note 33 at 623; see also Pelanda, supra note 2, at 555.
61 Id.
62 Id.
63 Brownlee, supra note 33, at 627.
64 Id. at 619.
65 Patry, supra note 17, at 750.
66 Id.
American printers and bookbinders were extremely successful because of this inequality of treatment. These industries made a lot of their profit by exploiting these royalty free works.\textsuperscript{67} When it came time for the United States to change their laws to accommodate the international community, these industries presented resistance and succeeded in holding back progress for over fifty years.\textsuperscript{68} In 1891, a compromise was finally reached but at a great cost to the foreign authors. The new version of the law finally protected foreign authors but only if their works were printed and bound in the United States.\textsuperscript{69} The printers and bookbinders made sure they could continue to profit off the foreign authors' inequality. This compromise is an example of the long standing tradition in the United States of putting domestic interests above the interests of foreign authors.

B. Economy today

a. Economy based on knowledge and trading of information

The policy of domestic interests superseding international concerns in copyright was the dominate viewpoint of the United States through the signing of the Berne Convention. Copyright law was territorial and domestically oriented.\textsuperscript{70} As of thirty years ago, copyright law was a limited field run by a small group of professionals and professors who shared the same domestically oriented attitude.\textsuperscript{71} International law and international trade were of little interest to these lawyers and their clients.\textsuperscript{72} The practitioners in this field only concerned themselves with U.S. copyright law because that was the only law that really influenced their clients' cases. There were very few international battles to fight.\textsuperscript{73}

In a short period of time intellectual property has become a much bigger part of our national economy, as well as the global economy.\textsuperscript{74} The American economy is no longer mostly based on the manufacture and sale of goods. Now the economy is ruled by copyright industries, such as movies, music, and computer software, which successfully export their goods around the world.\textsuperscript{75} Patent industries, such as pharmaceuticals, are now also enjoying a huge growth in exports creating a need for trademark protection abroad.\textsuperscript{76} Manufacturers in developing countries can now look to distant markets for more traditional industrial products so these developing countries are attempting to exploit the intellectual goods market.\textsuperscript{77}

This rise of knowledge based industries further expanded the market for intellectual property rights.\textsuperscript{78} Intellectual property is no longer in the background and has become an extremely important consideration for government leaders, CEOs, and corporate boards in the

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Hansen, supra note 17, at 580.
\textsuperscript{71} Id. at 582.
\textsuperscript{72} Id. at 584.
\textsuperscript{73} Id.
\textsuperscript{74} Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property, 112 YALE L.J. 2331, 2331-32 (2003).
\textsuperscript{75} Hansen, supra note 17, at 580.
\textsuperscript{76} Id.
\textsuperscript{77} Reichman, supra note 45, at 346.
\textsuperscript{78} Id.
The diverse number of fields that rely on intellectual property rights range from scientific research to creative authorship to commercial development. Because intellectual property rights are involved in so many fields they have become indispensable to industrial development. The entire field of international copyright is now trade oriented and controlled by large corporations instead of individual authors.

Because of the new globalization of the economy, a strong link has developed between trade and intellectual property rights. In the late 20th century, Western developed nations recognized this link. At the time there were two prevalent views of copyright in place. The Anglo-American system viewed copyrights in a more economic way, while French and Continental systems concentrated on the moral values behind copyright. Each system had their own way of protecting intellectual property rights which was compatible with their own culture. The conventions in place at the time could not adequately address the new "global village" that had developed. Intellectual property rights were only protected by voluntary conventions featuring no real repercussions for non-compliance. There were different schemes of protection in each country which were dictated by numerous multilateral and bilateral treaties. Because intellectual property rights have become one of the most valuable sources of wealth in the 21st century, the international community had to put aside their differences.

The TRIPs agreement was created as a response to the growing economic importance of intellectual property around the world. The new link that developed between trade and intellectual property rights now demanded a change in the way the world protected these rights. The agreement attempted to reposition the "relevance and legal status of IP in the context of trade." For the first time, the TRIPs agreement placed intellectual property rights into international trade agreements. Countries can now protect intellectual property rights with trade sanctions. If countries do not provide the proper protections they could be placed in economic isolation. For the first time, intellectual property rights were being treated as an economic, not a moral issue, by the entire world.

