

First Amendment Challenges to Copyright Laws: Beyond *Kahle v. Gonzales* and *Golan v. Gonzales*

David S. Olson

Abstract

The recent cases of *Kahle v. Gonzales* and *Golan v. Gonzales* build on the litigation that began in *Eldred v. Ashcroft*. The plaintiffs lost in *Eldred*, the defeat was not total because the Supreme Court rejected the D.C. Circuit's holding that copyright statutes are "categorically immune" from First Amendment review. This holding left some hope for those seeking to restrict copyright expansion on First Amendment grounds. The logical converse of the Court's holding that First Amendment scrutiny is not necessary where a statute does not "alter[] the traditional contours of copyright protection," is that when a statute does alter those traditional contours, First Amendment review should apply.

But what are the traditional contours of copyright protection? The Court left this unanswered in *Eldred*. Are the traditional contours of copyright protection present so long as the idea/expression dichotomy and fair use protections remain in the Copyright Act? Or are the traditional contours of copyright protection altered whenever a statute passed under the copyright clause differs from historical precedent?

Two circuit courts have recently addressed these questions, each coming to a different conclusion. Plaintiffs in *Kahle* challenged the Copyright Renewal Act of 1992, which eliminated copyright renewal requirements for works created between 1964 and 1977. The Ninth Circuit ruled against the *Kahle* plaintiffs, holding that the 1992 act did not depart from the traditional contours of copyright.

Plaintiffs in *Golan* challenged section 514 of the 1994 Uruguay Round Agreements Act ("URAA"), which provided copyright protection to foreign works that were still in copyright in their country of origin, but were in the public domain in the United States. After a detailed examination of the history of copyright laws in the United States, the Tenth Circuit concluded that "the traditional contours of copyright protection include the principle that works in the public domain remain there and that § 514 transgresses this critical boundary."

This paper addresses where First Amendment challenges to copyright laws stand after *Kahle* and *Golan*. The Tenth Circuit seems plainly correct in holding that the traditional contours of copyright protection must extend farther than the idea/expression dichotomy and the fair use defense. This Paper will explore the limits to these contours. The paper explores both how consideration of the traditional contours of copyright should limit statutes passed by Congress, and how courts' interpretations of copyright laws should be shaped by their consideration of copyright's traditional contours and First Amendment interests.