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79 Hansen, supra note 17, at 580.
81 Id.
82 Hansen, supra note 17, at 584.
83 Gutowski, supra note 80, at 754.
84 Id. at 714.
85 Hansen, supra note 17, at 580.
86 Id.
87 Gutowski, supra note 80, at 720.
88 Id. at 714-15.
89 Id. at 760.
90 Reichman, supra note 45, at 381-82.
91 Gutowski, supra note 80, at 714.
92 Id. at 715.
93 Id. at 714.
94 Id. at 714-15, 724.
95 Id. at 714-15.
96 Id.
97 Id. at 754.
b. Pirating

One economic issue facing intellectual property is pirating. Because technology has advanced so rapidly in the past few years, there are now more digital means of transmission for intellectual property to spread across countries borders. This has lead to a drop in distribution cost and an increase in pirating.

Most intellectual property right owners in the world are United States citizens. Because of this, the United States has a long standing tradition of respecting and protecting intellectual property rights within their borders. A lot of time and effort is dedicated to creating, defining, and enforcing these rights which includes trying to eliminate piracy. This respect for protection is not universally held around the world. Many other countries choose to look the other way when industries pirate from the United States. Because of this lax attitude by other countries in the world, billions of dollars a year are lost by U.S. firms due to pirating. Harmonization of the copyright laws around the world could combat some of this pirating and give greater protections, not just to United States citizens, but all intellectual property right holders of the world.

IV. GOLAN V. HOLDER

A. Background/Procedural History

The shift from a domestically oriented view of intellectual property rights to a more global one, and the measures taken to achieve this new view, was bound to be challenged by those who profited from the previous view. The removal of public domain works by § 514 of the U.R.A.A. had a negative effect on certain aspects of the creative arts. Golan v. Holder, was a suit commenced by a group of orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors who depended on the newly restored works for their livelihood. When these works were removed from the public domain, these works could no longer be used or became too cost prohibitive to be used by these professionals.

The plaintiffs originally filed suit in the U.S. District Court of Colorado challenging both the Copyright Term Extension Act (“C.T.E.A.”) and the Uruguay Round Agreements

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98 Brownlee, supra note 22, at 582.
99 Id.
101 Bickham, supra note 100, at 196.
102 Id.
103 Id.
104 Hansen, supra note 17, at 591-92.
105 Bickman, supra note 100, at 196.
106 Golan v. Holder, 609 F. 3d 1076, 1081-82 (10th Cir. 2010).
107 Id. at 1082.
108 Pelanda, supra note 2, at 551.
Act ("U.R.A.A.") on Constitutional grounds. The District Court dismissed the C.T.E.A. claim according to the Supreme Court’s decision in Eldred v. Ashcroft. The District Court determined that the U.R.A.A. claim should be dismissed because the Act did not exceed the limitations of the Copyright Clause of the Constitution. The plaintiffs’ First Amendment violation claim was dismissed because the court ruled the plaintiff’s had no protected interest in the works affected by the restoration clause of Section 514 of the U.R.A.A. The plaintiffs appealed to the 10th Circuit on both the C.T.E.A. claim and the U.R.A.A. claim. The Appellate Court agreed that the C.T.E.A. claim was foreclosed by the Supreme Court’s decision in Eldred. The court also affirmed the District Court’s ruling that the U.R.A.A. did not exceed the limitation inferred by the Copyright Clause of the Constitution. Golan and his colleagues argued that once a work entered the public domain it belongs to the public and the government could not remove it. The court disagreed and held that Congress did have the power to remove works from the public domain, but the First Amendment may limit the ability to do so.

In regards to the plaintiffs’ First Amendment violation claim, the court ruled that § 514 of the U.R.A.A. altered the traditional contours of copyright protections. When the traditional contours of copyright protection are altered, Congress’s action must be subject to First Amendment review. Traditionally, once a work enters the public domain, no one, not even the author, can copyright it. The court found that removing works from the public domain can hamper expression and undermines the very idea of the public domain. Because this alteration implicated the plaintiffs’ First Amendment right to freedom of expression, § 514 of the U.R.A.A. needed to be subjected to a First Amendment Review. The case was remanded to the District Court to conduct this First Amendment Review. The District Court was now charged with the task of deciding whether § 514 of the U.R.A.A. passed First Amendment scrutiny. The District Court first determined that this restriction was content neutral and should be reviewed under the "content neutral" standard. This standard states, "A content-neutral regulation [of speech] will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to

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13 "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, U.S. Const. art. I, § 8, cl. 8.
14 Golan v. Gonazales, 501 F.3d 1179, 1183 (10th Cir. 2007).
15 Id. at 1197.
16 Pelanda, supra note 2, at 571.
17 Id. at 562.
18 See Gonzales, 501 F.3d at 1183.
19 Gallager, supra note 3, at 453-54.
20 See Gonzales, 501 F.3d at 1184.
21 Gallager, supra note 3, at 466.
22 See Gonzales, 501 F.3d at 1197.
23 Id.
25 Id. at 1170.
further those interests."\textsuperscript{126} In making this determination substantial deference should be given to Congress, determining whether they have drawn reasonable inferences based on substantial evidence.\textsuperscript{127}

To overcome the First Amendment challenge, the government needed to show a valid government interest was served by removing works from the public domain.\textsuperscript{128} This would be difficult because removing works from the public domain does not encourage creation of new works, one of the main goals of the copyright scheme.\textsuperscript{129} The Government in this case stated three governmental interests are served by § 514 of the U.R.A.A.: complying with the Berne Convention, protecting copyright interests of American authors abroad, and correcting historic inequalities against foreign authors whowrongfully lost their U.S. copyrights.\textsuperscript{130} The court addressed each one of these interests separately and declared each one insufficient.

In regards to the first argument, which focused on complying with the Berne Convention, the Court ruled that Congress could have complied with the Berne Convention without interfering with the plaintiffs' rights to exploit these ex-public domain works.\textsuperscript{131}

The court also determined that the second substantial interest, the government's interest in protecting American copyright interests abroad, was insufficient to warrant infringing on the First Amendment rights of the plaintiffs.\textsuperscript{132} The Court did not give credence to the Government's argument that other countries would not respect American authors' copyright interests abroad if the United States did not support foreign authors here.\textsuperscript{133} It determined that the Government had not presented sufficient evidence to counteract the Plaintiffs' evidence that suppressing their First Amendment rights would not lead to suppression of other reliance rights in foreign countries and granted the Plaintiff's summary judgment on this matter.\textsuperscript{134}

Finally, the Court ruled that the third governmental substantial interest, righting an equality that existed for foreign authors in America, was not enough to overcome the First Amendment challenge.\textsuperscript{135}

The District Court ultimately determined that protecting American copyright interests abroad and correcting an inequality that existed in regards to foreign authors domestically were not substantial governmental interests to justify First Amendment infringement.\textsuperscript{136} Although the court did determine that complying with the Berne Convention was an important governmental interest, the Court determined that § 514 of the U.R.A.A. was too broad a mechanism to accomplish this goal.\textsuperscript{137} This was the first occasion where a section of the Copyright Act was deemed unconstitutional on First Amendment grounds.\textsuperscript{138}

\textsuperscript{126} Id. (citing Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997)).
\textsuperscript{127} Id. at 1171.
\textsuperscript{128} Gallagher, supra note 3, at 472.
\textsuperscript{129} Id.
\textsuperscript{130} See Holder, 611 F.Supp. 2d. at 1172.
\textsuperscript{131} Id. at 1174-75.
\textsuperscript{132} Id. at 1175.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 1176; Pelanda, supra note 2, at 581.
\textsuperscript{135} See Holder, 611 F.Supp. 2d. at 1177.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Pelanda, supra note 2, at 583.
B. Summary of Golan v. Holder Decision

The Government soon appealed the decision again to the 10th Circuit challenging the determination that Section 514 of the U.R.A.A. violated the First Amendment.\(^{139}\) The Plaintiffs cross appealed requesting the court to enjoin Attorney General Holder, from enforcing the statute and to order the Register of Copyrights Marybeth Peters, to cancel the copyright registrations of the restored works.\(^{140}\)

The government argued again on appeal that Section 514 was narrowly tailored to advance three government interests: (1) complying with international treaty obligations, (2) protecting American copyright holders’ interests abroad, and (3) fixing past inequalities experienced by foreign authors.\(^{141}\) The Circuit Court ruled that “the government demonstrated a substantial interest in protecting American copyright holders’ interest abroad, and Section 514 is narrowly tailored to advance that interest.”\(^{142}\) The court stated they had “no difficulty in concluding” that protecting American copyright holders’ interests abroad was a substantial governmental interest.\(^{143}\)

The court recognized that copyrights did not just serve creative interests of authors, but economic interests as well.\(^{144}\) The Court reasoned that securing the interests of American authors abroad was at least as important as other interests the Supreme Court has found to satisfy the intermediate scrutiny standard.\(^{145}\) This turning point in the case validated the need for Congress to take action on behalf of American copyright interests abroad.

Another element that needed to be proven by the government was that the harm was real and not just conjectural.\(^{146}\) Great deference should be given to Congress when making this determination. Therefore it is not for the court to second guess this determination, but to ensure that “Congress has drawn reasonable inferences based on substantial evidence.”\(^{147}\) The Court explained that this great deference comes from three sources. The first is Congress is much better at gathering and processing the vast amount of information that is necessary to make a determination of this magnitude.\(^{148}\) The second reason is out of respect for the legislative power that Congress has been bestowed.\(^{149}\) The third is the other branches are given special deference when it comes to foreign affairs.\(^{150}\)

Before enacting Section 514 of the U.R.A.A., Congress heard testimony concerning the interests of American copyright holders abroad.\(^{151}\) This testimony revealed that many foreign countries did not protect American works to the detriment of United States interests.\(^{152}\) The lack of protection for American authors is estimated to cost billions of dollars a

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\(^{139}\) Golan v. Holder, 609 F. 3d 1076, 1081-82 (10th Cir. 2010).

\(^{140}\) Id. at 1082.

\(^{141}\) Id.

\(^{142}\) Id. at 1083.

\(^{143}\) Id. at 1084.

\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Id. at 1084-85.

\(^{148}\) Id. at 1085.

\(^{149}\) Id.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id. at 1085-86.
American works were being exploited around the world without the copyright owners' consent or any compensation. After reviewing the significant amount of information gathered, the court determined that Congress had substantial evidence leading to the reasonable conclusion that the harm to American authors was “real and not merely conjectural.” This was enough to support the conclusion that Section 514 of the U.R.A.A. was enacted to combat a real threat.

Next the court needed to determine whether substantial evidence supported Congress’s conclusion that this exploitation would be remedied by Section 514. The court answered this question in the affirmative. Because the United States was not in compliance with its obligations under the Berne Convention, many other countries were following its example and refusing to restore copyrights to U.S. works that had fallen into the public domain. For example, Russia and Thailand refused to protect U.S. works that had fallen into the public domain in their countries and cited the United States’ non-compliance with Article 18 as their reason. Other countries stated they were only willing to provide protection reciprocally; if the United States did not protect works of their country, they would afford the U.S. works the same treatment. Congress also heard testimony that the position that the United States takes on the scope of their copyright restoration under the TRIPs agreement could dictate how developing countries act.

The bottom line was “if the United States wanted certain protections for American authors, it had to provide those protections to foreign authors.” The court ultimately determined that Congress’s “lax position” on copyright restoration harmed U.S. intellectual property rights holders and Congress’s decision to fix this problem with Section 514 of the U.R.A.A. was supported by substantial evidence. They reasoned that Section 514 made the United States efforts to protect foreign works more effective and it genuinely advanced the government’s interest.

C. What this decision means

Golan v. Holder, marks a new era in the world of copyright law. The United States is no longer just concerned with their domestic authors. The fundamentals behind our copyright law that have existed for hundreds of years now need to be altered to accommodate these new considerations. Before Golan v. Holder, precedent would have dictated that Section 104A violated the First Amendment by removing works from the public domain. This case had the power to outline the interface between the constitution and the public domain as well.

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153 Id. at 1086.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id. at 1086-87.
160 Id. at 1087.
161 Id. at 1087-88.
162 Id. at 1087.
163 Id. at 1090.
164 Id.
165 Pelanda, supra note 2, at 557.
as establish the public’s right to the continuous free use of public domain works.\textsuperscript{166} The 10th Circuit chose to protect the economic interests of many authors abroad, instead of just considering the interests of the U.S. citizens who relied on the newly restored works. This signifies a switch from the United States purely myopic view concerning copyrights, to a more worldly view.

V. EFFECTS ON COPYRIGHT LAW

Copyright law today has evolved exponentially from what the forefathers considered it to be. What can be protected, how long it can be protected, and the process that it must go through to be protected have all evolved and changed throughout the years.\textsuperscript{167} Copyright law has expanded so much that its constant evolution could be considered a traditional contour.\textsuperscript{168} It is now time for United States copyright law to change again, this time adapting to the growing globalization of the intellectual property market. The traditional constitutional analysis concerning copyright needs to be less domestically oriented and consider the global market.\textsuperscript{169} Foreign works that contribute to the knowledge of the United States need to become constitutionally relevant.\textsuperscript{170}

\textit{Golan v. Holder} recognized the substantial government interest in protecting American authors’ copyright interests abroad. Because this case has given the green light, the United States can now focus on a much more global plan of copyright protection. To reach this international protection goal, the United States will most likely focus on three specific areas. First, they will need to make international intellectual property protection paramount in their foreign relations and trade discussion. Second the United States will most likely internationalize their monopoly bargain to take into account the interests of American interests abroad. Finally, the United States needs to contribute and help shape the new form of international intellectual property law that is developing through a variety of different forums.

A. Intellectual Property Policy Now Needs to Be Global in Nature

Because the United States economy has become much more dependent on intellectual property, foreign policy must put greater focus on protecting these rights internationally.\textsuperscript{171} Intellectual property products are moving through international commerce quicker than the current laws in place can contemplate, and it is time for U.S. domestic law to work with the international community to protect U.S. authors’ interests abroad.\textsuperscript{172} The international market is no longer separated from the domestic market, and the U.S. copyright laws

\footnotesize{\textsuperscript{166} Id.  \\
\textsuperscript{168} Id.  \\
\textsuperscript{170} Id. at 343.  \\
\textsuperscript{171} Bickham, supra note 100, at 208.  \\
need to address this fusion of markets. Section 104A represents a fundamental change in U.S. copyright law and is just the beginning of the changes that need to come.

In order to achieve a global consensus for copyright protection, Congress needed to shift their concentration from insulating the public domain to copyright protection for foreign works. This switch was necessary to begin to achieve reciprocal protections for United States authors abroad but further action still needs to be taken. The United States can no longer remain an island in the field of copyright law. Because international pressure has finally forced one of the largest intellectual property markets to comply with the international norm set out in Article 18 of the Berne Convention, it is now more likely than ever that the world, including the United States, will work together to establish a universal copyright system of protections. Intellectual property laws must be global in reach to have any true value to author's interests. With support from the decision in Golan v. Holder, the United States can now concentrate on developing these international standards to protect U.S. authors' interests abroad without fear that their legislation will be struck down because it is not a substantial government interest.

B. The International Bargain

All of copyright is based on a balance between rewarding the author with a limited monopoly in return for him later relinquishing that work into the public domain for all the people to enjoy. Today, analyzing this bargain in relation to a single country makes little sense. This bargain is no longer just between the United States government and its domestic authors, but is now an international bargain between the United States government and all the authors of the world. An author today does not participate just in their domestic market, but any viable market for copyrighted works around the world. The national treatment doctrine needs to become a part of the bargain struck between the U.S. government and any author, regardless of nationality. The United States is one the world’s largest copyright markets and if rights and protections are given to foreign authors, they will no doubt take advantage of this market.

As intellectual property law becomes more important to international economic law, universal minimum standards are developing. Currently there are three ideologies concerning the level of copyright protection that needs to be implemented around the world. The United States, among others, wants broader worldwide protection.

174 Segal, supra note 5, at 94.
175 Id.
176 Id.
177 Architecture of International Intellectual Property, supra note 172, at 999.
178 Gallagher, supra note 3, at 469.
179 Austin, supra note 169, at 344.
180 Id. at 342.
181 Id. at 344.
182 Id. at 343.
183 Id.
184 Reichman, supra note 45, at 345.
185 Hansen, supra note 17, at 582.
pean community also want broader worldwide protection plus increased domestic protection to stimulate their own industries and compete with the larger intellectual property countries. Finally, developing and newly industrialized nations want to limit protections. Different national laws for each market impose a burden on the producer of copyrighted works. Reconciling these three ideologies on intellectual property will ultimately lead to a universal copyright law accepted by all these countries that will ease an author’s entrance into multiple markets simultaneously.

C. New Strategies for Developing International Property Rights Protections

Nations of the world are now interdependent on each other to effectively protect copyrights of their citizens. This interdependence has risen to such a point that countries will now look to international copyright law to protect the rights of their citizens rather than traditional domestic lawmaking. Domestic law can no longer stand on its own in the area of intellectual property and is constantly being influenced by international lawmaking. It is a simple fact that “copyright law demands international solutions.”

Because intellectual property law requires international attention, a wide range of processes have developed to put measures into place. Treaties and Conventions are no longer the only means to establish protections for intellectual property rights. First, international institutions, such as WIPO, are being restructured so they can react more quickly to changes in intellectual property law. Although some institutions can only produce non-binding law that must be implemented and chosen to be abided by, there is always the possibility that these policies will develop into binding law through some other means such as adoption. The United States needs to work with these organizations in developing universal copyright standards that protect American interests abroad.

The second change that will become useful for the United States is linking international property rights with trade relations. Intellectual property rights are being treated as any other good that can be traded between nations. When disputes arise concerning intellectual property rights, the WTO can now serve as a settlement body. Private law dispute settlements can also play an important role in internationalizing copyright law.

Another movement in the field of international intellectual property law development is to allow national courts to contribute and form international property law. This method of creating international law can respond to changing social conditions and is subject
to more refinement from all the political institutions involved.\textsuperscript{199} This system would allow for greater freedom for the countries involved because as they would be expected to refer to international intellectual property law, but they could also reach their own conclusion on what best fits their own political scheme.\textsuperscript{200} Intellectual property cases have always traveled across countries borders but for the first time they are being recognized as belonging to a greater body of law, rather than just as an example of what other nations are doing.\textsuperscript{201}

The United States needs to be involved in all these avenues to ensure the international intellectual property law that develops is beneficial to American interests.

\section{VI. CONCLUSION}

Although the United States has not had the best history concerning international copyright protections, \textit{Golan v. Holder} and the passage of the U.R.A.A. is a sign that the United States is moving in the right direction. With technology changing every day and our world shrinking, it is important for the United States to be a front runner in establishing any international copyright law. Establishing this international copyright law does mean altering some of the fundamental principles that U.S. copyright law was founded on. The public domain is no longer untouchable. The court’s decision in \textit{Golan} ruled that it was constitutional for this change to occur. As the U.S. navigates its way through the realm of international copyright law there are likely to be more changes to the bedrock principles of copyright. Decision like \textit{Golan} will allow progress to continue.

\textsuperscript{199} \textit{Id.} at 1010-11.
\textsuperscript{200} \textit{Id.} at 1011.
\textsuperscript{201} \textit{Id.} at 1013.